4-30-2018

Inclusive Legal Positivism and Legality in Brazil

Flavio Jaime de Moraes Jardim

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INCLUSIVE LEGAL POSITIVISM AND LEGALITY IN BRAZIL

By
Flavio Jaime de Moraes Jardim

Submitted to the International and Non-J.D. Programs Office
of Fordham University School of Law
in Partial Fulfillment of the Requirements for the Degree of
Doctor of Juridical Science (S.J.D.)

We, the dissertation Committee for the above candidate for the Doctor of Juridical Science (S.J.D.) Degree, hereby recommend acceptance of this dissertation.


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INCLUSIVE LEGAL POSITIVISM AND LEGALITY IN BRAZIL

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Supervisor: Benjamin C. Zipursky

April 2017
To Carlinha,
my amazing grace.
ACKNOWLEDGEMENTS

This work would not have been possible without the help of many important persons. I will certainly not remember them all, but I will try hard to thank everyone that helped me.

At first, I would like to thank Professor Benjamin Zipursky, my supervisor, for his incredible support, amazing guidance and wonderful insights. This work is certainly full of mistakes, but they are all mine. I am truly grateful for the intensive immersion in the magnificent world of Anglo-American jurisprudence that only he could have made possible.

I also cannot thank enough Professor James Kainen, who kindly let me audit his jurisprudence class, who carefully reviewed some parts of this thesis and who always had the time to clarify my questions and improve my writing. Many thanks also to Professor Ethan Leib, my S.J.D. colloquium instructor, and to Professor Abner Greene, for his inestimable comments. I am also grateful to Assistant Dean Toni Jaeger-Fine for believing in this project and for admitting me to the S.J.D. program at Fordham, an outstanding law school that offered me much more knowledge than I could have ever imagined.

I am extremely thankful to Justice Luis Roberto Barroso for taking the time to read my work and to join the panel. Justice Barroso’s work, both as a lawyer and now as a judge, has always been impressive and has had a great impact on me and on Brazilian law and society as well.

I would like to thank my S.J.D. colleagues Zahra Takhshid, Gulen Soyaslan, Kwaku Agyeman-Budu, Shany Winder, Christine Buamah, Nemika Jha and Steffanie Keim for the friendship, conversations and study time well spent together.

In Brazil, I owe a debt of gratitude to the people of the City of Brasilia and to the Procuradoria do Distrito Federal for the opportunity of spending two years on leave from practicing law. I thank Paola Lima, Luciana Marques, Mariana Khouri, Guilherme Bicalho, Ursula Figueiredo and Josele Lima for the encouragement.

I am also grateful to Justice Marco Aurelio Mello, who gave me a recommendation letter and from whom I have learned so much about law.

From the Escritório de Advocacia Sergio Bermudes, I am appreciative of the help of Sergio Bermudes, André Silveira, Paulo Branco, Guilherme Coelho, Jessica Baqui, Guiomar Feitosa, Guilherme Pitta, Maria Adrianna Mattos, Caio Vieira de Mello, Mateus Tomaz, Marcos Mares Guia, Vinicius Conceição, João Marcos Serejo and Ana Gabriela Leite. I highly regard their friendship and motivation.

Among the friends and relatives that commented drafts and that discussed the project with me, I am grateful to Rodrigo Becker, Marlus Alves, Marcelo Proença, Thiago Vitale Jayme, Gregório Moura, Alexandre Vitorino, Julião Coelho, Flávio Unes, Marilda Silveira, Antônio Pedro Machado, Paulo Paiva, Jules Queiroz, Victor Trigueiro, Guilherme Pupe and João Carlos Velloso.

I am grateful for the emotional support of my parents Jorge and Celina, who have greatly cared for my education throughout my life. I am also thankful for the friendship and encouragement of my brother Jorge Neto, my sisters Gisela and Camila, my nieces Priscila and Beatriz, my nephew Cassio, and my in-laws Carlos, Leila, Bruno César, Tayanna, Bruno Ervilha and Rhaoni.

Furthermore, I show appreciation to Orlando Eduardo for helping me to with the grammar review and for the incentive.

Finally, I am beholden to my wife Carla for her enormous help. Her patience, thoughts and companionship were simply incredible. Without her, I would not have had the strength to complete this thesis.
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I. INTRODUCTION

The goal of this thesis is to show why inclusive legal positivism is the best theory that captures what the law in Brazil is. Inclusive legal positivism allows the inclusion of moral standards in the criteria of legality. It essentially asserts that the “legality of norms can sometimes depend on their substantive merits, not just their pedigree or social source.”

Calling attention to this fact can provide great contribution for the country’s legal system, because it throws light upon the system’s upsides, but also makes clear what are the most relevant downsides. Highlighting these positive and negative features is relevant because they are not evident and, therefore, are not usually noticed.

The fact is that Brazilian legal theory is in a turmoil stage. Being part of a civil law family country, Brazilian jurists still have a high regard for written laws. Only laws enacted by legislative bodies justify coercion according to the text of Brazil’s Federal Constitution.

Separation of powers, considered to be a nuclear principle of government and an immutable constitutional clause, is reflected in the idea that rules are created by legislative bodies. Legal certainty is seen as inherent to the idea of rule of law and is embodied in the notion of enacted laws as the major source of law. These facts may create the impression that Brazil has a classically positivistic legal system, in which (a) only norms identifiable through historical social facts are legal, (b) a top-down ideal of precise rules prevails,

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2 Id. at 100.

3 See Wil Walsuchow, Inclusive Legal Positivism (Clarendon Press, 1994).

4 According to item article 5, II, of the Brazilian Federal Constitution, “no one shall be obliged to do or refrain from doing something except by virtue of [enacted] law.” CONSTITUIÇÃO FEDERAL art. 5, II (Braz.) (trans. Brazilian Federal Senate).

5 As per article 2 of the C.F., “[t]he Legislative, the Executive and the Judicial, independent and harmonious among themselves, are the powers of the Union.” CONSTITUIÇÃO FEDERAL art. 2 (Braz.) (trans. Brazilian Federal Senate).

6 Article 60 § 4, of the C.F. states that “[n]o proposal of amendment shall be considered which is aimed at abolishing: [,...] III – the separation of the Government Powers.” CONSTITUIÇÃO FEDERAL art. 60, III (Braz.) (trans. Brazilian Federal Senate).

7 See generally S.T.F., MS No. 22.357, Relator: Min. Gilmar Mendes, 27.05.2004, DIÁRIO DA JUSTIÇA art. 120 (Oxford, 2003). The use of the concept “classical legal positivism” does not have the intention to refer to the positivistic view contended by John Austin, which is designed as the “command theory.” See Wacks, Id., at 91.


9 As Carlos Santiago Nino asserts, “the expression ‘legal positivism’ is used in many different senses referring to clearly distinguishable and sometimes mutually incompatible thesis.” The most common statement that represents the Brazilian way of picturing positivism is the one Nino describes as “(7) The law consists only
and (c) norms are announced in advance and unequivocally provide the solutions adopted by Courts in adjudication.\textsuperscript{13} Indeed, some authors have acknowledged that, for decades, the most solid legal doctrine in Brazil was legal positivism.\textsuperscript{14}

Brazilian legal texts, however, have commonly been enacted using open textured language.\textsuperscript{15} Legal precepts are generally written in broad terms, often employing moral

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\textsuperscript{13} Wil Waluchow contends that the formalist ideal of precise rules takes place when jurists consider that all laws are announced in advance and applied without the need of law-creating activity. Wil Waluchow, A Common Law Theory of Judicial Review 205 (Cambridge, 2009).

\textsuperscript{14} Dimitri Dimoulis states that “[f]or decades, in Brazil, legal positivism was considered the most solid, plausible, truthful to the legislator’s will and stability, rationality and previsibility warrantor, which are usually designated by the term ‘legal certainty’.” Dimitri Dimoulis, Introduction to Neil MacCormick, H.L.A. Hart, XVI (Elsevier, 2010). Translation mine.

\textsuperscript{15} For definitions of “open texture” and its distinction from “vagueness”, I borrow Friedrich Waismann’s theory: “[v]agueness should be distinguished from open texture. A word which is actually used in a fluctuating way (such as ‘heap’ or ‘pink’) is said to be vague; a term like ‘gold’, though its actual use may not be vague, is non-exhaustive or of an open texture in that we can never fill up all the possible gaps through which a doubt may seep in. Open texture, then, is something like possibility of vagueness. Vagueness can be remedied by giving more accurate rules, open texture cannot. An alternative way of stating this would be to say that definitions of open terms are always corrigible or emendable.

Open texture is a very fundamental characteristic of most, though not of all, empirical concepts, and it is this texture which prevents us from verifying conclusively most of our empirical statements. Take any material object statement. The terms which occur in it are non-exhaustive; that means that we cannot foresee completely all possible conditions in which they are to be verified; there will always remain a possibility, however faint, that we have not taken into account something or other that may be relevant to their usage; and that means that we cannot foresee completely all the possible circumstances in which the statement is true or in which it is false. There will always remain a margin of uncertainty. Thus, the absence of a conclusive verification is directly due to the open texture of the terms concerned.

This has an important consequence. Phenomenalists have tried to translate what we mean by a material object statement into terms of sense experience. Now this a translation would be possible only if the terms of a material object statement were completely definable. For only then could we describe completely all the possible evidences which would make the statement true or false. As this condition is not fulfilled, the programme of phenomenalism falls flat, and in consequence the attempts at analysing chairs and tables into patterns of sense-data -- which has become something of a national sport in this country -- are doomed to fail. Similar remarks apply to certain psychological statements such as “He is an intelligent person”; here again it is due to the open texture of a term like ‘intelligent’ that the statement cannot be reduced to a conjunction or disjunction of statements which specify the way a man would behave in such-and-such circumstances.” Friedrich Waismann, Verifiability, in Antony Flew, Logic and Language (Oxford, 1951), http://www.ditext.com/waismann/verifiability.html. See also Waluchow, supra note 13 at 196. An example of vagueness is given by the Legal Theory Lexicon Blog: “What does it mean to say that a concept, term, or phrase is vague? Let’s start with some examples and then try for an elucidation of the concept. ‘Tall’ is a good example of a vague concept. Some humans are definitely not tall--Danny DeVito, for example. Others definitely are tall--Shaquille O’Neal, for one. But the term ‘tall’ is vague. 5’11 is almost definitely tall for a woman in the United States, but might be a borderline case for men. ‘Tall’ is not the sort of quality for which there are definite criteria that sort the world into ‘tall’ things and ‘not tall’ things. In other words, ‘tall’ is vague. There are lots of terms that are like tall: short, strong, weak, beautiful, ugly, heavy, light, warm, and cool--all of these are terms that seem to have borderline cases.” http://lsolum.typepad.com/legal_theory_lexicon/2006/08/legal_theory_le.html.

An example of open texture given by the Oxford Dictionary is given using the term ‘mother’: “[t]he term ‘mother’ is not vague, but its open texture is revealed if through technological advance differences open up between the mother that produces the ovum, the mother that carries the foetus to term, and the mother that rears the baby. It will then be fruitless to pursue the question of which is the ‘real’ mother, since the term is not adapted to giving a decision in the new circumstances.” http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100251341
standards, like *morality, efficiency, loyalty*, among others.\textsuperscript{16} It is uncommon to find written rules that fit the *all-or-nothing* fashion pattern, at least in a “plain fact” manner.\textsuperscript{17} The use of the so-called *indeterminate legal concepts* is highly encouraged, sometimes even in some punishment cases.\textsuperscript{18}

Legal principles also take part of the legal debate. Their supplementary character has evolved into being at the center of the legal system.\textsuperscript{19} With few exceptions,\textsuperscript{20} there is a prevalent practice among jurists that principles should interact with rules or other principles in a balancing process, to assist judges, when adjudicating a case, to reach a solution that intends to take into account all values in the best possible way. Principles are seen as “reflexive norms, which enable limiting, construing or reconstruing the rules.”\textsuperscript{21} Their source, nevertheless, may be written norms, not “a sense of appropriateness” developed in the profession and the public over time.\textsuperscript{22}

The situation gets more controversial because courts have established that the content of the norms set forth in Brazilian statutes should be found taking into consideration normative principles written in the constitutional text.\textsuperscript{23} The C.F., enacted in 1988, is understood as having inaugurated a new phase of the history of Brazilian law, since it textually enunciated fundamental rights and gave them prominent role in the system. Scholars argue that “constitutionalism, and especially the process of law in Brazil, [has] incorporate[d] as fundamental a right, a guarantee to access […] a just and fair judicial order.”\textsuperscript{24} *Neoconstitutionalism* is the name of this new perspective and is conventionally

\textsuperscript{16} Article 37 of the Federal Constitution for example, states that “[t]he governmental entities and entities owned by the Government in any of the powers of the Union, the states, the Federal District and the Municipalities shall obey the principles of legality, impersonality, morality, publicity, and efficiency […]”. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 37 (Braz.); Lei No. 8.666, de 21 de Junho de 1993. DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 6.7.1993 (Braz.). Article 3º, “Public biddings shall be conducted in order to assure the observance of the constitutional principle of equality, the selection of the most profitable proposal for the Government, and the promotion of national sustainable development, and will be processed and adjudicated in strict conformity with basic principles of legality, impersonality, morality, equality, publicity, administrative probity, observation of bid notice terms, objective judgment, and others that are linked to them.”; LEI NO. 8.429, de 2 de Junho de 1992. DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 3.06.1992 (Braz.). Article 4º, “Public agents of any level or hierarchy are obliged to ensure that the principles of lawfulness, impersonality, morality and publicity, and efficiency are strictly enforced in the matters that relates to their positions.”

\textsuperscript{17} See, generally, Ronald Dworkin, *The Model of Rules I*, 35 U. CHI. L. REV, 14, 25 (1967). “All-or-nothing fashion” rules are usually present in procedural, securities and some parts of civil, administrative and criminal laws, such as the precepts that deal with statute of limitations.

\textsuperscript{18} Maria Sylvia Zanella Di Pietro, for example, talking about disciplinary punishments states that “in administrative law, vagueness prevails. There are few infractions described by the law, as it happens with ‘public employment abandonment’. Most of the infractions are left to administrative discretion when dealing with a concrete case; it is the sentencing authority that will frame the act as ‘serious fault’, ‘irregular proceeding’, ‘service inefficiency’, ‘public disobedience’, or other infractions set forth in an indefinite manner by the statutory legislation. For this purpose, the severity of the breach and the consequences for the public service should be taken into account.” MARIA SYLVIA ZANELLA DI PIETRO, DIREITO ADMINISTRATIVO 515, (Atlas, 19. ed. 2006). See also subchapter III.3.

\textsuperscript{19} Article 4 of the *Introductory Act to the Brazilian Norms* sets forth that “when there is a gap in the law, the judge shall decide the case resorting to analogy, customs and general principles of law.” LEI DE INTRODUÇÃO AS NORMAS DO DIREITO BRASILEIRO [L.I.N.D.B.] [INTRODUCTORY ACT TO THE BRAZILIAN NORMS] art. 4. Translation mine.

\textsuperscript{20} See subchapter III.5.6.

\textsuperscript{21} MARCELO NEVES, ENTRE HIDRA E HÉRCULES 103 (Martins Fontes, 2nd ed. 2014). Translation mine.

\textsuperscript{22} Dworkin, *supra* note 17, at 41.

\textsuperscript{23} See subchapter III.5.7.

\textsuperscript{24} Paulo Roberto Pereira de Souza, *Constitutionalism in Brazil*, 16 FLA. J. INT’L L., 155, 156 (2004).
accepted by the majority of judges as the best way to interpret the C.F.. Constitutional norms have gained the status of enforceable norms. Their compliance has become imperative, especially in fundamental rights cases, which deal not only with the assurance of formal equality, but also with accomplishing social (substantive) equality. If not obeyed, constitutional norms can prompt government coercion. This assertion is also true for programmatic constitutional norms. Judges can largely recognize causes of action directly from the text. Lawyers file suits and judges decide cases based on readings of the constitutional principles and on interpretations of the enumerated rights, even if these readings are not grounded on any historical document or precedent, sometimes based on their personal readings of the text. Convention and some legal norms demand that judges, when deciding a case either in criminal, civil or administrative law, among others, should take into account broad constitutional principles to provide the appropriate [or correct] outcome: “[i]f it is possible to interpret a statutory provision in more than one way, the interpretation most congruent with the [C]onstitution is to be preferred.” The canon of constitutional avoidance is widely rejected and decisions are rarely minimalists. On the contrary, the phenomenon of constitutionalization of civil, criminal and administrative law,

26 As Gustavo Zagrebelsky notes “[t]he constitutions in force in Europe [and the C.F.] contain numerous provisions that enshrine principles and that do not directly concern individual rights but rather require the latter to conform to general interests. Article 3 of the Italian Constitution, for example, proclaims and defines two concepts of equality in a programmatic way. First, legal equality (‘all citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, of political opinion, of personal and social conditions’), in the sense adopted by Dworkin; and, second, as the duty of the public powers to provide equality in the distribution of collective resources (‘it is the task of the Republic to remove obstacles of a social and economic kind, which, by limiting the freedom and the equality of the citizens, prevent the full development of the human person and the effective participation of all the workers in the political, economic and social organization of the Country’). A list of social rights follows these programmatic description, such as the right to education, to health, to social assistance and security; these social rights constitute both guidelines for government action and rights enforceable by the courts and ultimately by the Constitutional Court. These social rights obviously require more than equilibrium among individual rights guaranteed by the courts. They also require pursuit of public policies, which, while also guaranteed by the courts, are likely to limit individual rights. The most characteristic examples include the constitutional constraints imposed on corporate law, which—as a whole—may not be contrary to ‘social usefulness’ and may be directed toward ‘social ends’ (art. 41), and the right of property, which is recognized but may be limited in order to guarantee its ‘social function’ (art. 42), while property rights in land are subject to limit that guarantee ‘equitable social relations’ (art. 44).”
27 See LUIS ROBERTO BARROSO, O NOVO DIREITO CONSTITUCIONAL BRASEIREIRO, 193 (Editora Fórum, 1st ed. 2014).
28 See Zagrebelsky, supra note 26, at 643.
30 The U.S. Supreme Court [SCOTUS] has stated that “[t]he Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.” Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936).
31 According to Cass Sunstein, “[m]any judges are minimalists. They favor rulings that are narrow, in the sense that they govern only the circumstances of the particular case, and also shallow, in the sense that they do not accept a deep theory of the legal provision at issue. In law, narrow and shallow decisions have real advantages insofar as they reduce both decision costs and error costs; make space for democratic engagement on fundamental questions; and reflect a norm of civic respect.” Cass R. Sunstein, Beyond Judicial Minimalism (John M. Olin Program in Law and Economics Working Paper No. 432, 2008).
among other areas, is largely recognized. Constitutionalization of law and constitutional avoidance may be inconsistent with one another.

Regarding the application of constitutional norms, scholars also note that they are different from other legal norms. They assert that these norms, being more political, open-ended and less complete, need to be concretized and not interpreted. The solution of the case will not be provided by the text, but by a dialectic process of “creatively determining results in conformity with, but not determinable by, the Constitution.” The judicial branch, grounded on the application of constitutional norms, has declared important new rights. Most of lawyers and the press may appreciate these decisions, but they are also criticized by few more traditional scholars as being, in some cases, judicial activism.

Taking all these aspects into account, the prevalent school of jurisprudence, that aims to describe law in Brazil, is post-positivism. Justice Luís Roberto Barroso, a member of Brazil’s highest court, the Supremo Tribunal Federal [S.T.F.], argues that “[t]he debate surrounding [the] characterization of post-positivism lies in the convergence of two major currents of thought offering opposite views of law: natural law and positivism—opposite, but sometimes uniquely complementary. Society’s competing demands for legal certainty and objectivity (on the one hand), and for legitimacy and justice (on the other) have expanded beyond the confines of the ‘pure’ and ‘encompassing models.’” Barroso observes, however, that this new “broad and diffused set of ideas are still in their systematization phase.” He claims that “[i]n a way, post-positivism is a third path between positivism and the natural law tradition. Post-positivist thinking does not ignore the importance of the law’s demands for clarity, certainty, and objectivity, but neither does it conceive of the law as being unconnected to a moral and political philosophy.”

This new comprehension of Brazilian law description advanced by post-positivist scholars has made the process of identifying what the law requires more complex, not only for judges, but for public employees and for the population in general. In fact, the post-positivist approach, which advocates that enacted rules (positivistic side) shall be construed in conformity with broad constitutional principles (natural law side), often makes the identification of what the enacted law demands less certain and objective, qualities that should be pursued by a system of law to offer better guidance. The lack of clarity is precisely at odds with the goals of a system of written norms and top-down methodology. While empirical disagreement among judges on identifying legal applicable norms is not usually a problem, theoretical disagreement about the content of these rules is pervasive. It

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33 Winfried Brugger, Legal Interpretation, School of Jurisprudence, and Anthropology: Some Remarks From a German Point of View, 42 Am. J. Comp. L. 395, 398 (1994).

34 Id.

35 Examples of fundamental rights proclaimed by judicial rulings of the S.T.F. are provided in subchapter IV.8.


38 Id.

39 Id.

40 The Lei Complementar No. 95/98, which establishes rules for the creation and consolidation of statutes in Brazil, sets forth that “legal precepts should be written with clarity, precision and logical order.” LEI COMPLEMENTAR no. 95, de DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 27.2.1998 (Braz.).
can be hard to identify which practical reasons for action Brazilian law demands, since, even in the presence of clear rules, judges may consider a citizen’s conduct illegal, if, in their opinion, the citizen complied with the literal terms of the rule but did not balance it with some abstract constitutional principle.\(^41\)

In this sense, one may note that even the traditional concept of legality is in some sort modified, since most of solutions are not preestablished in the written law. Unquestionably, there is room for subjective judgment and discretion to decide what is legal and what is illegal. However, the vast majority of Brazilian judges still do not acknowledge judicial lawmaking. Although concretization involves the reaching of a result not determinable by the text, it is still seen as a process of merely attributing sense to posited norms. All in all, the main goal of this thesis is to point out that the Anglo-American doctrine of inclusive legal positivism is able to explain and to justify what is the law in Brazil.

The Brazilian concept of law has been expanded to also include rules and principles whose meaning is not sometimes clearly established by social sources, but which courts must resort to when deciding cases.\(^42\) This view comes close to the notion of the inclusive legal positivistic approach, being in the core of the Hart-Waluchow soft-positivism idea, whereas morality can be a condition of validity of norms in a specific legal system.\(^43\) Brazilian law, as described and noted by Justice Barroso, has undoubtedly opened itself to moral reasoning. One issue to be examined is if this opening is an inherent characteristic of the Brazilian legal system or is merely contingent.\(^44\)

The second goal of this thesis is to criticize the basic concepts of post-positivism as understood by Brazilian scholars, to show that this view is not the appropriate view to describe what the law is in Brazil. I will argue that post-positivism is mistaken when it adopts as true some propositions about legal positivism that are not accurate. Indeed, the main flaw of post-positivism is the merging of two important theories that were correctly separated by Herbert Hart in his classic book *The Concept of Law*: the theory of law as a descriptive enterprise and the theory of adjudication.\(^45\) I will advocate that this merger is not a recent phenomenon and has its roots from the civil law traditions of (i) considering legal only the norms posited by the legislator; (ii) considering enacted law always binding—a practice called *ideological positivism*; (iii) at the same time, recognizing the practical incapacity of written texts to solve all legal problems, but making decisions that supposedly are merely a

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\(^{41}\) The S.T.F. Justice Ricardo Lewandowski, for example, in a court opinion, citing Maria Sylvia Zanella Di Pietro, one of Brazil’s leading administrative law scholars, stated that “the administrative official conduct, may be […] in conformity with the literal meaning of ‘the law, but if it is revealed to be offensive to morality, to good behavior, to the power-duty of probity, to the ideas of justice and equity and to the common sense of honesty, will be in evident confrontation with the constitutional principle of administrative morality. Indeed, as the romans affirmed, *non omne quod licet honestum est* [not all that is permitted is honorable]” S.T.F., R.E. No. 579.951/RN, Relator: Min. Ricardo Lewandowski, 20.08.2008, DIÁRIO DE JUSTIÇA [D.J], 18.12.2009 (Braz.). Translation mine.


\(^{44}\) Even in some constitutional law fundamental rights cases, the S.T.F. sometimes adopts approaches that can be considered formalist. See, for example, S.T.F., R.E. No. 397.762, Relator: Min. Marco Aurélio, 03.06.2008, 865, DIÁRIO DE JUSTIÇA [D.J], 11.09.2008, 611 (Braz.). (denying the request of a concubine, which took part on a stable polygamic relationship, to divide, among her and the legal spouse, pension fund rights inherited from their “common husband,” due to lack of posited norms on the matter).

\(^{45}\) As Cristóbal Orrego points out, “Herbert Hart proposed a new interpretation of analytical legal positivism. After him, several authors have accepted this new interpretation: […] David Brink, Jules Coleman, Joseph Raz and Mathew Kramer. They separate the theory of adjudication from the theory of law as a descriptive enterprise.” Orrego, see note 42, at 77.
logical-deduction of what is written [a mechanical approach], even when the existence of creativity is evident.

I will articulate that Hart’s descriptive-explanatory view, as noted by Benjamin Zipursky,\(^{46}\) provides veracity, clarity and candor in legal interpretation and helps to show when judges are incorporating their moral or political goals into law, without being locked to mechanistic practices. While I believe that Brazilian social conventions, in many situations, allow judges to decide what the law should become—through the process of concretization of written principles, for example—I will argue that the descriptive-explanatory evaluation of the law puts light on important issues such as on “questions as to whether the law should be respected or reviled, renewed, revised, or rejected.”\(^{47}\)

Moreover, a third goal of the thesis will be to acknowledge that neoconstitutionalism is the dominant normative adjudication theory in Brazil and is the conventionally accepted way of interpreting/concretizing the constitutional text adopted by most lawyers, scholars and judges. This view has contributed to the development of the Brazilian constitutional law by attributing an emancipatory character for the C.F. norms and, hence, has allowed the discovery of new fundamental rights and a broader control of government actions by the Judiciary, in the sense there is more checks and balances. There is nothing in this view that makes it incompatible with our Brazilian inclusive legal positivist system since it merely reflects legal conventions and source-based rules—rules of adjudication in Hart’s sense\(^{48}\)—that allow the judge to refer to moral principles when adjudicating a case. My recognition of neoconstitutionalism, therefore, is consistent with my view that one must not confuse what the law says with what judges effectively do.\(^{49}\)

Finally, the fourth goal of this thesis is to describe the main problems of that inclusive legal positivism in relation to the purpose and efficacy of what can be considered a “better” legal system, particularly in terms of the trouble in law identification and comprehension. I will point out that some of Lon Fuller’s eight basic principles of a legal system and of law should be observed in public law’s adjudication in the country, especially in cases involving the imposition of sanctions. I will take the position that in many cases judges should take into account that the determination of what the law demands has become a hard issue in Brazil, due to the complexities of the identification of the social sources involved. In this view, I will argue that Brazilian law should evolve to adopt approaches similar to doctrines of fair notice, rule of lenity and qualified immunity. Regarding the latter, the decisions rendered by the U.S. Supreme Court [SCOTUS], for example, in *City and County of San Francisco v. Sheehan*,\(^{50}\) among other, is an important benchmark. In these cases, the Court, dealing with public officials’ immunity from suits, reaffirmed the orientation that “[p]ublic officials are immune from suit under 42 U.S.C. §1983 unless they have ‘violated a statutory or constitutional right that was ‘clearly established’ at the time of the challenged conduct”\(^{51}\).

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\(^{47}\) Id.

\(^{48}\) According to H.L.A. Hart, “[t]he third supplement to the simple regime of primary rules, intended to remedy the inefficiency of its diffused social pressure, consists of secondary rules empowering individuals to make authoritative determinations of the question as to whether, on a particular occasion, a primary rule has been broken. The minimal form of adjudication consists in such determinations, and we shall call the secondary rules which confer the power to make them ‘rules of adjudication’. Besides identifying the individuals who are to adjudicate, such rules also define the procedure to be followed.” *Hart, Concept of Law*, supra note 43, at 96-97.

\(^{49}\) According to Orrego, David Brink writes that “one must not confuse what the law requires with what the judges ought to do”. Orrego, see note 42, at 85.


\(^{51}\) Id. at 2.
The opinion added that “[a]n officer ‘cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it, […] meaning that ‘existing precedent’ […] placed the statutory or constitutional question beyond debate.”

The adoption of solutions like the clearly established law, fair notice and rule of lenity approaches for cases that involve punishment may help to solve problems of injustice related to uncertainty and retroactivity of adjudication, while, at the same time, allow Courts to develop the law, concretizing constitutional principles, as sought by the neoconstitutionalist approach. In this view, Fuller’s ‘inner morality of law’ principles of generality, prospectivity, clarity, consistency, compliability, constancy, congruence, could be important benchmarks. I will show how some of these moral principles find shelter in works of both Hart and Dworkin. I will also point out that the clearly established law approach, although not largely developed in the Brazilian legal system, find light in some legal provisions and precedents.

Therefore, after stating the four goals of this thesis in this Chapter I, it is time to summarize what will be the next steps of this dissertation.

Chapter II will provide a basic overview of the mainstream view of Brazilian law. The basic purpose of the chapter is to call into the attention of the reader how moral reasoning comes into the Brazilian legal discourse. At first, three recent cases that made the news in the country, all of which dealing with controversial moral questions, will be analyzed. The fact that Brazilian judges, even though resorting to moral arguments to decide the cases, justify their conclusions in written rules, will be called into attention. Moreover, the chapter will demonstrate the tools civil law judges use to deny law creating but, at the same time, justify their creative and intelligible decisions.

Chapter III will shortly describe the basic Anglo-Saxon theories that analyze the relationship between legality and morality—inclusive legal positivism, exclusive legal positivism, modern natural law and interpretivism—and will offer arguments to show why inclusive legal positivism is able to explain law and why the Brazilian legal system helps to demonstrate that this assertion is true. Inclusive legal positivism, as noted, “allows that morality can be a condition of legality.” It essentially states that the “legality of norms can sometimes depend on their substantive (moral) merits, not just their pedigree or social source.” There may be doubts as to what will be the substantive requisites to achieve legality, since moral standards are usually controversial. The controversial aspect of some norms without pedigree may limit their ability to guide society effectively on what are the legal and illegal actions. But this is a practical problem, not a conceptual or theoretical matter.

Problems of coordination of conduct among citizens may exist; the legal system may not be a very efficient one in this respect, but it would still be a positivist system for the

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52 Id. at 11.
53 See, for example, Artigo 2, Sole Paragraph, XIII, Lei No. 9.784, de 29 de Janeiro de 1999, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 01.02.1999 (Braz.). “In administrative proceedings, it should be observed, among others, the criteria of interpretation of the administrative norm in the manner that best assures the public interest that it pursued, being prohibited the retroactive application of the new interpretation.” Translation mine. See also S.T.J., RESP No. 1.244.182/PB, Relator: Min. Benedito Gonçalves, 03.06.2008, DIÁRIO DA JUSTIÇA ELETRÔNICO [D.J.e], 19.10.2012, (Braz.) (when Government mistakenly interprets a statute, resulting in an undue payment for the public employee, a false expectation that the received values are legal and definite is created, and this fact entitles the public employees, who were in good faith, to keep the payment).
54 COLEMAN, supra note 1, at 100.
55 Id.
56 Id. at 102.
proponents of this theory. All in all, inclusive legal positivism shows that the Brazilian legal system is a legal system.

Chapter IV will criticize the Brazilian post-positivistic approach on the ground that it blunts the process of identifying the current state of the law in some areas, the need for law development and the process of adjudicating a case, in which judges may, in some situations due to our social conventions, convert moral principles into legal ones. It will also argue that neoconstitutionalism creates this convention and, therefore, is a correct form of constitutional interpretation in Brazil, being grounded in our inclusive positivistic system. Neoconstitutionalism is simply an “evidence of the existence of a social practice among judges of resolving [constitutional] disputes in a particular way” in Brazil. This particular way depicts pre-commitments of the Brazilian society, instead of final solutions, reveals a bottom-up model of case-by-case analysis aiming toward the development of the law, which Brazilian scholars are not used to due to their civil law tradition.

Chapter V will concentrate on the problems of guidance that an inclusive positivist system raises, since, in some situations, due to uncertainty on the source-based criteria, Brazilian law may be unable to furnish clear practical reasons for citizens to act in many situations. This aspect may not be a problem for cases in which fundamental rights are being enforced, but it may be a concern in cases that involve the imposition of punishments, for example, since creative adjudication is essentially retrospective. Of course, “judge-made changes in the law rarely comes out of a blue sky,” but it will relevant to analyze, for example, doctrines of clearly established law, fair notice and rule of lenity, and try to demonstrate why they provide important ideas for idealizing solutions for this problem when legal changes were not rationally foreseeable. It will show that these solutions are in conformity with Fuller’s basic principles of a legal system, which, although may be a wrong approach to describe the nature of law, are important to assure a functional and effective legal system. As Gustavo Zagrebelsky observes, “[t]he concretization of the principles take place in the course of the work either of the legislator, through a rule that looks to future events, or of the judge, through a decision that looks back to past events.” Lord Diplock, asserts that “[t]he rule that a new precedent applies to acts done before it was laid down is not an essential feature of the judicial process. It is a consequence of a legal fiction that the Courts merely expound the law as it has always been. The time has come, I suggest, to reflect whether we should discard this fiction.”

Finally, Chapter VI will provide conclusions for the ideas expressed in the previous chapters.

57 Id.
58 I agree with Tommaso Pavone: “[l]itigants and lawyers may reference the [moral principles] to achieve their legalization; judges may invoke them as guides when faced with open-textured law; and legislators may codify them via their inclusion in a civil code or a statute. But until these acts bestow legal status upon them, it is illusory to speak of the existence of legal principles as opposed to moral principles. Tommaso Pavone, A Critical Adjudication of the Hart-Dworkin Debate, (Sep. 10, 2014), https://scholar.princeton.edu/sites/default/files/tapavone/files/hart-dworkin_debate_critical_review.pdf.
59 Coleman, supra note 43, at 160.
60 See Reaume, supra note 11 at 144.
61 According to Mario Cappelletti, “the creative adjudication is supposed to be retrospective, for a new doctrine applies also to situations which had occurred previously. Since it has retroactive effect, creative adjudication runs counter to the values of certainty and predictability, indeed, it is ‘unfair’, for it catches the party by surprise.” MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE, 36 (Belknap Harvard, 1st ed. 1986).
63 Gustavo Zagrebelsky, see note 26, at 631. See also article 489 of Lei No. 13.105, de 16 de março de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.03.2015 (Braz.).
64 See CAPPELLETTI, supra note 61, at 37.
II. THE MAINSTREAM VIEW OF BRAZILIAN LAW

II.1. Short Explanation of Chapter Goals

In this chapter, I will offer a broad overview of the Brazilian legal system. I intend to describe and explain the basic answers that are commonly given to three philosophical questions about Brazilian law: (a) what is considered to be law in Brazil? (b) What is the role of rules and principles in Brazilian law? And, (c) is there a predominant criterion judges employ when adjudicating cases in Brazil?

In doing so, I will describe the country’s current legal practices. Although my purpose is to offer a descriptive-explanatory view, there may be situations in which I will be normatively providing my own opinions. These opinions may be criticized by readers who disagree with my understandings. The mere choice of citations and themes may be a point of divergence. I will try, inasmuch as I can, not to advance these normative views at this moment. This is the reason why I will use more quotes than usual. I would truly prefer to set a common ground of practices to better allow a truthful debate. I hope I will accomplish this task.

As previously noted, one of the goals of this thesis is to prove that inclusive legal positivism is the most appropriate theory to describe law and that the Brazilian legal system is an excellent example for this theory contenders. Therefore, throughout the chapter I will essentially describe cases, methods and techniques that employ moral reasoning. I will, therefore, anticipate how this moral reasoning enters the Brazilian legal discourse.

As the reader may note, I will show that the Brazilian discourse, being grounded in the civil law roots, acknowledges the role of enacted law as the main source of laws. Nevertheless, moral reasoning has always made its way in the country’s legal practices.

At last, even though my conclusions will be regarding the Brazilian legal practices, I will make reference to several authors that are not Brazilians, mostly from civil law countries, but whose works I believe meet and well explain the legal practices that are currently performed there.

II.2. Introductory Notes

I will start this subchapter by providing the description of three controversial disputes that took place in Brazil in recent times. They all involve situations in which moral reasoning was employed to decide the outcomes. These cases will be helpful throughout the chapter because I intend to refer to their conclusions when answering the philosophical questions above specified.

II.2.1. Nepotism

The S.T.F. ruling of 2008 that held nepotism unconstitutional was very controversial. To argue the constitutionality of Resolution No. 7, of the Conselho Nacional de Justiça [C.N.J.], enacted in 2005, which forbade the practice of nepotism—appointment of relatives to positions of confidence—within the Judiciary, the Associação dos Magistrados Brasileiros—A.M.B.—filed a declaratory action of constitutionality [A.D.C.], before the
Several entities—including associations of judges filed amicus curiae briefs requiring the Court either to uphold or to strike down the regulation.

The Court of Appeals of the State of Rio de Janeiro [T.J.R.J.] was among those who sustained the unconstitutionality of the C.N.J. resolution and also filed an amicus curiae brief. This shows that the matter was not apparently all clear; even judges showed disagreement as to whether nepotism was per se an unconstitutional practice or not within Brazilian law. The simple fact that the S.T.F. agreed to hear an abstract review action, whose main purpose was to uphold the constitutionality of a norm, shows the controversy over the issue, since the existence of divergent decisions from different courts is a requirement for the admissibility of this action.

Although neither the C.F. nor any statute had ever expressly outlawed the practice of nepotism, the S.T.F., in both actions, ruled that the prohibition derived from the republican principles of morality, impersonality (neutrality), equality and efficiency, which are set forth in article 37 of the constitutional text.

There is no doubt that the members of the T.J.R.J. had also read these constitutional principles, but in their view these principles did not forbid nepotism. For A.M.B. members, on the other hand, the very same principles supported the prohibition and, hence, Resolution No. 7 was within C.N.J.’s powers and did not offend article 5, II, of the C.F., which sets forth that “no one shall be obligated to do or refrain from doing something except by virtue of law.”

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67 The National Association of State Judges – ANAMAGES filed a brief sustaining the unconstitutionality, due to procedural violations. The Association of Labor Law Judges – ANAMATRA also petitioned before the Court but argued for the constitutionality. See A.D.C. 12, case files, p. 363-369.

68 See A.D.C. 12, case files, p. 93-130.

69 The Rio de Janeiro Court of Appeals, among other allegations, sustained that it is ingenuous the view that the “appointment of relatives for commission offices and trust positions violates the principles of impersonality and administrative morality, in spite of the good intentions of its supporters. This position undoubtedly reveals ingenuity, which is a product of an entirely distorted vision and of a pure demagogic posture, which comes pervaded of strong discriminatory weight. It may be said that it is a result of a simplistic view of the problem that it purposes to combat.” For the Court, “to consider immoral the appointment of a person to perform a function for which she is capable, because she fulfills all necessary requirements, specially the trust and efficiency requirements, solely because such person is a parent of her superior, is a demonstration of all human discredit, and, in special, on those that presented themselves to occupy relevant posts in the nation. […] It is the physiologism that must be condemned. The appointments of person that are evidently inapt and of the famous “ghosts” are the ones that must be object of the Administration’s moralizing action.” See A.D.C. 12, case files, p. 126-127. Only in the Rio de Janeiro Court of Appeals, 90 relatives of judges had to be dismissed due to the enactment of Resolution 7 of the CNJ. See TJ do Rio vai exonerar cerca de 90 parentes de juízes (Oct. 24, 2005, 7:23 PM), http://www.conjur.com.br/2005-out-24/tj_rio_exonerar_cerca_90_parentes_juizes.

70 See infra text accompanying note 368.

71 See supra note 66.

72 CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 37 (Braz.).

73 CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5, II (Braz.). AMB arguments were very strong: (i) most of Brazilian Courts had declared that they would enforce the Resolution; (ii) the creation of the C.N.J. by a constitutional amendment had recently been upheld by the Supreme Court and, hence, did not represent an interference with the Judiciary Branch powers of self-governance; (iii) within the powers given by the C.F. to the C.N.J. was the authority to enforce the Constitution’s Article 37 principles, in which impartiality and morality are established. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 103-B (Braz.).
On the very same day this decision was rendered, the S.T.F. also banned nepotism in the Executive Branch. Despite the fact that Resolution No. 7 only applied to the Judiciary, the Court unanimously concluded that no statute banning the practice was required to rule nepotism illegal, because the prohibition derived directly from the constitutional principles of morality and impersonality (neutrality).

The mayor of Agua Nova, a city in the northeastern State of Rio Grande do Norte, who had appointed his vice-mayor’s brother to be a municipal driver and, for this reason, was sued, may have read the same constitutional principles in article 37. He most probably disagreed with the conclusion that these principles ruled out the appointments of family members for the city government. His legal counselors may have advised him that the enactment of a statute law was necessary to ban the practice and this prohibition, in their understanding, could not be simply inferred from the constitutional principles of morality and impersonality. He could have been aware that even judges thought the practice was permitted—since apparently not formally forbidden—and appointed their own relatives for Court similar positions. In this case, can these claims be considered a plausible or a truthful reading of the C.F. text, independently of their beliefs or personal desires? If not, should the Agua Nova mayor be punished for having committed an administrative improbity act because he made this unconstitutional (immoral) appointment? These questions will be answered in chapter V.

II.2.2. Cruelty Against Animals

The S.T.F. Justices also disagreed on the meaning of the constitutional text when they, by 6 to 5, held unconstitutional a statute from the State of Ceara that permitted the practice of the *vaquejada*. “The *vaquejada* is a type of sport typical to the Northeastern region of Brazil, in which two cowboys ("vaqueiros") on horseback pursue a bull, seeking to pin it between the two horses and direct it to a goal (often consisting of chalk marks), where the animal is then knocked over.” Article 225, paragraph first, item VII, of the C.F. establishes that “it is incumbent upon the Government to protect the fauna and the flora, with prohibition, in the manner set forth by law, of all practices which represent a risk to their ecological function, cause the extinction of species or subject animals to cruelty.”

Yet, the five minority Justices reasoned that, although the *vaquejada* hurts the ox tail and hooves, and may even hurt its bone marrow, it is a cultural practice and a festive activity, which is carried out in obedience to regulations and techniques since the 19th Century and cultural practices are protected by the C.F. The professional *vaqueiros* are the only ones that...

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75 S.T.F., A.D.I. no. 4.983/CE, Relator: Min. Marco Aurélio, 06.08.2016, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e], 27.4.2017, (Braz.).
76 Constuição Federal [C.F.] [CONSTITUTION] art. 225, § 1º, VII, (Braz.).
78 S.T.F., A.D.I. No. 4.983/CE, Relator: Min. Marco Aurélio, 6.8.2016, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e], 27.4.2017, (Braz.). (Justice Dias Toffoli vote cited Euclides da Cunha who, in the famous Brazilian book “Os Sertões”, confirmed that the *vaquejada* “was a method incorporated to the activities of the *vaqueiro*, of the horseback rider, since the 19th Century.”
79 Constuição Federal [C.F.] [CONSTITUTION] art. 215, § 1º (Braz.) (asserting that “[t]he National Government shall protect expressions of popular, indigenous and Afro-Brazilian cultures and those of other
allowed to practice the *vaquejada*. The minority mentioned that the *vaquejada* has brought social and economic prosperity in the poorest region of Brazil, the Northeast, since it employs around 720,000 persons, directly and indirectly, and generate revenues of US$ 150 million a year.\(^{80}\)

Of course, all Justices are aware of the text of article 225 of the C.F.. Their disagreement rested on what the provision actually means, since its wording is not conclusive to say as to whether or not it bans the *vaquejada*. The C.F., indeed, forbids practices that subject animals to cruelty. However, article 225 expressly states that a statute law should regulate the subject. Does that mean that the enacted statute may tolerate cruelty in some cases? If so, does the Judiciary have to defer to any legislative choice? The Ceara statute was enacted with this purpose. Also, the Constitution protects the performance of historical and cultural practices.

Nevertheless, the S.T.F. ruled that the practice was cruel. The Court, in weighing the cruelty of the *vaquejada* against the benefits of the cultural practice, decided that the cruelty against the animals came first and stroke down the statute. This balance test may also have been done by the State of Ceara legislators when they enacted the statute that authorized the practice, but they had reached a different conclusion. After this ruling, the National Congress passed a Constitutional Amendment with the purpose of reversing the S.T.F.’s decision and allowing the *vaquejada*.\(^{81}\) Following, the Chief Prosecutor of Brazil filed a new abstract action before the S.T.F. with the purpose of declaring the constitutional amendment unconstitutional. The argument is that the constitutional amendment offends the entrenched clauses that establishes that amendments aimed to abolish individual rights and separation of powers shall not be considered.\(^{82}\) The right of an ecological balanced environment is considered to be a social right in Brazil and the proponents argue that it should also be understood as an individual right. This new case has not yet been decided.\(^{83}\)

II.2.3. Party Loyalty

A third example of a controversial case took place when the Brazilian Social Democracy Party—P.S.D.B. filed a writ of mandamus before the S.T.F., grounded on an abstract decision issued by the Superior Electoral Court [T.S.E.]. The electoral court, construing the principles of democracy, party pluralism and proportional representation, had asserted the duty of politicians to be loyal to the parties they were affiliated to when elected. The party also sought to regain the seats that it had lost when former members, elected to

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81 The new text of art. 225, § 7°, of the C.F., which was inserted by Constitutional Amendment No. 96, states that: “For the ends of the final part of item VII of § 1° of this article, sports practices that use animals are not considered cruel, as long as they represent cultural manifestations, in conformity with § 1° of art. 215 of this Federal Constitution, and they are registered as goods of immaterial nature that take part of the Brazilian cultural heritage and shall be regulated by a specific statute that assures the well-being of the animals.” *CONSTITUIÇÃO FEDERAL (C.F.) [CONSTITUTION]* art. 225, § 7°, (Braz.).

82 Article 60, §4°, of the C.F. says that “[n]o proposed constitutional amendment shall be considered that is aimed at abolishing the following: I. the federalist form of the National Government; II. direct, secret, universal and periodic suffrage; III. separation of powers; IV. individual rights and guarantees. *CONSTITUIÇÃO FEDERAL (C.F.) [CONSTITUTION]* art. 60, § 4°, I-IV (Braz.). Translated by Keith Rosenn, Constituteproject.org https://www.constituteproject.org/constitution/Brazil_2014.pdf.

Congress, switched to different political parties. Other opposition parties—the *Partido Popular Socialista* and the *Democratas*—filed similar actions.

The S.T.F. upheld the T.S.E. decision and confirmed the understanding that a member of the Local or State legislatives or of the Federal Chamber of Deputies cannot change her political party affiliation during her term, apart from exceptional situations.\(^{84}\) If she so proceeds, she shall lose her seat in the house. This opinion, rendered in 2007, consolidated the rule that, except for the seats and offices earned in majority elections,\(^ {85}\) the parliamentary seat belongs to the party, not to the elected member.\(^ {86}\) At the time, Brazil had more than 20 political parties and party switching was a very common practice.\(^ {87}\) This decision represented an overruling in the case law regarding the matter. In a previous case, decided in 1989, the Court ruled that the Constitution did not impose party loyalty to Deputies.\(^ {88}\)

The Court took this step because it understood that the “demand for political loyalty represents and reflects a constitutional value of high political and juridical meaning, which compliance […] represents an expression of respect both to voters and to the parties, by

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84 As an explanatory note, the Brazilian system of representation in the Federal Chamber of Deputies and in State and Municipal Assemblies is ‘proportional’ and not ‘district vote’. Therefore, candidates are awarded votes by the whole state or municipal population. Such candidates are compelled to be affiliated to a political party. Independent candidacies, up to this moment, are still not allowed in the country. The parties may form electoral coalitions with other parties. Voters cast votes to candidates but also to the parties and, indirectly, to the party coalition. The parties and the coalitions are awarded seats in conformity with the number of votes they receive, and the elected candidates are the ones that have the greater number of votes within such party or coalition.

85 Elections to the President, Governor and Mayor’s offices and to the Senate are considered majority elections.

86 S.T.F., MS No. 26.603-1/DF, Relator: Min. Celso de Mello, 03.10.2007, DIÁRIO DA JUSTIÇA ELETRÔNICO [D.J.e.], 17.12.2009, 318 (Braz.). Justice Celso de Mello, in his opinion, stated: “[…] PARTY UNLOYALTY AS A GESTURE OF DISRESPECT FOR THE DEMOCRATIC POSTULATE. – The demand for party loyalty expresses and reflects a constitutional value impregnated of high political-legal meaning, which compliance, by the elected office holders, represents an expression of respect to the voters that elected them (popular bond), inasmuch as to the political parties that permitted their candidacies (political party bond). – The infidelity act, being such unloyalty to the party or to the citizen-voter, is a serious ethical-political deviation, and also represents inadmissible outrage to the democratic principles and to the lawful exercise of power, in the sense that unexpected party switching, not always motivated by fair reasons, do not only surprise the very own electoral body and the parties – undermining the representativeness that they conquer in elections -, but also gives room for an arbitrary disequilibrium of forces in Congress, resulting, even, to cause a clear fraud to the popular will and a frontal violation to the proportional electoral system, which suffocates, as a consequence of the number of representatives, the full exercise of political opposition. The practice of party unloyalty, performed by congressional seat holders, for violating the proportional system, mutilates the rights of social minorities, depriving them of representativeness in their legislative bodies, and offend their essential rights – notably the right of opposition – which derive from the foundations that give legitimizing support to own Legal Democratic State, such as popular sovereign, citizenship and political pluralism (C.F., art. 1º, I, II e V). – The jurisdictional repulse to the party unloyalty, besides honoring an eminently constitutional value (C.F., art. 17, § 1º, “in fine”), (a) preserves the legitimacy of the electoral process, (b) provides respect to the citizen’s sovereign will, (c) prevents the deformation of the popular representation model, (d) complies with the purpose of the proportional electoral system, (e) enriches and strengthens the party organizations, and (f) gives precedence to the elected representative’s fidelity which shall by him be obey in relation to the electoral body and to the party by which he ran the election. […]” Translation mine.


which they were elected.” According to the opinion, “the unloyalty act […] represents a serious political-ethical deviation, and also an inadmissible violation of the democratic principle and of the lawful exercise of power, because unexpected switch from/to political parties […] surprises voters and parties and takes away the party representativeness earned in the election.” The Court also stated that the practice jeopardizes the “full exercise of political opposition,” due to the depletion of the party’s representation in the Chamber of Deputies.

It is hard to say that all members of Congress—aware of the constitutional text that establishes that Brazil is a democratic country—share the same understanding of the new S.T.F.’s ruling regarding political party loyalty. To many of them, switching political parties was not an illegal practice, as it was not expressly forbidden by the Constitution nor challenged democracy. They probably agreed with the view stated in the 1989 S.T.F.’s precedent, and that is why some had switched party affiliation. However, to the S.T.F., the practice offended the democratic principle entrusted in the Constitution. Switching parties, therefore, was declared an unconstitutional practice and might result in the loss of the parliamentary seat. Congress has accepted the decision and did not take any step to reverse it through constitutional amendment.

Nevertheless, most Chamber of Deputies’ members that had changed party affiliation before this decision did not lose their seat. The S.T.F. decided to establish that the new interpretation would only apply to those who had switched after March 27, 2007, because this was the date that the T.S.E. decided the first case which asserted the need for party loyalty in disagreement with the previous S.T.F. precedent. This basically means that only representatives that changed their party after the first T.S.E. ruling could lose their seat.

II.3. Notes on the Dominant View about the Brazilian Legal Sources

In this subchapter, I will essentially cover what criteria Brazilians employ to ascertain that a rule is law or is not law in Brazil and these criteria are adopted—the origins of it. I will show that the dominant legal discourse generally depicts Brazilian law as being a product of social facts. Following, I will point out that this comprehension of factual sources of law is a result of the country’s civil law tradition.

II.3.1. Written Law as the Major Source of Rights and Duties

All cases referred in the previous subchapter are similar in at least two respects. First, they all dealt with matters that raised disagreement among legal scholars, politicians and judges regarding the meaning of Brazilian law. Second, the justifications of the decisions, although not founded in rules that provided unequivocal instructions, were supposedly based on specific dispositions of Brazilian enacted law. For the S.T.F., nepotism is unconstitutional due to article 37 of the constitutional text, which states that the Government shall obey the principles of lawfulness, impersonality (neutrality) and morality. The prohibition of the vaquejada was grounded on article 225, Item VII, of the C.F., which bans practices that subject animals to cruelty, in the form defined in a statute. And the democratic principle,

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90 Id.
91 Id.
92 Id.
which is mentioned in article 1 of the C.F., was the main reason for the S.T.F. to disallow the loose hopping of political parties among Chamber of Deputies members.

Indeed, it is common in Brazil to read passages like the following written by Alexandre de Moraes, a S.T.F. member: “[o]nly through statutes duly enacted, it is possible to create obligations to the individual, because they are the expression of the general will.”93 Moraes adds that “[w]ith the rule of [enacted] law, the privilege of the power holder’s capricious will ceases on behalf of the law, guaranteeing the citizen the possibility to confront state coercion that is not imposed by legislative due process.”94

José Afonso da Silva argues that:

“[t]he principle of legality is an essential note of the rule of law. It is, also, therefore, a basic principle of the Legal Democratic State, […] because it is of the essence of its concept to subject the government to the Constitution and ground it in democratic legality. […] All its activity remains subject to the law, understood as an expression of the general will, which only materializes in a regime of powers divided among branches in which the law is the act created by the popular representatives, through the legislative process established in the Constitution. It is in this sense that one may understand the statement that the government, or the public power, or the administrators cannot demand any action, nor impose any abstention, nor also ban any citizens’ conduct, except due to the virtue of law.”95

Manuel Gonçalves Ferreira Filho lectures that “[the] principle—no one shall be obliged to do or refrain from doing except by virtue of law—intends to oppose the arbitrary power and is linked to the concept of law written in the French Declaration of the Rights of Man and of the Citizen of 1789. Only [enacted] law may create an obligation for the individual because it is the general expression of the general will. Expression of the general will by its body, the Parliament. Expression of the general will that governs everyone in democracy.”96

These comments, as seen, are usually made when explaining the content of article 5, II, of the C.F., which sets forth that “no one shall be obliged to do or refrain from doing except by virtue of law.”97 They are also referred to when discussing article 5, XXXIX, of the C.F., which establishes that “there are no crimes unless defined in prior law, nor are there any penalties unless previously imposed by law.”98 The word “law” in these provisions should be understood as meaning “enacted law,” since, in the cited authors’ views, state

94 Id.
96 MANOEL GONÇALVES FERREIRA FILHO, CURSO DE DIREITO CONSTITUCIONAL, 244 (Saraiva, 23rd ed. 1996). Ferreira Filho also observes that “[t]he principle of legality in which law is solely the act approved by Parliament, representing the people, expresses democracy, in the sense that it subjects the individual behavior only and solely to the will manifested by the popular representation bodies.” Id. Translation mine.
coercion is only justified by norms approved by the legislative process. For all of those authors, therefore, solely through the enactment of a written law, which expresses the general will, the Government can create an obligation for the individual in Brazil.

There are some opinions from the S.T.F. that sustain this comprehension. According to the Court, “[t]he principle of [enacted] law reservation operates as an expressive constitutional limitation to the government power, whose regulatory authority, for that reason, is not sufficiently legally trustworthy to restrain rights or to create obligations. No regulation may impose obligations or restrict rights, because it would trespass a constitutional area which is substantially reserved for formal enacted law.”

In these opinions, the Court explicitly acknowledged the role of statute law as the only mean of creating law admitted in the country. Regulations are understood to simply specify obligations which are created by Congress through enacted laws. Agencies have no lawmaker power, at least formally speaking. Judges supposedly decide cases solely applying written law commands.

In a case ruled by the State of Sao Paulo Court of Appeals,100 this Court stated that the “image of the ‘judge makes law’ is incompatible with the tri-division of Powers, because it results in the practice of arbitrary acts by the Judiciary, with the overstepping into the legislative sphere, other branch’s attribution […]”.101 The decision ends by asking “where will the certainty of law go to if every judge becomes a legislator?”

Regarding the C.F., the mainstream view among Brazilian courts and scholars is that, during the 20th Century, a great change took place in the way we should understand it. Constitutional norms gained the status of enforceable norms. Their observance became imperative. If not obeyed, constitutional norms can prompt government coercion.102 The last century European model, in which the constitutions were seen as an essentially political document, a mere invitation to the political powers to act, has been superseded. This new view argues that there is normative force in the constitutional text.104 All opinions that were referred to in the introduction of this section conferred meaning to written constitutional provisions to decide the cases.

99 S.T.F., Q.O. no AgR. na A.C. No. 1033, Relator: Min. Celso de Mello, 03.10.2007, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 17.12.2009, 318 (Braz.). Likewise, the following passage of another S.T.F. ruling: “The constitutional principle of formal law reservation reflects a limitation to the exercise of State administrative and jurisdictional activities. The law reservation—examined under such perspective—constitutes a postulate endowed of exclusionary function, of negative character, because it prohibits, in matters which are subjected to such principle, any normative interventions of non-legislative public entities at a primary level. This constitutional clause, therefore, projects itself in a positive dimension, due to the fact that its incidence reinforces such principle, which, founded on the authority of the Constitution, imposes the necessary submission of the administration and of the jurisdiction to the commands exclusively enacted by the legislator. S.T.F., A.D.I. No. 2.075 MC, Relator: Min. Celso de Mello, j. 07.02.2001, Diário da Justiça [D.J.], 27.26.2003, 238 (Braz.).
101 RT 604/43.
102 Id.
104 The classic book about the matter, which became famous in Brazil, is “The Normative Force of the Constitution” (Die normative Kraft der Verfassung) written by the former judge of the Supreme Administrative Court of Germany. See KONRAD HESSE, A FORÇA NORMATIVA DA CONSTITUIÇÃO, (Sergio Antonio Fabris Editor, 1st, 1991). For information regarding this view in Spanish Law see ENRIQUE ÁLVARES CONDE, CURSO DE DERECHO CONSTITUCIONAL VOL. I, 137 (Tecnos, 5th ed, 2005).
Legality, in this sense, is understood by the mainstream view of the Brazilian legal system as the necessity of enacted legislation, both constitutional and/or ordinary, to justify coercion. This traditional view, although questioned nowadays, is still prevalent.

II.3.2. Civil Law Roots

This way of describing the basis of Brazilian law is typical of countries that have their roots in the civil law system. As Joseph Daniow points out, legislation is the main source or basis of the law in civil law jurisdictions. That is the reason why some have argued that “the function of a civil law court is to merely apply the written law.”

Gustavo Zagrebelsky, who served in the Italian Constitutional Court, talking about his country, states that “the concept of law as a collection of norms of behavior exclusively proposed by the legislator (both constitutional and ordinary) is still prevalent among legal academics, judges and lawyers.”

The French author René David mentions that in his country, “[f]ormally, only loi [written law] is accredited as a source of French positive law. This emphasis is particularly strong in criminal law where the adage, ‘[n]ullum crimen, nulla poena sine lege’ expresses the general requirement that only a statute can define crime and penalty. But the spirit of statutory reference also pervades the entire body of the private law.”

Nino adds that “the adhesion to legislation as a primary source of law in the exegesis school had constituted a rational acceptance, grounded on the coincidence of the new codes with the formal and axiological ideals of the systems advocated by the juridical philosophers.” A phrase attributed to Napoleon Bonaparte states that “public morals are natural complements of all laws; they are by themselves an entire code.” Nino, however, adds that “contrariwise, in the current juridical science, [the adhesion to legislation] is a dogmatic devotion based on the fact that norms have been sanctioned by certain state bodies endowed with general efficacy, not in the evaluative acceptance of the juridical norms’ content or its logical qualities.”

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105 For example, it is worth citing a speech given by Sergio Cavalieri Filho, a former President of the Court of Appeals of the State of Rio de Janeiro, in his presidential swearing in ceremony: “IV – The Sources of Justice. Everyone acknowledges that the Judiciary branch is the “Guardian of the Constitution” and of the laws. Few understand, however, this mission’s extent. In reality, it is much wider than most of people notice, because the Judiciary is the guardian of Justice itself, which sources, that should be preserved, go beyond the Constitution and the laws; they reach ethical, moral and spiritual values, which govern society. This is why the modern Judiciary is not limited to only apply blindly and mechanically the laws to concrete cases, it is not just the mouth of the law anymore, as the orthodox positivists used to proclaim. Its mission is much wider in the sense that it has to interpret and adjust laws to the real necessities of the society. [...] That is why some people say that the judge is the co-author with the legislator.” Sergio Cavalieri Filho, Speech made at his swearing in ceremony as President of the Rio de Janeiro Court of Appeals (Feb. 1, 2005).


107 Zagrebelsky, supra note 26, at 622.


109 According to Carlos Santiago Nino, the exegesis school is known for “considering legislation the sole legitimate source of law and the only valid recourse to interpret the law is given by the legislator’s intent.” CARLOS SANTIAGO NINO, *INTRODUÇÃO À ANÁLISE DO DIREITO* 383 (Martins Fontes, 2010). Translation mine. This school is considered surpassed.

110 Id.


112 Id. at 383.
This comprehension of legality in a formal way, as anticipated by Nino, incorporates the traditional notion that enacted law fulfills general requirements of generality, equality of application and certainty, and respects the separation of powers.\footnote{113} Hardly anyone denies the need for the enacted law to be interpreted. But there is still a widespread notion that interpretation is a “logical operation, of technical character, through which one investigates the exact meaning of a juridical norm, not always clear or precise.”\footnote{114}

Regarding this notion, Gustavo Zagrebelsky mentions that, in Italy, “[it is still] dominant […] the idea of adjudication as a logical-deductive operation consisting in the objective application of the law to a particular case in point, by way of a normative and legalistic syllogism and without any need to look beyond the four corners of the law.”\footnote{115} He also points out that “[t]he practical impossibility of decision making exclusively inferred from the law does not shake this conviction, though it does induce resentment against the legislator and criticism of [flaws] in legislation. Rationalist aspiration to mechanistic jurisprudence stands firmly in place, as the product of a need of certainty.”\footnote{116}

In Brazil, even well-known judges and scholars that argue for a constructive interpretation of legal texts—especially of the constitutional text—, such as the S.T.F. Justice Luis Roberto Barroso, claim that the traditional logical-deductive operation notion is still important for the resolution of easy cases:

“The traditional constitutional interpretation relies on a model of rules, applicable by subsumption, in which it is up to the interpreter to reveal the meaning of the norms and apply them in the case under analysis. The judgments he makes are of fact, not of value. For this reason, there is no creativity, but merely a technical activity. This conventional perspective is still of great importance for the resolution of a great part of legal problems, but it is not always sufficient to deal with constitutional questions, notably in situations of fundamental rights collisions.”\footnote{117}

However, even for hard cases, in which, pursuant to Barroso’s view, the logical-deductive operation would not be applied, the grounds for decision are found in constitutional principles. In his opinion, “these principles have a minimal meaning and range, an essential core, to which they are similar to rules. From a certain point, nonetheless, the interpreter enters into a realm of indeterminacy, in which its content definition will be subject to the interpreter’s ideological or philosophical conception.”\footnote{118}

According to Barroso’s quote, even when the interpreter enters into a realm of indeterminacy to define the content of the principle, he is still trying to provide the meaning for a principle which has a social source, a known pedigree: the Brazilian Constitution. He will not acknowledge law creation, but mere application of the text.\footnote{119}

\footnote{114} PAULO BONAVIDES, CURSO DE DIREITO CONSTITUCIONAL, 437 (Malheiros, 22th ed., 2008).
\footnote{115} Zagrebelsky, supra note 26.
\footnote{116} Id. at 623.
\footnote{117} BARROSO, supra note 27, at 153.
\footnote{118} Id. at 151.
\footnote{119} The same opinion is shared by Paulo Pereira de Souza, former Dean of the State University of Maringa, in the South of Brazil. According to Pereira de Souza even though the new constitutionalism inaugurated with the 1988 Constitution represents the beginning of a new era of comprehension of law in Brazil, Brazilian judges are still too tied to the enacted law: “In Brazil after 1988 we approved a new constitution and a new phase was
Even for the S.T.F. to hear a case, the party generally must specify which particular constitutional article was not observed. This is a constitutional requirement for extraordinary appeal cases, in which the Court incidentally reviews a lower court ruling on constitutional interpretation and an implicit requirement for abstract cases directly heard, in which the S.T.F. has original jurisdiction to examine the constitutionality of federal and state statute laws.\(^{120}\) If the party seeking the case review argues that an implied principle has been violated, she commonly informs which precise constitutional provision gives ground to this implied principle, at least rhetorically.\(^{121}\)

Based on these comments, although I have not yet analyzed the role of principles in Brazilian law, it is not too soon to state that the Brazilian legal classic discourse, grounded on the civil law tradition, incorporates a social fact view of the source of rights and obligations and, therefore, of the law. According to this traditional view, the social fact that distinguishes law from non-law is the enactment of legislation, either constitutional or statutory. As per article 5, item II, of the C.F., the citizen may only be coerced by the public forces to act in a certain way if the government enacts a statute with this determination. Coercion will always be justified by means of interpreting enacted rules and principles. Precedents usually have a mere persuasive role,\(^{122}\) but generally there is no acknowledgement of law creation. This view basically reflects an idea of legislative inaugurated in the history of our law. This constitutionalism, and especially the process of law in Brazil, incorporates as fundamental a right and a guarantee to access, not only to justice, but to a just and fair judicial order. This protects not only the guarantee to access from the point of view of the insufficiently provided for, the poorer populations, which require free access to law, but it allows an adaptation of the judicial system to the social, political, and economic reality of the country. The implementation of this new vision of access to justice is based on giving more power to the judges, which rejects a dogmatic and positivist vision of the law. This new vision has made its mark during the last few decades and sees processes in a more effective, agile, and fairer type of law. This type of vision is very difficult to implement in Brazil in view of the judicial system adopted, which is the European civil law system, a heritage left by our Portuguese colonizers. Contrary to the system of common law, where the freedom of the judge is much higher, the Brazilian judge is too tied to the law, or as Montesquieu said, the judge is “the mouth of the law.” Souza, supra note 24, at 156.

\(^{120}\) For information regarding the types of appeals and actions heard by the Brazilian Supreme Court, see http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=120199.


\(^{122}\) There are exceptions to this affirmation in the Brazilian system. When a case is decided in an abstract review proceeding, the Constitution expressly states that the decision has binding effect. See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 102, par. 2º, VII, (Braz.). “Final decisions on merits, pronounced by the Supreme Federal Court, in direct actions of unconstitutionality and declaratory actions of constitutionality shall have force against all, as well as a binding effect, as regards the other bodies of the Judicial Power and the governmental entities and entities owned by the Federal Government, in the federal, state, and local levels” (Official Translation from the Brazilian Senate). Also, according to Article 103-A of the C.F., “[t]he Federal Supreme Court may, ex-officio or upon request, upon decision of two thirds of its members, and following reiterated judicial decisions on constitutional matter, issue a summula (restatement of case law) which, as from publication in the official press, shall have a binding effect upon the lower bodies of the Judicial Power and the direct and indirect public administration, in the federal, state, and local levels, and which may also be reviewed or revoked, as set forth in law.” See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 103-A (Braz.) (Official Translation from the Brazilian Senate). In addition, with the enactment the new Civil Procedure Code in 2015, a new rule (Article 926) has been established obliging judges to uniformize their decisions, keeping it stable, consistent and coherent. Some authors have argued that this new rule confer binding effects to some precedents. See Lenio Luiz Streck, Jurisdição, fundamentação e dever de coerência e integridade no novo CPC, CONSULTOR JURÍDICO (Apr. 23, 2016, 08:00 AM), https://www.conjur.com.br/2016-abr-23/observatorio-constitucional-jurisdictaco-fundamentacao-dever-coerencia-integridade-cpc.

In this subchapter, I will cover the problems of the written law criterion for legality and how it is introduced by judges through practices that allow non-legal reasons, especially moral reasons, enter into the legal discourse. As one may note, moral reasons always took part of the civil law, but the manner these values played a role changed considerably. The subchapter will show that moral arguments have always entered the scene due to the need of interpreting the more general terms that are commonly employed in civil law statutes, especially if compared to statutes enacted in common law countries. In addition, the civil law judge has also accepted some specific dogmatic characteristics in law identification and application that have allowed him to update and reformulate the law, proposing certainty to its vague terms, filling its gaps, solving its incoherencies and adjusting its norms to determined axiological ideals. These dogmatic properties open the door to moral reasoning.

As seen, the written law, in a general sense, is still the major source of law in civil law systems. This means that in these countries, when examining a legal question, jurists consider primarily legislative and regulatory sources, trying to discover, by the application of different methods of interpretation, the solution which in each case corresponds to the intention of the legislators. In using the written law as their major source, courts in civil law systems are adhering to their tradition.

When referring to the techniques and policies of precedents in the civil law tradition, René David observes that courts and jurists of the civil law family are not comfortable unless they can invoke provisions of enacted law to justify or support the legal solution they chose to apply. “It may sometimes even be necessary to demonstrate that a legislative provision has been violated for the court to be seized at all or for there to be recourse to a higher court.” David adds that this attitude may pass the impression that the law and the written texts are still considered to be one and the same in the civil law countries.

Mauro Cappelletti, when addressing the distinctions between the judicial career in civil and common law jurisdictions, argues that judges in the civil law world are sworn in very young, after passing high competitive exams, and generally do it without much practical experience. Their legal education usually focuses on how to manage the technical tools, instead of adopting value and policy-oriented solutions. So, civil law judges usually do not like to bring attention to any law creation. Their decisions tend to appear as a mere technical, almost mechanical, application of the law.

123 JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION, 24 (Stanford University Press, 3rd. 2007). According to Merryman, legislative positivism is the concept that "only statutes enacted by the legislative power could be law." The author adds that "the accepted theory of sources of law in the civil law tradition recognizes only statutes, regulations, and customs [customary law] as sources of law." Therefore, the judge “cannot turn to… prior judicial decisions for the law.” See Raj Bhala, The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy), 14 Am. U. Int'l L. Rev. 845, 907, (1999).

124 Id.

125 RENÉ DAVID & JOHN E. C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY, 94 (Stevens & Sons, 2nd, 1978).

126 Id.

127 Id. at 97.

128 Id.

129 See MAURO CAPPELLETTI, JUÍZES LEGISLADORES? 120, 121 (Sergio Antonio Fabris Editor, 1993)
The following paragraph, which is part of a S.T.F. opinion written by Justice Marco Aurélio Mello may confirm this view of the importance of posited norm to the civil law judge:

“[…] since the first days of my legal career, I have understood that the judge, when facing a case, should idealize the fairest solution to the controversy, using, in this first stage, only his humanistic background. Following, hence, with great respect to legal certainty, he examines the legal precepts that are pertinent to the situation. If he concludes for the harmony between the fairest result and the posited juridical order, he applies it, in which case, he will materialize justice in its widest conception. If he does not find support in the dogmatic, he will disregard the solution that seems the fairest one to him and will decide in compliance with the statute’s will.”

Hence, according to Mello, even if the judge identifies a fairer solution for the case, according to his intuition or hunch, if this solution is not supported by the posited juridical order, he cannot adjudicate the case in that direction.

But how do judges consider that enacted law is the major source for solving most of the cases, given the unclarity of the text and the circumstance of profound political disagreement? Is this rationally possible? This question will be answered in the following subsections. Firstly, I will examine the civil law legislation style and some problems that emerge from its drafting practices. Secondly, I will show the techniques that judges employ to make this convention possible.

II.4.1. Civil Law Legislation Style

The legislation style differs in civil law and in common law countries. William Burnham notes that “[c]ommon law judges see statutes as containing specific rules of law that will be applied fairly according to their terms, but not beyond. […] Any judicial effort

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131 See Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decisions*, 14 Corn LQ 274 (1928) (taking the position that general propositions of law do not decide concrete cases. This decision will depend on a judgment or intuition subtler than any articulate major premise). Luhmann also writes something similar. According to Thomas Vesting, citing Luhmann, “it remains incorporated in all legal interpretation the mysterious and enigmatic element of the decision, an infomulable element (should we say: divine). This explains why the legal sentiment, the pre-judgment, is considered up to this date to be an ‘indispensable compass’ for the good jurist.” *THOMAS VESTING, TEORIA DO DIREITO – UMA INTRODUÇÃO*, 227 (Gercélia Mendes trans., Saraiva, 2015). Translation mine. However, according to Hart, “[i]t is possible that, in a given society, judges might always reach their decisions intuitively or ‘by hunches’, and then merely choose from a catalogue of legal rules one which, they pretended, resembled the case in hand; they might then claim that this was the rule which they regarded as requiring their decision, although nothing else in their actions or words suggested that they regarded it as a rule binding on them. Some judicial decisions may be like this, but it is surely evident that for the most decisions, like the chess-player’s moves, are reached either by genuine effort to conform to rules consciously taken as guiding standards of decision or, if intuitively reached, are justified by rules which the judge was antecedently dispose to observe and whose relevance to the case in hand would generally be acknowledged. HART, *supra* note 43, at 141. (Concept of law)
to extend a statute beyond a fair reading of its text would add something to the statute that the legislative apparently did not wish to be there.”

Burnham points out that common law statutes are usually much longer and detailed in comparison to civil law statutes. According to him, “[a] quick glance at a federal or state statute books will disclose that U.S. statutes are longer and infinitely more complex than the average civil law code or even most ‘special legislation’ that has grown up in civil law countries outside the codes.” He also contends that common law judges do not fill “[…] any statutory gaps by extending the reach of the statute. Any gaps have already been filled by the common law. Enacting a statute in a common law system, then, is like placing a rock in a bucket of water. The rock displaces the water as far as it goes, but the water rushes in to fill any holes or crack in the rock. Judges deciding a case not covered by the statute simple resort to the common law. As a result, common law judges faced with gaps in a statute need not to resort to a highly flexible interpretation of statutory language, such as reasoning by analogy, or germination of rules from the statutory principles.”

This view expressed by Burnham would probably be questioned nowadays by textualism defenders. Nevertheless, some early 20th Century Anglo-American scholarship proves that this view was traditionally adopted. Ernest Bruncken, in an article published in the Yale Law Journal, in 1929, describing the difference in statutes in common law and civil law countries, stated that “[i]n the common-law countries, the customary law, defined and developed by courts, is the foundation on which the legal edifice is reared. All statutes, large and small, whether called codes or not, are but modifications of the customary law and must be interpreted with a constant regard to this underlying foundation.” He added that this

133 Id.
134 Id.
135 Id.
136 The reference to textualism is based on the following comments made by William N. Eskridge et al.: “In the 1980s, a group of judges and executive officials developed a more constrained version of the plain meaning rule than that followed in cases like Griffin and TVA v. Hill. For example, Judge Frank Easterbrook’s Statutes’ Domains, 50 U. Chi. L. Rev. 533 (1983), insisted that courts have no authority even to apply a statute to a problem unless the statute’s language clearly targets that problem. Judge Easterbrook’s Legal Interpretation and the Power of the Judiciary, 7 Harv. J. L. & Pub. Pol’y 87 (1984), argued that courts interpreting statutes have no business figuring out legislative intent, which is an incoherent concept, largely for reasons suggested in 1930 by Professor Radin, but updated to reflect modern public choice theory. Justice Antonin Scalia delivered a series of speeches in 1985-86, urging courts to abandon virtually any reference to legislative history, especially the committee reports referred to in Griffin and TVA v. Hill. The Department of Justice’s Office of Legal Policy endorsed and developed these views in a document drafted by Stephen Markman, Using and Misusing Legislative History: A Re-Evaluation of the Status of Legislative History in Statutory Interpretation (1989).

What we call “the new textualism” is an approach to statutory interpretation developed by these judges and scholars. Although its proponents draw from legal process theory for their own purposes, their approach to statutory interpretation differs from that supported by Professor Hart, Sacks, and Fuller. Also, new textualist construction is different from the “soft” plain meaning rule of TVA v. Hill and Griffin, as suggested by the exchanges in the cases that follow.” WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY, ELIZABETH GARRETT AND JAMES J. BRUDNEY, CASES AND MATERIALS ON LEGISLATION AND REGULATION – STATUTES AND THE CREATION OF PUBLIC POLICY 568-569 (West, 5th, 2014).

137 Ernest Bruncken, The Common Law and Statutes, The Yale Law Journal, Vol. 29, No. 5, 516 (Mar., 1920). In regard to civil law countries, Bruncken argues that “the relation between statutes and other forms of law are precisely the opposite. There, every statute or rule analogous to a statute, from the most comprehensive code to the pettiest regulation, is an original statement of the law on the subject to which it relates. Unwritten law may indeed modify the written in particular instances, but only as under the English system a special custom may modify the general ones. It always remains an exception, usually confined to the narrowest proportion which a reasonable interpretation may give to it, and the very existence of a custom has to be proven under
assertion was true even for jurisdictions like California, in which the codes provided expressly that they were “not amendments of existing law, but an independent statement of the law of the state.” According to him, “these provisions have for the most part remained ineffective.”

In the civil law system, the concept of the legal rule is different. Rene David affirms that the “legal rule […] is the fundamental basis of codification such as it is conceived in continental Europe. A code would be no more than a mere compilation, and more or less successful as such, if one were to see a legal rule in every judicial decision and only at the level of such decisions. According to the Romano-Germanic notion, a code should not attempt to provide rules that are immediately applicable to every conceivable concrete case; but rather an organized system of general rules from which a solution may be easily deduced by as simple a process as possible.”

David adds that “[t]he Romano-Germanic legal rule [lies] between the judicial decision in dispute, which is seen as a concrete application of the rule, and the more general principle of which the rule itself may be considered the application [of the principle]. In the Romano-Germanic countries, the art of the jurist consists in finding and formulating the rule at this point of equilibrium. It must not be too general, for then it would no longer be a sufficiently certain practical guide; on the other hand, the rule must be general enough to cover a certain series of types of situations rather than merely apply to some particular situations as does the judicial decision.”

This point of balance varies according to the specific area of law; criminal and tax laws should be more specific and discretion should be limited inasmuch as possible. “Greater generalization, on the contrary, may be preferable in certain other and more fluid areas where it is intended that the rigor of legal solutions be less strictly imposed.”

David argues that “the generality of the legal rule explains why the task of lawyers in these countries is conceived essentially one of interpreting legislative provisions and is thus unlike that of [c]ommon law countries where the legal technique is characterized by the process of distinguishing judicial decisions.” He explains that “the ‘right’ legal rule itself is not thought of in the same manner: in [c]ommon law countries the judge is expected to formulate, as precisely as possible, the rule which provides a solution [for] the dispute; in the Romano-Germanic countries, on the contrary, because its function is simply to establish the framework of the law and to furnish the judge with guidelines for decision-making, it is considered desirable that the legal rule leave him a certain margin of discretion.”

exacting conditions. Whoever under this system asserts a right is expected primarily to cite the precise section of a statute on which it is based. Even where, before the modern codes, such a statute covering his case was absent and he relied on the Roman Law as a subsidiary source, he was in many jurisdictions required to cite the precise passage in the Justinian Code or the Gloss, which was held to be of the same nature as a statute. Invariably the statute is the rule, every other form of law the special exception.” See Id at 516-517.

138 Id.
139 Id.
140 DAVID & DE VRIES, note 108, at 88.
141 Id. at 89.
142 Id. See also Zagrebelsky, note 52. “In certain determined fields, [a decision that looks back to past events] is expressly excluded. This is predominantly the case in criminal law, where it is preferable that the legislator establish crimes and punishment through prospective and predictable rules.” See also Benjamin C Zipursky, The Inner Morality of Private Law, 58 Am J Juris 27 (2013) (arguing that Tort law is essentially “implicit, retroactive, intrinsically incapable of multiple competing interpretations, and often limited to particular fact patterns”).
143 Id.
144 Id. at 90.
145 Id.
Nino asserts that “in countries with our legal tradition it is wrong to consider a code or a statute as part of the law isolated from theoretical constructions that were developed around it.”\textsuperscript{146} For that reason, David is right when he says that in civil law systems, the generality of the rule is considered a positive property because of the assumption that the judge or the legislator will never be able to foresee all possible cases in which the rule must govern.

Taking these ideas into account, one may observe that the sort of social fact required to satisfy legality in common law or civil law countries is very different. Brazil, following this tradition of civil law drafting, does not have well-developed theories of \textit{fair notice}, \textit{vagueness} or \textit{overbreadth}, for example. For a legal rule to satisfy the requisite of legality, it will not really matter if its terms are vague, broad or may not offer good guidance to the citizens. There is a sort of general understanding—or convention—that the terms will be made clear through a process of interpretation or concretization. The fact that some applications of the rule will not find support in the legislative history or even in the original intent of the drafters is not generally a problem. The social fact has taken place, there is written law on the general issue and what the Judiciary extracts from the text—in a process that may also take into account constitutional principles, as we will see—is considered within the legitimate authority of Courts—if it is understood that its action does not contradict the Constitution.

A good comparison of the way statutes are generally drafted in Brazil and in the U.S. may be found in the regulation of the crime of \textit{passive corruption}, which takes place when a public official receives a bribe. In Brazil, the matter is disciplined by article 317 of the Penal Code, which states:

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“Passive Corruption
Art. 317 – Request or receive, for himself or other, directly or indirectly, even when not in office or before swearing in, but because of the official position, undue advantage, or accept a promise of this advantage:
Sanction – incarceration, from 2 (two) to 12 (twelve) years, and fine. ”\textsuperscript{147}
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In the U.S., for the Federal Government, Chapter 18, Section 201, of the US Code establishes the crime:

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“(a) For the purpose of this section—

[...]

(3) the term “official act” means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in this official’s official capacity, or in this official’s place of trust or profit.

[...]
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\textsuperscript{146} \textsc{nino}, see note 109, at 399.  
\textsuperscript{147} \textsc{código penal [C.P.] [Criminal Code]} art. 327 (Braz.). Translation mine.
(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

[...]

(c) Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

[...]

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by this official or person;

It is easy to note a difference in the drafting and style, as well as the purposes of the statute. There seems to be more concern with clarity and on anticipating possible conflicts of interpretation in the U.S. Federal Code. Undeniably, the American judge is more constrained to interpret the statute than the Brazilian judge, who may construe vague terms, like “undue advantage.” In fact, there is still an ongoing debate as to whether the practice of an “official act” is necessary for characterize the crime in Brazil and the statute was enacted in 1940.\(^{148}\)

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\(^{148}\) Former President Fernando Collor de Mello was acquitted by the Supreme Court for corruption charges, in 1994, on the grounds that he had not performed any official act in exchange for undue advantage. The S.T.F. asserted the practice of official act was necessary for configuring corruption. See S.T.F., A.P. No. 307, Relator: Min. Ilmar Galvão, 13.12.1994, Diário da Justiça [D.J.], 13.10.1995 (Braz.). But, in 2017, when former President Luís Inácio Lula da Silva was convicted for corruption charges, Judge Sergio Moro asserted that the question as to whether the performance of an official act was a necessary requisite for configuring corruption is still an issue under debate on Brazilian criminal law. He cited a recent precedent from the Superior Tribunal de Justiça, the highest court for settling statutory interpretation in Brazil and claimed that the official act requirement does not have to be precisely delimited. See TRF-4, A.P. No. 5046512-94.2016.4.04.7000/PR, Juiz Sergio Moro, https://abrilveja.files.wordpress.com/2017/07/sentenc3a7a-lula.pdf. See also S.T.J., R.H.C. No. 48.400, Relator: Min. Gurgel de Faria, 17.03.2017, Diário da Justiça eletrônico 30.3.2015 (Braz.) (taking the position that the effective practice of a specific official act is not necessary to configure the crime of passive corruption. There is no need to individuate the official act because the public function trade takes place in a diffuse manner, through a plurality of acts which are of hard individualization).
A close reading of article 317 of the Penal Code shows that it does not say whether the practice of an official act is necessary.

Also, since doctrines of *vagueness* or *fair notice* are more developed in the U.S., American judges are more likely to worry about the possibility that the existence of vague terms in the statute may result in lack of limits on law enforcement. It is rare to see these concerns in Brazil, because judges consider that the statute merely needs to be interpreted and that the limits, if necessary, will be established through adjudication.

In *McDonnell v. United States*,\(^*\) for example, the SCOTUS vacated a conviction of a former Virginia Governor, Robert McDonnel, and his wife, Maureen McDonnell, on honest services fraud and Hobbs Act extortion charges related to their acceptance of $175,000 in loans, gifts, and other benefits from a Virginia businessman. The SCOTUS basically held that “the jury instructions on the statute term ‘official act’ were expansive and raised significant constitutional concerns.”\(^*\) The Chief Justice, writing for a unanimous Court, stated that “[t]here was no doubt that this case was distasteful; it may be worse than that. But [their] concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government’s boundless interpretation of the federal bribery statute. A more limited interpretation of the term “official act” leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this Court.”\(^*\)

In Germany, there have been criticisms regarding the use of *indeterminate legal concepts* to define criminal sanctions, which is constitutionally permitted.\(^*\) Giacomolli and Aflen point out that the article 104, 1, of the Basic Norm establishes that “only through formal law a sanction of incarceration may be applied.” They complain that “the generalization of the criminal statutes represents a risk to legal certainty, because it is a result of the excessive use of general clauses, objectively distinctive, which void the guarantee function of the criminal law.”\(^*\) They mention that German authors claim that legislators have been neglecting this legality postulate, by “creating penal norms that, even for experts, are not the most comprehensible. Rules in which it is hard to distinguish the punishable conduct to a lawful one.”\(^*\)

To sustain their point of view, these scholars cite a precedent from the German Constitutional Court:

“The art. 103, item 2, of the Basic Norm demands the legislator to circumscribe the punishable elements in a concrete manner, in the sense the ambit of application and the reach of criminal rules result from the content of the statute, or, in any case, may be obtained through interpretation. This does not exclude, however, the use of concepts that need in a certain way be interpreted by the judge. Also, in criminal law, the legislator faces the necessity of taking into account life’s multiform. In addition, it is due to the criminal rules inevitable generality and abstraction that, in the concrete case, it is doubted that a conduct is still prohibited by the criminal law. Nevertheless,


\(^{150}\) *Id.* at 4.

\(^{151}\) *Id.* at 28.


\(^{153}\) *Id.* at 574.

\(^{154}\) *Id.* at 575.
in all cases, the norm’s recipient shall be able to foresee, from the legal precept, if a conduct is punishable. In borderline cases, it must be calculated at least the possibility of sanction.”

In light of this precedent, they state that “this […] has contributed, decisively, for the criminal law be guided by indeterminate legal concepts.” And they conclude that “the classic postulates of the legality principle, which form the base of criminal law, in practice, have been considered an unreachable ideal, an ideal that may be forgotten if the citizen falls within the hands of the criminal law.”

Indeed, in some civil law countries, this regulation of criminal acts through the use of principles is still criticized. Zagrebelsky, for example, asserts the following:

“[t]he interesting logical difference, from a practical standpoint, is that in order for the principle to work in practice, its ‘concretization’ is required; in other words, it must be reducible to a formula containing a case in point relevant to a historical event and the consequence must derive from it. The concretization of the principle takes place in the course of the work either of the legislator, through a rule that looks to future events, or of the judge, through a decision that looks back to past events. In certain determined fields, the second option is expressly excluded. That is predominantly the case in criminal law, where it is preferable that the legislator establish crimes and punishment through prospective and predictable rules. Beyond this exception, however, rules and principles often operate jointly and in parallel fashion.”

A final important issue to point out is an argument regarding the length of the C.F. text. Brazil is said to have a very analytical constitution, as opposed to the U.S. Constitution, which is qualified as synthetical. This assertion is true, the C.F. has more than 250 articles, some of which also have many items and paragraphs. It deals with a vast number of subjects which are not considered traditional constitutional issues, such as tax, family, environmental and health law. But this fact does not undermine the point made regarding the style of norms in Brazil. Most of the C.F. precepts are written in a synthetic manner and do not have the ambition of regulating the whole matter they deal with, leaving great room for construction. About this issue, Patrícia Perrone, a law clerk and professor in Brazil, states:

“the 1988 constitutional text employs, in its provisions, undetermined legal concepts, fundamental rights and/or principles, which meanings, to solve cases, demand the judge’s

155 92 stRspr, vgl. BVerfGE, 1 12 (Ger.). Id. at 581.
156 Id.
157 Id. at 580. Translation mine.
158 See Zagrebelsky, supra note 26, at 631.
159 Scholars argue that there is a distinction among substantial constitutional norms and formal constitutional norms. According to Paulo Bonavides, the material norms of the C.F. are the ones that regulate the organization of powers within the three Branches and within the Union, States and Municipalities, the system of government, and individual and social rights of the citizens. All the rest is considered to be only formally constitutional. BONAVIDES, supra note 114, at 80.
evaluative and, many times, creative attitude. Examples of undetermined legal concepts included in the Constitution: “political party plurality”, which is a foundation of the Brazilian State; the “social function” to be accomplished through property; “the imminent public danger”, which authorizes the Government to use a private good; the “threat of violence” against freedom of locomotion, which is protected by habeas corpus.”

Saulo Ramos, former Ministry of Justice, made a similar comment in a book:

“It was not possible, however, to improve the whole congress bill of the constitutional text. A constitutional assembly always becomes a pressure cooker, and the Brazilian politicians, when writing the text of a constitution, have a tendency to create things that look like recreation center by-laws. They include details, smallness, artistic, sports and financial directors’ competences, and end up mixing up rules that interface and are contradictory among themselves, some ridiculous, others audacious, but nearly all a product of unreflected fruits of non-digested ideological confrontations. These extravagances hallucinate ordinary legislators, and also make interpreters and hermeneuts crazy.”

Examples to prove this point can be extracted from the cases cited in subchapter II.2. above. Article 225, paragraph first, item VII, of the C.F. establishes that “it is incumbent upon the Government to protect the fauna and the flora, with prohibition, in the manner set forth by law, of all practices which represent a risk to their ecological function, cause the extinction of species or subject animals to cruelty.” This provision sets a goal to be pursued, but, at the same time, leaves ample room for statute regulation and judicial construction.

II.4.2. Civil Law Legislation Dogmas

This view that enacted law is what constitutes the sole source of law for the solution of most cases in the civil law world is supported due to some specific dogmatic characteristics in law identification and application. There are certain ideological attitudes and rational ideals regarding the comprehension of statutes and of the C.F. that judges articulate when reaching a decision, while still thinking they are simply following the enacted law. That is the reason civil law jurists call legal dogmatic the method that allows the finding of legal solutions.

Although Santiago Nino calls the dogmatic predicates a fiction, he observes that they serve the relevant function of reformulating the law, proposing certainty to its vague terms, filling its gaps, solving its incoherencies and adjusting its norms to determined axiological

160 PATRÍCIA PERRONE CAMPOS MELLO, NOS BASTIDORES DO STF 29 (Editora Forense, 2015). Translation mine.


162 NINO, see note 109, at 371-409.

163 Leszek Nowak, A Concept of Rational Legislator, in POLISH CONTRIBUTIONS TO THE THEORY OF PHILOSOPHY IN LAW, 137, 138 (Amsterdam ed., 1987).
ideals. The juridical dogmatic, therefore, is essential to the administration of justice and to the development of the law, although it presupposes to only be applying what is already law.  

Nino notes, also, that the singularity of the dogmatic is that the judge’s activity of reconstruing and developing the law is not done in a clear, candor way, but in a feint manner, using rhetorically the conceptual apparatus to pass the impression that the original solutions emerge as if they merely derive from posited law. The applied techniques “perform the important mission to adapt the law to certain rational and axiological ideals [and], at the same time, provide a feeling of preserving legal certainty by allowing to affirm that the proposed solutions derive implicitly from posited law and are not modifying it.”

I will now go over the most common dogmatic predicates, which are: (a) unity, coherency, consistency and completeness; (b) adhesion to the legislation; and (c) the rational legislator.

II.4.2.1. Unity, Coherency, Consistency and Completeness

At first, the enacted law is understood as being a unitary system, totally coherent, consistent, and complete. The civil law jurist considers that the conjugation of these attributes is what makes the law a system, something distinct from a group of scattered norms.

The legal system is understood as a unitary system because there is a general convention that all rules are posited—directly by the legislature or indirectly through administrative regulation—by the same authority. All enacted laws, in this sense, come from the same source, which is the legitimated power to make the law.

Hans Kelsen’s basic norm (grundnorm), which traditionally offers an underlying basis for the legal system and whose existence is presupposed by the civil law jurist, provides the authority to the legislator.

According to the University of Heidelberg Professor Winfried Brugger, “[e]nsistency or legal coherence entails that all of the law—its purposes, principles, and rules—should form a bond of unity; of mutual coordination, accommodation, and clarification.” He adds that “laws should avoid contradiction and excessive vagueness, and judges should do their best to read the law as a ‘rational continuum’ in order to promote clarity and consonance.”

Brugger adds that “this [attempt to read the law as a ‘rational continuum’] is more realistic in modern pluralistic societies, whose legal systems must integrate many different values, and where the democratic process usually is not compelled by a constitutional mandate to proceed consistently; furthermore, legislatures often evade their responsibility to

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164 NINO, see note 109, at 384.
165 Id.
166 Id.
168 BOBBIO, supra note 9, at 198.
169 Id. at 200.
170 Id. at 201.
171 Id.
172 Brugger, see supra note 33, at 411.
take difficult (read: politically potentially damaging) decisions by intentionally using open-ended language that leaves the burden of decision-making on the judiciary."173

Both Hans Kelsen and Norberto Bobbio assert that the dogma of completeness means that the legal system is capable of providing a solution for all cases. The legal system, in this sense, has no gaps.174

As Thomas Vesting notes, “either the \textit{quaestio juris} of a circumstance of life is already anticipated by the law of the jurists or by the political legislative activity or, if this is not the case, at least, the adjudicator may solve it through literal, logic, gap-filling or, eventually, analogic interpretation, in the deductive sense employed. The system always has the prompt response, at least ideally.”175

The attributes of coherence and completeness, according to Francesco Carnelutti, are pertinent because the law may have two defects: an excess defect (exuberance), when there are more rules than there should be and they conflict with each other, and an emptiness defect (deficiency), in which case there is a gap. When the excess defect takes place, the jurist will have to \textit{expurgate} it from the legal system, that is, to eliminate the extra norm; in the second case, she will \textit{integrate} the legal system.176 The gap, in this sense, would not be one of the legal system, but of rules, because the system would always have a solution.177

Brazilian law is written in a way that incorporates the dogmas of coherence and completeness. Even when facing a gap, the Brazilian judge has to decide the case (prohibition of \textit{non liquet}). Article 140 of the Civil Procedure Code sets forth that “the judge may not exempt himself to decide a case under the argument that there is a gap or an obscurity in the legal system.”178 Brazilian statute law determines that, in these cases, the judge shall rule by applying analogy, customs or general principles of law.179 She may not decide the case applying equity, except when authorized by statute law.180 Therefore, Brazilian law acknowledges the existence of normative gaps, but also considers itself complete in a way that in these cases judges will resort to an inclusive general norm, through which judges will decide non-regulated cases to the discipline of similar regulated cases.181

\begin{footnotes}
\footnote{Kelsen notes that, in this case, it is not possible to apply a single rule, but it is still possible to apply the legal order and, therefore, the law. There is, for this reason, no normative gap. The Austrian scholar adds that judges may recognize a \textit{normative gap} when the lack of a legal norm is considered undesirable by the judge, who regards it important under a juridical-political view. The outcome of the case based on the application of the closure rule may not be considered desirable. Judges may also recognize an \textit{axiological gap} when there is a norm (therefore there is no normative gap), but its application is considered wrong. Kelsen states that axiological gaps are highly subjective and do not exclude a judgment made in accordance with opposing values. Kelsen’s approach is strongly criticized by Carlos Alchourrón and Eugenio Bulygin. See \textsc{Nino}, supra note 109, at 334. See also Eugenio Bulygin, \textit{Carlos E. Alchourrón and the Philosophy of Law}, 1 South America Journal of Logic, 345, 347 (2015) (discussing Alchourrón’s contributions to legal philosophy, including his works on the axiological gaps).}
\end{footnotes}
These solutions are different from the ones adopted by the Swiss Civil Code, for example. Although the Swiss Code also has an inclusive legal norm, it authorizes the judge to behave as a legislator when facing a gap, which may denote that he is expressly authorized to go beyond the legal system to find the best solution that suits him. 182 Alfred E. von Overbeck contends that because of this provision the Swiss Code “deliberately rejects the idea that it could be complete and give an answer to every conceivable question.” 183 Nonetheless, when deciding cases that do not have a solution in the system, grounded in the closure rule, judges do not seem themselves legislating, because, adopting Kelsen’s view, they will only be authorized to “create an individual norm, valid for the single, present case.” 184

Coherence and unity are dogmas that allow the presence of contradictory instructions to exist in the system (exuberance). As observed above, for example, the Brazilian statute law instructs the judge to decide following the enacted norms and only to apply analogy, customs or general principles of law when facing gaps in the system. But, at the same time, Brazilian law tells him to apply the law observing the social ends and the needs of common well-being. 185 Also, as noted before, open-textured constitutional principles also must be taken into account by judges when adjudicating most statutory law cases, a practice known as constitutionalization of statute law. 186

When defining the range of factual situations covered by broader and open-textured constitutional provisions, Brazilian legal practice adopts similar notions of system coherency and unity. Brugger notes that the “[t]he prevailing view holds that the Constitution differs from statutes in that it is more political, more open-ended, and less complete. From that it follows, according to this view, that vague constitutional provisions cannot be 'construed' (ausgelegt) but must be 'actualized' (aktualisiert) or 'concretized' (konkretisiert); the reasoning (today we would call it an analytic judgment or a tautology), that restricts itself in showing consequences that are already implied in the furnished premises.

182 “Art. 1. 1) The law applies according to its wording or interpretation to all legal questions for which it contains a provision. 2) In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule it would make as legislator.” SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC][CIVIL CODE] Dec. 10, 1907, SR 210, RS 210, art. 1 (Switz.).

183 Alfred E. von Overbeck, Some Observations on the Role of the Judge Under the Swiss Civil Code, vol. 37, No. 3, La. L. Rev., 681, 686 (1977). Regarding the practical application of this provision, Overbeck notes: “How has Article 1(2) worked in practice? The judges certainly have not abused their power to act as legislators. The contrary may be true. In his most recent article, Meier-Hayoz sounds a somewhat pessimistic note; he finds that judges are very reluctant to assume the responsibility of acting modo legislatoris. Such a function is a burden, not a joy for them. They prefer to use arguments which make the decision appear as if it was a mere interpretation of the existing law. They also prefer to hide the policy considerations, which are the real grounds of decision, behind constructive arguments. Meier-Hayoz expresses also some criticism of Article 1 itself, which makes too clear-cut a distinction between two functions of the judge: interpretation according to paragraph 1 and gap-filling under paragraph 2. In fact, there are few cases which are decided entirely by statute or entirely by the judge. In the great bulk of cases the decision is a result of a combination of interaction of statute law and judge-made law. The part of each may vary, but the legal process is always the same. Meier-Hayoz would prefer to abandon the idea of an “application” of pre-existing law by the judge and move towards a concept of “law in making” which combines the rule and the application of the rule, the decision finding and the formulation of rules. Swiss judges may be reluctant to act modo legislatoris because the training of lawyers places excessive emphasis on the application of existing law and neglects the question of creation of law.” Id.

184 HANS KELSEN, PURE THEORY OF LAW 244 (University of California Press, 2nd, 1967). Translated by Max Knight.

185 See LEI DE INTRODUÇÃO ÀS NORMAS DO DIREITO BRASILEIRO [L.I.N.D.B.] [INTRODUCTORY ACT TO THE BRAZILIAN NORMS] art. 5 (Braz.), (stating that “in the law application, the judge will observe the law’s social ends and the needs of common well-being). Translation mine.

186 See pages 3-4.
difference being that a strict 'construction' reveals a solution already inherent in the text, whereas an 'actualization' or 'concretization' entails a dialectic process of creatively determining results in conformity with, but not determinable by, the Constitution."  

Brugger explains that Konrad Hesse, a former member of the German Constitutional Court and the most influential proponent of this view, lectures that the goal of creating constitutional law is reached by adhering to five points of reference for constitutional interpretation, which reflect the dogmas of coherence and unity:

“(1) Each interpretation must support the unity of the constitution;  
(2) In cases of tension or conflict, the principle of practical concordance (praktische konkordanz) must be employed to harmonize conflicting provisions;  
(3) All governmental organs must respect the functional differentiation of the Constitution, that is, their respective tasks and powers in the separation of powers scheme;  
(4) Each interpretation must try to create an integrative effect with regard to both the various parties of a constitutional dispute as well as to social and political cohesion;  
(5) These points together lead to the legitimating function of the Constitution: [e]ach interpretation shall attempt to optimize all the aforementioned elements.”

To assure practical concordance, civil law jurists understand that the constitutional provisions must be optimized when in conflict, preserving the constitution’s unity. As Professor Konrad Hesse stated, “[t]he principle of the constitution’s unity requires the optimization of [values in conflict]: [b]oth legal values need to be limited so that each can attain its optimal effect. In each concrete case, therefore, the limitations must satisfy the principle of proportionality; that is, they may not go any further than necessary to produce a concordance of both legal values.”

Therefore, civil law jurists when interpreting constitutional texts use similar dogmas as to when they interpret statutory law. Although they may acknowledge a different attitude and a more developed method, the process also considers the dogmas of unity, practical concordance and integration of posited norms.

An example of the application of the civil law dogmas of the unity, coherence and consistency regarding the constitutionality of death penalty in the U.S. is offered by Professor Bernard Schlink:

“For German constitutional understanding, incidentally, it is not the intentions and expectations of the constitution’s authors that make the Fifth Amendment’s guarantee—that life cannot be taken without due process of law—important in interpreting the prohibition on cruel and unusual punishment. The fact that a life can only be taken with or without due process of law if a death penalty exists—that is, where the

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187 See Brugger, supra note 33, at 398.
188 Id.
guarantee that the life cannot be taken without due process of law assumes the admissibility of the death penalty, and that it cannot, at the same time, be an inadmissible cruel and unusual punishment—has to do with a concept of constitution as a logical whole free of contradictions, in which no provision is without function and all are functionality coordinated with each other. This systematic interpretation is, in fact, based not on the subjectivity of the constitution’s authors, which could include inconsistencies and contradictions; rather it takes seriously the constitution’s claim to principles and objectivity.

II.4.2.2. Adhesion to Legislation
(Ideological Positivism)

The second dogma is the attitude of adhesion to the legislation, either statutory or constitutional. Legislation is seen as the major source of law and any judicial decision that disregards it openly is repudiated. There is, among civil law jurists, a dogmatic acceptance of positive law’s mandatory force. In the legal discourse, civil law jurists assert that their mission is to describe the law de lege lata (Latin for “existing law”) and not to propose solutions de lege ferenda (Latin for “what the law should be”), which shall explain norms as they are, regardless of their personal preferences.

As Santiago Nino points out, this attitude of adhesion to enacted law and of confidence in its formal qualities was dogmatically adopted by contemporary juridical science. Nino explains that this shows “the apparent incoherence among the natural law ideals exposed by the dogmatic and their supposedly positivist statements, when they face the task of proposing legal solutions.” He notes that the dogmatic is intensively impregnated with the ideology, called by Alfred Ross pseudo-positivism and by Bobbio ideological positivism. This ideology consists in recognizing compulsory force in all positive law for the simple fact that law exists or is what it is. Despite the positivist label, this ideology, according to Nino, “reflects a form of conservative jusnaturalism and means that the positive law shall be obeyed and applied by judges irrespective of any axiological disagreement, which, in every case, shall be oriented to propose any modification through legal means.”

In Brazil, for example, the Binding Statement No. 10, approved by the S.T.F. in 2008, may be considered an example of this ideology. This statement basically prescribes that a Court cannot choose not to apply, in whole or in part, a statute or regulation in a given case, without holding it unconstitutional.

A curious reasoning given by S.T.F. Justice Eros Grau, in his concurring opinion may reveal this attitude. In Brazil, pursuant to article 100 of the C.F., payments by the state

191 NINO, see note 109, at 383.
192 Id. at 380.
193 Id. at 383.
194 Id.
195 Id. See also Roberto Gargarella, Juridification and social citizenship: international law, democracy and professional discretion, in JURIDIFICATION AND SOCIAL CITIZENSHIP IN THE WELFARE STATE, (Edward Elgar ed., 2014).
196 Id.
treasuries, in any level, shall be made exclusively in chronological order of submission of court orders. In 2006, an ill person requested immediate payment due to her severe health conditions and to the fact that persons in her situation had extraordinarily been awarded payments in the past. When this case was decided, in conformity with the C.F., there were few situations that made possible an early payment and suffering from severe illness was not one of them.

In his concurring opinion, Justice Grau reasoned that to maintain integrity with what he had decided in the past, he had to deny the ill person’s claim. The constitutional rule did not allow the Government to make early payments in that situation. But the facts of this case did not present what is considered a normal situation, but an exceptional one. Grau then wrote that “the exceptional situation is a spot of indifference between chaos and regular situations, a spot captured by the norm. But it is the norm that, suspending its force, gives place to the exceptional circumstance—only in this way the norm is turned in to a rule, keeping this status in relation with the exception.” Grau added that the S.T.F., when necessary, must take into account these exceptional circumstances. Doing so does not depart from the juridical order because it applies the norm by disapplying it, that is, removing it from the exception. Therefore, he ruled that the ill person should have precedence over the general public to receive her indemnization. Shortly thereafter, in 2009, the Brazilian Congress approved a constitutional amendment and included this right of preference for ill people as one of the hypothesis that allow preferable payment.

From this reasoning, it is possible to note that what the S.T.F. did, in the case, was to depart from the general application of a written rule to achieve justice in an individual case, under compelling circumstances, finding an exception to the rule. This departure is tolerable in most rule of law systems. The same line of reasoning is used to justify, for example, the exceptions for upholding legislation that treats people unequally, without considering it a violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, when compelling, important or legitimate state interests are proven by the government. However, in these cases, U.S. courts would hardly consider that the Equal Protection Clause is being applied by being disapplying, even though it does not treat people equally. On the contrary, Justices will probably reason that there is an exception for the application of the clause that is justified by some other interest or that equal treatment depends always on circumstances validating distinctions.

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197 CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 100 (Braz.). Since the C.F. does not adopt a doctrine of sovereign immunity and, on the contrary, sets forth that the state has strict responsibility for its actions, the Brazilian governments, at all levels, are highly involved in litigations about damages.

198 S.T.F., Rel.-AgR. No. 3.034/PB, Relator: Min. Sepúlveda Pertence, 21.09.2006, 191, Diário da Justiça [D.J.], 27.10.2006, (Braz.) (Grau, E., concurring). Translation mine. The same rationale was also adopted by the S.T.F. in the following case, whose opinion was also written by Justice Eros Grau: S.T.F., A.D.I. No. 3.489/SC, Relator: Min. Eros Grau, 09.05.2007, 425, Diário da Justiça [D.J.], 03.08.2007, (Braz.).

199 Id.

200 CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 100, § 2° (Braz.).

201 See TAMANAHA, supra note 113, at 120 (arguing that rule of law systems that adopt formal legality can also accommodate doing justice in an individual case, so long as the rules of law are departed from to achieve injustice infrequently, under compelling circumstances).

202 See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (which requires that, to survive constitutional review, a racial classification, for example, must serve a compelling governmental interest, and must be narrowly tailored to further that interest); In Clark v. Jeter, 486 U.S. 456, 461 (1988) (holding that to withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective); Warren v. City of Athens, 411 F.3d 697, 710 (6th Cir. 2005) (stating that the rational basis test means that courts will not overturn government action unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government’s actions were irrational).
This idea that the law applies, even in exception cases in which the rule does not apply and an exception is declared, is an example of the strength of the civil law judge adhesion to the legislation.

II.4.2.3. The Rational Legislator

In addition, in the civil law world, attributing to the legislator certain rationality qualities is typical. These qualities, in Santiago Nino’s view, are far from being real, but they enable the practical reformulation of the enacted law. Therefore, this reformulation will sound as a mere description of latent solutions.203

Santiago Nino points out that civil law jurists refer to the legislator as being a unique individual who has established all norms that are part of a legal system.204 He adds that lawyers and judges “[a]lso mention an imperishable legislator, which through his will sustains the norms’ validity, including those established a long time ago by men that even may be dead.”205 “The rational legislator is also always conscious of the statutes that he enacts.”206 This is true even for statutes approved by Congress by their members simply raising their hands, without knowing what in fact is written in the bill.207 Omniscience is another quality of the rational legislator. According to the dogma, he is aware of all the factual circumstances that are comprised by the enacted statute.208 The legislator is also operant, meaning that he will not enact rules that do not have any function.209 This property is similar to the rule against surplusage, which is commonly used in U.S. statutory interpretation.210

Jurists, in addition, say that the rational legislator is, generally, fair. In this sense, they often give him credit for the axiological interpretative solutions that they adopt when deciding cases.211 Moreover, the legislator is always coherent, meaning that his will cannot be itself contradictory, and precise, in the sense that his will points in an unambiguous direction, even when the language he uses is open textured.212

Nino asserts that the adoption of this rational legislator fictional model occurs because it allows the dogmatic jurists to give the rational legislator the credit for the solutions they adopt when interpreting axiological standards. In this sense, dogmatic jurists fill gaps, eliminate contradictions, make clear vague terms, and waive superfluous norms, all without showing that a modification of the law has taken place. They simply pass off the impression that they are providing a description of the current law, as if Congress has genuinely thought of it.213

Nino adds that this technique is not used in a cynical or speculative manner, but in most cases by obeying traditional theoretical habits, which are soundly adequate to reconcile legal certainty with standards of rationality and justice.214

203 NINO, supra note 109, at 386.
204 Id.
205 Id.
206 Id.
207 Id.
208 Id.
209 Id.
210 ESKRIDGE JR. ET. AL., supra note 136137, at 507.
211 NINO, supra note 109, at 387.
212 Id.
213 Id.
214 Id.
The Polish jurist Slawomira Wronkowska, a current member of the Constitutional Court of her country, also has a work on the rational legislator. She explains that “a lawyer considering the problems of lawmaking builds a certain model of the rational legislator by selecting the assumptions constituting this legislator in a way so that the norms enacted by this legislator could be used as means for the attainment of objectives set by him.”

She adds that “[i]t is a characteristic that a lawyer interpreting a particular text in order to reconstruct binding legal norms […] adopts assumptions about the legislator as to reconstruct from the given text not any norms, but the norms, which—assuming that they will be realized—would be an appropriate means for the attainment of the set objectives.”

Further, she asserts that “[a] lawyer formulating recommendations how to apply legal norms derived from interpretation acts in a similar way. He assumes that the legislator wants, [using] particular norms, to establish an appropriate and desired system of social relations and on the basis of this assumption he recommends a particular application of legal norms.”

Finally, Wronkowska concludes that “the assumptions constituting the rational legislator are selected in such a way as to make the rational legislator a certain model of socio-technical abilities; and to make the norms enacted by him sufficiently effective and economic for the attainment of the set objectives.” Nevertheless, she warns that the rational legislator is solely a formal model, which varies through different periods of time and cultures.

Luis Jiménez de Asúa says that “today, in democracies, the law does not emerge from an autocrat, from a single person, whose ‘spirit’ and ‘will’ is, in any manner, very hard to find. The legislator is nowadays an abstraction, or even better, a function.”

The excerpt below, which summarizes a case decided by the Court of Appeals of Sao Paulo, shows how these dogmas are generally applied in Brazil. The case involved the recognition and dissolution of a same sex partnership, a matter not expressly treated by Brazilian statute law and, for some, banned by the constitutional text. The C.F. has a chapter that regulates matters of family law. Article 226, paragraph 3, states that “[f]or purposes of protection by the State, the stable union between a man and a woman is recognized as a family entity, and the law shall facilitate the conversion of this entity into marriage.” Since the text wording refers to “a man and a woman”, conservative jurists assert that the C.F. banned the recognition of same-sex unions and gay marriage in the country. Even though the S.T.F. already decided the issue in 2011 and held that these unions are a right of gay couples, the São Paulo Court, in 2013, relied on dogmas such as legal order completeness.

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216 Id.
217 Id. The fact that a lawyer invokes the rational legislator to develop an argument does not mean that he is advancing a previous settled scheme of social policies and that the judicial decisions will be coherent with past precedents. He may argue that his position is the most appropriate one and therefore should be employed by the court. There is wide margin for argumentation and great possibility of subjectivism.
218 Id.
219 Id. at 162.
220 Cited by NINO, see note 109, at 392.
221 CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 226, paragraph 3 (Braz.). Official Translation from the Brazilian Senate.
222 S.T.F., A.D.I. No. 4.277, Relator: Min. Carlos Britto, j. 05.05.2011, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.],14.10.2011, 341 (Braz.).
and rational legislator to justify the conclusion that the law protects the same sex relationship and did not invoke the S.T.F. precedent on their case summary.  

Justice Carlos Ayres Britto, who wrote the 2011 Supreme Court opinion that upheld the constitutionality of same sex unions, also made reference to the rational legislator dogma on that occasion.  

Keith Rosenn, writing about this Brazilian Supreme Court ruling, noted that Justice Carlos Ayres Britto, “whose opinion was followed by a majority of the [Court], reinterpreted article 1.723 of the Civil Code in conformity with the Constitution, to make same sex couples eligible for treatment as a family unit. Three members of the Court reached a similar result by treating the absence of regulation of same-sex unions as a gap in the law, which they filled by resorting to analogy.”  

The interesting thing to point out is that Justice Britto considered the reference to the rational legislator pertinent even taking into account that constitutional history showed that the reference to the words man and woman on article 226, paragraph 3, was inserted with the purpose of discriminating gay couples. Justice Lewandowski, who followed Britto’s opinion, cited some constitutional conventional debates and proved this point. Therefore,  

“[...] Dissolution of a civil partnership, with division of property, grounded on the existence of a stable relationship among same sex persons is not an impossible legal request, despite the fact that there is no written law on the subject. – Application of general principles of law, such as the dogmas of legal order completeness, prohibition of non liquet, rational legislator and legal system cohesion and harmony. – Article 226, paragraph 3, of the Federal Constitution, which must be applied in conjunction with, at minimal, article 1, item III, which establishes the dignity of the human person as one of the Republic founding principles. – Claim that allows setting a logical conclusion from the described facts, without contradiction. Interlocutory Appeal Dismissed. 

Appeal. Dissolution of civil partnership with division of property acquired during the relationship. The evidence demonstrates that a same sex union existed until 2007. Photos in the case file prove that a public affective relationship among the parties took place and the defendant’s claim that only a friendship happened is not plausible. Witness testimony shows that the parties lived together and held a marital relationship for eight years, with manifest intent of forming a family. Despite the fact that they had not officially declared their union, in public, they acted as a couple. The requisites of article 1.723 of the Civil Code are present. The property acquired during the relationship must be divided by the parties. Sentence upheld.” T.J.S.P., Ap. Civ. No. 9112420-77.2009.8.26.0000 São Paulo, Relator: Des. José Joaquim dos Santos, 17.09.2013, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 19.09.2013 (Braz.). 

“[...] the Supreme Court, in this issue, will not establish a spectacular mark of re-writing the minorities protection history in Brazil. The census numbers here mentioned prove that same sex unions are a fact of life. Homosexual relationships are part of social reality. It is so true that there are various secondary norms that allow same sex partners to be health insurance dependents. The Federal Revenue Service grants same sex spouses filing a single tax return. And this is not a phenomenon that should make us proud. We know that the Supreme Court of the United States [...] has stated that same sex unions conspire in favor of constitutional values. I would also say that the Federal Constitution, when blessed the stable unions [common law marriages], did not want to exclude same sex partnerships. Maybe the constitutional legislator understood unnecessary – because he set forth that all men are equal under law, without distinction of any nature -, since sexual liberty is protected as an entrenchment clause. The fact is that there are certain rights that are inferred from constitutional principles, and one of these rights is to have same sex marriages recognized with all their consequences, as it takes place with stable unions. And, in addition to the American progress, we may also refer to European cases on this issue, what denotes that society has evolved and the Supreme Court, which is the voice of society, also follows this evolution S.T.F., A.D.I. No. 4.277, Relator: Min. Carlos Britto, j. 05.05.2011, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.],14.10.2011, 691 (Braz.). 

Keith Rosenn, Recent Important Decisions by the Brazilian Supreme Court, 45 U. Miami Inter-Am. L. Rev. 297, 322 (2014). 

In his concurring opinion, Justice Lewandowski wrote: “The constitutional convention members, as seen, after discussing the matter, chose, unequivocally, to exclude same sex marriages from the concept of stable unions.” S.T.F., A.D.I. No. 4.277, Relator: Min. Carlos Britto, 5.5.2011, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.],14.10.2011, 691 (Braz.).
the rational legislator is not the ‘actual legislature’ and may be referred to by judges even to justify a different view from the one adopted by the legislature.

These references to the legislator in judicial opinions basically reflect a form of communication that the civil law jurist considers to take place between the enacted legislation—not Congress—and courts. According to Marcelo Neves, the “interpreter-applicator attributes sense to the normative text. This does not mean that this attribution of sense turns the interpreter into the producer of the norm. The situation points to a limited desire of structuring a double contingency and determine the content of a communication (what did the *alter* mean?). The message of the legislation or Constitution drafters (*alter*) carries an informative meaning which needs to be understood by *ego* (judge), who may make a mistake.”

In accordance with Nino, “the juridical dogmatic accomplished […] an extraordinary relevant social function. Regardless of its written law systematization activity, it provides their main recipients (judges), much more coherent, complete, precise and adequate, in axiological terms, systems of juridical solutions in comparison to the materials created by legislators. In this way, the ideal of division of powers is sustained and courts, when facing possible gaps, contradictions and ambiguities in legislation are able to justify its sentences grounding them on allegedly authentic interpretations of this legislation, not on their own opinion. Courts, then, see their interpretative problems reduced.”

All in all, it is possible to note the approach described by civil law scholars and courts regarding the interpretation of texts: the interpreter assumes he is applying the statute in the better updated way and not creating new law, even if his application attributes senses that have never been thought or attributed before to the written law, or even if it contradicts the textual meaning. So, his work is viewed as a form of giving attribution to a social fact source.

II.5. Rules and Principles in Brazilian Law

Justice Luís Roberto Barroso states that “the modern dogmatic approves the comprehension that the norms in general, and the constitutional norms in particular, can be framed in two big and diverse categories: principles and rules.” This classification seems to be prevalent among judges and lawyers in Brazil. It also seems to be undisputable that “principles and rules can direct actions and decisions in certain determined circumstances, but the nature of the direction that comes from them varies.” This variation is in the core of the current debates in Brazil.

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227 NEVES, see note 21, at 11-12.
228 NINO, see note 109, at 398.
229 See BARROSO, supra note 27, at 147. Translation mine.
230 Marcelo Neves points out that some authors contend the existence of a third category, the *hybrids*. He states that such normative postulates are brought to debate by authors such as Humberto Ávila, who ground his work in the ideas of Von Wright, Aarnio and Hage. These authors define principles in a narrow manner, as “immediately purposive norms”, which refer to “ideal state of things.” NEVES, supra note 21, at 105, 108-109. Humberto Ávila, a professor at the University of São Paulo, also argues for the existence of a third category in Brazil: the postulates. Postulates are considered to be metanorms, which establish the manner of how other norms should be applied. For Ávila, many norms that are usually considered principles by scholars and judges should be understood as postulates, such as *reasonableness, proportionality* and, sometime, *equality*, since they “scaffold the interpretation and application of principles and rules by the more or less specific requirement of relations between elements according to the criteria.” HUMBERTO ÁVILA, THEORY OF LEGAL PRINCIPLES 83-132 (Springer, 2007). Nevertheless, these are isolated views and the terminology they adopt it not the most common, especially among judges.
231 See Zagrebelsky, supra note 26, at 629.
The task of providing a precise definition for the current function of rules and principles in the Brazilian system may not be an easy one for this and other reasons.\textsuperscript{232} As previously noted, recent scholarship acknowledges that the enactment of the C.F. in 1988 represented a substantial change in the role of legal rules and of principles in the country compared to early scholarly works from the 20th Century. This change is considered the main reason for the emergence of the post-positivistic theory.\textsuperscript{213} It is not the purpose of this work to go deeper than necessary to describe the current role of rules and principles.\textsuperscript{234} Therefore, some important facts and some influential opinions will be omitted.

Indeed, the main purpose of this subchapter is to describe the role legal rules and principles serve in helping to decide cases in Brazil. I will basically describe how rules and principles orient the actions of judges when they reach a case solution. I will not yet examine the position of neoconstitutionalism to evaluate if this line of reasoning is right or wrong. I will do that in chapter IV.

\subsection*{II.5.1. Rules and Principles}

When talking about principles, in general, Brazilian scholars will mention Ronald Dworkin.\textsuperscript{235} Citations of Dworkin’s works are commonly made to distinguish rules from principles. This logical distinction is largely incorporated in Brazil’s legal works, and jurists commonly say that both standards are different species of norms\textsuperscript{236} and differ in the character of the direction they give.\textsuperscript{237}

In this sense, rules are commonly understood as being more clearly defined, objective and applicable to a specific set of facts. If the situation they regulate occurs, rules generally govern. “They are cogent and one either respects them completely or clearly violates them.”\textsuperscript{238} They are mostly described as having an all-or-nothing fashion.\textsuperscript{239}

\textsuperscript{232} According to Manuel Atienza and Juan Ruiz Maneor, eight different meanings may be attributed to the term principle. See DAVID DINIZ DANTAS, INTERPRETAÇÃO CONSTITUCIONAL NO PÓS-POSITIVISMO – TEORIA E CASOS PRÁTICOS 42-44 (Madras, 2nd ed., 2005).

\textsuperscript{233} See BARROSO, supra note 27, at 144-145.

\textsuperscript{234} For a deeper analysis of this argument, see generally DANTAS, supra note 232.


\textsuperscript{236} According to Zagrebelsky, “[p]rinciples, like rules, are norms, because they mark a direction for action in the terminology of Robert Alexy […] norms denote the genus, principles and rules, the species”. Zagrebelsky, supra note 26, at 629-630.

\textsuperscript{237} See Dworkin supra note 17, at 25. The fact that Dworkin’s distinction is commonly referred to in Brazil does not mean that the Brazilian understanding of rules and principles is equivalent to Dworkin’s. This will be carefully studied in subchapter III.5.

\textsuperscript{238} Zagrebelsky, supra note 26, at 629.

\textsuperscript{239} Dworkin supra note 17, at 25-29. Some authors criticize Dworkin’s view that principles are more imprecise than rules. Marcelo Neves, for example, contends that in the constitutional and in the statutory spheres, there are semantically imprecise rules that are extremely dependent on the context to which they are applied. He gives an example of the rule set forth in item II of article 94 of the Brazilian Penal Code establishing the requirements of “public and private good behavior” for criminal rehabilitation. He inquires “how to define ‘good behavior’ without considering the judges’ social context and values?” He also mentions the rule established in article 55, item II, of the C.F., which states that a Senator or a member of the House of Representatives may lose her seat if her actions are “incompatible with parliamentary decorum.” A paragraph in article 55 declares that “parliamentary decorum” is “the abuse of prerogatives assured to a member of the National Congress or the perception of unlawful gratuities.”

However, Neves’ view is not much addressed in judicial decisions or debated by most Brazilian scholars in academic works. And the criticism was rebutted by Dworkin in chapter 3 of his seminal article The Model of Rules I. Dworkin expressly stated that “a rule and a principle can play much the same role
by subsumption. If the facts they address occur, certain predeterminate consequences usually follow.\textsuperscript{240} If rules conflict, one shall prevail. The criteria for choosing the one to apply are their \textit{generality, temporality and hierarchy}.\textsuperscript{241}

The distinction among \textit{primary} and \textit{secondary rules}, which will be explained in the subsequent chapter, is present in the country’s legal texts. There are \textit{duty-imposing} and \textit{power-conferring} rules, as in any other organized legal system.\textsuperscript{242} There are also \textit{metarules} that guide how other rules should be interpreted, such as the rules that specify the criteria used to resolve conflict of rules.\textsuperscript{243}

Principles, on the other hand, are traditionally seen as norms with a higher degree of abstraction, which do not specify with certainty the action that shall be performed in a wide range of situations.\textsuperscript{244} They are described as an initial goal that demands to be realized by consequentially oriented activities.\textsuperscript{245} They are, therefore, “not \textit{definitive} but only \textit{prima

\textsuperscript{240} See Zagrebelsky, \textit{ supra} note 26, at 629.

\textsuperscript{241} In Brazil, the conflict of rules is solved by declaring one of them invalid. Normally, these conflicts are solved by applying the following criteria: (1) hierarchy: the superior rule prevails over the inferior (\textit{lex superior derogat legi inferiori}); (2) temporality: the more recent rule prevails over the older one (\textit{lex posterior derogat legi priori}); and (3) generality: the special rule prevails over the general rule (\textit{lex specialis derogat legi generali}).

\textsuperscript{242} See \textit{supra} note 43, at 81.

\textsuperscript{243} Neves, \textit{ supra} note 21, at 108.

\textsuperscript{244} \textit{Barroso}, \textit{ supra} note 27, at 148-149.

\textsuperscript{245} Zagrebelsky, \textit{ supra} note 26, at 628.
facie requirements.” They are subject to the logic of the possible and, within this ambit, they often meet other conflicting principles. They need to be harmonized, relativized and balanced. The fact that they are not applied in a case or are applied without full force does not mean that they are invalid. They have dimensions of weight and are considered optimization requirements.

II.5.2. Dworkin’s Principle Source Argument (No Pedigree)

Since Dworkin is a commonly referred source for the definition of principles, it is important to analyze if his doctrine well explains the Brazilian use of principles.

Dworkin’s well-known attack on positivism focuses primarily on the impossibility of a social fact model of rules to capture the role that principles play in the law. Dworkin contends that the legality of principles depends on their content, not on their source. He claims that the power of principles come from their sense of appropriateness, but not from some test of pedigree:

“The origin of these as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time. Their continued power depends upon this sense of appropriateness being sustained. If it no longer seemed unfair to allow people to profit by their wrongs, or fair to place special burdens upon oligopolies that manufacture potentially dangerous machines, these principles would no longer play much of a role in new cases, even if they had never been overruled or repealed. (Indeed, it hardly makes sense to speak of principles like these as being "overruled" or "repealed." When they decline they are eroded, not torpedoed).”

Of course, Dworkin does not deny that institutional support plays an important role in asserting the force of principles. He argues that if the judge resorts to prior cases to justify a principled decision in which that principle was cited or figured in the argument, or if the judge mentions any statute that seemed to exemplify that principle, or even if the principle was cited in the preamble of the statute, or in the committee reports or other legislative documents that accompanied it, all these facts of course could be considered and would give more weight to the principle.

But these aspects are not essential for him. As Scott Shapiro points out, “Dworkin’s argument appears to be this: the legal impact of a principle’s institutional support on its legality and weight is itself determined by principles, namely, those relating to institutions

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247 Id.
248 Zagrebelsky, supra note 26, at 633.
249 ALEXY, supra note 246, at 47.
251 Dworkin, supra note 17, at 41.
252 Id.
and their authority. [...] These institutional principles [...] are supported by very broad principles of political morality.”

Therefore, as Shapiro observes, “Dworkin believes that no rule could be fashioned that accurately reflect the verdicts of all these principles, presumably because the possibilities that would have to be considered and codified are infinite in number. Moreover, these principles and their weights fluctuate overtime, based on their own degree of institutional support, and hence any resulting master rule would fail to be stable.”

In Dworkin’s own words:

“Yet we could not devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle, still less to fix its weight at a particular order of magnitude. We argue for a particular principle by grappling with a whole set of shifting, developing and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards.”

Dworkin’s refined view of principles seems to vary substantially from how civil law jurists traditionally see their legal principles and also differs from the prevalent view in the Brazilian constitutional law stage. This assertion will be examined in the following chapter, but the main reasons for this conclusion will be detailed in the subchapters below.

II.5.3. The Civil Law Jurist’s view of Principles

This subchapter has the purpose of showing what is the most popular understanding of the role of principles in Brazilian law, both as to their origins and their functions.

The civil law jurist historically has dealt with principles in law reasoning. The fact that she has traditionally acknowledged written laws as the major source of law creation never precluded her from formulating arguments and from deciding cases grounded on this type of standards. And this is true nowadays in her practice.

In summary, according to the former S.T.F Justice Eros Grau, the system of law is composed of:

[i] general principles of law, [...] as the principle of unjust enrichment;  

[ii] implied principles, which are inferred as a result of the analysis of one or more constitutional precepts or of one or multiple statutes; and

253 Shapiro, supra note 250, at 14.  
254 Id.  
255 Dworkin, supra note 17, at 41.  
Principles had generally a supplementary role in Brazilian law in most of the 20th Century.\textsuperscript{258} In fact, this supplementary trait may be perceived in the wording of article 4 of the \textit{Introductory Act to the Brazilian Norms}, a statute enacted in 1940 with the purpose of guiding judges in the application of the law. Pursuant to article 4, “when the [written] law has a gap, the judge will decide the case by means of analogy, customs and the general principles of law.”\textsuperscript{259} A similar provision—article 7—existed in the former Brazilian Civil Code, which was enacted in 1916 and remained in force until 2003.\textsuperscript{260} However, there has been a matter of controversy on which are the \textit{general principles of law}. There is a division among scholars as to whether judges, resorting to the \textit{general principles of law}, are authorized to apply natural law. This dispute is sustained on the fact that some civil law countries expressly restrict the content of these principles as being the one that the positive legal system grants. This is the case, for example, in Italy and Spain. Both countries adopt a \textit{positivistic} view of this concept, as opposed to a \textit{naturalistic} view.\textsuperscript{261} The article 12 of the Italian Civil Code states that “[i]f a dispute cannot be decided by a specific provision, consideration shall be given to the provisions governing such cases or similar matters; if the case remains unsolved, it shall be decided according to the general principles of the legal state.”\textsuperscript{262} The fact that the text makes reference to the general principles of \textit{the legal state} is seen as a prohibition of use of \textit{ius naturale}. A similar, but no so clear, precept is set forth in the Spanish Civil Code. Article 1, item 4, establishes that “[g]eneral legal principles shall apply in the absence of applicable statute or custom, without prejudice to the fact that they contribute to shape the legal system.”\textsuperscript{263} Some traditional Brazilian authors have argued this approach in classical law books.\textsuperscript{264} However, the author of the bill that resulted in the approval of the first Brazilian Civil Code by the Brazilian Congress in 1916, Clovis Beviláqua, was a defender of the natural law position:

\begin{itemize}
  \item \textsuperscript{257} \textit{GRAU, supra} note 235, at 155.
  \item \textsuperscript{258} Minister Napoleão Nunes Maia Filho, in addressing this issue, cites Professor Ivo Dantas, for whom constitutional principles serve as vectors to the interpretative activity of statutes and regulations, and led to the gradual abandonment of the idea that principles had a supplementary character. \textit{NAPOLEÃO NUNES MAIA FILHO, AS NORMAS ESCRITAS E OS PRINCÍPIOS JURÍDICOS} 139 (Impre, 2009).
  \item \textsuperscript{259} \textit{LEI DE INTRODUÇÃO ÀS NORMAS DO DIREITO BRASILEIRO [L.I.N.D.B.] [INTRODUCTORY ACT TO THE BRAZILIAN NORMS]} art. 4 (Braz.).
  \item \textsuperscript{260} \textit{CÓDIGO CIVIL DE 1916 [C.C.] [CIVIL CODE OF 1916]} art. 7 (Braz.).
  \item \textsuperscript{261} Maria Clara Díaz Falavigna. \textit{Os princípios gerais do Direito e os standards jurídicos no Código Civil, UNIVERSIDADE DE SÃO PAULO – USP}, at 108, \url{www.teses.usp.br/teses/disponiveis/2/2131/tde-23032008-183352/.../TESE.pdf}.  
  \item \textsuperscript{262} Art. 12, C.C. [CIVIL CODE] (It.).
  \item \textsuperscript{263} Art. 1, 4, C.C. [CIVIL CODE] (Spain).
  \item \textsuperscript{264} According to Caio Mario da Silva Pereira, “the law appeals to the higher inspirations of the civilized humanity and plays with those rules incorporated to the nation’s cultural and legal heritage, allowing the judge to supplement the legislative loophole by adopting a cannon that the legislator did not cite in the form of a legal precept, but that it is immanent in the spirit of the legal system.” \textit{CÁRIO MARIO DA SILVA PEREIRA, INSTITUIÇÕES DE DIREITO CIVIL} VOL I 55 (Forense, 1991).
\end{itemize}
“The general principles of law, unlike what some contend, do not refer to the general principles of the national law, but to the current fundamental elements of the human legal culture; to the ideas and principles over which the dominant juridical conception rests; to the inductions and generalizations of the legal science and of the technique precepts. Such principles, some criticize, are vague, undetermined. But they are not that much. Certainly, we shall deeply enter in the legal philosophy, in the history of civilization, and with the spirit equipped by a careful legal education, in order to undertake the investigation of the general principles of law. […] Notions of freedom, liberty, equity, morality, sociology and compared legislation concur to detach from the whole set of ideas, which are the basis of modern civilization, the general principles of law.”

Finally, since the article 4 of the *Introductory Act to the Brazilian Norms*, cited above, does not prohibit the judge to resort to natural law when applying general principles of law, some judges have done exactly that in recent cases. For example, the quote below is a part of a case summary decided in 2017 by the *Superior Tribunal de Justiça* [S.T.J.], the Brazilian highest court for statutory interpretation:

“[…] in cases such as this one, it is possible to clearly denote that the demand’s solution does not find grounds in the positivity of the *Bid Invitation Document*, being inevitable for the judge to resort to general principles of law, especially to values such as equality, reasonableness and proportionality, among other things, since positive reason does not help her in writing a fair opinion.”

For the purposes of this thesis, it is worth emphasizing that the first major opening of the Brazilian legal system to principles in adjudication took place with the enactment of article 4 of the *Introductory Act to the Brazilian Norms*, Brazil’s closure rule, which allows the judge to turn to general principles of law to decide a case that has no solution on the posited norms and cannot be appropriately solved by resorting to analogy or customs.

**II.5.3.2. Implied Principles**

Another manner that principles enter into the legal discourse of the Brazilian system is similar to what happens in Italy regarding the comprehension of the general principles of law.

Nino contends that “in addition to the legislation rationality, the dogmatic applies various argumentative tools to show as compatible their adherence to the written legislation, avoiding its formal imperfections and adapting the text of the law to the current evaluating


267 Kelsen, supra note 174, at 273-274.
He explains that a relevant technique is the work jurists perform to systematize the written law, building a body of legal principles, which are more general and allegedly equal to the enacted law. In this sense, the jurist describes the system in a simple manner, as a set of few principles, whose logical consequences are easy to determine.

Joseph Raz, in an article in which he criticizes Dworkin’s definition of principles, stated that “not everything that looks like a legal principle is a legal principle, at least not in the sense that Professor Dworkin has in mind.” The first example he gives is this dogmatic judge’s tool pointed out by Nino. Raz asserts that courts and scholars, by invoking principles, refer summarily to a body of legal rules without specifying their content in detail. But Raz says that “they are not statements of the contents of laws of a special type, namely legal principles. They are merely a brief allusion to a number of rules.” He calls this method of reasoning *individuation* of rules. He gives an example regarding freedom of speech in the U.S. law:

“Someone may say that in this country the principle of freedom of speech is recognized by law. When asked what he means he may say that the only laws setting limits to the liberty to express opinions are concerned with libel and military security; that censorship of films, books and the theatre must be justified by the protection of the infants; that there are detailed regulations guaranteeing access to the mass media to people representing all shades of opinions on public matters; and so on. His statement that in his country freedom of speech is recognized by law can thus be seen to be a summary reference to a great number of laws, not a statement of the content of a single law.”

This definition, which for Raz differs from the one Dworkin is talking about when referring to principles, is the definition alluded by Nino above.

In the context of civil law, Nino points out that the method of individuation of many rules in general principles does not imply, for the civil law judge, a modification in the legal system, if the statements that are made remain in the same reach as the enacted rules. However, he claims that “it is not rare for dogmatic jurists to overstep this limit, proposing general principles in substitution to various norms of the system, but which, at the same time, have a field of reference longer than the whole body of substituted rules and allowing new principles not included in the original system derive and fulfilling system gaps.” Nino asserts that the new norms are introduced in an almost unnoticed manner, because they seem as mere logical consequences of the rules that were encompassed in the principle.

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268 NINO, supra note 109 at 392. Translation mine.
269 Id.
271 Id.
272 Id.
273 In order to differentiate this definition with Dworkin’s definition, Raz states the following: “Another person, by contrast, may say that a certain legal system incorporates the principle of freedom of speech because it contains a law instructing the courts and all public officials to protect freedom of speech in all cases, even those not governed by particular rules. This person’s statement is a statement of the content of one particular law, and it is a principle in the sense in which Professor Dworkin employs the term. It imposes an obligation and thus guides action of courts and officials.” Id.
274 NINO, note 109, at 392. Translation mine.
275 Id.
At last, the Argentinian scholar compares this technique of identifying implied principles with another similar one, also adopted by the civil law jurist, which he claims to be a bit more sophisticated. The civil law lawyer also, by grouping statements of written laws, formulates “theories.”\footnote{Id. at 393. Translation mine.}

The most relevant theory in Brazil nowadays is the \textit{theory of fundamental rights} articulated in most constitutional law school books, grounded on the reading of article 5 of the C.F., which is Brazil’s equivalent document to the Bill of Rights.

\textbf{II.5.3.3. Written Principles}

The Brazilian Constitution and many of its statutes also establish a wide variety of principles. As an example:

\begin{quote}
“Art. 34. The Union shall not intervene in the States or in the Federal District, except to:
[...]
VII. ensure compliance with the following constitutional principles:
a. republican form, representative system and democratic regime;
b. individual rights;
c. county autonomy;
d. rendering of accounts of direct and indirect public administration;
e. application of the minimum required by the receipts resulting from the state taxes, including those stemming from transfers, for maintenance and development of education and for public health activities and services.”\footnote{See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 34 (Braz.).}

[...]

“Art 37. The direct or indirect public administration of any of the Branches of the Union, States, Federal District and Counties, shall obey the principles of legality, impersonality, morality, publicity and efficiency, as well as the following:
[...].”\footnote{See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 37 (Braz.).}

Following this C.F. tendency of writing down principles—but not only due to this circumstance—it became common to include principles in the text of statutes. A good example is article 2 of \textit{Lei} No. 9.784/1999, which regulates administrative proceedings in Brazil:

\begin{quote}
“Art. 2 The public administration shall obey, among others, the principles of legality, finality, motivation, reasonableness, proportionality, morality, full defense, contradictory, legal certainty, public interest and efficiency.”\footnote{LEI DE IMPROBIDADE ADMINISTRATIVA [L.I.A.] [ADMINISTRATIVE IMPROBITY LAW]. Art. 2 (Braz.).}
\end{quote}
The federal statute that sets forth practices of administrative improbity also has provisions which spell out principles that shall be obeyed by public authorities and employees:

“Art. 4. Public agents of any level or hierarchy have an obligation to strictly follow the principles of legality, impersonality, morality and publicity in matters that they handle.”

This type of norm is also present in legal texts of other civil law countries. In Colombia, for example, article 209 of the Constitution sets forth that the “administrative function is at service of general interest and is developed based on the principles of equality, morality, efficiency, economy, celerity, impartiality and publicity, through the decentralization, delegation and deconcentrating functions.” The German Constitution also has several principles in its text. For example, in article 33, item 5, which regulates equal citizenship in public service, there is a provision that states: “[t]he law governing the public service shall be regulated and developed with due regard to the traditional principles of the professional civil service.”

Therefore, Brazil, as well as some other civil law countries, expressly took the position to include standards in rulebooks and attribute them the qualification of principles. The fact that these norms are qualified as principles translates an attitude to judges and lawyers as to how they view the role of these standards in legal reasoning. Indeed, traditional logical properties of principles such as not falling into the “all-or-nothing” fashion and having dimensions of weight are commonly predicated by Brazilian jurists to these posited standards. As Joseph Raz precisely observes, “the word ‘principles’ usually carries an implication of greater generality and greater importance than the word ‘rules.’”

The importance of this validity dependence on the case is mostly noted when one reads the traditional type of written norm that sets forth these principles. Usually, many principles are listed in the same legal precept and some give contradictory instructions to the determinations given by others. One that carefully reads article 2 of Lei No. 9.784/1999, cited above, may note that the application of principles of legality, morality, legal certainty and efficiency may be contradictory in a specific set of facts. If a public employee has to be efficient in his task, he may not be able to apply, in a strict sense, some posited norms that would ordinarily be applied to the case. This departure may be seen as a violation of legality, especially if the enforcing authorities understand that strict application of norms has more weight and is more important than achieving efficiency in the situation.

Therefore, defining the content of principles, but particularly the content of posited principles, may be a difficult task for the interpreter. The meaning of some written principles, like “county autonomy” or “republican form, representative system and democratic regime” is, in most of cases, settled in advance in other rules. Their content is most likely to be construed taking into account express rules concerning these issues in the C.F. text as well as in other statutes. But the content of other posited principles will have to be settled as the

280 LEI DE IMPROBIDADE ADMINISTRATIVA [L.I.A.] [ADMINISTRATIVE IMPROBITY LAW]. Art. 4 (Braz.).
281 CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 209 (Colom.).
283 BARROSO, supra note 27, at 153. Translation mine.
situations arise. Take the principle of *administrative morality*, for example. In one of the first cases in which this principle was interpreted (or concretized) by the S.T.F., the Justices commented the difficulties that it brings for the interpreter. During oral debates, Justice Néri da Silveira stated that “the morality principle is currently a constitutional principle and it will be up to the Supreme Court to define it, in our system.”

Nevertheless, article 4 of the administrative improbity statute, which was quoted above, states that public agents of any level or hierarchy have an obligation to strictly follow the principle of morality in the matters that they handle.

Regarding the application of principles, Justice Barroso argues that “as they do not put in detail the conduct to be followed for its concretization, the activity of the interpreter will be more complex, because it will be up to her to define the direction to take.” He adds that, “in relation to principles, an additional hardship may be stated: the goal to be reached or the ideal state to be transformed in reality may not be objectively determined, which will demand a subjective integration by the interpreter. A principle has a minimal sense and range, an essential core, in which it is equated to rules. But, from a determined point, nevertheless, the interpreter walks into an undetermined space, in which the demarcation of its content will be subjected to the interpreter’s ideological or philosophical conception.”

This idea of the existence of a *core* in principles was endorsed by the S.T.F. in the nepotism cases mentioned in subchapter II.2. It is possible to note from the following quotation of Justice Ricardo Lewandowski’s opinion that the S.T.F. concluded that the principle of morality listed in article 37 of the C.F. has a “fixed core,” a “certain zone” and nepotism lies inside these areas:

“This morality is not an element of the administrative act, […] but is fulfilled with ethical values culturally shared by the community, which are part, due to this fact, of the legal order in force.

The semantic indetermination of the principles of morality and impersonality cannot be an obstacle to the determination of the rule of prohibition of nepotism. As Garcia de Enterría well points out, in the structure of every undetermined concept, it shall be identified a ‘fixed core’ (*Begriffkern*) or a ‘certain zone’ that is composed of previous and safe data, from which an applicable rule to the case can be extracted. The prohibition of nepotism is a constitutional rule that is inside the zone of determination of the principles of morality and impersonality.”

A final remark is that Lenio Streck has articulated that the introduction of written principles in the law has made the concept of *general principles of law*, analyzed in subchapter II.5.3.1., outdated. Although I disagree with his position and the recent precedent

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286 LEI DE IMPROBIDADE ADMINISTRATIVA [L.I.A.] [ADMINISTRATIVE IMPROBITY LAW]. Art. 4 (Braz.).

287 BARROSO, supra note 27, at 151. Translation mine.

288 Id. at 150-151. Translation mine.

I have cited in that subchapter shows that the concept is still applied, it is true that the concept has lost its importance due to the vast number of principles that have been written into legal norms, because it is more difficult for a judge to consider a gap in the system:

“The general principles of law are constructions of the nineteenth century, which have the purpose to solve the problem represented by the closure of the legal system, “closed” by article 4 of the French Civil Code. That is, the general principles of law were introduced as a criterion for closing the system, aiming to preserve, therefore, the pureness and integrity of the world of rules. It is no longer possible to talk about general principles of law in the era of constitutional principles (if someone talks about it, bad luck – it is outdated; and even if the S.T.F. uses it, the observation has the same equal value). Who asks this question (or affirmation) does not know that there has been a discontinuity between general principles of law and constitutional principles.

Although Streck takes this position, it is a fact that in 2010, Congress passed a statute attributing the name of Introductory Act to the Brazilian Norms, instead of Introductory Act to the Civil Code, to Decreto-Lei 4.567, of 1940. Article 4 of such decree-law, as shown in the beginning of this subchapter, is the one that states that judges may resort to general principles of law. Streck’s position, therefore, seems to be contradictory to Congress’ intent. Indeed, he strongly criticized the enactment of the statute that changed the name of this decree-law, claiming that this norm is incoherent with the contemporaneous constitutionalism model. However, his point is important because the relevance of general principles of law in legal reasoning has diminished. That is the reason I have stated in the introductory chapter that the supplementary character of principles has evolved into being at the center of the legal system.

II.5.4. The Breadth of Principles


\[291\] Lenio Streck, *Em concurso público, princípio vira regra estática! Por quê? Porque sim!* (Aug. 14, 2014, 8:08 AM), https://www.conjur.com.br/2014-ago-14/senso-incomum-concurso-publico-principio-vira-regra-estatica-porque-sim. Translation mine. Gustavo Zagrebelsky adopts the same position: “This way of conceiving principles [the general principles of law category] was valid in the legal case of simpler system, such as those of liberal societies of the nineteenth century or authoritarian ones of the twentieth (the Italian civil code is still the one issue in 1940). Such a conception, however, cannot be valid nowadays. The interpreter who ventures in search of consistent legal principles risks encountering contradictions and political conflict translated into open-minded, inconsistent, and unstable legislative norms. Accordingly, principles, which at one time were the ultimate expression of the logical unity of the legal system, are now called upon to perform a normative task, namely the articulation of a common normative matrix allowing for the dialogical unity of the law of complex societies, supported by the institutional architecture of the constitutional state. Because of this, principles cannot originate in the rules, but must have their own autonomous origin and validity.” Zagrebelsky, *supra* note 26, at 636.

Another relevant distinction is the civil law view of the breadth of principles, especially the Brazilian one, in comparison to Dworkin’s view. In *Hard Cases*, Dworkin asserts that “[a]rguments of principle are arguments intended to establish an individual goal; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals.” 293 Alexy, on the other hand, remarks that “[p]rinciples can be related both to individual rights and to collective interests.” 294

Dworkin, therefore, claims that principles are linked to individual rights. But by the reading of posited principles and of the cases cited in subsection II.2, one may conclude that Dworkin’s view is narrow in comparison to the concept used in Brazil and probably in most civil law jurisdictions, where this distinction between *arguments of policy* and *arguments of principle* is not clearly drawn. The definition of principles such as democracy in the party loyalty cases and administrative morality in the nepotism cases were not made to protect individual rights. On the contrary, by affirming that political seats belong to the parties in proportional elections, the S.T.F. was mostly advancing a goal of strengthening party fidelity and, therefore, in the Court’s view, protecting the interests of the whole society, not of one specific person. The same took place in asserting that appointing public official relatives to public positions is a violation of the principle of morality. The goal was to avoid personal privileges in the Public Administration.

Alexy recognizes the importance of the distinction between individual rights and collective interests. But he adds that “it is neither necessary nor desirable to tie the concept of a principle to that of an individual right. The common logical characteristics of both types of principle, which Dworkin alludes to his ‘principles in the generic sense’, and which become patently obvious when principles compete, make a wider concept of principle appear more suitable.” 295 He claims that Dworkin’s distinction can be made within that wider concept if one wishes.

Dworkin, in an article in which he offered a response to overseas commentators of his work, addressed the difficulties that his distinction between policies and principles pose for some countries, due to the way these nations’ constitutions are written. When offering comments to an article authored by Arthur Chaskalson, former Chief Justice of the Constitutional Court of South Africa, he observed that:

“The quality of Chaskalson’s Court and his own role in leading that Court is evident in his discussions of some of its most important decisions, and, in particular, its decisions enforcing what are often called socioeconomic constitutional rights. People’s moral rights against their government include not only what are called ‘negative’ freedoms—the right to important liberties, like freedom of speech, religion, and conscience, and rights to a fair trial—but also ‘positive’ rights to support for their basic needs of health, housing, and education that is consistent with the economic resources of their community. Traditional constitutions, including the American Constitution, provide guarantees of certain negative rights that are enforceable by courts. But they do not make explicit provisions for positive rights except for making hard policy decisions about resource application, strategy, timing,

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294 ALEXY, supra note 246, at 65.
295 Id. at 66.
and these decisions are better made by officials who are directly responsible to the electorate than by judges. Following World War II, however, many of the newer constitutions did include guarantees of positive rights, either as nonjusticiable, as aspirations or as judicially enforceable mandates. The framers of the South Africa’s new Constitution believed, understandably, that they could not deny positive constitutional assurance to the majority of citizens who had been deprived of the basic requisites of human dignity for so long, and so they chose to include carefully drafted and judicially enforceable positive rights in the form Chaskalson describes.”

The Brazilian C.F. has made reference to several social goals and purposes that ultimately are considered socioeconomic fundamental rights. Some of those rights are treated as principles in legal reasoning. The content of these principles, in the Brazilian current legal practice conventions, is seen not as mere aspirations but as judicially enforceable mandates.

II.5.5. Interpretation of Rules and Concretization of Principles

In a world dominated by the written law, texts have to be interpreted and the judge’s task, therefore, has traditionally been to rationally express the content of the words of the enacted law when adjudicating a case.

The literal meaning of the text initially dominated legal interpretation. The importance of this method came from ancient times. However, Friedrich Carl Von

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297 See, e.g., CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] Articles 1 and 3 (Braz.), translation at http://english.tse.jus.br/arquivos/federal-constitution. “Article 1. The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the federal district, is a legal democratic state and is founded on: I – sovereignty; II – citizenship; III – the dignity of the human person; IV – the social values of labour and of the free enterprise; v – political pluralism. Sole paragraph. all power emanates from the people, who exercise it by means of elected representatives or directly, as provided by this constitution. [...] Article 3. The fundamental objectives of the Federative Republic of Brazil are: I – to build a free, just and solidary society; II – to guarantee national development; iii – to eradicate poverty and substandard living conditions and to reduce social and regional inequalities; IV – to promote the well-being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination. [...] “
298 According to Thomas Vesting, “[t]he act of binding interpretation to the text, safeguarding the text literally, is an ancient idea, which is intimately related with the invention of the alphabetical writing and its uses for documentation purposes. In Mesopotamia, where it is believed that writing began to be employed from the last years of the 2nd century B.C., the idea is conserved, firstly, in the so-called literal meaning formula: ‘nothing shall be removed, nothing shall be added’; in the 13th century BC, an Hittite text, The Plague Prayers of Mursilis, already said, in reference to a writing contract on clay: ‘But to this table there shall not be added nor removed any word’. The Jewish culture also accentuated the necessity of being bound to the literal meaning, specially, of the mosaic laws. ‘You shall not add to the word that I command you, nor take from it, that you may keep the commandments of the Lord your God that I command you.’ Further, the Greek City-States (poleis) legislation acknowledged since ancient times, e.g., the Gortyn Law, the strict commitment of the judge with the literal written text. The roman law also adopted, in a first moment, the strict literal interpretation. In a passage of Justinian’s Digest attributed to the roman jurist Marcelo (2nd Century A.D.), one may read that no one is authorized to dodge from the literal meaning of the law. Additionally, other rules and juridical canons of this type were taught, as, for example, the maximum that the one who dodges a syllable, dodges the whole text. However, the Roman law also know many rules that state the opposite, as, for example,
Savigny, in a 1840 treatise on Roman Law, argued for a new “regular method for interpretation of law.” He asserted that there are three techniques for legal interpretation that shall be considered: (1) textual, verbal or grammatic; (2) systematic, structural or contextual and (3) historical. Further, reacting to the problem of an environment in fast transformation, Savigny added a fourth technique: (4) purposive or teleological interpretation.

Savigny’s work was of decisive importance in Brazil and there is no doubt that any Brazilian judge or lawyer that interprets a statute, until today, considers Savigny’s four techniques appropriate and applies them. The four methods were first used to interpret rules but are also relevant to construe the content of principles.

There is a general notion in the country that these four methods must be combined. None shall be deemed absolute. Therefore, the literal meaning is not considered the most important and relevant mode for achieving the right interpretative result. The others are treated as supplementary to it. On the contrary, some precedents mention that the maximum in claris cessat interpretatio [“when [law] is clear, it does not need interpretation] is no longer pertinent for the majority, if not all cases. Some authors, like the S.T.F. Justice Gilmar Mendes and Professor Paulo Branco, even contend that “it is correct the result that, through the successive utilization of all methods of interpretation, transmits the meaning of the law.” Brugger also makes the same point:

“One should avoid concentrating on any particular one method or on any school of jurisprudence that focuses solely on the textual, contextual, historical, or teleological perspective. This may be seen a trivial criterion, but it is not without consequences. It leads to the critique of simplistic premises such as: ‘law is (or should only be) politics’, ‘the law is (or should only be) in the books, ‘law is (or should be) restricted to what historically was willed’, law only reflects (or should only reflect) economic rationality’, etc. Consequently, my advice may be stated thus: Let us adhere to some form of integration theory when applying methods of interpretation and assessing schools of jurisprudence.”

the formula that the interpretation against the literal meaning does not promote injustice.” VESTING, supra note 131, at 217-219. Translation mine.

299 The book’s name is System des heutigen römischen Rechts. See Id at 221-222.
300 Id. at 217.
301 Id. at 227.
302 Brugger, supra note 33, at 396.
303 Translated by http://latin.topword.net/?Legal=261.
304 S.T.J., REsp no. 1.251.566/SC, Relator: Min. Mauro Campbell Marques, 7.6.2011, Diário da Justiça [D.J.], 14.6.2011, (Braz.) (asserting that “the departing point, surely, must be the law’s words, but the judge shall not keep herself tied to them. For long, the maximum in claris cessat interpretatio has been losing importance in the legal hermeneutics and has given in to the necessity of interpreting any right as of the effective protection of the legal good, even if that situation has not yet been particularly established by the legislator. The obligation of the judge, in the law application, is to observe the social goals to which the law is oriented and the demands of the common good (art. 5° of the Introductory Act to the Brazilian Norms). But, when the law does not find in the factual world ground in which it should subsume, it is up to the adjudicator integrate the legal order, through analogy, customs and general principles of law”). Translation mine.
306 Brugger, supra note 33, at 415.
Therefore, in Brazil, due to Savigny’s influence and to the dominance of his mode of thinking, there is no debate whether it would be acceptable for judges to adopt a *purposive interpretation* when interpreting statutes and/or the Constitution. Purposive reasoning shall be used in the majority, if not all cases since there is no hierarchy among this technique and the other three. There is not a “fear of purposive interpretation of law and legal institution,” as observed by Lon Fuller, when he criticized H.L.A. Hart’s positivism. 307

Regarding the different views of common law jurists with respect to the civil law Savigny’s *teleological* method, Lord Denning, from the U.K., asserts the following:

“They adopt a method which they call in English by strange words—at any rate they were strange to me—the "schematic and teleological" method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit—but not the letter—of the legislation, they solve the problem by looking at the design and purpose of the legislature—at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation. They ask simply: What is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly. If you study the decisions of the European Court, you will see that they do it every day. To our eyes—shortsighted by tradition—it is legislation, pure and simple. But, to their eyes, it is fulfilling the true role of the Courts. They are giving effect to what the legislature intended, or may be presumed to have intended. I see nothing wrong in this.” 308

The civil law judge does not behave in the same way as some U.S. judges do regarding the need to update statutory law or the understanding of the constitutional text, at least with respect to the *textualist* views. In the U.S., legal scholars specify two paths that judges follow when identifying mistakes in legal texts. “One strain, represented by Judge Foster [in Lon Fuller’s classic book ‘The Case of the Speluncean Explorers’ 309] […], emphasizes statutory purposes and sees judges and agencies as helpful partners as well as normative updaters in the ongoing statutory enterprise. 310 The other strain, represented by Judge Keen [also from Fuller’s book], emphasizes the rule-of-law virtues in following statutory plain meanings and the greater institutional competence of the legislature to make and update public policy.” 311

Judge Keen’s approach, similar to the argument advocated by Justice Antonin Scalia’s *textualism*, which does not take a progressive role in solving statute problems and

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310 ESKRIDGE JR. ET. ALL, supra note 136, at 507.
311 Id.
advance public policy, would likely be understood to be wrong in Brazil and would probably be considered contrary to the judge’s duty set forth in article 5 of the Introductory Act to the Brazilian Norms, which states that “in the application of the law, the judge shall observe the social goals to which the law is oriented and the demands of the common good.” If the interpretation goes beyond the application of linguistic laws, through a “corrective interpretation”, the civil law jurist will probably attribute it to a logical interpretation. Civil law jurists consider that the interpreter may be able to better understand a text than the text drafter understood it.

Patricia Perrone confirms this view. She takes the position that by grounding an interpretation on its teleological element, the judge goes along with the evolutive comprehension of the C.F., “discovering the interpretation of its commands to situations not originally foreseen and, consequently, changing its content, without modifying its text, in order to fulfill the ends that justify its norms when facing new realities.”

This necessity of updating the constitutional and the statutory law was also an issue identified when the legal dogmatic approach was described in subchapter II.4.2. As said, the juridical dogmatics has been considered essential to the administration of justice and to the development of the law. The applied techniques, like the teleological method and the rational legislator myth, among others, perform the relevant mission of adapting the law to certain rational and axiological standards.

According to Thomas Vesting, “the environmental pressure fatally burdened the act of interpretation, giving rise to fresh judgment; the factual reach was transformed in each new case as the result of selections through systemic stable rules and, in turn, totally controlled in the system.” As noted, “either the quaestio juris of a life circumstance is already anticipated by the law of the jurists or by the political legislative activity or, if this is not the case, at least, the adjudicator may solve it through literal, logic, gap-filling or, eventually, analogic interpretation, in the deductive sense employed. The system always has a readily response, at least ideally.”

Some civil law jurists [at least some modern ones] use different words when they analyze the content of rules and principles. If rules are interpreted, the same cannot be said of principles. As Zagrebelsky remarks, “it is not interpretation – in the sense this term is used by jurists – because the wording that expresses legal principles contains very little to be interpreted.”

As seen in subchapter II.5.3.3., especially due to the fact that the legislative branches have expressly included legal principles in the text of statutes and, more significantly, of the C.F., contemporary constitutional scholars began to take the position that it is not right to say that these norms must be interpreted but must be concretized. Concretization does not reveal a solution that is in the text but sets a dialectic process of creatively determining results in conformity with, but not determined by, the C.F.. This term is commonly used by many

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312 Lei de Introdução às Normas do Direito Brasileiro [L.I.N.D.B.] [Introductory Act to the Brazilian Norms] art. 5 (Braz.).
313 VESTING, supra note 131, at 227. Translation mine.
314 Id. at 226.
316 Id. at 227.
317 Id.
318 Zagrebelsky, supra note 26, at 631.
319 See Brugger, note 33.
well-known jurists, like Winfried Brugger, Gustavo Zagrebelsky, Thomas Vesting, Karl Larenz, Marcelo Neves, among others.

The main debate that takes place is whether the act of concretization of principles reflects creation of new law. Zagrebelsky denies it. He points out that “the case already falls under the law” and adds that “[i]n the presence of a pertinent principle, the judge cannot invoke the lack of a law to reject a question as lacking legal relevance. He must, on the contrary, reason constructively about the case, in light of the relevant principle and from this position give an answer.”

On the other hand, Thomas Vesting:

“the supporters of the concretization model agree unanimously that a legal argumentation that locates itself beyond the logical deductive methods is inescapable, especially, due to the undetermined character of the major premises. This supposition seems imperative, in that it would not be necessary any methodologic theory that reflects over the interpretive method, if law’s interpretation could take place in a totally deductive way, if it were not more than imperative subsumption according to the logic. Today, in any case, the methodologic theory majorly considers that interpretation (juridical) itself is creative, that it is, so as to speak, the very creation of the law; today, few stick to an idea of strict deduction of the application of the law.”

In fact, Vesting points out that the very use of a new linguistic expression, such as concretization instead of interpretation, traces to this comprehension of law creation, instead of mere deduction of rules: “[f]or expressing the difference in comparison to the juridical-positivistic model of application and subsumption even linguistically, the term ‘interpretation’ has been since the sixties on ongoing replacement by other terms like ‘obtaining the law,’ ‘legal work,’ ‘legal argumentation’ or even ‘law concretization.’ Sometimes, ‘interpretation’ and ‘law concretization’ may be considered opposites.”

Another remark is that Alexy asserts that “principles can be reasons for decisions, that is, for concrete ought-judgements.” He argues that principles are not merely reasons for rules but may be reasons for actions.

This assertion is to a great extent adopted by Brazilian judges. As shown in subsection II.2, although neither the C.F. nor any statute had ever expressly outlawed the practice of nepotism, the S.T.F. ruled that the prohibition derived from the republican principles of

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320 Id.
321 See Zagrebelsky, supra note 26, at 631.
322 See VESTING, supra note 131, at 227.
323 See KARL LARENZ, METODOLOGIA DA CIÊNCIA DO DIREITO 148 (José Lamego trans., Fundação Calouste Gulkenkian, 7th, 2014).
324 See NEVES, supra note 21, at 57.
325 See Zagrebelsky, supra note 26, at 631.
326 Id.
327 VESTING, supra note 131 at 214. Translation mine.
328 Id.
329 ALEXY, supra note 246, at 60.
330 Id.
morality, impersonality, equality and efficiency, which are set forth in Article 37 of the constitutional text. 331 Hence, posited principles were the main source for the decisions.

Finally, I agree with Joseph Raz’s assertion regarding the five different purposes that he points out that principles are used in law. 332 Principles serve as grounds (a) for interpreting laws; (b) for changing laws; (c) for finding particular exceptions to laws; (d) for making new rules; and (e) for justifying action in particular cases. This list, nevertheless, is not complete and other authors may point other common uses. 333

II.5.6. Conflict of Rules and of Principles

The conflict of rules is traditionally solved by declaring one of them invalid or inapplicable. 334 Normally, these conflicts are solved by applying the following criteria: (1) hierarchy: the superior rule prevails over the inferior (Lex superior derogat legi inferiori); (2) temporal: the more recent rule prevails over the older one (Lex posterior derogat legi priori); and (3) generality: the special rule prevails over the general rule (Lex specialis derogat legi generali). This is what is established in article 2, §§ 1st and 2nd, of the Introductory Act to the Brazilian Norms. 335

The idea of conflicting principles is a more recent debated issue in Brazilian jurisprudence. The doctrine most frequently advanced in Brazilian legal books and in court decisions is Robert Alexy’s balancing theory, exposed in Theory of Constitutional Rights. 336

According to the German scholar, when two principles compete, the issue must be resolved by balancing the conflicting interests served by these principles. The judge must decide which principle (that have equal status in the abstract) has greater weight in the concrete situation. 337 The solution will establish a conditional relation of precedence between the principles in light of the concrete circumstances. Alexy points out that “the relation of precedence is conditional because in the context of the case conditions are laid down under which one of the principles takes precedence. Given other conditions, the issue of precedence might be reversed.” 338

Alexy notes that the important point in the theory of condition of precedence is that “the court is no longer speaking about the precedence of a principle, requirement, interest, claim, right or any other subject; rather conditions are being identified under which there is breach of constitutional rights.” 339

331 See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 37 (Braz.).
332 Raz, supra note 270, at 839-842.
333 Manuel Atienza and Juan Manero, for example, point out that principles are employed in eight different senses. See Manuel Atienza and Juan Manero, Sobre Principios Y Reglas, 103-105. https://rua.ua.es/dspace/bitstream/10045/10763/1/doxa10_04.pdf
334 See Dworkin, supra note 17. See also the S.T.F. case cited in note 198 (finding one exception will be, for some, equivalent of finding them invalid, but, for others, will reflect its application by disapplication)
335 See LEI DE INTRODUÇÃO AS NORMAS DO DIREITO BRASILEIRO [L.I.N.D.B.] [INTRODUCTORY ACT TO BRAZILIAN NORMS] art. 2, par. 1° and 2° (Braz.).
336 Juliano Benvindo, a professor at the University of Brasilia, states that “if we examine the great majority of the edited books on the new methodologies that the S.T.F. employs, particularly the principle of proportionality, the same conclusion applies here: they reproduce the contents of those decisions and, simultaneously, make an examination, which is normally a very brief and simplified, of Robert Alexy’s Theory of Constitutional Rights (Theorie der Grundrechte), as the main theoretical source to systematize the principle of proportionality, and balancing in particular.” JULIANO ZAIDEN BENVINDO. ON THE LIMITS OF CONSTITUTIONAL ADJUDICATION – DECONSTRUCTING BALANCING AND JUDICIAL ACTIVISM 85 (Springer, 2010).
337 ALEXY, supra note 246, at 51.
338 Id.
339 Id. at 53.
An example of balancing was given in the *vaquejada* case. The S.T.F. weighed the cruelty of the *vaquejada* against the benefits of the cultural practice and established that cruelty against the animals had precedence, striking down the State of Ceará statute.

Balancing became such a dominant technique in adjudication that the new Civil Procedure Code [C.P.C.], enacted in 2016, incorporated it in its text. The C.P.C. states that “in the case of collision of norms, the judge shall justify the object and the general criterion of the balancing adopted, stating the reasons that authorize the interference of the displaced norm and the factual premises that ground the conclusion.”

Zabrebelsky points out that this relation of precedence is also made by legislatures when drafting rules. In the *vaquejada* case, the State of Ceará Assembly had supposedly done it. But, according to Brazilian conventions and to article 102 of the C.F., the S.T.F. has the power to review the constitutionality of this decision.

Another widely agreed approach to solving conflicts of principles is the application of the principle of proportionality. According to Alexy, the “nature of principles implies the principle of proportionality. [...] If a constitutional right norm competes with another principle, then the legal possibilities for realizing that norm depend on competing principles. To reach a decision, one needs to engage in a balancing exercise as required by the Law of Competing Principles.”

Proportionality in judicial practice instructs the judge to consider three subprinciples: necessity, suitability and proportionality in a narrow sense. Alexy notes that the first two follow from the nature of principles as optimization requirements relative to what is factually possible, whereas the last one derives from its relation as to what is legally possible.

The most controversial case in which the principle of proportionality was applied was possibly the *Habeas Corpus no* 82.424, the so-called *Ellwanger* case, decided in 2003, by the S.T.F.. This case discussed whether the publication of a Holocaust denial book configured racism, a non-bailable and imprescriptible crime in Brazil. By a 7 to 3 vote, the court denied the *habeas corpus* and allowed the criminal lawsuit to proceed. Two of the Justices, Gilmar Mendes and Marco Aurélio, applied the principle of proportionality, but reached contradictory results. Mendes, after reviewing the book, asserted that it had no historical revisionist purpose and represented a mere attack on the Jewish population. Therefore, he reasoned that in the collision of freedom of speech and nondiscrimination principles, both established in the C.F., the latter should prevail. Marco Aurélio, on the other hand, considered that the content of the book did not cause imminent violence and simply represented the defendant’s personal opinion. He stated that the case involved a book whose ideas were intolerant and anti-Semitic but did not incite racist violence. Therefore, in weighing the same principles, he concluded that the crime of racism had not been committed. Proportionality, then, allows subjectivity in judgment.

Justice Luís Roberto Barroso also points out that the principle of proportionality has mostly been applied as a criterion for examining the reasonableness of legislative and of administrative acts. He notes that it allows the judiciary to invalidate legislative or administrative acts in situations in which:

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340 CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CIVIL PROCEDURE CODE] art. 489, § 2 (Braz.).
341 Zagrebelsky, see note 26, at 629.
342 ALEXY, supra note 246, at 50-52 and 66-67.
343 Id.
“a) [t]here is no adequacy between the end sought and the means used to achieve that end ([suitability]);
b) [t]he measure is not required or necessary, there being an alternate means for arriving at the same result with a lesser burden upon a fundamental right (prohibition of excess) ([necessity]); and
c) [t]here is no proportionality in the strict sense of the word, meaning that what is lost by effecting a given measure is more important than what is gained ([proportionality in its narrow sense]).”346

A good example of how this application may take place is provided by electoral cases in Brazil. In proceedings in which an electoral wrongdoing occurs, electoral judges must resort to the principles of proportionality and of reasonableness to decide whether the unlawfulness is serious enough to justify the application of the sanctions of office removal and disqualification to run for eight years.347 If they find that applying these sanctions in the case is disproportional, they may choose not to punish the infringer, even though it is undisputable that the facts are subsumed by the law text occurred. In these cases, judges are basically deciding what the reach of the statute is, not interpreting, making an intelligible and rational decision and avoiding a mechanical one. 348

In fact, the principle of proportionality has become an essential tool for civil law judges and has acquired unprecedented relevance in legal reasoning. As David Beatty, a law professor at the University of Toronto, correctly observes, “the judiciary has constructed a working model of judicial review that relies, almost entirely, on the principle of proportionality to tell […] when the elected representatives of the people and their officials are acting properly and when they are not.”349 He adds that:

“[i]n all areas of government regulation, no matter the nature of the right or freedom that is alleged to have been violated, and regardless of the personal characteristics of those bringing the case, on what might be called the jurist’s model, the test is always the same. Laws—indeed any act undertaken in the name or without the authorization (explicit or tacit) of the state—must respect a basic principle of proportionality in the way they deal with the different interests and values they affect. Whether judges are faced with a claim of religious freedom, sex discrimination, or for material support from the assessment as possible of what the disputed state action actually means to those it affects the most. When it is applied

346 Barroso, supra note 37, at 590.
347 See, e.g., T.S.E., AgR-R.O. No. 8902-35.2010.6.09.0000 Goiânia, Goiás, Relator: Min. Arnaldo Versiani, 14.06.2012, DIÁRIO DA JUSTIÇA ELETRÔNICO [D.J.e.], 21.08.2012, (Braz.). “Representation Action. Prohibited Conduct. Inauguration of Public Construction. 1. This Superior Electoral Court has settled the issue that, in relation to the prohibited conducts established in Article 73 of Law No. 9.504/97, the removal from office punishment shall be imposed in the most serious cases. The Court must apply the proportionality principle of the sanction in relation to the conduct. […] 3. The removal of a candidate from the state representative office that shows up in one single opening ceremony of a public facility, in one city, in which the number of voters was not significant and the candidate’s participation was not significant, is disproportional.” Translation mine.
349 Id. at 159.
properly, proportionality requires judges to assess the legitimacy of whatever law or regulation or ruling is before them from the perspective of those who reap is greatest and those who stand the most.”

Regarding the popularity of the principle, Beatty affirms that “[i]n tracing its roots beneath the words of the page, judges have found that proportionality runs to all four corners of every constitutional text. Collectively, their judgements establish the neutrality of its definition as well. Although […] it often goes by different names, ‘reasonableness’ in India and Japan, ‘toleration’ in Israel, ‘strict scrutiny’ in the U.S., its meaning never changes.”

Proportionality has acquired such an importance that many statutes have included provisions—Humberto Ávila calls them metanorms or normative postulates, which he considers a distinct species of norm, different from rules and principles—compelling judges to take the principle into consideration. Some of those statutes were referred in subchapter II.5.3.3. above. Another legal precept that shall be mentioned is article 8 of the recent Civil Procedure Code, enacted in 2015, which sets forth that “in applying the legal order, the judge shall follow social goals and common good demands, sheltering and promoting human dignity and observing the proportionality, the reasonableness, the legality, the publicity and the efficiency.”

II.5.7. Constitutionalizing the Law

Since principles can serve as grounds (a) for interpreting laws; (b) for changing laws; (c) for figuring out particular exceptions to laws; (d) for making new rules; and (e) for acting in particular cases, they may conflict with rules. In these situations, principles may weigh in a case in which a rule unequivocally applies, changing the rule or finding an exception to it or generating other consequences.

This relationship among rules and principles is more apparent when one examines the phenomenon of constitutionalizing the law. This phenomenon is well described by Justice Barroso:

“[I]n countries where democracy arrived later, such as Portugal (1976), Spain (1978), and Brazil (1988), the constitutionalization of the law is a more recent—and perhaps more intense—phenomenon. In Brazil, particularly, due to its extensive and analytical Constitution, the constitutionalization of the law has taken on two important dimensions: a) the inclusion in the Constitution of principles related to multiple areas of the Law, including civil, administrative, criminal, procedural, and other areas, and b) the projection of fundamental constitutional principles, like human dignity, in the different domains of sub-constitutional law, giving new meaning and scope to their norms and institutions.”

350 Id.
351 Id. at 163.
352 Metanorms are understood as norms that set forth how other norms shall be applied. See ÁVILA, supra note 230, at 121-166.
353 CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CIVIL PROCEDURE CODE] art. 8 (Braz.). Translation mine.
354 Barroso, supra note 37, at 596.
Barroso adds that the constitutionalizing the law phenomenon resulted in an “extensive and profound process of judicialization of social relations and politically controversial issues that have sparked debate regarding the role of the judiciary and the legitimacy of its decisions.”

Indeed, the phenomenon of constitutionalizing the law has led Brazilian adjudication to adopt an opposite practice to the one exercised in the U.S., regarding statutory interpretation. In Brazil, due to this circumstance, there is no canon of constitutional avoidance or minimalism. On the contrary, judges are highly encouraged to take into account constitutional principles to decide the meaning of statutes, even in cases that statutory interpretation would be sufficient. Through their constitutional reasoning, they may sometimes “rewrite” or “improve” statutory provisions, what may be criticized in the U.S.

An example of that phenomenon took place is a tax case. Although the Brazilian National Tax Code sets forth that rules granting tax exemptions shall be construed literally, courts have constantly been declaring the right of disabled persons who cannot drive to purchase cars without paying sales tax. This exception, however, according to local legislation, is only granted to disabled drivers who can drive an automobile. The reason for this discrimination is that the exemption supposedly shall compensate the costs of vehicle adaptation. Courts, however, consider this discrimination unreasonable because it does not furnish all disabled people with the same protection granted by the Federal Constitution. They say that people who cannot drive cars are probably the ones that mostly need the use of an automobile. Therefore, courts constantly grant claims for tax exemption, when disabled persons file lawsuits.

II.6. Stare Decisis (Doctrine of Precedent)

The Brazilian doctrine of precedent also differs from the prevalent doctrine of common law countries. The binding force of precedents in Brazil has been more a matter of rules than of culture.

355 Id.
356 Id. at 591.
357 In United States v. Marshall, the Court of Appeals of the Seventh Circuit stated: “A preference for giving statutes a constitutional meaning is a reason to construe, not rewrite or ‘improve’. [… ] Constitutional decisions breed penumbras, which multiply questions. Treating each as justification to construe laws out of existence too greatly enlarges the judicial power.” 908 F. 2d 1312 (1990) (the SCOTUS asserted that it did not need to examine whether a drug statute that set forth mandatory minimum terms of imprisonment based not only in the weight of the pure LSD was constitutional because the statute provision unequivocally intended to weigh the paper and the LSD). This is one of the views of constitutional avoidance, the issue is more complex and can be applied for other situations. See Eskridge Jr. et. al., supra note 136, at 507.
358 Regarding minimalism, see Mello, supra note 160, at 169-171, 192 (Perrone asserts that there is a tendency in the S.T.F. that in relevant cases the Justices will avoid minimalism and will resort to a maximalist argumentation, using vast abstract categories, general principles and wide academic citations).
359 Id.
360 Código Tributário Nacional [C.T.N.] [Federal Tax Code] art. 111 (Braz.).
361 The tax is called Imposto sobre Operações relativas à Circulação de Mercadorias e Prestação de Serviços de Transporte Interestadual e Intermunicipal e de Comunicação – ICMS. See Constituição Federal [C.F.] [Constitution] art. 155, II (Braz.).
Winfried Brugger, talking about Germany, states that “[r]espect for judicial precedent is not a formally binding guideline for judicial interpretation in [his country], because in a code law system, judicial decisions serve only as gloss on the law which is to be found in the rules and principles of the governing legal texts.”\textsuperscript{363}

Karl Larenz, also German, affirms that to qualify as “jurisprudence”—the term continental lawyers use to designate caselaw—as source of law, one shall specify what she understands as \textit{source of law}. “If all factors that cooperate with the creation and latter development of the law qualify, then the jurisprudence, so as the legal science, is a source of law. However, if one considers only the base for the origin of a legal norm to which one wishes normative validity, in a binding sense, in this case, [the sources of law] are only the legislation and the original use in a general conviction (as source of customary law).”\textsuperscript{364}

The Brazilian judge, grounded in the civil law tradition, has a different approach towards precedents from the common law judge because Brazilian law considers enacted law to be its major source of law.

Precedents do not have the same force as the enacted law because they commonly offer only \textit{persuasive reasons} for judges to decide in the same manner in similar cases. Since judges are only bound to apply the legislation, they may choose to follow the previous decision if they consider it to be a right application of the enacted law. Precedents are not considered \textit{mandatory norms} or \textit{peremptory reasons}, at least in the majority of cases.\textsuperscript{365}

As Larenz observes, “courts, according to our legal organization, are not bound to precedents as they are to the [enacted] law. It is not the precedent, for being a precedent, that binds, but the norm that it contains, if this norm is considered a correct interpretation or concretization [of the law].”\textsuperscript{366} For these reasons, the judge’s behavior is different when facing the necessity of applying a written norm or a precedent:

“[…] every judge that decides again the same issue can and shall, in principle, decide independently and shall follow the precedent’s interpretation, the norm’s concretization or the judicial development of the law, if he is convinced that the precedent is right and is grounded on current law. Therefore, the judge does not have to blindly accept the precedent. He not only has the power, but is compelled to depart from the previous decision if he concludes that the precedent’s interpretation is wrong or if such interpretation represents an poor development of the law, or even if he concludes that the question the precedent addresses, although rightly decided in the past, shall be settled in a different manner today, due to the change in a normative situation or in the whole legal order.”\textsuperscript{367}

The same view exposed by Brugger and Larenz is shared in the Brazilian law. Since precedents historically have had only a \textit{persuasive effect}, they are not considered binding, unless in exceptional hypotheses, in which the C.F. or the C.P.C. grants this effect. These circumstances are the following: firstly, when the full bench of the S.T.F issues a final

\textsuperscript{363} Brugger, supra note 33, at 398.
\textsuperscript{364} LARENZ, supra note 323, at 615.
\textsuperscript{365} See RAZ, supra note 284.
\textsuperscript{366} Id. at 612.
\textsuperscript{367} Id.
decision, on the merits, in an abstract constitutional review action, this decision has binding effect as regards to the other bodies of the judicial branch and the governmental

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368 The Brazilian system of judicial review of the constitutionality of norms is considered to be a mixed one, having been developed under influence of both the U.S. diffuse model (any judge may bar the application of a law on the grounds that it is incompatible with the C.F.) and the Austrian concentrated model (only the Constitutional Court may issue a ruling on the constitutionality of legislation). In Brazil, pursuant to the C.F., the Judiciary branch can review the constitutionality of legal norms both in concrete and in abstract cases.

The abstract actions can be initiated by public authorities or representative entities that, pursuant to the C.F., have specific standing to commence this type of proceeding. Before the S.T.F. adjudicates the case, several interested entities and political parties may file amicus curiae briefs defending or attacking the constitutionality of the statute under analysis, and the Chief Prosecutor of the Republic and the Federal Solicitor General are obligatorily heard. It is worth noting that the S.T.F. has mandatory review over these actions. In this sense, if the proponent party can, under the Constitution, initiate the abstract review proceeding, the Court will hear the case and issue an opinion. There is no discretionary power not to issue a ruling.

Also, the S.T.F. Justices adjudicate cases in public, not privately as in the SCOTUS, for example. So, after hearing oral arguments, the Justices debate and vote the case in a public session. Sometimes, the appreciation of the case may be adjourned, if one of the Justices asks for more time to study the proceeding file. The judgment will then resume in a future session, previously announced in the Court’s calendar.

Once all of the Justices issue a vote, the Chief Justice pronounces the result and publishes a short conclusion of the ruling in the Court’s official gazette. The result of the judgment is binding whenever this short conclusion is published. But the whole opinion is only disclosed after the debates are typed, reviewed and approved by the Justices, which also may turn in written votes. Therefore, it is common in Brazil that lawyers know the case result but have not yet read the Court’s opinion.

Pursuant to the Constitution, in an abstract review case, if the S.T.F. rules that an article or an entire statute or regulation is unconstitutional, either on formal or on substantive grounds, this article or whole norm is declared to be void and is considered removed from the legal system. This opinion, in general, has retrospective effects, which means that Courts will treat the legal norms as always having been void, not only after the enactment of S.T.F. ruling. In exceptional cases, the S.T.F. may issue an opinion conferring prospective effects to the unconstitutionality decision, or even to the constitutionality ruling. This will take place only in extraordinary circumstances, in order to protect legal certainty or other compelling interest.

The other form of judicial review is called concrete or incidental review. It may be practiced by all Brazilian judges in any case. If, in a lawsuit, a judge is confronted with the debate of the constitutionality of a statute or a regulation (the judge himself may initiate the debate), he has the power to declare it unconstitutional and then adjudicate the case. If the losing party appeals, this decision may be subject to review by a Court of Appeals, either State or Federal depending on the matter, and, after that, the case may be heard by the S.T.F. if the losing party files an extraordinary appeal.

This extraordinary appeal is decided by the S.T.F. if it considers that the constitutional question in debate has general relevance. The vote of four justices is necessary to meet this requirement. If the Court considers the issue of general repercussion, it has also to review the case, not having discretion to merely dismiss the appeal without issuing an opinion.

The Article 97 of the Constitution requires that all decisions that hold a statute or a regulation partly or fully unconstitutional must be decided by the majority of the members of the ruling Court (or at least of the majority of the highest bench of a Court of Appeals). In the case of the S.T.F., a total vote of 6 Justices is necessary to proclaim the unconstitutionality of a statute or a regulation since our Highest Court has 11 Justices.

If a statute or a regulation is held unconstitutional in an extraordinary appeal case, technically, since the proceeding is merely subjective (that is, involves a litigation between two parties, it is not abstract review), the unconstitutional article is not removed from the legal system. In this case, the S.T.F. notifies the Brazilian Senate in order for it to suspend the execution of this norm in Brazil (Article 52, X, C.F.).

Finally, state courts also exercise abstract judicial review of state statutes and regulations regarding state constitutions. These decisions can only be reviewed by the S.T.F. if the state constitution norm that provided the basis of the court decision is a mere reply of a C.F. norm. Since the S.T.F. is considered, under Article 102 of the C.F., the ultimate guardian of the constitutional text, it hears the appeal in order to check if the state court’s ruling contradicts its interpretation of the federal constitutional text. See http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=120199.
entities in all levels, not being mandatory to the legislative branch. This rule is set forth in article 102, § 2 of the C.F.369

Secondly, the S.T.F may, ex-officio or upon request, by the vote of two thirds of its members, issue a súmula vinculante (binding statement) of a case result, which will express the conclusion of reiterated decisions of the Court on a constitutional matter. Such súmula vinculante (binding statement) shall have binding effect, in conformity with art. 103-A of the C.F.370 The S.T.F. also may issue sumulas não vinculantes (non-binding statements), which, although reflect a settled understanding of a legal issue grounded in previous cases adjudicated by the Court, are not legally considered to be binding and are merely persuasive.

Furthermore, the new Civil Procedure Code [C.P.C.] of March 2015371 adopted a new attitude towards precedents, which, for many Brazilian scholars, approximated the Brazilian system to the common law system.372 It was an attempt to introduce a culture of following precedents in the country. The article 927 of the C.P.C. says that judges must “unify their jurisprudence and keep its stability, integrity and coherence.”373 To achieve such purpose, § 4 of article 928 determines that the modification of (a) sumulas (statement of settled law), (b) settled caselaw or (c) theses adopted in multiple appeals issue374 shall observe the necessity of adequate and specific justification, taking into account legal certainty, protection of trust and equality of treatment.375 If precedents or statements that the Code considers binding on judges are not followed, the parties may file a claim directly to the court that issued the decision to uphold its authority.376

The new C.P.C. has also established a rule377 that to depart from previous unbinding precedents, judges must distinguish the cases or show that the understanding adopted in them has been overruled. If they do not bear this burden, their decisions will be considered insufficiently justified and, therefore, will be void. For some authors, such rule changed the force of precedents in general. If they are not binding, at least there is a general expectation that they will be followed and, although the law recognizes the judge’s power to deviate from

369 Art. 102, § 2, of the C.F: “The Supreme Federal Tribunal’s definitive decisions on the merits in direct actions of unconstitutionality and in declaratory actions of constitutionality shall have erga omnes effect and shall be binding with respect to the rest of the Judiciary and the federal, state and county public administration, both direct and indirect.” See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 102 (Braz.). Translated by Keith Rosenn, Constituteproject.org https://www.constituteproject.org/constitution/Brazil_2014.pdf

370 Some courts consider that a third circumstance in which a decision is binding takes place when the full bench of a court issues an abstract ruling on the constitutionality or unconstitutionality of a legal precept or interpretation. This decision shall be considered binding on the court’s divisional panels. However, this opinion may not be technically true. The effect of a full bench decision on the remaining panels of the court is that these divisional panels will be authorized to pronounce the unconstitutionality of norms in similar cases, without having to send the case to be reviewed by the full bench again. Nevertheless, there is no legal provision that literally attributes the binding effect. Additionally, when a court decision has binding effect, it means that if the decision is not applied in a subsequent case, the losing party may file a claim to the grantor court demanding its application. In the situation herein specified, this claim is not legally admitted, since it is not a case established in the statute.

371 The C.P.C. entered into force on March 2016, one year after its enactment.

372 This attitude was expressly stated in the bill drafters’ justification for the proposed statute. See https://wwwсенадо.gov.br/сенадо/нововипу/pf/Антропроекто.pdf.

373 CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CIVIL PROCEDURE CODE] art. 927 (Braz.).

374 The multiple appeals legal issue may be recognized in judgments of the S.T.F. and of the S.T.J., when these courts declare that these appeals shall be taken as representative of general relevance cases. CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CIVIL PROCEDURE CODE] art. 928, I and II (Braz.).

375 CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CIVIL PROCEDURE CODE] art. 927, § 4 (Braz.).

376 See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 102, I, ‘l’ and art. 105, I, ‘l’ (Braz.).

377 See CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CIVIL PROCEDURE CODE] Article 489, § 1, VI (Braz.).
them, it also imposes the burden of providing reasons why they are doing so. In this sense, such authors call them weak binding precedents. The need to install a culture of precedent-following has led Brazilian high judges to draw up different justifications from their American counterparts in unconstitutional decisions. Both countries adopt the rule that ‘the unconstitutional law is no law at all’ and, therefore, that ruling has retrospective effects. But, since stare decisis is a rule of American Law, the fact that an unconstitutional law is not formally removed from the legal books is not considered a major problem, because judges will not apply it, especially after a SCOTUS ruling.

Indeed, American legal books have several unconstitutional laws that have not been technically removed from its texts but are considered void and, in practice, inapplicable. A significant example is the article VI, Section 8, of the North Carolina Constitution, which disqualifies for office “any person who shall deny the being of Almighty God.” The Texas Penal Code rule, which provides that “[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex” and which was invalidated by the SCOTUS in Lawrence v. Texas, has never been formally repealed by the Texas Legislature and, hence, removed from the code. Nevertheless, it is very unlikely that a Texas district attorney, by still trying to enforce such statute, would prosecute someone for engaging in homosexual activity, even if he disagrees with the Supreme Court decision. Courts would probably think that he does not know the current law in force. Therefore, technically, in the U.S., judges “cannot reach into statute books and erase laws.”

In Brazil, a measure adopted by the S.T.F. that certainly contributed to strengthening the force of its decisions in relation to future similar cases was to consider the

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378 As Laura Baccaglini, Gabriella Di Paolo and Fulvio Cortese observe “[M]erely stating that in Italy judicial precedent has no binding force for the other judges does not fully clarify the effect that a decision might have on other judges. A judicial precedent may in fact have varying degrees of effectiveness; the fact that, in a legal system, decisions do not bind subsequent judges to rule in the same way on similar or identical cases does not necessarily mean that there is a general expectation that the precedent will be followed. Indeed, some systems, which deny the existence of an obligation on the part of the judge to follow the precedent, refer to a so called ‘weak’ binding force of the ruling, i.e., they recognise the judge’s power to deviate from prior decisions if there are serious and well-founded reasons for ruling otherwise. As we shall see, the position of the Italian legal system wavers clearly between those who believe that precedent can have a weak binding force and those who see a mere persuasive effect.” Laura Baccaglini, Gabriella Di Paolo and Fulvio Cortese, The value of judicial precedent in the Italian legal system,

379 See Marbury v. Madison 5 U.S. (1 Cranch) 137 (1803).

380 According to the SCOTUS, “[t]he obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, The Nature of the Judicial Process 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. See Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13, 16. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.” Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854 (1992).

381 N.C. CONST. art. VI, § 8.


383 There is a note in Texas Code about the Supreme Court ruling, but the provision is still there. See Tex. Penal Code Ann. § 21.06(a) (2003).

unconstitutional law formally removed from the legal world.\footnote{385}{This rule was adopted in the opinion written by Justice Moreira Alves in the Administrative Proceeding No. 4.477-72, DJ de 16/5/1977, p. 3.123-3.124. Alves used the \textit{teleological reduction} technique, which limited the range of art. 42, X, of the 1967/69 Constitution, which set forth that the Senate had the power to suspend the execution, as a whole or in part, of a law or decree, declared unconstitutional by a S.T.F. final decision. Through this \textit{teleological reduction}, the S.T.F concluded that art. 42, X, only applied to cases of concrete review. For a better overview of the different systems of constitutional review in Brazil, see \textit{supra} note 368.} This effect automatically takes place every time the S.T.F. reaches a decision in an abstract review case.\footnote{386}{Additionally, it is worth noting that \textit{abstract review} was first introduced in Brazil in 1965, through an Amendment to the 1946 Constitution. It was further kept in the text of the 1967 Constitution and in the text of the 1988 Constitution. New forms of actions were later introduced by subsequent Constitutional amendments. The 1988 not only introduced new types of abstract review actions, but also widened the range of parties that have standing to initiate this type of proceeding. See \textit{CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION]} art. 102, I and 103 (Braz.).} Therefore, contrariwise to the U.S. view, members of the Judiciary branch have the power to reach into a statute book and erase the law—in fact, technically, since the law is void, it works as if it has never been enacted—. The S.T.F. understands that it has such power because its decisions, in abstract review cases, have binding effect, according to the C.F..\footnote{387}{See \textit{CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION]} art. 102, I and 103 (Braz.).} Congress does not dispute it and has never reacted to such understanding.

However, for \textit{concrete review} cases, which may be exercised by any judge in any type of subjective lawsuit, in order for an unconstitutional decision to have \textit{extra parties effect} (not limited to the litigating parties), article 52, X, of the C.F. demands that the Senate suspends the execution of such unconstitutional law. Only then, by the terms of such precept, the law will be considered not to have any legal effect and judges will not be able to apply it anymore if they disagree with the S.T.F. decision. The Senate suspension act will only have prospective effect, not retroactive effect.\footnote{388}{This means that persons who have not filed an individual lawsuit and were not awarded a judicial ruling exempting them to follow the law will still be obligated to observe it.}

Despite the clarity of its words, until recently, there was a debate over whether article 52, X, of the C.F. should still be understood as to bring the Senate an action to suspend the unconstitutional law for it not to be considered in force anymore.\footnote{389}{The case result is published shortly after the ruling session is over. It essentially contains a statement of what was ruled by the court, but not the Justices votes. This publication, therefore, is not the case opinion, which is then drafted by the Court and is also published.} In a very recent case, decided on November 29, 2017, whose opinion has not yet been published, the S.T.F. reviewed its former understanding that a declaration of unconstitutionality of a statute in a concrete review case did not automatically have binding effects. According to the case result summary,\footnote{390}{See \textit{S.T.F., Rcl. No. 4.335, Relator: Min. Gilmar Mendes, 20.03.2014, DÍARIO DA JUSTIÇA ELETRÔNICO [D.J.e], 22.10.2014 (Braz.).}} the Court granted binding effects to such ruling, which incidentally declared the unconstitutionality of article 2 of Lei No. 9.055/95, that authorized the use of white asbestos in Brazil. Therefore, the Court held that the Senate decree would no longer have the force of suspending the validity of the law, but only to help publicize the S.T.F. decision.\footnote{391}{See \textit{S.T.F., A.D.I. No. 3.046, Relator: Min. Rosa Weber, 29.11.2017, Opinion Pending (Braz.).}}

Nevertheless, the relevant point to note, for the purposes of this work, is that \textit{stare decisis} is historically far from being a cultural tradition in Brazilian law and though its importance has been gaining momentum, many judges still remain faithful to the view exposed by Karl Larenz, that “it is not the precedent per se that binds, but the norm that it contains when such norm is considered a correct interpretation or concretization.”\footnote{392}{\textit{LARENZ, supra} note 323, at 612.}
The absence of a *stare decisis* rule has consequences for the Brazilian legal society. Lower court judges and prosecutors do not feel compelled to follow non-binding precedents and upper judges feel freer to depart from their courts’ own prior decisions. This freedom is one of the causes of the high number of cases that reach upper courts in Brazil and also of the considerable number of reversals. A recent study from the Fundação Getúlio Vargas [F.G.V.], for example, showed that 44% of the *habeas corpus* filed in the S.T.J., the highest Brazilian court for legal matters, had been filed against opinions from the Court of Appeals of the State of São Paulo [T.J.S.P.]. Among these proceedings, the S.T.J. reversed the lower court ruling in 27% of the cases. According to an article published by Bruno Torrano, a law professor and clerk at the S.T.J., the T.J.S.P. tend to be harder on criminal defendants than the S.T.J..  

Even though Torrano may be angry about the São Paulo judges’ attitude, following upper courts’ precedents—technically speaking—is not required because S.T.J. opinions in *habeas corpus* cases do not bind them. The fact that their decisions may be reversed will not hinder their careers—they hold a life tenured position and need not to seek reelection like judges in many U.S. states—and they will not be fired for it, nor that will be held against any career promotion. They may simply choose to ignore the upper court precedent, because they see themselves free to apply the law in the way they consider correct.

An example of this assertion is the sentence that convicted former President Luiz Inácio Lula da Silva for corruption charges, the crime mentioned in subchapter II.4.1. above. The sentence, written by the Federal Judge Sergio Moro, asserted that there is an ongoing debate about whether the performance of an official act is a necessary requirement for the crime of passive corruption. Moro cited a S.T.J. precedent, holding that the practice of an official act is not necessary. He also said that the S.T.F.’s ruling in *Ação Penal 470*, a famous case called *Mensalão*, decided in 2012, in which former officials from the *Partido dos Trabalhadores – PT* were convicted for corruption, had not settled the issue.  

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394 Thiago Bottino, a law professor at Fundação Getúlio Vargas at Rio de Janeiro, Visiting Scholar at Columbia University, while being interviewed by *Consultor Jurídico*, a legal website in Brazil, stated the following: “In the case of binding statements from the S.T.J. [which do not have binding effect according to the law], the district judge and the Court of Appeals judge have independency to decide in the manner they want it. The problem is doing so when they already know that an upper court has a different understanding of the issue. In this case, the judge is compelling a party to appeal the case. Or, if the party is poor and will not appeal, the judge is treating her in an unequal manner in comparison to the party that will appeal. When one says that whomever has a good lawyer gets a lot of things, it is true, because he will go to the higher court, and, hence, will be granted a ruling which applies the settled law, while others cannot do the same. This is valid for the criminal law, but also to civil and family law.” Marcelo Pinto, *Habeas Corpus, STJ e STF não comunicam bem sua jurisprudência a tribunais*, *CONSULTOR JURÍDICO* (May 18, 2014, 9:38 AM), https://www.conjur.com.br/2014-mai-18/entrevista-thiago-bottino-professor-direito-fgv-rio. Translation mine.


396 *S.T.J., R.H.C. No. 48.400, Relator: Min. Gurgel de Faria, 17.3.2017, DIÁRIO DA JUSTIÇA ELETRÔNICO [D.J.e] 30.3.2015 (Braz.)* (taking the position that the crime of passive corruption exempts the effective practice of an official act. The decision asserts that the official act does not have to be individualized and does not have to undoubtedly be linked to the received advantage, since the public function trade takes place in a diffuse manner, through a plurality of acts that are of hard individuation).  

397 The Brazilian style of opinions is similar to the English style. The S.T.F. issues *seriatim* opinions by each judge, having the reader the hard task of identifying the reasons that justified the majority reasoning. *See* BURNHAM, supra note 132, at 64. *Seriatim* is a Latin word that means “in due order, successively; in order, in succession; individually, one by one; separately; severally.” *Seriatim, Canadian Law Dictionary* (Barron’s, 7th ed., 2006. Also, as said in note 368 *supra*, the Supreme Court Justices (as all Brazilian Court judges) adjudicate
However, the reason why the former President Fernando Collor was acquitted by the S.T.F. for corruption charges, in 1994, was because the Court ruled that he had not performed any official act in exchange for undue advantage.³⁹⁸ The S.T.F. acknowledged Collor’s acceptance of undue advantage but acquitted him of the corruption accusation because he had not performed an official act in exchange for it.

Clearly, Judge Moro did not feel bound to follow the precedent settled in Collor’s criminal case, even though he was judging another former president for the same crime. Moro did not even cite Collor’s case in his reasoning.³⁹⁹ He cited an opinion from the S.T.J. and three opinions from U.S. Courts of Appeals [one of them reversed after McDonnell] while asserting that “in the Brazilian jurisprudence, the issue is still subject to debates, but the most recent rulings take the position that to be convicted for corruption, one needs not to perform an official act, but if an act is performed, it is not necessary to precisely individualize it.”⁴⁰¹ As he observed, the S.T.F. in the Mensalão trials had not followed its previous ruling in Collor’s case requiring an official act.⁴⁰²

Consequently, although passive corruption has been a crime in Brazil since 1940, one of its requirements is still not settled in the case law, nor Congress has acted to clarify the law—a practice that is not common in the country. Prosecutors, for example, do not need to prosecute corruption only if they can prove that an official individual act was performed, such as the one required by the S.T.F. to convict Collor. If they disagree with the S.T.F. ruling, they may simply initiate an action without proving such fact and hope that the judge that will hear the case also disagrees with the S.T.F. precedent. If this suit results in an acquittal, the fact is not considered a down point since they have a professional career and a lifetime job. Judges, under the current stage of the law, do not need to convict only if they recognize such requirement in the evidence. They may adopt the S.T.J. precedent cited by Moro and rule differently from the S.T.F. in Collor’s case. If the case gets appealed, there is

³⁹⁸ United States v. Jefferson, 2017 U.S. Dist. LEXIS 165824 (asserting that “in light of the Supreme Court decision in McDonnell, it cannot be said that the erroneous Birdsall introduction that Jefferson received at trial was harmless with respect to his convictions for bribery and vacating some of the convictions”).

³⁹⁹ Id. The three U.S. Court of Appeals cases cited by Sergio Moro were the following: US v. DiMasi, No. 11–2163 (1st Cir. 2013); US v. Terry, No. 11–4130 (6th Cir. 2013); and US v. Jefferson, No. 09–5130 (4th Cir. 2012).

⁴⁰¹ In an article published in the newsprint Folha de S. Paulo, Justice Luís Roberto Barroso admitted that even some of the S.T.F. members—although a minority—have a tendency not to follow some full bench decisions with which they disagree and consider a wrong constitutional interpretation. Barroso notes that “this is a negative fact that must be contextualized: many judges, educated in the civil law tradition, still are not adapted to the culture of precedent following, which is an innovation brought from the common law tradition. The problem, which is residual, will be solved soon.” Luís Roberto Barroso, ‘Operação Abafa’ tenta barrar avanços do STF, escreve Barroso (Feb. 23, 2018, 6:00 AM), https://www1.folha.uol.com.br/ilustrissima/2018/02/em-artigo-ministro-do-supremo-rebate-criticas-feitas-aotribunal.shtml.
no certainty as to whether the ruling will be reversed since even the S.T.F.’s position was modified or at least weakened in the *Mensalão* cases. The issue will only be definitely settled when the S.T.F. decides an abstract review case on the matter or enacts a *binding statement* with its final decision on the issue.

Another example was a decision rendered by the S.T.F. in an election matter. The Court examined if the T.S.E. had acted properly when disqualified a reelected mayor to run for a new office term in a neighboring city.\(^{403}\) The issue was whether the one reelection limitation rule for Executive Office set forth in the C.F. also applied for elections in other cities or states. The S.T.F. upheld the T.S.E.’s ruling but held that such Court could not have applied this new understanding for cases heard in the same election, because it had already ruled differently for other candidates in appeals that had been decided in that same election year. Article 16 of the C.F. demands that alterations in election law shall not occur in the year of the election. Indeed, the T.S.E. had changed its reading of § 5 of article 14 of the C.F. on the third similar case that it heard in that year.\(^{404}\) Therefore, the S.T.F. had to notify the T.S.E. not to change its prior rulings, at least in cases decided in the same elections, because that did not guarantee equal treatment of the candidates.

All and all, the absence of a consolidated *stare decisis* doctrine makes the evolution of the law more complicated in Brazil. Case law is also seen as *the law of the land* in common law countries [having the same force as the statute law], whereas in Brazil it is generally not seen as having the same force of the enacted law, except when the enacted law says so. This fact carries significant consequences for the guiding function of law and will be examined in chapter 5.

### II.7. Chapter Conclusions

The main purpose of this chapter was to describe the basic answers that are commonly given to three philosophical questions about Brazilian law: (a) what is considered to be law in Brazil? (b) What is the role of rules and principles in Brazilian law? And, (c) is there a predominant criterion that judges employ when adjudicating cases in Brazil? In summary, the main answers that I think are accurate to these questions are the following.

Brazilian law considers that a social fact is necessary to take place in order for law to exist. This social fact is traditionally seen as an act of the legislative branch: the enactment of legislation. The most important social fact that has taken place in Brazil for the legal community was the enactment of the C.F. in 1988. Such document established the basic rules as to what are the necessary steps for Brazilians to identify what is *law* and what is *not law*. It states, in its article 5, II, that “no one shall be obligated to do or refrain from doing something except by virtue of [enacted] law.”\(^{405}\) The basic comprehension of the term *law* in this constitutional provision is *enacted law*. Therefore, coercion is traditionally deemed legitimate only when the citizen performs an act that runs against a written legal provision, which is considered a product of the democratic will of the people. The necessary procedures for making law are regulated in the constitutional text (either federal, state or municipal level) and, as said, are basically understood as taking place through the enactment of legislation.

Brazilian judges share this basic view. In the three cases that were cited in subchapter II.1 and in the others cases referred throughout this chapter, the justifications of the decisions rendered, although many times founded in rules that clearly did not provide unequivocal


\(^{404}\) See *CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 14, § 5 (Braz.).

\(^{405}\) See *CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5, II, (Braz.).
instructions as to how to decide the case, were attributed to specific provisions of Brazilian enacted law.

Indeed, Brazilian legal practice adopts Savigny’s four interpretation methods: literal, historical, contextual and teleological, to identify the content of the law. Only if these techniques do not provide an answer, should the judge rule by applying analogy, customs or general principles of law. Even when facing a gap, in accordance with article 140 of the C.P.C., the Brazilian judge has to decide the case. The country adopts the prohibition of non liquet rule.

The in claris cessat interpretatio maximum, which is similar to the plain meaning rule of interpretation, is not usually followed, since Brazilian lawyers share the view that their legal texts shall not be read in parts, but as a whole. They adopt the legal dogmatic approach, which is very common in the civil law world, and understand their legal system as having properties such as unity, consistency, coherence, and completeness. Such properties have allowed Brazilian judges to update—without formally changing—their statutes, which are, in general, not so clear and detailed in comparison with the U.S. statutes.

Regarding the C.F., the current mainstream view among Brazilian courts and scholars is that, after its enactment in 1988, a great change took place in the way we understand its function. Constitutional norms gained the status of enforceable norms. Their observance became imperative. If not obeyed, constitutional norms can prompt government coercion. They are seen as mandatory norms, even if their text demands complement by statute law. They also have started influencing many areas of the law, such as civil, criminal and administrative law. The phenomenon is called ‘constitutionalizing the law’ and reflects an opposite view of the American constitutional avoidance doctrine or minimalism.

The interpretation of constitutional norms also uses dogmatic techniques, such as Savigny’s four methods, but scholars argue for additional approaches. To assure practical concordance, Brazilian jurists understand that the constitutional provisions—commonly broader and open textured if compared to statutory provisions—must be optimized when in conflict to preserve the Constitution’s unity. Works of Konrad Hesse and Robert Alexy are very popular and are constantly cited in judicial opinions. They basically state that “[t]he

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406 Decreto-Lei No. 4.657, de 4 de setembro de 1942, DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 4.9.1942 (Braz.).
407 CÓDIGO DE PROCESSO CIVIL [C.P.C.][CIVIL PROCEDURE CODE] art. 140 (Braz.).
408 A very influential doctrine in a book written in the middle of the 20th century, authored by José Afonso da Silva, has been superseded by this new view of constitutional norms being self-enforceable. See JOSÉ AFONSO DA SILVA, APLICABILIDADE DAS NORMAS CONSTITUCIONAIS (Malheiros, 8th ed., 2015) (arguing for a classification of constitutional norms that focused on their efficacy. For Silva, there are three types of constitutional norms: (a) norms that have full efficacy; (b) norms that have limited efficacy and demand statutory regulation; (c) norms that have full efficacy but may be limited in part by statutory law).
409 See supra text accompanying notes 30 and 357.
410 See supra text accompanying note 358.
411 See Brugger, supra notes 33 and 172, at 398. Regarding Hesse’s integrative effect, Rudolf Streinz stresses the following: “There is no doubt that the constitution also has an integrative function over and above its function as a set of rules. This applies less to the actual text itself than to the content, which is not necessarily in detail, but is sensed, and on which ‘constitutional patriotism’ focuses. Democracy, if it is not to simply remain a formal principle of responsibility, depends on the existence of certain pre-conditions. The ‘basic understanding of state and law which holds national citizens together and affords the unity of the state’, cannot be secured solely by a constitutional text, but finds its true roots in the constitutional preconditions. The state does not have a good constitution but is in good shape. In its constitution, it documents the political reality developed by its people and institutions, to the extent that it is to be formalized as a legal achievement and continuously updated. In this respect constitutional law enables integrative identity building. We must simply remain aware of its limits. Rudolf Streinz, European Integration through constitutional law in GOVERNING EUROPE UNDER A CONSTITUTION 16 (Springer, 2006).
principle of the constitution’s unity requires the optimization of [values in conflict]: both legal values need to be limited so that each can attain its optimal effect. In each concrete case, therefore, the limitations must satisfy the principle of proportionality; that is, they may not go any further than necessary to produce concordance of both legal values.”

*Stare decisis* is not a general rule or principle in Brazilian law. The recent enactment of some legal provisions shows an effort to disseminate and acculturate it in the country. However, some Brazilian judges still feel free to disregard upper court precedents when they disagree with their interpretation of the law. They generally only do not do it with decisions that the legislation attributes binding effects.

Furthermore, Brazilian judges also resort to legal principles when deciding cases. Principles, at first, were merely supplemental in legal reasoning and judges commonly used them to fill gaps in the system. Their content was mostly found in natural law. However, nowadays, principles are paramount in legal reasoning. They may be written in legal texts, whereas judges will essentially concretize what they mean once they apply them to a case. Or they may also be implicit, being extracted as an inference of the content of legal norms that are posited in the Constitution and in statutes. At last, constitutional principles interact with legal rules in adjudication, optimizing their content, allowing judges to reach a solution which they consider in line with the principle’s content.

II.8. Jurisprudential Notes

Brazilian law has unquestionably changed in the last thirty years. The enactment of the 1988 C.F. was a significant moment in the country’s legal history. Judges today resort to legal sources that are very differently written in comparison to the legal texts that existed before 1988. Some of the norms are essentially moral and, for that reason, demand that officials employ moral reasoning when construing them. Judges adjudicate more complex cases, many related to the enforcement of social and collective diffuse rights, which involve arguments of policy. They consider their role to be different from the role of their predecessors: they must enforce a Constitution that is not only a political document, but a legal and enforceable rule-book.

In this sense, it was more than reasonable for Brazilian jurisprudential scholars and judges to engage in a project to evaluate (a) what indeed has changed in Brazilian law; (b) why it has changed; and (c) if these changes are so deep as to even have modified the philosophical spine of the system.

As I noted in chapter I, legal positivism was, for decades, the most prominent school of jurisprudence in Brazil. But, due to the recent changes, some scholars have simply claimed that positivism is no longer able to explain the Brazilian legal system. They argue that positivism is tied to surpassed ideas, like the *separation of law and morals* and *legalism*. They contend that the contemporary constitutionalism has opened the legal system to moral values and, therefore, to natural law. In this way, they try to systematize a new theory, which they call *post-positivism*, to better capture the phenomena that currently dominate the legal system.

Nonetheless, post-positivists cannot explain if morality is always present in the law, or if it is just contingent. They also do not have an answer to convincingly describe why Brazil’s former constitutional regimes, some of them evil and, therefore, immoral, are...

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412 HESSE, *supra* note 189, at 68.
413 See *supra* note 14.
414 Barroso, *supra* note 37, at 585-586.
415 Id.
considered law. In addition, they cannot elucidate why, in some moments, Brazilian law is still tied to legalist approaches, and sometimes tolerates immoral decisions.

Brazilian post-positivism, chained to the civil law tradition, does not acknowledge judicial lawmaking. Even though judges concretize constitutional concepts through a dialectic process of “creatively determining results in conformity with, but not determinable by, the Constitution,” they still consider this to be mere posited law application and their creative decisions, as a rule, may be applied retroactively to the facts of the case.

Moreover, a German post-positivistic theory, in trying to deny judicial discretion in hard cases, have adopted a different approach regarding what is considered to be the law. They argue for the separation of the text and the norm. Therefore, posited law would not be the law, because the law would only exist once the norm is applied to a concrete situation.

The main contender of this view is the German author Friedrich Muller, who advanced the structuring legal theory and argues that this “theory developed a new post-positivistic concept of legal theory according to which the legal norms […] have not already been written into legislation.” This view, nevertheless, has trouble in explaining criminal legality, for example.

Although the structuring legal theory is not purely adopted in Brazil—except in few S.T.F. opinions, generally written by former Justice Eros Grau—this distinction among text and norm has acquired some support. A strong criticism of positivism in the country is that it does not “distinguish the text from the norm.”

In this sense, post-positivism, although is the prevalent jurisprudential theory in Brazil, is often seen with suspicion and is sometimes associated with judicial activism and usurpation of legislative power. Professor Jorge Galvão, for example, claims that the notion of the rule of law has been severely compromised.

Post-positivism also does not convince old school legalistic judges that the current judicial activity is sensibly different from the pre-1988 period. For these judges, “rationalistic aspiration to a mechanistic jurisprudence stands firmly in place, as the product of a need of certainty.” The “idea of adjudication as a logical-deductive operation consisting in objective application of the law to a particular case at point, by way of

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416 See Brugger, supra note 33, at 398.
417 According to Cruz, Brazil’s classic theory of decision states that the “decisional act is of cognitive nature, with declaratory and temporal retro-operant effects. ALVARO RICARDO DE SOUZA CRUZ, JURISDIÇÃO CONSTITUCIONAL DEMOCRÁTICA 94 (Del Rey, 2004).
418 The exception would be the application of article 27 of Lei No. 9.868/1999 declares that “when holding a statute or a normative act unconstitutional and taking into account legal certainty and exceptional social interests reasons, the Supreme Court, by a two-third count, may restrict the effects of that declaration or decide that it will only have efficacy after the decision may no longer be appealed or in any other moment that the Court determines.” Lei No. 9.868, de 10 de Novembro de 1999, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 11.11.1999 (Braz.).
419 Muller, supra note 29, at 331.
421 CRUZ, supra note 417, at 96.
422 JORGE GALVÃO, O NEOCONSTITUCIONALISMO E O FIM DO ESTADO DE DIREITO 312 (Saraiva, 2014) (Galvão refers to neoconstitutionalism, but says that neoconstitutionalism is sometimes described as post-positivism, Id. at 23).
423 This old legalistic view, according to Susanna Pozzolo, “does not point out simply a formalist doctrine of interpretation and application of positive law, but also an ideology of legality that identifies it with law-application, separation of powers and, recently, with the respect for a written Constitution, guaranteed for a legal judge.” SUSANNA POZZOLO, NEOCONSTITUCIONALISMO E POSITIVISMO JURÍDICO 104 (Landy, 2011).
424 Zagrebelsky, supra 26, at 622.
normative and legalistic syllogism and without any need to look beyond the four corners of the law," 425 is still dominant for them.

Also, post-positivism is criticized by authors that claim that judicial decisions should not employ moral arguments and that law simply cannot be filtered by morality. 426 Ingeborg Maus, from Germany, states that the elevation of the Judiciary branch to a condition of superior instance of morality represents a regression to pre-democratic social models:

“If the justice elevates, in this sense, to the condition of society’s superior moral instance, the social mechanism of control that—in an ideal field—every state apparatus should be bound to are removed. In the dominance of a Judiciary branch that exercises a “higher” morally enriched law in relation to the other branches that occupy themselves only with ordinary law—and in relation to the rest of the society—it is notorious the regression to the pre-democratic model of integration.” 427

In the opening paragraph of this thesis, I stated that I intend to demonstrate why inclusive legal positivism best describes the Brazilian legal system. I will show that the theory not only explains the issues that Brazilian post-positivism fails to do, but also better elucidates the country’s current practices, in a clear and technical manner, which helps to avoid the unfair criticisms that post-positivism suffers today.

Inclusive legal positivism, in this sense, will help to clarify “the distinct nature and legitimacy of judicial decision making in the absence of clear textual guidance” 428 in Brazil. In this sense, I borrow David Kennedy’s remarks: “[o]nly if it seem[s] possible to see judicial reasoning as different from and differently legitimate than legislation [can] an engaged liberal judiciary be defended.” 429

After examining inclusive legal positivism and the other dominant Anglo-American theories that purport to explain what the law is, I will go over the most diffused ideas of post-positivism in Brazil and will explain why I disagree with many of its claims but agree with others.

425 Id.
427 INGEBO RG MAUS, O JUDICIÁRIO COMO SUPEREGO DA SOCIEDADE 19 (Lumen Iuris, 2010).
429 Id.
III. LAW AND MORALITY IN ANGLO-AMERICAN JURISPRUDENCE AND
THE BRAZILIAN LEGAL SYSTEM

III.1. Short Explanation of the Chapter Goals

The relationship between legality and morality is the central focus of the debate about the nature of law, which is the fundamental question of general jurisprudence. In the posthumously published Postscript to the second edition of his classic The Concept of Law (hereinafter referred to as “Postscript to The Concept of Law”), H.L.A. Hart acknowledged that the rule of recognition—his conventional master rule that determines which of the community’s norms are legal ones—“may incorporate conformity with moral principles or substantive values as a criterion of validity.” For this reason, he classified the legal theory he described at the center of The Concept of Law as soft-positivism, which, in his words, “permits the identification of the law to depend on controversial matters of conformity with moral or other value judgments.”

Although Hart acknowledged soft-positivism, which is more commonly referred as inclusive legal positivism, as an accommodation to Ronald Dworkin’s criticism of legal positivism, his endorsement was not sufficient to convince Dworkin or to promote consensus among the last century’s most prominent jurisprudence scholars on the legality-morality relationship. In fact, by the end of the 20th Century, at least four different theories dominated the American academy in respect to the issue of the relationship between legality and morality. Such theories are inclusive legal positivism, exclusive legal positivism, natural law theory, and interpretivism.

In this chapter, I will briefly analyze these four different theoretical perspectives. For explaining them, I will essentially adopt the views exposed by H.L.A. Hart and Wil Waluchow for inclusive legal positivism, Joseph Raz for exclusive legal positivism, John Finnis for the modern natural law theory, and Ronald Dworkin for interpretivism.

AILEEN KAVANAGH & JOHN OBERDIEK, ARGUING ABOUT LAW 93 (Routledge, 1st ed., 2009).
See Coleman, supra note 43, at 139.
Id.
Id. at 251. Hart asserts that: “Dworkin in attributing to me a doctrine of ‘plain-fact positivism’ has mistakenly treated my theory as not only requiring (as it does) that the existence and authority of the rule of recognition should depend on the fact of its acceptance by Courts, but also as requiring (as it does not), that the certain criteria of legal validity which the rule provides should consist exclusively of specific kind of plain fact which he calls ‘pedigree’ matters and which concern the manner and form of law-creation or adoption. This is doubly mistaken. First, it ignores my explicit acknowledgement that the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantial values; so my doctrine is what has been called ‘soft positivism’ and not as in Dworkin’s version of it ‘plain-fact’ positivism.” HART, supra note 43, at 250.
See, generally, DWORKIN, supra note 293; and RONALD M. DWORKIN, LAW’S EMPIRE (Cambridge: Harvard University Press, 1986).
HART, supra note 43, at 251. Hart acknowledged in his Postscript that Dworkin had also criticized other soft positivism proponents. Dworkin’s most fundamental criticism, in Hart’s words, was that “the identification of the law [can] depend on controversial matters of conformity with moral or other value judgments” is inconsistent with the “general positivist ‘picture’ of law as essentially concerned with providing reliable public standards of conduct which can be identified with certainty as matters of plain fact without dependence on controversial moral arguments.” Id. I go over this criticism in subchapter III.5.1.
See KAVANAGH & OBERDIEK, supra note 430, at 93.
While describing each of these theoretical perspectives, I will also offer arguments to make clear why the basic characteristics of the Brazilian legal system shown in the previous chapter demonstrate that inclusive legal positivism is appropriate to answer what the law is and why its basic traits do not permit it to be framed within any of the other three views in the country.

I believe this analysis will be relevant to describe, theoretically, the jurisprudential characteristics of the Brazilian legal system. This examination will also allow beginning pointing out of the practical basic features that I consider to be problematic about the country’s legal system, which I will go over in detail in chapter 5.

III.2. Inclusive Legal Positivism

To explore the basic properties that best characterize the inclusive legal positivistic theory, I will essentially resort to H.L.A. Hart’s theory, exposed in the well-known essay Positivism and The Separation of Law and Morals, as well as in the seminal book The Concept of Law and in the article Problems of the Philosophy of Law. As Dworkin famously declared in his The Model of Rules I, Hart’s positivist approach is not only clear and elegant, but also constructive thought in legal philosophy “must start with a consideration of his views.”

III.2.1. H.L.A. Hart’s Legal Positivism

In his seminal book The Concept of Law, Hart basically described the law as a particular social practice through which a society defines its rules. According to him, the key to the science of jurisprudence lies in the investigation of what it is for a social group and its officials to accept rules. Through such analysis, Hart argued for an institutional view of law. Law, in his opinion, is a system of social rules in two senses:

(a) the social rules generally regulate how human beings shall behave (“the character of the legal directive imposing the duty is injunctive and normative”); and

(b) the social rules only exist due to human social practices (“the criteria for what counts as a legal norm are artificial and conventionalist, and not moral”).

Legal rules differ from moral or game rules because they commonly impose duties or obligations in imperative form and are, in general, considered obligatory to citizens.

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440 Hart, supra note 431.
441 HART, supra note 43.
443 Dworkin, supra note 17, at 17.
445 Hart, supra note 431, at 602.
446 HART, supra note 43, at 240.
449 Id.
450 Hart calls the obligatory property of the rules as an “enduring character which laws have”. HART, supra note 43, at 23.
Rules, therefore, are usually formulated to guide actions.\textsuperscript{451} Citizens and officials behave in a certain manner not because they morally agree with what has been commanded by the lawgiver—they may or may not—or because they have a habit to do so, but due to the existence of a social practice that tells them to do so. If someone does not act in the manner established by the social rule, there should be a critical reflexive attitude that the binding standard is not being observed. This attitude is the internal aspect of rules, an aspect that habits, for example, lack.\textsuperscript{452} Most of the times, a sanction may be imposed for not observing a rule. “Hart’s approach, with emphasis on the internal aspect of rules and of the law, is hermeneutic in the sense that it tries to understand a practice in a manner that takes into account the way the practice is perceived by its participants.”\textsuperscript{453}

“The clear cases are those in which there is general agreement that they fall within the scope of a rule, and it is tempting to ascribe such agreements simply to the fact that there are necessarily such agreements in the use of the shared conventions of language. But this would be an oversimplification because it does not allow for the special conventions of the legal use of words, which may diverge from their common use, or for the way in which the meanings of words may be clearly controlled by reference to the purpose of a statutory enactment which itself may be either explicitly stated or generally agreed.”\textsuperscript{454}

\textsuperscript{451} Id.
\textsuperscript{452} Id. at 57.
\textsuperscript{454} HART, supra note 442, at 106.
For a system of law to exist and to differ itself from a pre-legal regime, a special kind of rules, that impose no duties or obligations, shall also exist and be accepted by officials. These rules are Hart’s secondary rules and are introduced with the purpose of solving problems of uncertainty, staticity and inefficiency. The combination of primary rules—rules that impose obligations and duties—and secondary rules is, in his view, the real “key to the science of jurisprudence.”

According to Hart, there are three types of secondary rules and each of them has the goal of remedying each one of the mischiefs above:

(a) to correct the uncertainty as to define which primary rules of obligation are legal and which are not, the system must introduce a rule of recognition. This rule—which Zipursky says that it is not really a rule but consists of propositions—may take a variety of forms, simple or complex. The rule of recognition has also the purpose of implementing the idea of a legal system, by furnishing a unified set of rules, as opposed to an unconnected set. Without the existence of a rule of recognition, the “judicial role as such is inconceivable.”

Hart contends that “law’s primary role is to guide individuals’ conduct in day-to-day life, to define what we may expect from fellow citizens, governments,

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455 HART, supra note 43, at 94.
456 Id. at 92-94.
457 Id. at 81.
458 According to Benjamin Zipursky, “in The Concept of Law Hart uses the phrase ‘rule of recognition’ in three interrelated ways. First, he sometimes suggests that rules of recognition are linguistic entities that designate what the primary rules of the system are (famously, through designating the criteria for legal validity). Thus, Hart’s first example of a rule of recognition is ‘an authoritative list of text of the [primary] rules to be found in a written document or carved on some public monument. In the Postscript, and in ‘Positivism and The Separation of Law and Morals’, Hart suggests that the United States Constitution may be a part of the rule of recognition in the American legal system, and this is certainly an example of a text. The tendency to see the rule of recognition in this way is further supported by the fact that primary rules of a legal system are very plausibly identified with linguistic entities—with texts—and Hart appears to regard primary and secondary rules as different species of the same type of thing—rules.

Second, Hart often suggests that the rule of recognition is what certain linguistic entities (such as certain provisions within the United States Constitution) express. The rule of recognition, on this view, is the designation of standards or criteria that determine what the primary rules of the system are. But no particular formulation is the rule of recognition. These formulations merely express it. On this view, the rule of recognition is a proposition that sets forth the standards which determine what the primary rules of a legal system are. It is plain that the first, purely linguistic aspect is inadequate for interpreting The Concept of Law: ‘In the day-to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule.’ The use of unstated rules of recognition, by courts and others, in identifying particular rules of the system is a characteristic of the internal point of view. Moreover, Hart frequently speaks of acceptance of a rule, by which he means accepting that certain criteria determine which putative norms are legally valid, and accepting the latter is accepting something of a propositional order.

Third, and most famously, Hart frequently claims that a rule of recognition is a particular kind of social practice, which he calls a ‘social rule’. This claim, and the analysis of social rules to which it is conjoined, lie at the core of his account of law, as recent scholarship suggests.” Benjamin C. Zipursky, The Model of Social Facts, in HART’S POSTSCRIPT – ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 219, 226-227 (Oxford, 2001).

459 As Benjamin Zipursky notes, “The Concept of Law asserts that in a modern legal system (such as the American and the U.K. systems) the extant laws are rules that satisfy certain conditions. What those conditions must be will depend on what a set of legal officials in the legal system—typically the judges—accept as the master rule of the system. This ‘rule of recognition’ is two things alone: (i) a propositional entity (which is concededly difficult to formulate) that sets out various conditions for what counts as law, and (ii) a social practice. See Zipursky, supra note 46, at 1199.

460 HART, supra note 442, at 106.
461 HART, supra note 43, at 94-95.
462 MACCORMICK, supra note 447, at 166.
corporations, among others” and the rule of recognition is the way he imagines the citizen may be able to grasp these rules. As such, they have propositional content and they are normative in nature.

(b) in dealing with the staticity problem of rules—which consists in the fact that in primitive societies rules can only be altered through a slow process of growth, whereby courses of conduct once thought optional become first habitual or usual, and then obligatory—, the system introduces rules of change. Such rules empower "an individual or a body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules;"

(c) to solve the inefficiency problem, which refers to social conflicts that may take place as to whether the primary rules of obligation have or have not been violated, the legal system introduces the rules of adjudication. Such rules identify the individuals who are to adjudicate disputes and the procedure that shall be followed by them. Rules of adjudication, therefore, introduce concepts of judges, courts, judgments and jurisdiction, and may be reinforced by further rules imposing duties on judges on how to adjudicate.

He also states that “if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are. So, the rule which confers jurisdiction will also be a rule of recognition, identifying the primary rules through the judgments of courts and these judgments will be a ‘source’ of law.” At last, he adds that legal systems have also centralized pressure and commit officials with the task of implementing sanctions.

As Neil MacCormick notes, Hart has a view that a particular aspect of a government ruled by laws is that there are institutions and proceedings to elaborate, in a clear and authoritative manner, which standards of conduct are legal and which are not. The legal order converts vaguer standards of conduct into rules, which ideally are more precise. MacCormick also asserts that “Hart clearly does not agree that all law is in the relevant sense ‘posited’ by some deliberate legislative decision […] . What he does hold is that legal rules as social rules have social sources, being entirely rooted in the actual practices (doings, sayings, and thinkings) of persons in society. Legal rules are neither derive nor include, nor derive from objectively preexisting and valid natural standards of human conduct.” Furthermore, in the Postscript to the Concept of Law, Hart stated that the practice theory is not pertinent to enacted legal rules, for these norms “may exist as legal rules from the moment of their enactment before any occasion for their practice has arisen.”

Hart’s theory, then, is focused on the actual behavior, on the words and on the thoughts employed in the depiction of rules among society, whether in legal texts, decisions, or other statements that may be considered authoritative by officials, as well as in the official practices that describe the comprehension of these social facts. Law uses “normative

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463 WALUCHOW, supra note 3, at 49. See also HART, supra note 43, at 30.
464 ZIPURSKY, supra note 458, at 232.
465 HART, supra note 43, at 95.
466 Id. at 97.
467 Id.
468 Id. at 98.
469 MACCORMICK, supra note 447, at 57.
470 Id. at 190.
471 HART, supra note 43, at 256.
472 WACKS, supra note 9, at 95.
vocabulary of *ought to*, *entitled to*, *authorized to*. Legal statements are generally practical [and in] contrast with descriptive statements, their function is to guide and appraise our conduct." As Benjamin Zipursky contends, for primary rules, "[w]hat matters [for Hart]—as in language and meaning generally—is that the rule exists within a certain context in which members of a community regard the expression as properly interpreted and responded to in a certain manner. The injunctive quality of legal directives is what Hart has in mind when he calls them ‘duty-imposing rules.’ Their content is such that they purport to direct individuals to act or not to act in a certain manner."474

### III.2.1.1 Hart’s Battles

Hart’s jurisprudential works targeted many important points: (a) John Austin’s command theory;475 (b) William Blackstone’s mechanistic view of law; (c) the American realist movement, led by Oliver Wendell Holmes and by Karl Llewellyn; and (d) the natural law theories and their view that morality and law are inherently interconnected.

Hart’s attack on Austin’s command theory was made both through the introduction of the *internal aspect of rules* and of the notion that all legal rules are not necessarily posited by a sovereign’s deliberate decision, but exist due to social origins, rooted in social practices of persons in a society, through acts, statements and thoughts.476 By means of these ideas, Hart demonstrated that legal rules could not be considered merely commands because rules differ from acts done under coercion and they did not originate from a sovereign, but from a practice. Also, commands are more precise to describe duty-imposing rules and cannot explain Hart’s secondary power-conferring rules.

Additionally, he pointed out that an important distinction of a legal rule from a command is the fact that the rule, in the administration of justice, may be applied to cover a situation that was not present or believed to be present in the minds of legislators.477 That would be true, according to him, for any legal system. Hart argues that Bentham’s utilitarian description calls this application—which was not thought or believed to be thought by legislators—*judicial legislation*, whereas Hart thinks that this qualification may fail to make justice to this phenomenon, at least in some cases.478 The scholar notes that it is important to distinguish: [(a)] when applying rules to instances different that legislators considered or could have considered represents a deliberate choice or fiat of the interpreters from [(b)] when the inclusion of the new case under the rule is a natural elaboration of the rule, as something implementing a purpose which seems natural to attribute (in some sense) to the rule, rather to an intention of the law drafter.479

Hart’s criticism on mechanistic decisions is detailed in his article *Positivism and the Separation of Law and Morals* and in *The Concept of Law*. Hart takes the position that opinions rendered in a mechanistic fashion “would scarcely deserve the name of decisions.”480 He considers mechanical reasoning an ‘error’, calls mechanistic judges ‘automatic’ or a ‘slot machine’ and says that it would be better to ‘toss a penny in applying a rule of law.’481 The formalist vice is centered in the excessive use of logic by courts, in

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473 MEYERSON, supra note 10, at 23.
474 Zipursky, supra note 46, at 1238.
475 See Hart, supra note 431, at 601.
476 MCCORMICK, supra note 447, at 195.
477 See Hart, supra note 431, at 627.
478 Id.
479 Id.
480 Id. at 611.
481 Id. at 610-611.
taking “a thing to ‘a dryly logical extreme’, or in making an excessive use of analytical
methods.”\textsuperscript{482} Hart considers the lack of examination of social values and consequences when
interpreting some general term the main mechanistic error.\textsuperscript{483}

“[…] [L]ogic does not prescribe interpretation of terms; it
dictates neither the stupid nor intelligent interpretation of any
expression. Logic only tells you hypothetically that if you give
a certain term a certain interpretation then a certain conclusion
follows. Logic is silent on how to classify particulars—and this
is the heart of a judicial decision.”\textsuperscript{484}

Hart recognizes that the adoption of rigid modes of interpretation leads to more
situations in which the meaning of rules will be predetermined in a legal system.\textsuperscript{485}
Nevertheless, he criticizes such method, arguing that “rigid classification and divisions
ignore differences and similarities of social and moral importance.”\textsuperscript{486} The British scholar
says this adoption “prejudges what is to be done in ranges of different cases whose
composition cannot be exhaustively known beforehand.”\textsuperscript{487}

Next, Hart gives his famous “crossing stolen vehicle across State lines” example,
regarding the problem a judge confronts when someone steals an airplane and take it to
another state. He mentions that the case is not controlled by linguistic conventions and
criticizes the mechanistic judge for deciding based on logic, and for not confessing that he is
not dealing with the standard but is in an area of penumbra. In this penumbral zone, the
general terms of the rule are susceptible to different interpretations and the decision is most
likely to be determined by the judge’s discretionary choice. The result is uncontrolled by
linguistic conventions.\textsuperscript{488} As Hart asserts at the end of the essay, “we live among
uncertainties between which we have to choose, and […] the existing law imposes only limits
on our choice and not the choice itself.”\textsuperscript{489}

The lack of identification of a core area of rules is Hart’s main criticism to the realist
movement, whose proponents had a skeptical view of rules. He acknowledges that the realists
“opened men’s eyes to what actually goes on when courts decide cases, and the contrast drew
between the actual facts of judicial decision and the traditional terminology for describing it
as if it were a wholly logical operation.”\textsuperscript{490} He called senseless the notion articulated by some
extreme realists that rules never control courts’ decisions and insisted in the possibility of
hard core settled meaning in some norms.\textsuperscript{491} Also, he criticized the fact that Holmes’
prediction theory\textsuperscript{492} could not explain the existence of courts and judges, and why their
decisions are authoritative.\textsuperscript{493} As Zipursky observes, Hart attacked mischiefs in legal
interpretation and advocated for judges to be more transparent, frank and truthful, exposing

\begin{footnotesize}
\textsuperscript{482} Id.
\textsuperscript{483} Id.
\textsuperscript{484} Id.
\textsuperscript{485} HART, supra note 442, at 104-105.
\textsuperscript{486} Id.
\textsuperscript{487} Id.
\textsuperscript{488} Id.
\textsuperscript{489} Id.
\textsuperscript{490} Id. at 629.
\textsuperscript{491} Id. at 607-608.
\textsuperscript{492} Id. at 614.
\textsuperscript{493} In the Path to the Law, Oliver Wendell Homes argued that “[t]he prophecies of what the courts will do
in fact, and nothing more pretentious, are what [he meant] by the law.” This is known as his prediction theory.
Oliver Wendell Homes, The Path of the Law, 10 Harvard Law Review 457 (1897).
\textsuperscript{494} HART, supra note 43, at 136.
\end{footnotesize}
the law’s flaws instead of imposing their own views by saying that the law covers what it does not.494

Nevertheless, Hart did state that in case of “rules with an open texture and at the points where the texture is open, individuals can only predict how courts will decide and adjust their behavior accordingly.”495 In fact, Hart understood the importance of rules-skepticism as a theory of the function of rules in judicial decisions.496 But he claimed that this approach resulted from a misconception of rules being able to anticipate all possible situations to which they should apply. When the sceptic discovers the flaws of the rules, he then moves to deny that there can be any rules:

“Thus the fact that the rules, which judges claim bind them in deciding a case, have an open texture, or have exceptions not exhaustively specifiable in advance, and the fact that deviation from the rules will not draw down on the judge a physical sanction are often used to establish the sceptic’s case.”497

At last, Hart’s most famous struggle was to sustain, under his concept of law as a system of rules, the separation of law and morals, a thesis that had been priorly articulated by Austin and Bentham. While emphasizing that in the penumbral area the system of law does not have a response to the case, leaving to the judge the responsibility to make a rational non-formalist decision, Hart argued that the fact that a choice has to be made does not mean law and morals are merged. He points out that there can be intelligible decisions in the penumbral area which do not appeal to moral arguments, but to social aims, policies, among other types of reasoning. Moral arguments only show one type of criticism and of argument that may be employed by the judge, under his discretion, when reaching the decision, but are far from exclusively representing in totality what the word “ought” may mean. Economic, political, even evil arguments could be referred to by the judge; his decision would not be considered formalistic, but not necessarily moral:

“The point here is that intelligent decisions which we oppose to mechanical or formal decisions are not necessarily identical with decisions defensible on moral grounds. We may say a decision: ‘Yes, that is right; that is as it ought to be,’ and we may mean only that some accepted purpose or policy has been thereby advanced; we may not mean to endorse the moral propriety of the policy or the decision. So the contrast between the mechanical decision and the intelligent one can be reproduced inside a system dedicated to the pursuit of evil aims.”498

494 Zipursky, supra note 46, at 1171.
495 HART, supra note 43, at 138.
496 Id.
497 Id.
498 See Hart, supra note 431, at 613. In The Concept of Law, Hart adds that “the open texture of law leaves a vast field for a creative activity which some call legislative. Neither in interpreting statutes nor precedents are judges confined to the alternatives of blind, arbitrary choice, or ‘mechanical’ deduction from rules with predetermined meaning. Very often their choice is guided by an assumption that the purpose of the rules which they are interpreting is a reasonable one, so that the rules are not intended to work injustice or offend settled moral principles. Judicial decision, especially on matters of high constitution import, often involves a choice between moral values, and not merely the application of some single outstanding moral principle; for it is folly
Nevertheless, Hart concludes that the pursuit of evil aims would not be possible in systems like the British and the American, which “widely recognize principles of justice and moral claims of individuals.” Such phrase, taken from the essay entitled *Positivism and the Separation of Law and Morals*, written in 1958, discloses a position that would be later better detailed by Hart: his acknowledgement of *soft-positivism* or *inclusive legal positivism*.

In his 1965 essay *Lon L. Fuller: The Morality of Law*, in response to Fuller’s assertion that his rule of recognition could not be subject to any explicit or implicit provision for revocation of abuses, Hart argued that:

“There is, for me, no logical restriction on the content of the rule of recognition: so far as ‘logic’ goes it could provide explicitly or implicitly that the criteria determining the validity of subordinate laws should cease to be regarded as such if the laws identified in accordance with them proved to be morally objectionable. So a constitution could include in its restrictions on the legislative power even of its supreme legislature not only conformity with due process but a completely general provision that its legal power should lapse if its enactments ever conflicted with principles of morality and justice.”

Hart, in that occasion, however, slipped a critical opinion on the adoption of substantive vague standards of morals and justice in the rule of recognition:

“The objection to this extraordinary arrangement would not be ‘logic’ but the gross indetermination of such criteria of legal validity. Constitutions do not invite trouble by taking this form.”

III.2.1.2. Hart’s Inclusive Legal Positivism Acknowledgement

In the *Postscript to The Concept of Law*, Hart clearly took the position that “in some systems of law, as in the United States, the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional restraints.” Therefore, Hart called this doctrine *soft-positivism*, which is also known as *inclusive legal positivism*. The first proponents of the ideas associated to this doctrine were E. Phillip Soper, in *Legal Theory and The
Obligation of the Judge: The Hard/Dworkin Dispute\textsuperscript{504} and Jules Coleman, in the essay \textit{Negative and Positive Positivism}, published in 1982.\textsuperscript{505}

A problem of a system that includes substantive restraints in its rule of recognition, nevertheless, is that there may be situations in which citizens are not able to ascertain, in advance and with certainty, what the legal rules are. Nevertheless, Hart thinks this is an overrated problem, at least for most legal systems, and contends that the exclusion of all uncertainty is impossible:

“It is of course true that an important function of the rule of recognition is to promote certainty with which the law may be ascertained. This would fail to do if the tests which it introduced for law not only raise controversial issues in some cases but raise them in all or most cases. But the exclusion of all uncertainty at whatever costs in other values is not a goal which I have ever envisaged for the rule of recognition. This is made plain or so I had hoped, both by my explicit statement [...] that the rule of recognition itself as well as particular rules of law identified by reference to it may have a debatable 'penumbra' of uncertainty. There is also my general argument that, even if laws could be framed that could settle in advance all possible questions that could arise about their meaning, to adopt such laws would often war with other aims which law should cherish.”\textsuperscript{506}

Therefore, regarding the relationship of law and morals, Hart articulated that it is possible to have a legal system in which laws do not have to observe any substantive standards to be valid. This legal system, even though could have valid immoral laws, would still deserve to be called a legal system. However, the mere fact that the rule of recognition of a system accepts morality as a criterion for some (or all) of its laws does not shake Hart’s conviction that it is theoretically possible to distinguish legal standards from moral standards and, therefore, does not strike the separation thesis.

It is important to stress that Hart’s support for the separation thesis does not turn him into an apologist of immoral, dishonest or unethical acts. On the contrary, he centered great


\textsuperscript{505} In this essay, Coleman concluded that “a particular rule of recognition may specify truth as a moral principle as a truth condition for some or all propositions of law without violating the separability thesis, since it does not follow from the fact that, in one community in order to be law a norm must be a principle of morality, being a true principle of morality is a necessary condition of legality in all possible legal systems.” Coleman, \textit{supra} note 43, at 141-142.

\textsuperscript{506} \textit{Id.} Throughout the book, Hart articulates that “[i]t is a feature of the human predicament (and so of the legislative one) that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim. If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice. Everything could be known, and for everything, since it could be known, something could be done and specified in advance by rule. This would be a fit for ‘mechanical’ jurisprudence.” \textit{Id.} at 128.
part of his scholarship arguing for a critical morality in many legal areas, such as criminal law. His main goal with the separation thesis was to avoid the premature conclusion prevalent in classic natural law theory that “an unjust law is no law at all.” For Hart, such conclusion discourages society from developing a critical position as to whether its laws are unfair and, for this reason, deserve to be changed.  

A final remark is that Hart drew a line between two types of morality: positive morality and critical morality. The term “positive morality” was used by Hart in the book Law, Liberty and Morality. This is a concept that was first used by John Austin. For Hart, positive morality is not the individual morality; it is the social morality, the morality of a social group that is socially integrated. It is the morality that in fact is accepted and shared by a certain group, which is capable to apprehend it as a matter of fact.  Positive morality is opposed to critical morality, which refers to the criterion adopted by lawyers to criticize the posited norms, seeking their modification.

III.2.1.3. The Model of Social Facts

Hart’s legal doctrine treats law as a product of social facts. As Zipursky notes, for Hart, “what makes a statement of law true is that the legal norm that it asserts satisfies the conditions set out by some rule of recognition.” Zipursky adds that Hart takes the Austinian idea that a command is law and turns this idea to attribute the quality of law to the command (and to the secondary rules) that are positioned. “How it is positioned is a matter of social and historical fact about the position and conduct of the issuer and audience of the command.”

The strong criticism against Hart’s social fact view is that “knowing the law in a useful sense will always mean being able to apply it, and so long as there are open questions

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507 This phrase is translated from the latin saying *lex injusta non est lex* and is attributed to St. Augustine. See John Finnis, Natural Law & Natural Rights 351 (Oxford, 2nd ed. 2011). See also R. E. Asher & J. M. Y. Simpson, The Encyclopedia of Language and Linguistics - Volume 4 2058 (Pergamon Press, 1st, 1994).

508 Hart, supra note 43, at 301. According to Aileen Kavanagh and John Oberdiek, Hart “was loathe to conflate law and morality if anyone was but maintain [...] that the ‘concept of a right belongs to that branch of morality which is specifically concerned to determine when one person’s freedom may be limited by another’s and so to determine what actions may appropriately be made the subject of coercive legal rules.’” The authors note that this “claim is certainly consonant with Hart’s rejection of legal moralism […] but Hart here is not so much denying the state’s authority to enforce conceptions of moral virtue as he is maintaining that whatever the appropriate boundary of state coercion, surely it encompasses the legal codification of moral rights.” Kavanagh & Oberdiek, supra note 430, at 308.

509 See Neil MacCormick, supra note 447, at 63.

510 “Critical to Hart’s enterprise, therefore, is the possibility of sustaining what in earlier chapters we have called the ‘hermeneutic’ approach to legal scholarship. (It might be more accurate to call this ‘Hart’s version of the hermeneutic approach’, since there are others, notably of Ronald Dworkin). Hart acknowledges that the content of law is a matter of concern, of strongly value-laden concern, to those whose law it is. It is a standard for their behavior and for critical judgement of it. If this cuts against the grain of their moral convictions, the situation is an unhappy one for them in reasonable harmony. The position of Hart, or the Hartinian jurist, is to take full account of the ‘internal point of view’ of the insiders. Such a jurist may, however, abstain from engagement with it in terms of the jurist’s own personal opinions on the substantive views of morality and expediency put in issue by the laws. The laws can be described, in outline or in detail, as laws that make a certain sense to (or raise objections among) those who administer them and those who live by them. The jurist need not—should not—endorse or condemn, but merely observe. One’s job as jurist is one thing, one’s job as exponent of a critical morality is another (Hart, it will be recalled, himself undertook both jobs.).” MacCormick, see note 447, at 203-204.

511 Zipursky, supra note 458, at 253.

512 Id. at 226.
about how the law is to be interpreted at various junctures, there will be huge gaps in what is the truth about law.”\(^{513}\) Therefore, simply stating that all laws can be captured by a social fact alone may reveal to be an impossible task, because to understand how the law is comprehended by the officials that shall apply it, one may have to understand the rules of interpretation these officials put to use. This idea is clearly argued by Zipursky:

“The apparatus to articulate this problem was in front of Hart in *The Concept of Law*, but he made little use of it, at least explicitly. So long as there are secondary legal rules that have the status of social rules and are conventionally accepted by legal officials, it is plausible that norms of interpretation are social rules too.”\(^{514}\)

Zipursky adds that it is a possibility that Hart would have understood that norms of interpretation are implicit in the rule of recognition, or are a form of rule of adjudication, or even a special form of secondary rule. But he concludes that such comprehension does not matter, because even if understood as such type of rules, uncertainty would not be eliminated and Hart was aware of that:\(^{515}\)

“Hart of course believed there was uncertainty and would have no reason to wish a theoretical device that would suppress that truth. It would, rather, help us to articulate the possibility of law existing with respect to a matter that was prima facie ambiguous (on language alone), but that competent legal officials would all regard as having the same meaning. To the extent that there are accepted rules of interpretation, those rules also determine what the underlying legal rules mean in the legal system. Hence, there could also be truth about the correct interpretation of a legal rule.”\(^{516}\)

Zipursky, therefore, argues for an extension of Hart’s social facts thesis, one that would accommodate much of the problem of the “open texture of the law.” Under this expanded version, which he labels the *model of social facts* or the *penumbra-extending version*, “we would still have answers to legal questions that were true by virtue of social facts determining secondary legal rules as extant, and by virtue of the application of those secondary rules.”\(^{517}\)

Hart did mention a few words about law adjudication—what in one occasion he called “justice in the administration of the law”\(^{518}\) —and criticized the utilitarians for calling every decision in the penumbral area *judicial legislation*, a qualification that fails to distinguish when rule application is a deliberate choice of judges for situations which are beyond any possibility of the legislator’s consideration to when the application is a natural elaboration of the rule—which merely implements the a purpose natural to the law in some sense.\(^{519}\) Nonetheless, he conceded, in the Postscript to *The Concept of Law*, that he “said

\(^{513}\) Zipursky, *supra* note 46, at 1200.

\(^{514}\) *Id.*

\(^{515}\) *Id.*

\(^{516}\) *Id.* at 1200-1201.

\(^{517}\) *Id.* at 1201.

\(^{518}\) Hart, *supra* note 431, at 613.

\(^{519}\) *Id.* at 627.
far too little […] about adjudication and legal reasoning and, in particular, about arguments that his critics call principles."\(^\text{520}\)

To correct his omission, Hart criticized Dworkin for making a sharp contrast between rules and principles, as described in subchapter II.5.1. above. He called the latter *non-conclusive* norms and made the following observations:

“I see no reason to accept either this sharp contrast between legal principles and legal rules, or the view that if a valid rule is applicable to a given case it must, unlike a principle, always determine the outcome of the case. There is no reason why a legal system should not recognize that a valid rule determines a result in cases to which it is applicable, except where another rule, judged to be more important, is also applicable to the same case. So a rule which is defeated in competition with a more important rule in a given case may, like a principle, survive to determine the outcome in other cases where it is judged to be more important than another competing rule.”\(^\text{521}\)

Therefore, in conformity with Hart’s words on adjudication, one may notice that he does make a clear distinction between what the *law* is and its *institutional forces*. As Waluchow precisely points out, Hart evidently takes the position that “a judge must sometimes decline to apply valid law”:\(^\text{522}\)

“It is a common mistake to think that Hart’s theory of law does imply that valid laws must be applied in all cases in which their core of settled meaning would seem to make them clearly applicable. But this is far from true. Nowhere does Hart suggest this theory of adjudication, nor is there anything in his theory of law which commits him to that position. This is clear if one examines Hart’s writings carefully with an eye towards the distinction between law and its institutional forces. Whether a valid rule must be followed in a core case will crucially depend, in part, on the institutional rules of adjudication accepted within the legal system. These, together with rules of recognition, help define the varying institutional forces valid laws have for judges.”\(^\text{523}\)

Indeed, Waluchow is right about pointing out that Hart’s theory does not determine an unsophisticated binding application of laws by judges whenever they are valid. Hart spent a lot of energy in trying to demonstrate the impossibility of law to predict all situations. Moreover, his struggle against mechanical application of laws reveals his opposition to unintelligible decisions. Attributing to Hart a literalist conception does not seem to be fair with one of his most important scholarship goals. Hart’s theory, as MacCormick observes, is considered to be *hermeneutical* due to his purpose of comprehending the law as how their participants understand and apply it (or not).\(^\text{524}\)

\(^{520}\) HART, *supra* note 43, at 259.

\(^{521}\) Id. at 261-262.

\(^{522}\) WALUCHOW, *supra* note 3, at 65.

\(^{523}\) Id. at 65.

\(^{524}\) See Bix, *supra* note 453.
“When Hart ascribes to sociologists the job of external description of legal orders, he is presumably referring to Weber’s view that the sociologist is not directly concerned with a normative interpretation of law, but with the probability that people in society will respond in certain ways to their own normative interpretation of law.”

In fact, in the Postscript to The Concept of Law, Hart criticized Dworkin’s all-or-nothing rule’s conception and admitted that even areas that demand near-conclusive rules prohibiting or requiring the same specific actions admit exceptions in the application of the rule in “rare cases.”

An example of application of this assertion is the British law’s golden rule, which is basically “designed to ensure that in interpreting words literally, no absurdity or inconsistency results.” When such rule is applied, of course the literal meaning of the text is not observed and one may argue that the rule has not been followed. However, such criterion for deciding cases is largely adopted by British judges and there is no doubt that the golden rule is a rule in the United Kingdom. The golden rule, which leads to the departure of the literal application of a rule, is Hart’s “rare case” in which the judge may not apply a rule.

A similar approach exists in the civil law world. According to Nino, civil law judges may identify axiological gaps in the legal system. This situation takes place when judges consider that the legislator would not have established the solution that he adopted in the statute if he had noticed a particularity that he did not pay attention to. Therefore, judges conclude that the stipulated solution shall not be applied to the case, because they consider it illogical or unfair and that there is a gap in the system that may be integrated in adjudication.

For John Finnis, the application of the golden rule clearly takes part in a process of identifying “a moral standard as one which anyone adjudicating a given case has the duty to apply even though it has not (yet) been posited by the social facts of custom, enactment, or prior adjudication.”

An example from American Law comes from the issue cited in the subchapter II.4.2.2. concerning the interpretation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. This clause prohibits states from denying any person within its territory the equal protection of the laws. However, U.S. Courts have some

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525 MACCORMICK, supra note 447, at 43.
526 HART, supra note 43, at 263.
527 PHIL HARRIS, AN INTRODUCTION TO LAW 212 (Cambridge, 7th, 2007).
528 See Becke, Assignee of Wm. Ashton, an Insolvent Debtor v. Smith (1836) 150 Eng. Rep 724 (KB). See also Grey v. Pearson, 6 ER 60 (1857) (asserting that “[i]n construing statutes, the grammatical and ordinary sense of the words is to be adhere to … [but if there is] some absurdity or some repugnancy or inconsistency with the rest [of the statute] … the grammatical and ordinary sense of words may be modified so as to avoid that absurdity and inconsistency, but no further.”) Cited by NEIL BOYD, CANADIAN LAW: AN INTRODUCTION 77 (Nelson Education, 2006).
529 NINO, supra note 109, at 340. KELENS, supra note 174, at 275.
530 Finnis adds that “[t]his specific moral standard will usually be a specification of some very general principle such as fairness, of rejecting favourable or unfavorable treatment which is arbitrary when measured by the principle (the Golden Rule) that like cases are to be treated alike, unlike cases differently, and one should do for others what one would have them do for oneself or for those one already favours…” John Finnis, Natural Law: The Classical Tradition in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 10 (Oxford, 2002).
precedents in which they stated that statutes that treat people unequally can be held constitutional and, for this reason, this constitutional clause will not be offended, if states are able to prove compelling, important or legitimate interests for treating people unequally.\textsuperscript{531}

Nevertheless, it seems true that, for Hart, in the vast majority of cases, it is likely that judges will follow the law, even if they morally disagree with it. The use of the word “rare” denotes his position that law departure in adjudication shall be exceptional. Hart, nonetheless, rejects ideological positivism.\textsuperscript{532}

The important point to bear in mind is that it is wrong to say that Hart’s positivistic view asserts that judges are always bound to apply the law and that Hart was aware that some uncertainty would always exist in the system, and that, in these cases, judges are likely to adopt a form of accommodation of the problem of “relative indeterminacy” of the law. Zipursky “penumbra covering rules” may vary in a legal system and may take different forms, as we will see in the following subchapters. The system may adopt several criteria that judges should follow to make the decisions, such as golden rule, axiological gaps, balancing, attributing certain dogmatic properties to the system or even act as a legislator—as set forth in the Swiss Civil Code.\textsuperscript{533}

\section*{III.2.1.4. Coherentism}

One last remark on Hart’s theory is concerned with what he called \textit{truth in law adjudication}. As Zipursky described in the essay \textit{Practical Positivism versus Practical Perfectionism: The Hart-Fuller Debate at Fifty}, when advocating the separation thesis, Hart’s goal was not primarily to point out a conceptual distinction among law and morality, but to draw a line between what the law is from what the law ought to be.\textsuperscript{534}

Even though Hart did not think that judges should always decide cases following the text of rules, he did believe that judges should be clear about this fact, when they decided not to follow it.\textsuperscript{535} Therefore, for an opinion to be rightly written, the judge should inform the applicable law and should describe the reasons why it should or should not be applied in the particular case. If the case was in a penumbral zone, the judge should expose this fact. When talking about the Grudge Informer case in \textit{Positivism and The Separation of Law and Morals}, Hart asserted that merely sustaining that Nazi Law was not law at all—as Gustav Radbruch and Lon Fuller contended—did not correctly address the question as to whether a woman that committed an outrageously immoral act, not forbidden under the Nazi regime, should be punished. Hart observed that one should not conceal that, in some occasions, life forces us to choose between the lesser of two evils and the person that has the authority to make the decision must be conscious that “they are what they are.”\textsuperscript{536} In the Grudge Informer case,

\begin{itemize}
\item \textsuperscript{531} See note 202.
\item \textsuperscript{532} For ideological positivism, see subchapter II.4.2.2.
\item \textsuperscript{533} “Art. 1. 1) The law applies according to its wording or interpretation to all legal questions for which it contains a provision. 2) In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule it would make as legislator.” \textsc{Schweizerisches Zivilgesetzbuch [ZGB], Code Civil [CC], Codice Civile [CC][Civil Code]} Dec. 10, 1907, SR 210, RS 210, art. 1 (Switz.).
\item \textsuperscript{534} See Zipursky, supra note 46.
\item \textsuperscript{535} According to Hart, “what is mostly needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system have, its demands must in the end be submitted to moral scrutiny.” \textsc{Hart, supra note 43}, at 210.
\item \textsuperscript{536} Hart, supra note 431 at 620. (Positivism and Separation) Hart adds that “[t]he vice of this use of the principle that, at certain limiting points, what is utterly immoral cannot be law or lawful is that it will serve to cloak the true nature of the problems with which we are faced and will encourage the romantic optimism that

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the two evils were (a) punishing someone based on an *ex post facto* law or (b) letting a person who committed an atrocious act go free.\textsuperscript{537}

Hart believed that there ought to be clarity, candor, an excellence in accurate legal interpretation. Zipursky individuates these values advocated by Hart as *veracity*, a term not used by the British author, but which accurately captures Hart’s thought. This quality is practical, not conceptual, because veracity allows one to accept the truth in law in practical cases. This is good for instrumental reasons, because “[w]e cannot know whether to obey, disobey, revise, reject, celebrate, or overturn the law unless we know what it actually says.”\textsuperscript{538}

Based on these excerpts, one might conclude that Hart believed in a conception of *truth* in law adjudication. The qualification of something as true in law, however, according to Benjamin Zipursky, cannot come from the fact that (a) there is a correspondence of the legal proposition to the world—a theory called the *correspondence theory of truth*; (b) statements of law are empirically verifiable—the *reductionist verificationism in the theory of meaning*; or (c) statements of law can be justified by some other self-justified beliefs—the *foundationalism theory*.\textsuperscript{539} All these qualities argued by these theories, if demanded, would probably not authorize to affirm that there is truth in law adjudication.

Instead, Zipursky argues for a *coherentist* approach, which adopts a thinner account of legal truth, one that would be possible by attributing the quality of truthfulness or falseness to “a domain of assertions that purport to be about a range of practices, goods, actions, and entities connected with our everyday world, and spoken about and argued coherently,”\textsuperscript{540} and not by being in accordance with empirical evidence, justification for believing in it or correspondence of the proposition to the world. Moral arguments, in this sense, are mostly *construed*, not *found*.\textsuperscript{541}

Therefore, with regards to legal positivism, Zipursky strive that, even though law in the penumbral area could not be captured by a social fact, it is possible to talk about truth in relation to decisions made to solve these penumbral cases, if we admit that these decisions follow accepted practices of interpretation that correspond to secondary rules:

> “Another way to describe this practice is […] [through] a practice of truth-seeking. The practice seems to be accompanied by a presumption that there is some answer to which adjudicators ought to converge, a presumption that justificatory forms of argument that can be analyzed as truth-preserving will lead us to the argument, an idea that the right answer is independent of the will of the answer-seeker, and conviction that the answer will be a sound basis for action. The suggestion is that a critical question in jurisprudence is the legitimacy and appropriateness of what might be called truth-seeking […] practices and attitudes in adjudication.”\textsuperscript{542}

\textsuperscript{537} See HART, supra note 43, at 210.
\textsuperscript{538} See Zipursky, supra note 46, at 1180.
\textsuperscript{540} Zipursky, supra note 46, at 1206.
\textsuperscript{541} See STEPHEN GUEST, RONALD DWORKIN 15 (Stanford, 3rd ed, 2013).
\textsuperscript{542} MACCORMICK, supra note 447, at 43.
Zipursky adds that this truth-seeking practice, in the positivist case, should not be focused as a “locus of legitimacy,” but as a form of assessment of the laws and the methods of argumentation:

“This approach does not focus on the truth-seeking practice as a locus of legitimacy. Instead, it says that we should pour our energy into the assessment of laws and the methods of argumentation. We must also question the proper scope and occasions of the exercise of adjudicative power, on the other, given that the adjudicative practices work as they do, and given that the law and its methods are what they are. Both these approaches are consistent with saying that legal statements are about the law; there is nothing problematic with saying that legal statements are true; that no extra-legal discourse is needed to describe the subject matter of law; and that coherence among our legal statements is the measure of whether to accept legal statements.”

Hart’s positivistic conception of truth in law adjudication, of course, differs from Dworkin’s, as we will see in the following subchapters. Zipursky observes that “Dworkin is ultimately a legal coherentist with a twist. The twist is to give a sufficiently rich and attractive account of the detailed nature of the truth-seeking practices in adjudication that the institutions of the law, and communities governed through those institutions, turn out to possess a certain sort of social virtue; in Dworkin’s case, it is the virtue of integrity.”

As a conclusion, it is important to point out that, under the coherentist approach, it is possible to speak about the veracity of statements of law if one considers that the truth of these statements is not claimed because it is compatible with empirical evidence, justification for believing in it or correspondence of the sentence to the world, but because it follows forms of argumentation conventionally adopted in the legal community and are argued coherently in the everyday world.

This approach is largely adopted by Brazilian judges, whenever they talk about truth in law, because truth will be considered to be found if forms of argumentation conventionally adopted through rules of adjudication are argued, like balancing or proportionality, among others.

III.2.2. Brazil: A Hartian Legal System

This subchapter intends to show that Hart’s theory of law, which purports to demonstrate how law is generally understood, in his soft-positivistic view, captures how Brazilians understand their legal system. At first, the subchapter outlines some propositions that give an account of part of the country’s current rule of recognition and show how substantial constraints compose it. Following, it will elucidate how Hart’s concept of norms and his approach regarding the separation of law and morals takes part in the country’s legal practice. At last, it will show why Zipursky’s model of social facts and coherentism theories are appropriate for depicting Brazilian law because they also explain that a legal theory can adopt a criterion orienting judges on how to decide cases.

\[543\] Zipursky, supra note 539, at 1718.

\[544\] Id.
III.2.2.1. Brazil’s Rule of Recognition

In this and in the next subchapter, I will formulate propositions to show what is the current rule of recognition in Brazil in respect to law identification and adjudication. I do not intend to exhaust Brazil’s rule of recognition propositions. This task would deserve an entire article focused on it. My goal is to demonstrate how substantive criteria are incorporated within the rule.545

Brazilians, as Hart, do see their legal system as very institutionalized, being the result of a specific set of social facts, which are created by human institutions to regulate how they shall behave.

Pursuant to the description provided in subchapter II.3, the enactment of a written law is the major source of rights and duties in Brazil, therefore, is the social fact that generally needs to take place for a norm of conduct to become legal in the country. The quotes from José Afonso da Silva, Manuel Gonçalves Ferreira Filho, and the S.T.F. Justice Alexandre de Moraes, in subchapter II.3.1, expose a comprehension that legality is fulfilled with the enactment of written legal norm by the Legislative Branches. Institutional support through law enactment, therefore, is generally required for norms to enter into the legal word. The cited rulings both from the S.T.F. and from the State of São Paulo Court of Appeals confirm this view. These scholars and officials, when technically justifying this claim, usually refer to the text of article 5, II, of the C.F., said to reflect the content of the legality principle. This constitutional provision sets forth that “no one shall be obligated to do or refrain from doing something except by virtue of [enacted] law.”546

A depiction of the Brazilian rule of recognition, for this reason, shall contain a proposition like the following:

- The judicial duty is to apply as valid law every statute passed and not further repealed by the majority of the Legislative Branch, either in the Federal, State, Federal District or Municipality level, if the statutes observe the formal and substantial limits set out in the Federal Constitution, and, if applicable, in State Constitutions and in the Federal District and Municipalities organizational laws.547

The role of the constitutional text, as depicted in subchapter II.3.1, cannot be left behind in a description of the Brazilian rule of recognition. After the enactment of the 1988 C.F., officials no longer see the C.F. merely as an essential political and organizational document, but as a text with normative force that allows judges to recognize causes of actions without the need of statutes concretizing its provisions. The prevalent official practice considers constitutional norms to be self-enforceable, being able, in most of cases, to prompt government coercion even if no statute is enacted to regulate the obligations established in the text.

Therefore, if one were to imagine a rule of recognition proposition applied by Brazilian officials with respect to the C.F., one could say that this rule would run as follows:


546 See note 2.

547 I took as an example of rule of recognition statements, the propositions presented by Neil MacCormick. See MACCORMICK, supra note 447, at 138.
- The judicial duty is to apply as valid law the provisions inserted in the Constitutional text ratified in 1988, recognizing causes of actions for protecting the rights established in the text, save for the provisions that have been validly repealed by procedures set forth in article 60 of the Constitution, but including every provision validly added by way of constitutional amendment under article 60.\textsuperscript{548}

Subchapter II.4.1. demonstrated that Brazilian statutes are generally not as detailed as their U.S. counterparts. Also, the C.F., although much longer and analytic than the U.S. Constitution, does not generally go into specificities in the wide range of issues that it deals with. On the contrary, the 1988 Framers expressly introduced a large number of rules and principles in the C.F., some of them reflecting social goals, others fundamental rights. These value-laden text includes, for example, as foundations of the Republic, human dignity and the social value of labor,\textsuperscript{549} and as fundamental goals of the nation the eradication of poverty and marginalization, the reduction of social and regional inequality and the promotion of the good of all.\textsuperscript{550} Other examples of open-textured words established in the C.F. that were mentioned in cases cited throughout this work were animal cruelty, administrative morality, democracy and administrative probity. A quotation from Professor Patrícia Perrone, cited in subchapter II.4.1, helps to paint the current picture.\textsuperscript{551}

These principles, social goals, fundamental rights and foundations written in the C.F., according to Hart’s theory, are all part of Brazilian law, because they are so identified as valid legal rules in accordance to the criteria provided by the rule of recognition.\textsuperscript{552} The fact that they establish the obligation of statutes and official action to conform with the moral criteria they impose is not a problem for asserting their legal status, at least for an inclusive legal positivist adept. As Hart observed, there is “no logical restriction on the content of the rule of recognition: so far as ‘logic’ goes it could provide explicitly or implicitly that the criteria determining the validity of subordinate laws should cease to be regarded as such if the laws identified in accordance with them proved to be morally objectionable.”\textsuperscript{553} Indeed, one of Hart’s example of moral standards in the rule of recognition is the Nineteenth Amendment to the U.S. Constitution, which establishes substantive constraints on the content of legislation regarding abridgments of the right to vote.\textsuperscript{554} Waluchow, talking about Canada’s rule of recognition, takes a similar position in respect to section 1 of the Canadian Charter. This provision declares that the Charter “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”\textsuperscript{555}

“So what is required by section 1 of the Canadian Charter is not the kind of reasoning which strives to be neutral with respect to, or totally detached from, concerns of political

\textsuperscript{548} Id.
\textsuperscript{549} CONSTITUIÇÃO FEDERAL [C.F.][CONSTITUTION] art. 1, III (Braz.).
\textsuperscript{550} CONSTITUIÇÃO FEDERAL [C.F.][CONSTITUTION] art. 3, III-IV (Braz.).
\textsuperscript{551} See note 160.
\textsuperscript{552} HART, supra note 43, at 256.
\textsuperscript{553} HART, supra note 442, at 361.
\textsuperscript{554} See HART, supra note 43, at 250. The 19th Amendment states that “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XIX.
morality. The issues are not purely factual in nature, nor are they purely technical legal matters. What is required by section 1 is some measure of normative, moral judgment which tackles the tricky issues involved whenever one is called upon to strike a reasonable balance between competing moral and political interests. Section 1, then, requires a significant measure of moral reasoning. In determining the constitutional status of laws in Canada, courts must often consider their ‘moral merits’. For good or ill, in Canada the existence of law is not one thing, its merit or demerit another thing entirely. The two have been joined by Canada’s rule of recognition and the charter validates it.”

Brazilian jurists, as stated in subchapters II.5.4 and II.5.5, very commonly decide cases based on the interpretation/concretization of moral standards embedded in these principles. They accept these standards; consider that they may provide direct causes of action and use them as guide for their decisions. An external observer, in reading judicial opinions, would easily conclude that in Brazilian legal practices these standards are part of law. A statement about this issue could, then, be written in the following way:

- The judicial duty is to enforce as valid law the principles, social goals, fundamental rights and foundations inserted in the Constitutional text ratified in 1988, save for the provisions that have been validly repealed by procedures set forth in article 60 of the Constitution, and including every provision validly added by way of constitutional amendment under article 60.  

Furthermore, the existence of the Judiciary branch and its role in solving disputes is laid out in the C.F., satisfying the criteria of legal validity. Therefore, the criterion of legality assures, through secondary rules, the power of courts and makes their decisions binding on the parties. As Raymond Wacks observes, “judges are empowered by […] rule[s] of adjudication.”

III.2.2.2. Brazil’s Rules of Adjudication

The mere fact that someone depicts that Brazilians see their constitution as a binding document does not tell us how judges interpret it. In the U.S., originalists and living constitutionalist jurists also see the U.S. Constitution as a binding document and yet

556 WALUCHOW, supra note 3, at 154-155.
557 Id.
558 There are several articles in the C.F. that deals with the Judiciary Branch power. Article 5, XXXV, states that the “the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power.” Also, there is a full chapter in the C.F. text—Chapter III—comprising articles 92-126, that regulate the Judiciary Branch. See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5, XXXV, 92-126 (Braz.).
559 WACKS, supra note 9, at 96.
560 According to Sotirios A. Barber and James E. Fleming, the following typologies of approach cover the controlling issues regarding constitutional interpretation: textualism (plain words of the constitutional document); consensualism (current social consensus on what the words mean); philosophic approach (nature of things the words refer to/best understanding of concepts embodied in the words); originalism (intentions or original meaning of framers/ratifiers/founding generation[, or original understanding in this period]; structuralism (document’s arrangement of officers, powers, and relationships); doctrinalism (doctrines of courts
disagree on how the document should be interpreted. It is, however, possible to try to capture, as a social fact, what is the prevalent practice adopted by officials in interpreting texts that meet the legal criterion.\textsuperscript{561} This social fact will have to take into consideration the way most Brazilian judges behave in construing the interpretation of the country’s enacted rules and other primary rules they consider binding. This, pursuant to Hart’s classification of rules, will be a form of \textit{rule of adjudication}.

Since the C.F. expressly states that the S.T.F. is responsible “for safeguarding the Constitution,”\textsuperscript{562} it is important to pay attention to the methods of interpretation that this Court employs to define the meaning of the provisions of the C.F. The identification of the behavior of judges towards the text is relevant because, as previously described, it has changed throughout the years in comparison to practices adopted by the S.T.F. with respect to Brazil’s previous constitutions. But even in this new constitutional regime, the practices of the S.T.F. Justices towards constitutional interpretation have varied. Patrícia Perrone points out this behavioral modification:

“There are two important marks in relation to the S.T.F. judicial behavior after the enactment of the 1988 Constitution. The first is the recognition of the efficacy of the constitutional norms. Up to the enactment of the 1988 C.F., the Brazilian Constitutions were not seen as authentic legal norms and were systematically disrespected. After the 1988 C.F., jurists started to hold the position that the Constitution is a legal norm, which must be applied directly to regulate reality, without the need of statutes to give efficacy to it. The power to apply the text was given to judges, in resemblance to what already took place with statutory law. […]

The second mark of the S.T.F. judicial behavior, in a hermeneutical point of view, is the assimilation of the \textit{theory of principles}, which took place in the mid-1990s. This new phase was distinguished for the recognition of the status of norms of constitutional principles, for the appeal to the principles of reasonableness and proportionality, for the affirmation of balancing of values technique as the leading interpretative approach in this new context, of a wider openness and fluid legal hermeneutic.”\textsuperscript{563}

This reference substantiates Hart’s approach that some of the rules of adjudication—which are called by Humberto Ávila \textit{metanorms} or \textit{normative postulates} (subchapter and judicial precedents); pragmatism (preferences of dominant political forces). SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION – THE BASIC QUESTIONS 64 (Oxford, 2007).

561 It is possible to say, as a matter of social fact, that Justices Clarence Thomas and Antonin Scalia interpret the U.S. Constitution using originalism as a method. It is also possible, as a matter of social fact, to identify differences between both Justices’ understandings of originalism. See, e.g., Elizabeth Price Foley, \textit{The Court Needs Another Clarence Thomas, Not a Scalia} (Jan 30, 2017), https://www.nytimes.com/2017/01/30/opinion/the-court-needs-another-clarence-thomas-not-a-scalia.html.

562 CONSTITUIÇÃO FEDERAL [C.F.][CONSTITUTION] art. 102 (Braz.).

563 MELLO, supra note 160, at 27. Translation mine. Perrone adds that “the progressive overcoming of the \textit{negative legislator dogma} from the year 2000, when the [S.T.F.] began overruling its precedents related to the writ of injunctions and started to create normative solutions that allow the exercise of constitutional rights and liberties that depended of statutory law regulation, may be considered a third mark in judicial behavior, because the S.T.F. began considerably venturing in the normative field.” Id. Translation mine.
II.5.6.)—may be considered legal rules due to judicial practice. The rules of adjudication in Brazil are generally not set forth in any legal text, but are usually described by scholars through observation of the judicial practice. Judges may simply accept the practice and conform to it, especially in Brazil, in which, pursuant to subchapter II.4.4., in a general manner, there is no stare decisis.

As stated in subchapter 4.3, principles have been written in Brazilian legal texts. These principles are considered *prima facie* norms; they, along with implied principles, are commonly employed by judges to decide cases in which there is no clear solutions in the posited norms. According to Robert Alexy’s theory, the most prominent in the country, when two principles compete, the issue must be resolved by balancing the conflicting interests served by these principles. The judge must decide which principle (that have equal status in abstract) has greater weight in the concrete situation.

Patricia Perrone noted a modification of the attitude of judges after the enactment of the 1988 Constitution. Judges no longer saw the document as a mere political but began treating it as an enforceable legal norm. So, the general comprehension of constitutional law changed due to judge’s practices. There was no reaction from Congress to challenge this change of behavior and to stop the growth of judicial power. No rules or constitutional amendments were passed to bind a certain behavior as to how interpret the C.F. or statutes. On the contrary, many statutes that were drafted in the period have incorporated these conventional practices within, particularly the ideas of constitutionalizing the law, which were described in subchapter II.5.7.

Also, many political parties have initiated abstract actions before the S.T.F. to enforce fundamental rights. Based on these reasons and on the current judicial practice adopted by the majority of judges in Brazil in relation to written and implied principles, one may argue that one of the propositions of the rule of recognition, related to a secondary rule of adjudication, may run like this:

- The judicial duty is to enforce the goals, foundations, principles and fundamental rights established in the provisions of the Constitutional text currently in force. If these goals, foundations and principles conflict, the judge shall solve this conflict through the application of a balancing test and/or through the application of the principles of proportionality and reasonableness.

In addition, even before the 1988 C.F., Brazilian officials shared a discourse that valid laws were only the ones enacted by the Legislative branch, but, at the same time, employed several techniques that allowed updating legal texts, such as the four traditional
methods of interpretation—literal, systematic, teleological and historical—and also the fictions of the juridical dogmatic—unity, coherence, consistency and completeness and the rational legislator myth. Despite the fact that the range of these techniques was substantially shorter if compared to the current judicial practices, they served and still serve the relevant function of reformulating the law, proposing certainty to its vague terms, filling its gaps, solving its incoherencies and adjusting its norms to determined axiological ideals. These techniques are all part of Brazilian law and may be perceived as a social fact. They are rules of adjudication and it is possible to make the subsequent propositions to describe their role in the official practice:

- The judicial duty is to interpret legal texts through the application of the literal, systematic, teleological and historical methods of interpretation.

- The judicial duty is to generally apply the legal system as a whole, with unity, coherence and consistency, and not by the reading of insulated texts.

The balancing technique, the methods of interpretation and the juridical dogmatic, along with Brazil’s closure rule, all serve as Zipursky’s penumbra covering arguments. They have the purpose of accommodating the problem of the open texture of the law. This problem is intentional when a system chooses to use principles, which are prima facie non-conclusive norms and need to be concretized in adjudication.

### III.2.2.3. The Separation of Law and Morals in the Brazilian Legal System

Hart’s most famous endeavor was to sustain the possibility of the separation of law and morals. He considered that the incorporation of moral standards is contingent, not inherent to a legal system. That is why he acknowledged inclusive legal positivism. He notoriously believed that there could be evil regimes and those would still count as law. The goal of this subchapter is to analyze how this issue is treated by Brazilian officials; whether Brazilians would consider that law exists in a system that pursues evil aims.

#### III.2.2.3.1. Evil Regimes

In fact, Brazil is a good example for confirming Hart’s point that a legal system would still exist even though it could pursue evil aims. The country’s journey as an independent nation has experienced many tyrannical moments. The task is to evaluate, as a

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569 NINO, see note 109, at 384.

570 There are several opinions of the S.T.F., generally written by the former Justice Eros Grau, in which it is stated that “the Constitution shall not be interpreted in strips, in pieces. […] the interpretation of law is the interpretation of the law, not of insulated texts, depicted from the law as a whole. We do not interpret texts of law, insulated, but the law—the Constitution—as a whole.” S.T.F., A.D.I. No. 3.685, Relator: Min. Ellen Gracie, 22.6.2006, DIÁRIO DA JUSTIÇA [D.J.] 10.8.2006 (Braz.) (concurring opinion written by Justice Eros Grau). See also S.T.F., ADPF No. 144, Relator: Min. Celso de Mello, 6.8.2008, DIÁRIO DA JUSTIÇA ELETRÔNICO [D.J.] 25.2.2010 (Braz.) (concurring opinion written by Justice Eros Grau).

571 Article 4 of the Introductory Act to the Brazilian Norms sets forth that “when there is a gap in the law, the judge shall decide the case resorting to analogy, customs and general principles of law.” LEI DE INTRODUÇÃO AS NORMAS DO DIREITO BRASILEIRO [L.I.N.D.B.] [INTRODUCTORY ACT TO THE BRAZILIAN NORMS] art. 4. Translation mine.

572 Zipursky, supra note 46, at 1206.
social fact, how Brazilians perceive the status of the norms that were in force in these totalitarian times.

Brazil became an independent country in 1822. However, the country did not immediately adopt a democratic regime. D. Pedro I, son of King John VI of Portugal, was proclaimed Emperor and ruled until 1831. His son, D. Pedro II, after a transitory period, was crowned and stayed in power until 1889, when the Republic was proclaimed.

During this monarchist regime, the country was ruled by a Constitution, enacted in 1824, which established four branches of government: the Executive, the Legislative, the Judiciary and the Moderator (the Emperor). The Moderator Power, which looked over the well-functioning of the other three, was, in reality, the manner the Emperor had to interfere in the functioning of the other three branches. The Supremo Tribunal de Justiça, the highest court on the land, acted as a mere “office of the Imperial Government.”

Throughout Brazil’s Imperialist regime, elections were carried, but under selective suffrages. Voting rights were awarded on the basis of employment and minimum property and were denied to women. Slavery was permitted during most of the regime—Brazil is the country that received the greatest number of African slaves on Earth—and was only abolished in 1888.

Nevertheless, some parts of the Imperialist Commercial Code, enacted in 1850, are still enforced by judges in Brazil today and are considered to have been taken in by the 1988 C.F., a document that started a new era of comprehension of law, with the purpose of assuring democracy, equal treatment and guaranteeing a just and fair order. These goals are the opposite of those of the imperialist regime—whose legal order was insensible to popular suffering—but there is no debate as to whether laws from that period that do not confront with the substantial limits of the C.F., and have not been formally revoked, are still binding.

The same is said of the laws that were approved in other totalitarian moments. The country’s current Criminal Code was enacted in 1940 during Getúlio Vargas government (1930-1945). Vargas promulgated a Constitution in 1937, revoking the former document that had been approved three years before. He justified that this new Constitution was necessary because there was a state of apprehension raised in Brazil due to the communist

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573 CONSTITUIÇÃO FEDERAL DE 1824 [C.F. 1824] [1824 CONSTITUTION] art. 10 (Braz.).
574 See supra note 417, at 270. Cruz points some important moments of judicial review during the empire, especially after the creation of the habeas corpus in 1832, with the enactment of a Criminal Procedure Code. Nevertheless, he claims that law was not able to limit the excesses and arbitrariness of the Executive Branch during the Imperial Regime. Id, at 272.
575 CONSTITUIÇÃO FEDERAL DE 1824 [C.F. 1824] [1824 CONSTITUTION] art. 92 (Braz.).
576 According to the Trans-Atlantic Slave Trade Database, a project at Emory University, Brazil received about 4.9 million slaves through the Atlantic trade, while mainland North America imported about 389,000 during the same period. See Simon Romero, Rio’s Race to Future Intersects Slave Past (Mar. 8, 2014), https://www.nytimes.com/2014/03/09/world/americas/rios-race-to-future-intersects-slave-past.html. The last country on Earth to abolish slavery was Mauritania, in 1981. See John D. Sutter, Slavery’s last stronghold, http://www.cnn.com/interactive/2012/03/world/mauritania.slaverys.last stronghold/index.html.
577 Brazil was the last country in the Americas to abolish slavery. The Lei Aurea (Golden law) was approved by Congress and signed in by Princess Isabel on May 13, 1888. See https://library.brown.edu/create/fivecenturiesofchange/chapters/chapter-4/abolition/
578 The articles which are still in force are 457 to 913. They regulate maritime commerce. The first part of the code was repelled by the Brazilian Civil Code enacted in 2002. See CÓDIGO COMERCIAL (Pt. I, recodified in Civil Code, 2002) [C. Com.] [COMMERCIAL CODE] (Braz.).
579 Souza, supra note 24, at 156.
580 CRUZ, supra note 417, at 92.
581 See CÓDIGO PENAL [C.P.] [Criminal Code] (Braz.).
infiltration, which, because of its extension and deepness, demanded radical and permanent remedies.\footnote{Constituição Federal de 1937 [C.F. 1937] [1937 CONSTITUTION] preambule (Braz.). Translation mine.}

Under the 1937 Constitution, the efficacy of judicial review was seriously compromised, because any unconstitutionality ruling could lose its effects by a decision of Congress. But Congress was closed during the regime, therefore, this provision meant that the President could reverse any S.T.F. decision.\footnote{Cruz, supra note 417, at 284.} Article 180 of the 1937 Constitution declared that “while Parliament does not meet, the Republic President will have the power to issue decree-laws on all the legislative matters that are under the Federal Government powers.”\footnote{Constituição Federal de 1937 [C.F. 1937] [1937 CONSTITUTION] art. 180 (Braz.). Translation mine.}

Vargas also issued a state of emergency decree that allowed deportations, censorships and the suspension of individual liberties. Pursuant to the terms of the decree, those acts could not be reviewed by the Judiciary.\footnote{Cruz, supra note 417, at 285.} The case of Olga Benario Prestes, a German Jew, married to Luis Carlos Prestes, the then leader of the communist party, one of Vargas’ main opposers, is emblematic. In 1936, she was arrested and, while pregnant, was deported to Germany. She died in a concentration camp in Bernburg. The Olga Benario case is an evidence of the close ties that Vargas had to the Nazi regime—Brazil only joined the war on the allies’ side due to significant American pressure and in exchange for economic compensations; Brazil’s exports to Germany during the Vargas regime were as financially relevant as the exports to the U.S..\footnote{See e.g., S.T.F, AO No. 63/RS, Relator: Min Celso de Mello, 14.2.2014, Diário da Justiça Eletrônico [DJe] 14.2.2014. There is no doubt, however, that if the current President tried to issue a Decree-law, enacting a Criminal Code, such statute would be as a whole unconstitutional, because it does not observe the C.F. formal legislative requirements, even if its provisions were materially compatible with it.}

During Vargas’ dictatorial government, Brazil’s Criminal Code, still in force, was enacted through an exclusive act of the President. The fact that the Criminal Code was never approved by a democratic Congress and was enacted during a dictatorship period is no barrier for being enforced today. Indeed, the S.T.F. has ruled that pre-constitutional norms that substantially conform with the 1988 C.F. are considered taken in by it even if their approval process did not follow the C.F.’s procedural requirements for similar legislation.\footnote{See Anos de Chumbo: é ordenada a reabertura do Congresso Nacional, https://seuhistory.com/hoje-nahistoria/anos-de-chumbo-e-ordenada-reabertura-do-congresso-nacional.} The Criminal Code is considered received because judges regard its provisions substantially compatible with the 1988 C.F.. Judges, hence, consider that this legal norm, passed as a decree-law,\footnote{The official number of Brazil’s Criminal Code is Decreto-Law No. 2.848, of December 7, 1940.} has the current status of an ordinary statute and can only be amended by laws of identical or higher hierarchy. The same is the status of the Criminal Procedure Code.\footnote{The official number of Brazil’s Criminal Procedure Code is Decreto-Law No. 3.689, of October 3, 1941.}

A third evil period of Brazilian history was the military dictatorship regime that lasted from 1964 until 1985. During that time, Congress was closed for a couple of years; elections were manipulated by the sitting government; around 333 federal parliamentary seats were revoked in 1969;\footnote{See Anos de Chumbo: é ordenada a reabertura do Congresso Nacional, https://seuhistory.com/hoje-nahistoria/anos-de-chumbo-e-ordenada-reabertura-do-congresso-nacional.} five seats were added to the Supreme Court; three Supreme
Court Justices were forced to retire; the right to habeas corpus was denied for crimes of opinion; there was press and speech censorship; and around 434 persons were killed or disappeared because they were against the regime and many more were tortured. Keith Rosenn, a Professor at the University of Miami, described the regime in the following way:

“The period preceding the promulgation of the 1969 Constitution was one of constant crisis resulting from widespread opposition to the military government. The government responded by issuing a series of 12 Institutional Acts that continuously modified the 1967 Constitution in accordance with the military command’s assessment of the needs of the moment. A constitution that can be modified by the government’s unilateral declaration that it has decided to utilize a self-proclaimed ambulatory constituent power is, like the Emperor’s new clothes, only a transparent disguise for naked power. In 1972, Professor Riordan Roett concluded, with considerable justification, that the military’s commitment to constitutionalism was basic cosmetic.”

The fact that Brazilians suffered under such a brutal regime has not been sufficient to state that the country did not live under a rule of law system. In fact, it is common to draw a line between what Brazilians called a state of law (estado de direito) and a democratic state of law (estado democrático de direito). The first concept is commonly associated to the 1964-1985 dictatorship period, while the second concept is used to describe the current constitutional regime, installe after the enactment of the 1988 C.F.. This expression is mentioned in the text of article 1 the C.F. The state of law, although a legal system, is not considered to be the current legal system, because of the substantial choices made with the enactment of the 1988 C.F. text. But this does not mean that Brazilians do not consider it to have been a system of law, neither indicates that every legal norm that was passed in this period is void.

Indeed, many legal norms and acts that were enacted and performed during the military dictatorship were received by the current constitutional regime and are applied by judges. For example, S.T.F. appointments made during those years were honored by the 1988 C.F. and the Justices served until retirement. Only with the retirement of Justice Sydney Sanches, in 2003, the Court no longer had members appointed by military presidents.
These justices served honorably their positions and many of them are still regarded among the country’s best judges in history.\textsuperscript{597}

Many laws passed in that period are still valid, even if they could not be approved today. A curious case is the \textit{amnesty law},\textsuperscript{598} enacted in 1979, which pardoned all crimes committed by the armed forces and by civilians during the tyrannical regime. That law undoubtedly conflicts with the country’s current substantial values that are engraved in the 1988 C.F.. However, in 2010, the S.T.F. ruled that the amnesty law is compatible with the current Constitution and remains valid.\textsuperscript{599} The Court took into account the historical context in which the law was approved and the conciliatory spirit that prevailed in the debates that allowed the peace talks to start the process of returning to a democratic regime. The Justice who wrote the majority opinion, Eros Grau, a left-wing lawyer appointed to the S.T.F. by former President Lula, was arrested during the dictatorship years. He stated that deciding not to hold the amnesty law incompatible with the 1988 C.F. did not mean denying the need to repudiate all the torture that had been carried. But he voted that the amnesty law should be declared received by the new constitutional order.

Those examples show that Brazil’s account to law is very Hartian in the sense of the possibility of separation of law and morals. Even during immoral regimes in its history, Brazil regards that a rule of law regime existed in the country, although part of the laws that those regimes enacted were, even then, considered immoral. Nonetheless, they were valid law.\textsuperscript{600} The other part of the laws, which were not immoral then and that are not immoral nowadays, are considered to be valid and are still applied if in accordance with other requirements of the criteria of validity.

A distinction among \textit{Nazi law} and \textit{Nazi-era law} adopts a similar approach.\textsuperscript{601} It is true that Lon Fuller, in his famous essay \textit{Positivism and Fidelity to Law}, acknowledged that under the Nazi regime there was no comparable deterioration in the ordinary branches of private law, if contrasted to laws of race or criminal law, for example.\textsuperscript{602} Therefore, the examples provided in this subchapter regarding Brazilian law would probably not be sufficient to convince Fuller that law and morality may not overlap and that those systems still were legal ones. Fuller focused on the capacity of the system to subsist as an enterprise of subjecting human conduct to the governance of rules. These Brazilian authoritarian regimes did not endure.

But since the main goal of this subchapter was to analyze how Brazilians perceive the evil regimes—whether they are able to produce valid laws or if they are not legal systems

\textsuperscript{597} A classic example is Justice Moreira Alves, appointed by President Geisel, in 1975. For information on his importance for the country’s law, see http://english.tse.jus.br/videos/justice-moreira-alves-leaving-medical-school-for-law-school.
\textsuperscript{598} Lei No. 6.683, de 28 de Agosto de 1979, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 28.8.1979 (Braz.).
\textsuperscript{600} The worst act that was enacted in Brazil, at least during the 20th Century, was the \textit{Ato Institucional No. 5}, of 1969, which closed the Congress, suspended habeas corpus for political crimes, among other measures. For more information, see https://en.wikipedia.org/wiki/AI-5.
\textsuperscript{601} “There is a difference between what one might call ‘Nazi law’ and ‘Nazi-era law’, so there were a few pieces of legislation from the Nazi period that were considered sufficiently uncontroversial and free of the ideological taint of Nazism to be left on the statute books—for example, the Credit Law of 1934 and the Energy Law of 1935. Though subject to later revisions, amendments and modernisations, both are still in force today.” See Q&A: Are any laws made by the Nazi regime still in use?, http://www.historyextra.com/period/qa-are-any-laws-made-by-the-nazi-regime-still-in-use/.
\textsuperscript{602} Fuller, \textit{supra} note 307, at 661.
at all—the examples prove that Hart’s institutional view is correct to describe the country’s practices: law may exist even in evil times.  

Of course, nowadays, after the enactment of the 1988 C.F., it is certain that Hart’s conclusion that the pursuit of evil aims would not generally be possible in countries like Britain and the U.S.—because they “widely recognize principles of justice and moral claims of individuals,”—is applicable to Brazil.

III.2.3.2. Reasoning in Cases that Deal with Unsettled Legal Issues

In *Positivism and Separation of Law and Morals*, while emphasizing that in the penumbral area the system of law does not have a response to a case, leaving to the judge the responsibility to make a rational non-mechanical choice, Hart argued that the fact that a choice has to be made does not mean law and morals are merged. This is at the center of Hart’s discretion argument, probably the most controversial and contested of his views.

Hart pointed out that judges, when deciding a case attributing sense to open-textured standards, which do not have settled meaning, can make intelligible decisions that do not necessarily appeal to moral arguments, but to social aims, policies, among other types of reasoning. Moral reasoning is solely one type of argument that may be employed by the judge but is far from exclusively representing in totality what the word “ought” may mean—Hart believes that judges are likely to create a rule in the case, since there is no solution in the law, but natural applications of the settled law to similar situations may also occur. *Economic* and *political* arguments could be referred to by the judge; if so, his decision would not be considered mechanical, but not necessarily moral.

Later in his life, in *Problems of the Philosophy of Law*, Hart contended that when rules do not control the outcome of the case, judges have discretion to make this decision.

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603 Hart, nevertheless, acknowledged that systems that advance an evil agenda suffer from instability: “[h]ence a society with law contains those who look upon its rules from the internal point of view as accepted standards of behaviour, and not merely as reliable predictions of what will befall them, at the hands of officials, if they disobey. But it also comprises those upon whom, either because they are malefactors or mere helpless victims of the system, these legal standards have to be imposed by the force or threat of force; they are concerned with the rules merely as a source of possible punishment. The balance between these two components will be determined by many different factors. If the system is fair and caters genuinely for the vital interests of all those from whom it demands obedience, it may gain and retain the allegiance of most for most of the time, and will accordingly be stable. On the other hand, it may be a narrow and exclusive system run in the interests of the dominant group, and it may be made continually more repressive and unstable with the latent threat of upheaval. Between these two extremes various combinations of these attitudes to law are to be found, often in the same individual.” HART, see note 43, at 201-202.

604 Id.

605 See, generally, Dworkin, supra note 17.

606 According to Hart, “[t]he point here is that intelligent decisions which we oppose to mechanical or formal decisions are not necessarily identically with decisions defensible on moral grounds. We may say a decision: ‘Yes, that is right; that is as it ought to be,’ and we may mean only that some accepted purpose or policy has been thereby advanced; we may not mean to endorse the moral propriety of the policy or the decision. So the contrast between the mechanical decision and the intelligent one can be reproduced inside a system dedicated to the pursuit of evil aims.” Hart, *Positivism and the Separation of Law and Morals*, supra note 431, at 613. In *The Concept of Law*, Hart adds that “the open texture of law leaves a vast field for a creative activity which some call legislative. Neither in interpreting statutes nor precedents are judges confined to the alternatives of blind, arbitrary choice, or ‘mechanical’ deduction from rules with predetermined meaning. Very often their choice is guided by an assumption that the purpose of the rules which they are interpreting is a reasonable one, so that the rules are not intended to work injustice or offend settled moral principles. Judicial decision, especially on matters of high constitution import, often involves a choice between moral values, and not merely the application of some single outstanding moral principle; for it is folly to believe that where the meaning of the law is in doubt, morality always has a clear answer to offer.” HART, supra note 43 at 204.
Hart, in this occasion, revealed that he never intended to endorse discretion because he romantically thought of it as the best option. He was not taking the position of what is best for the legal system but looking for a term that allows capturing what in fact happens and confessed that ‘discretion’ may not accurately describe what takes place: “[i]t may well be that terms like ‘choice’, ‘discretion’, and ‘judicial legislation’ fail to do justice to the phenomenology.”

Hart’s discretionary argument, in a sense, reveals a lot of his unromantic view of law and his unwillingness to accept illusory descriptions of what effectively takes place. He considers Roscoe Pound, Ronald Dworkin and Karl Llewelyn [and probably Hans Kelsen] noble dreamers.

Discretion, nevertheless, for him, does not mean arbitrary or non-justified decisions:

“Judges do not generally, when legal rules fail to determine a unique result, intrude their personal preferences or blindly choose among alternatives; and when words like ‘choice’ and ‘discretion’ or phrases such as ‘creative activity’ and ‘interstitial legislation’ are used to describe decisions, these do not mean that courts do decide arbitrarily without elaborating reasons for their decisions—and still less that any legal system authorizes decisions of this kind.”

The argument he made was that “a wide variety of individual and social interests, social and political aims, and standards of morality and justice [come into play]; and they may be formulated in general terms as principles, policies and standards.”

I have cited that Brazilian judges, such as Justice Luís Roberto Barroso, correctly assert that some of the cases covered by principles cannot be objectively determined; these standards are commonly understood to have a certain minimum range, but there are areas of indeterminacy, in which subjective judgments are necessary and in which choices shall be made. As an illustration, Barroso cites an argument based on the principle of human dignity:

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607 HART, supra note 442, at 106.
608 See HART, American Jurisprudence through English Eyes: The Nightmare and the Noble Dream, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY, supra note 442, at 123-145. Hart, of course, knew Llewelyn was a realist exponent. But Hart considers Llewelyn’s grand style example of the judicial decision, in which he draws a metaphor of the judge having to ‘carve’ his decision with the ‘grain’ of the system as a whole, the example of a Noble Dream. Id. at 137.
609 Hart’s view looks similar to the following view, written by Kent Greenawalt: “[w]hen authoritative standards yield no clear answers, when a judge must rely on debatable personal assessments to decide a case, and when more than one result will widely be regarded as satisfactory fulfillment of his judicial responsibilities then it does not make good sense to say that a judge is under a duty to reach one result rather than another; as far as the law is concerned, he has discretion to decide between them.” Kent Greenawalt, Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges, 75, Columbia Law Review, 359, 378 (1975).
610 Id. at 106-107.
611 Id.
612 “In relation to principles, an additional hardship may take place: the goal to be achieved or the ideal state to be transformed in reality cannot be objectively determined. There is a need for subjective integration of the interpreter. A principle has a sense, a minimal meaning and range, an essential core, to which it is similar to rules. From a certain point, nonetheless, the interpreter enters into a realm of indeterminacy, in which its content definition will be subject to the interpreter’s ideological or philosophical conceptions.” See BARROSO, supra
“An example is the principle of human dignity. Other than not stating the necessary behaviors to comply with human dignity—this is the first difficulty: discover the behaviors—there may be controversy as to what dignity means from a determined essential content, according to the point of view of the interpreter.”

Barroso’s acknowledgement is clearly an evolution from the old civil law tradition of considering the system of law complete and, therefore, able to provide a solution for all cases. The purpose of this subchapter is to examine if Brazilian judges think like Hart or if they consider that their decisions in interpreting and construing principles on unsettled legal issues should be grounded solely on moral reasoning—we will see that Dworkin contends that these decisions shall be made according to the political morality, at least in individual rights cases.

The answer to this question was somewhat given in subchapter II.5.4, in which I described the breadth of principles in Brazil. Due to the fact that principles in Brazil do not cover solely individual rights cases, but also several social goals and purposes that are considered to be socioeconomic fundamental rights, courts generally do not only resort to moral arguments to solve these type of cases, but to economics, politics, even legalists, among others.

In reality, it is very hard to know when judges will resort to moral principles as the main institutional force to solve a penumbral case, or if they will resort to social and political aims, even in individual rights cases. In this sense, the point of view of the interpreter, as Barroso notes, can be decisive.

In fact, in Brazil, cases involving conflict of principles commonly happen when an individual fundamental right conflicts with socials goal. Courts generally decide these cases balancing rights and interests, as well as applying the principle of proportionality. Individual moral rights, under the proportionality scheme, cannot be totally suppressed, but can be limited. Brazil’s approach is similar to the one adopted by article 1 of the Canadian Chart of Rights and Freedoms:

“1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

Due to the adoption of this line of reasoning, the S.T.F has an understanding that “there are no absolute rights, even the fundamental rights set forth in art. 5, of the C.F., or in treaties or in human rights international conventions. The criteria and methods of reasonableness and proportionality are fundamental in this context because they disallow the

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note 27, at 151. Translation mine. Barroso admits the existence of discretion. See text referred to by note 288. Id. at 154.

613 Id. at 151.


615 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, c 1 (Can.).
prevalence of one determined right or interest over the other of same or higher juridical-evaluative stature.”

The Civil Procedure Code of 2016 [C.P.C.], which, as seen, posited balancing as a technique for reasoning under art. 489, § 2, does not specify the kind of arguments that may be used by the judge in the balancing process.617

There are many cases decided by the S.T.F. in which one could argue that moral principles did not win the argument. One may cite, for example, a case concerning the social right of housing, decided in 2006.618 The Court, by a 7 to 3 count, upheld a statutory provision that establishes that the realty in which a guarantor of a lease agreement resides can be judicially sold to pay debts of the tenant, if this real state was purposely included as collateral for rental payments in the lease agreement, even if the guarantor does not have any other realty to reside.619

The question was controversial because, in Brazil, there is a statute that sets forth that the family residence real estate cannot be sold to pay personal debts. The lease agreement collateral situation is a statutory exception to the general rule and the appellant party argued that this exception provision was unconstitutional, because article 6 of the C.F establishes housing as a social right.620 The majority reasoned that the social right of housing does not mean that every person has a right to own a house. The Court noted that the fiduciary guarantee is the cheapest form of collateral and asserted that declaring the unconstitutionality of the statutory provision would raise the costs of access to lease agreements for low-income persons, since lessors would be unwilling to take it due to its lack of strength.

In the reasoning, Justice Cezar Peluso argued that a balance between the right of housing of an ample class—formed by persons interested in renting a realty—has to prevail even if it harms a smaller group—formed by the guarantors who own only one real estate, its family dwelling—as they are not compelled to offer it as a collateral in a lease agreement. He stated that the economics of the market should not be modified by the Court. Therefore, economic arguments were weighed to justify the majority opinion. The three dissent votes focused on moral arguments to hold the statutory provision unconstitutional.

Another case in which moral reasons were not decisive was the ruling adopted in six abstract actions that attacked a Resolution, issued by the T.S.E., that redistributed the Chamber of Deputies seats among the Brazilian states, to match the populational growth modification. The S.T.F. concluded that this seat assignment should have been made by Congress and not by the T.S.E..621 But Congress has not taken any measure since the

617 Art. 489, § 2, of the C.P.C., sets forth that “in the case of collision of norms, the judge shall justify the object and the general criteria of the balancing adopted, stating the reasons that authorize the interference of the displaced norm and the factual premises that ground the conclusion.” CÓDIGO DE PROCESSO CIVIL [C.P.C. [CIVIL PROCEDURE CODE] art. 489, § 2 (Braz.).
619 Lei No. 8.009, de 26 de Março de 1990, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 30.3.1990, art. 3, VII (Braz.).
620 “Art. 6. Education, health, nutrition, labor, housing, leisure, security, social security, protection of motherhood and childhood and assistance to the destitute, are social rights, in accordance with this Constitution.” Translated by Keith Rosenn, Constituteproject.org https://www.constituteproject.org/constitution/Brazil_2014.pdf
621 “Article 45. The Chamber of Deputies is composed of representatives of the people, elected in each State, Territory and the Federal District by a proportional system.
§ 1° The total number of Deputies, as well as the representation of each State and the Federal District, shall be established by complementary law in proportion to the population. The necessary adjustments shall be made in the year prior to the elections, so that none of the units of the Federation has fewer than eight nor more than seventy Deputies.” CONSTITUIÇÃO FEDERAL [C.F.][CONSTITUTION] art. 45, § 1° (Braz.). The complementary
enactment of the 1988 C.F., because the majority of states would lose seats and just few would gain. The necessary criterion to calculate the proportion of seats among the states has never been set in a statute.

It is easy to see that the Court chose a legalist approach, maintaining a situation of unequal treatment among the states, since the seat representation at the Chamber of Deputies has not been updated and does not reflect the current population distribution in Brazil. This lawsuit involved the right of a minority of states, which has been violated by the majority inertia. It is a typical case in which courts traditionally should employ moral reasoning, like equal treatment and equal protection, but that was not the S.T.F.’s path.

In the U.S., in contrast, to assure the efficacy of the “one man one vote” principle, the SCOTUS has ruled unconstitutional several district maps that abusively drew voting districts. Non-legalistic decisions seem common when constitutional courts interpret moral constitutional provisions to assure equal treatment.

A third case that can be cited involved the possibility of division of a retirement pension among the wife and the husband’s concubine, after his death. According to the facts, the man had concomitantly formed two families and had several children with both of them. He financially supported both his wife and his concubine, who pacifically accepted that bigamous situation. Nevertheless, when he died, the married wife refused to share the pension with the concubine. The latter filed a lawsuit and the Court of Appeals of the State of Bahia awarded her half of the pension. The state appealed. The S.T.F. reversed the holding on the grounds that her relationship was unlawful since legal unions [similar to common law marriages] can only be recognized if both the companions are not married. The case approach was legalist, because the factual situation, in which all three involved parties had for many years consented, was not taken into account. The Court stated that Brazilian positivist law only gives effect to legal unions if none of the parties is legally married. This legalist approach ended up treating the concubine unfairly, depriving her of her means of subsistence.

There are even easier cases that are worth mentioning. For example, if a judge denies a claim on an unequivocal legal issue covered by a statute, and the lawyer files the losing party appeal after the statutory deadline, no appellate judge will hear the case. The fact that the sentence adopted an unconstitutional, illegal, unfair or immoral reasoning, will not matter. They will apply the literal rule of the C.P.C. that states that appeals should be filed

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law enacted to regulate this article is the Lei Complementar No. 78, of December 30, 1993. This law established the maximum number of 513 members at the Federal Chamber of Deputies and, in sole paragraph of article 1, awarded the T.S.E. the power to allocate the seats. The S.T.F., in this case, ruled this sole paragraph unconstitutional, because it violated art. 45, § 1°, of the C.F., which requires a complementary law to regulate the matter. S.T.F., A.D.I. No. 4.947, Relator: Min. Gilmar Mendes, 1.7.2014, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 30.10.2014 (Braz.).

622 Based on the Resolution issued by the T.S.E., the following states were awarded seats: Para (4 seats), Ceará and Minas Gerais (2 seats), Amazonas and Santa Catarina (1 seat). The following states would lose seats: Paraíba and Piauí (2 seats), Pernambuco, Parana, Rio de Janeiro, Espírito Santo, Alagoas and Rio Grande do Sul (1 seat).


624 See also WALUCHOW, supra note 3, at 144.


626 The deceased had 11 offspring with his wife and 9 with his concubine. Id.

627 According to the case record, the lower court opinion registered that: “In reality, this situation described in this case records, although uncomfortable, is very common in the Brazilian culture. As the inferior judge described, the deceased accomplished to administer his wedding’s subsistence with a serious and longstanding affective relationship with the concubine, what brings to the indeclinable conclusion that the deceased had two families, administer and provided for both of them, financially supporting them.” Id. Translation mine.
within 15 days of the sentence’s publication in the official court report. The S.T.F. would rule in the exact same way if an extraordinary appeal filed after the 15-day term.628

Adopting a similar outcome, the S.T.F. also rejected the possibility that courts, in judging rescissory actions, rescind final judicial decisions that applied the holding of precedents that were later overruled by the S.T.F..629 The Court sustained that the rescissory actions are only admissible, under the C.P.C., in restricted cases and that this action does not have the function of uniformizing case law. Therefore, persons that were denied rights under old precedents may not have the possibility of having this right acknowledged now, in conformity with the more recent understanding of the law, because their cases were adjudicated and the decisions are final. Therefore, even if you have moral laws, there is no guarantee that you will have a moral outcome, because many variables may play a role to avoid the moral result, such as procedural issues.

Nevertheless, the citations and examples above should not pass the impression that moral reasoning never comes into play. On the contrary, especially in the activity of concretization of principles, the most common feature is to adopt moral approaches and the cases cited in subchapter II.2 are good examples. Precedents that declared the right of same-sex couples to legal unions630 and the right to perform an abortion in the first trimester of the pregnancy631 are other good examples. The phenomenon of constitutionalizing the law is evidently dominated by moral reasoning, because the language and comprehension of constitutional principles is essentially moral (e.g. administrative morality). 632 Human dignity, as stated, is posited as one of the Republic founding principles and has enormous relevance in adjudicating cases.633 Nonetheless, it is not treated as an absolute principle that trumps all other conflicting considerations.634

Even the rules that incorporate the balancing and proportionality techniques of solving conflict of norms, such as art. 489, § 2, of the C.P.C., do not impose moral reasoning as the mean for defining content of indeterminate legal concepts. They do demand that judges justify the positions they adopt, but do not establish the type of argument that judges shall employ.

In summary, when deciding a case attributing sense to unsettled legal issues, Brazilian judges may make intelligible decisions that do not necessarily appeal to moral arguments, but to social aims, policies, economic and political, among other types of reasoning.

III.2.2.4. Commands and Sanctions

631 See S.T.F., HC No. 124.306, Relator: Min. Luís Roberto Barroso, 9.8.2016, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e], 16.3.2017 (Braz.) (asserting that the criminalization of abortion in the first trimester offends fundamental rights of the woman, like her right of autonomy, of physical and psychical integrity, of controlling sexual and reproductive choices, of equal treatment and of social discrimination, because the criminalization substantially impacts poor women).
632 See Subchapter II.5.7.
By attacking Austin’s command theory, Hart demonstrated that legal rules could not be considered only commands because they differ from acts done under coercion. He also drew a line between duty-imposing rules and power-conferring rules, a distinction that Brazil widely accepts—as stated in subchapter II.5.1—and showed that the latter have the nature of rules, even though they do not prescribe sanctions. Hart also attacked Kelsen’s conception that all rules are backed by sanctions and are drafted for instructing officials as how to behave when certain conditions are satisfied.635 He showed that legal norms are normative in the sense that try to orient general behavior, not only official. The purpose of this subchapter is to briefly show that Brazil does not accept the idea that all rules are followed by a sanction and that even duty-imposing rules may not be backed by a threat and are still considered rules.

There are several duty-imposing rules that are not backed by threats in Brazilian codes and still are considered rules. For example, in Civil Procedure, there are many provisions that establish deadlines for judicial acts, what Brazilian scholars call improper time limits. Article 226, III, of the C.P.C. states that judges shall issue sentences within 30 days after the fact-finding phase of the proceeding ends.636 But the judge will not be punished if the does not perform the act within that term. In fact, there is no stipulated sanction for the breach of that rule in the statute.

More recently, the S.T.F. held that even a crime not backed by a sanction [in a criminal sense] can be, nonetheless, considered a crime. This understanding took place when the Court decided whether possessing drugs for personal use was still a crime. Due to a modification of the criminal statute, that crime is not punished by time in prison or restriction of rights. If a drug user is caught, he shall be notified of the consequences of this habit and can be ordered to provide services to the community. This comprehension led the S.T.F. to conclude that drug possession is no longer penalized but is still a crime.637

These examples show that a judge who does not follow a statute deadline or the drug possessor, as a matter of the internal point of view, may know that they are disobeying the law, but their disobedience will not cause them any punishments [or at least incarceration in the drug user’s case]. It will not be the fear of punishment that will move them, but the psychological notion of legal duty.

In addition, returning to Hart’s attack, he understood that there is a difference between “making a law” and “making a face-to-face order”. Commands are authoritative and, even general ones, give the idea that a specific order has been demanded and that the ordered person understood it. Making a law may not fit this frame:

“In this respect making laws differs from ordering people to do things, and we must allow for this difference in using this simple idea as a model for law. It may indeed be desirable that

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635 “Power-conferring rules as fragments of laws. In its extreme form this argument would deny that even the rules of the criminal law, in the words in which they are often stated, are genuine laws. It is in this form that the argument is adopted by Kelsen: ‘Law is the primary norm which stipulates the sanction’. There is no law prohibiting murder: there is only a law directing officials to apply certain sanctions in certain circumstances to those who murder. On this view, what is ordinarily thought of as the content of law, designed to guide the conduct of ordinary citizens, is merely the antecedent or ‘if-clause’ in a rule which is directed not to them but to officials, and orders them to apply certain sanctions if certain conditions are satisfied. All genuine laws, on this view, are conditional order to officials to apply sanctions. They are all of the form, ‘If anything of a kind X is done or omitted or happens, then apply sanction of a kind Y’. HART, supra note 43, at 35-36.

636 CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CIVIL PROCEDURE CODE] art. 226, III (Braz.).

laws should as soon as may be after they are made, be brought to attention of those to whom they apply. The legislator’s purpose in making laws would be defeated unless this were generally done, and legal systems often provide, by special rules concerning promulgation, that this shall be done. But laws may be complete as laws before this is done, and even if it is not done at all. In the absence of special rules to the contrary, laws are validly made even if those affected are left to find out for themselves what laws have been made and who are affected thereby.”

As an example, a case decided by the S.T.F.: there is a constitutional provision that states that governments may enforce tax raises in the subsequent year of the one in which the statute that raised the tax is published. This rule, known to establish the principle of tax anteriority, exists to give fair notice to taxpayers of tax raises, so that they may reorganize their budget to pay the new or incremented tax. Removal of tax benefits also shall obey this principle. Nevertheless, in a case in which the law that affected the taxpayer was published on December 31, 1994, a Saturday, in an extraordinary edition of the official gazette, the S.T.F. concluded that the principle of tax anteriority was not offended.

It is hard to consider that taxpayers had notice of this statutory modification before the beginning of the new year. Yet, the mere fictitious notice was considered enough by the S.T.F.

Therefore, if Hart’s example for striking down the command theory was that, under this doctrine, laws make face-to-face orders to citizens so that they clearly know what has been demanded, the example above helps to illustrate his point, because actual publicity of laws is hardly an issue in Brazil—the official requirement is publication in the official gazette, which lawgivers are unlikely to read, especially on extra editions, published on weekends, as depicted in the facts of the cited case.

Also, Hart’s arguments to defeat the command theory demonstrate his assertion that positivism is not strictly committed with unequivocal clarity, what drives him away from exclusive legal positivism, as will be shown below.

These brief considerations, of course, do not exhaust Hart’s criticism on Austin but seem to be the most controversial ones and show why the Brazilian system would side with Hart on these matters.

### III.3. Exclusive Legal Positivism

It is now time to explain why exclusive legal positivism does not capture what Brazilians consider to be law. In examining this issue, I will keep justifying why inclusive legal positivism is a more powerful doctrine at least for Brazil’s reality.

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638 HART, supra note 43, at 22.
639 Article 150. Without prejudice to other guarantees assured the taxpayer, the Union, States, Federal District and Counties are prohibited from: […] III. collecting taxes: […] b. in the same fiscal year in which the law that instituted or increased them was published. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 150, III, b (Braz.).
642 For more of Hart’s criticism on the command theory, see HART, supra note 43, at 16-25.
Exclusive legal positivism is a respectable doctrine, whose most prominent supporters are Joseph Raz and Scott Shapiro. This work will focus on Raz’s view of it because he was the first proponent of the theory and his is the most debated version in the Anglo-American academy.

Raz essentially argues for a source thesis of law. The word source is used by him in a technical sense and means that “[a] law has a source if its contents and existence can be determined without using moral arguments.” For Raz, “the law on a question is settled when legally binding sources provide its solution. In these cases, judges are typically said to apply the law, and since it is source-based, its application involves technical, legal skills in reasoning from those sources and does not call for moral [discernment].” He thinks that there are two reasons for accepting the sources thesis. The first one is because this thesis “reflects and explicates” our conception of the law. The second one is because it provides reasons for adhering to that conception. For saying that the source thesis provides the correct description of the legal practice, Raz draws a line between law application and law development. He asserts that judges perform two functions: either they apply the law or they develop the law. In some cases, it is hard to disentangle these two operations. But, the point he intends to make is that while applying the law judges use legal skills and while developing the law judges use moral arguments.

Raz also makes a distinction between settled law and unsettled law. On the one hand, he claims that “[i]t is primarily deciding cases regarding which the law is unsettled (as well as distinguishing and reversing settled law) that judges are thought to develop the law using moral, social, and other non-legal arguments.” On the other hand, “[i]t is when deciding cases where the law is settled that judges are thought of as using their legal skills in applying the law.” For Raz, the phenomenon of law only takes place when there is settled law, because only then “the private view of member of the society, or of influential sections or powerful groups in it, ceases to be their private view and becomes (i.e. lays a claim to be) a view binding on all members notwithstanding their disagreement about it.”

The reason for stating that the law is only settled law is mainly that, by claiming authority over citizens, law has to be able to make a practical difference in orienting their conduct. Law should preempt all other conflicting considerations. If law is unsettled, it does not serve this orienting function and, therefore, should not be considered law, because people

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644 Id. at 49-50.
645 Id. at 48.
646 In order to prove the difference of both activities, Raz gives an example of judicial appointments to the bench: “When discussing appointments to the Bench, we distinguish different kinds of desirable characteristics judges should possess. We value their knowledge of the law and their skills in interpreting and arguing in ways showing their legal experience and expertise. We also value their wisdom and understanding of human nature, their moral sensibility, their enlightened approach, etc. There are many other characteristics which are valuable in judges. For present purposes these two kinds are the important ones. The point is that while it is generally admitted that both are very important for judges as judges, only the first group of characteristics mentioned is thought of as establishing the legal skills of the judge. The second group, though relevant to his role as a judge, is thought of as reflection of his moral character, not his legal ability. Similarly, when evaluating judgments as good or bad, lawyers and informed layman are used to distinguishing between assessing arguments as legally acceptable or unacceptable and assessing them as morally good or bad. Of many legal decisions we hear that they are legally defective, being based on misinterpretation of a statute or a case, etc. Of others it is said that though legally the decisions are acceptable, they betray gross insensitivity to current social conditions, show how conservative judges are, that they are against trade unions, or that in their zeal to protect individuals they go too far in sacrificing administrative efficiency, etc.” Id.
647 Id. at 49.
648 Id.
649 Id. at 51-52.
will not be sure on how to behave in order to follow it, neither judges will be reasoning according to the law. As Raz asserts, “it is of the very essence of the alleged authority that it issues rulings which are binding regardless of any other justification, it follows that it must be possible to identify those rulings without engaging in a justificatory argument.”

In summary, Raz points out that the underlying function of law is “to provide publicly ascertainable standards by which members of the society are held to be bound so that they cannot excuse non-conformity by challenging the justification of the standard.” Raz’s sources doctrine is called exclusive positivism because no legal rule may condition legality on morality.

Based on the considerations noted in the previous subchapters, it is clear that exclusive legal positivism explains law differently than Brazilians do. For the proponents of this theory, many open textured provisions of legal texts that Brazilians consider part of the law—because they were enacted by Congress—would not be law because the instructions they provide are not unequivocally certain.

It is true that the Brazilian legal system has, as a goal, the intention of furnishing the country’s citizens with ascertainable standards of conduct. This is a statutory requirement set forth in a statute that regulates how statutes shall be written in Brazil. Brazilians are also very concerned with legal certainty. As stated in the introductory chapter of this thesis, the concept is seen as inherent to the idea of rule of law. Nonetheless, as described in subchapter II.4.1., in the civil law tradition, the generality of the rule is considered a positive property of the legal norm because of the premise that the judge or the legislator will never be able to foresee all possible cases in which the rule must govern. On the contrary, for assuring the continuum adaptation of the legal rules to the new cases, civil law countries draft broader statutes if compared to common law countries and adopt Friedrich Carl Von Savigny’s four techniques of legal interpretation—textual, systematic, historical and teleological. The adoption of the juridical dogmatic also allows judges to develop and update the law, presupposing to only be applying what was already law.

Moreover, after the enactment of the 1988 C.F., the tendency of Brazilian law has been to employ moral standards in legal texts, such as morality, efficiency, loyalty, among others. These concepts are sometimes qualified as indeterminate legal concepts. The fact that jurists currently employ the verb concretizing, instead of interpreting legal principles, show that their meaning in particular cases is construed “in a process of creatively determining results in conformity with, but not determinable by, the [C.F.].”

In addition, Brazil does not have well-developed theories of fair notice, vagueness or overbreadth, for example. For a legal rule to satisfy the requisite of legality, it will not really matter if its terms are vague, broad or may not offer good guidance to the citizens. There is a sort of general understanding—or practice—that the terms will be made clear through a process of interpretation or concretization. The fact that some court applications of the rule will not find support in the legislative history or even in the original intent of the drafters is not generally a problem. The social fact has taken place, there is written law on the general issue and what the Judiciary extracts from the text, in a process that may also take into

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650 Id.
651 Id. at 92.
652 Id. at 8.
654 See generally S.T.F., MS No. 22.357, Relator: Min. Gilmar Mendes, 27.05.2004, DIÁRIO DA JUSTIÇA [D.J.], 05.11.2004 (Braz.).
655 VESTING, supra note 131, at 217-219.
656 NINO, supra note 109, at 384.
657 Brugger, supra note 33, at 398.
account constitutional principles, as we will see, is considered within the legitimate authority of courts.

In light of these considerations, it is clear that Brazilians do not consider, as a social fact, that the legal phenomenon only takes place when the law is settled. Defining the content of vague laws is deemed to be a task of courts, although judges do not acknowledge law creation, only law application, even when they are developing the law. These decisions generally apply retrospectively to past facts because they are seen as an expression of what the law has always been.

Take the nepotism case for example (subchapter II.2.2.). The S.T.F. Justices reasoned that the prohibition of the practice already existed in the law. The existant law is the administrative morality and impersonality principles. Nonetheless, even the then lawyer Luís Roberto Barroso, who filed the actions before the S.T.F., stated that “the case was morally good, but faced juridical hardships.” 658 The issue was controversial and provoked disagreement. In ruling the case, the Court did not acknowledge that it was creating law but concluded that the prohibition lied in the core of the referred principles. If one examines the case in light of Raz’s thesis, it will be hard to affirm that the principle of administrative morality offers such an ascertainable guidance that he claims law needs to provide. It is more likely that Raz would contend that the law was developed in these cases and that the prohibition was created in that occasion, since even judges disagreed as to whether the prohibition could be extracted from these principles. 659

Another example is Brazil’s approach towards disciplinary punishments. Maria Sylvia Zanella Di Pietro states that “in administrative law, vagueness prevails. There are few infractions clearly described by the law, as it happens with ‘public employment abandonment’. Most of the infractions are left to administrative discretion when dealing with a concrete case; it is the sentencing authority that will frame the act as a serious fault, irregular proceeding, service inefficiency, public disobedience, or other infractions set forth in an undetermined manner by the statutory legislation.” 660 In order for punishments to be applied, will the law need to be settled in each case? Only in a second equal case will the law be applied? That is not the Brazilian current practice. This example resembles Waluchow’s point that “[w]ithin [some] societies, some degree of ‘unsettledness’ is wisely accepted as a reasonable price to pay for the sake of other values considered to be of at least comparable importance.” 661

Finally, going back to the analysis of the crime of corruption in Brazil (subchapter II.4.1), even though it is still controversial the question as to whether the commitment of an official act is a necessary requirement for configuring corruption—as Judge Moro noted in the former President Lula case—judges do not dispute if the requirements of article 5, XXXIV, of the C.F., have been observed. This legal provision states that “there are no crimes unless defined in prior law, nor are there any penalties unless previously imposed by law.” 662 Lula was convicted despite the fact that the law could be uncertain—I am not saying that it is uncertain, I am just calling attention to the fact that the sentencing judge pointed out that there was uncertainty as to what the settled law was and Moro claimed that Lula performed an official act, although not a specific one. 663

658 BARROSO, supra note 27, at 370.
659 See text accompanying notes 67 and 69.
660 Di PIETRO, supra note 18, at 515. Translation mine.
661 WALUCHOW, supra note 3, at 134.
663 See supra text accompanying note 399.
Hart, by endorsing inclusive legal positivism and an institutionalist view of law, unequivocally disagrees with Raz. Hart acknowledges some flexibility in law application, especially because he recognizes ‘the relative indeterminacy of rules and precedents.’ His view is unequivocally more precise to describe Brazilian law than Raz’s view, as a matter of social fact:

“This indeterminacy springs from the fact that it is impossible in framing general rules to anticipate and provide for every possible combination of circumstances which the future may bring. For any rule, however precisely formulated, there will always be some factual situations in which the question whether the situations fall within the scope of the general classificatory terms of the rule cannot be settled by appeal to linguistic rules or conventions or to canons of statutory interpretation, or even by reference to the manifest or assumed purposes of the legislature. In such cases the rules may be found either vague or ambiguous. A similar indeterminacy may arise when two rules are expressly framed in such specific terms as ‘reasonable’ or ‘material’. Such cases can be resolved only by methods whose rationality cannot lie in logical relations of conclusions to premises. Similarly, because precedents can logically be subsumed under an indefinite number of general rules, the identification of the rule for which a precedent is an authority cannot be settled by an appeal to logic.”

If Hart considers judicial decisions to be authoritative, although acknowledging the relative indeterminacy of the law, it is likely that he does not see authority as only being legitimate if citizens are able to priorly identify law without relying on other substantive reasons. The understanding for the Brazilian legal system by its judges and officials is much closer to this picture.

Nevertheless, Raz’s view of positivism is a more sophisticated theory if compared to the mechanistic view of law, in which all laws are supposedly announced in advance and applied without the need of law-creating activity. Raz does not think that enacted rules always furnish the reasons to act. On the contrary, he claims that only when the interpretation of the rule is settled and reasons are furnished, there will be law. He asserts that moral reasoning comes into play in the process of construing those clear reasons, that make authority legitimate. The task of judges, for that reason, is not only to apply, but also to develop the law. His only wrong point, at least in accordance with the Brazilian prevalent point of view, is to consider that when the judge concretizes moral standards incorporated into law by the legal criteria—including the C.F.—he is acting outside the legal system and, hence, no law exists until the issue is settled.

The argument that laws, to offer guidance, should be settled in advance is a powerful one and cannot be neglected. As we saw, Brazil has a statute conveying this obligation to legislators. Indeed, as Kristen Rundle argues, Raz’s position may reveal “a commitment to understand law as a phenomenon that is fundamentally linked to respect to the legal subject

664 HART, supra note 500, at 103.
Raz asserts that by entailing treating humans as persons capable of planning and plotting their future, the rule of law respects human dignity. However, due to Brazil’s institutional view of law, Brazilians do not consider that a legal norm only exists when unequivocal guidance is provided. This would mean to confuse the concept of law with the concept of rule of law. Yet, most of the country’s scholars would concur on the need of legal certainty because this concept has been adopted as a C.F. principle and is embedded in the idea of democratic state of law. I intend to examine how to deal with this issue in chapter V.

III.4. Modern Natural Law Theory

“Natural law theory has been remarkably influential since it made its first appearance 2,500 years ago in ancient Greece. Its origins lie in the idea that there is a rational order which exists in nature and which is discoverable by human reason.” There is a wide variety of writings on the topic, from Aristotle to Thomas Aquinas. Nevertheless, natural law has long been “surrounded in mystery and generality.” John Finnis’ neo-Thomism theory, developed in the book Natural Law and Natural Rights, is seen as a restatement of classical natural law theory. His influence in the Anglo-American jurisprudence is unquestionable. That is the reason why I will focus on his work.

The first point to stress is that, according to Finnis, “[a] theory of natural law need not be undertaken primarily for the purpose of thus providing a justified conceptual framework for descriptive social science.” Therefore, as Hart observes, Finnis “flexible interpretation of natural law is in many respects complementary to rather than a rival of positivist legal theory.” Finnis does not deny the separation of law as it is and law as it

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666 RAZ, supra note 270, at 221.
667 See subchapter III.2.2.3.1. See also S.T.F., M.S. No. 26271 AgR., Relator: Min. Celso de Mello, 4.12.2012, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e], 15.3.2013 (asserting that the postulates of legal certainty, objective good faith and protection of trust, while expressions of the democratic state of law, are infused of high ethical, social and legal content and applies to legal situations, even in public law).
668 MEYERSON, supra note 10, at 33.
669 According to Brian Bix, “one can find important aspects of the natural law approach in Plato (c. 429-347 BC), Aristotle (384-322 BC), and Cicero (106-43 BC); it is given systematic form by Thomas Aquinas (c. 1225-74). In the medieval period and through the Renaissance, with the works of writers such as Francisco Suárez (11548-1617), Hugo Grotius (1583-1645), Samuel Pufendorf (1632-94), John Locke (1632-1704), and JeanJacque Rousseau (1712-78), natural law and natural rights theories were integral parts of the theological, moral, legal, and political thought. The role natural law has played in broader religious, moral, and political debates has, perhaps unsurprisingly, varied considerably. Sometimes it has been identified with a particular established religion, or more generally with the status quo, while at other times it has been used as a support by those advocating radical change. Similarly, at times, those writing in the natural law tradition have seemed most concerned with the individual-based question, how is one to live a good (‘moral’, ‘virtuous’) life?; at other times, the concern has been broader—social or international: what norms can we find under which we can get along, given our different values and ideas about the good?” Brian Bix, Natural Law: The Modern Tradition in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 62 (Oxford, 2002).
671 See generally THOMAS, AQUINAS, ON LAW, MORALITY AND POLITICS/THOMAS AQUINAS; translated by Richard J. Reagan, 2nd ed. (Indianapolis: Hackett, 2002).
672 WACKS, supra note 9, at 33.
673 FINNIS, supra note 507.
674 Id. at 18.
675 HART, supra note 442, at 11.
In this sense, he disagrees with the conclusion prevalent in classic natural theory that “an unjust law is no law at all,” at least when referring to posited law. His theory seeks to “assist the practical reflections of those concerned to act, whether as judges, or as statemen, or as citizens.” Finnis wants them to understand “what morality has to say about law.”

Although Finnis, therefore, does not deny neither the need, nor the independence of posited law, it is important to emphasize the differences between soft positivism and natural law at the level of theory: “inclusive legal positivists advocate a morally neutral conception or conceptual analysis of law, while natural law theorists argue that law is best understood teleologically, within the context of a larger moral analysis.”

In light of these considerations, what Finnis argued is that a “theory of natural law claims to be able to identify conditions and principles of practical right-mindedness, of good and proper among persons, and in individual conduct,” and not really explain what it takes to be the law of a system. In this sense, it is clear that his theory does not fit the purpose of this thesis because it will not help describing the Brazilian legal system in a descriptive-explanatory fashion.

Nonetheless, Finnis’ theory can offer important insights to law development in Brazil, as to how the moral principles that have been incorporated to the country’s posited law—through written principles—shall be concretized. This point has been constantly addressed throughout this thesis. The S.T.F. has asserted the importance of natural law in construing broad constitutional principles, such as administrative morality, for example:

“[…] morality, as a principle of Public Administration (art. 37) and as a requirement of validity of administrative acts (art. 5, LXXIII), has the system of law *par excellence* as its source, especially the constitutional legal order. It is certain that human values inspire and underlie the order are, in many cases, the normative concretization of values removed from the guideline of natural rights, or from the ethical and moral heritage established by society’s common sense.”

Another example is the natural right to pursue happiness. The S.T.F. has also acknowledged that this right, mentioned in the U.S. Declaration of Independence, is an important hermeneutical guide to develop the fundamental rights set forth in the Brazilian Constitution. This right was referred by Justice Celso de Mello as grounds for recognizing the right of same sex unions and the right for transgenders to change their names to match their gender preference.

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677 This phrase is attributed to St. Augustine. See MARTIN LUTHER KING, LETTER FROM A BIRMINGHAM JAIL in KAVANAGH & OBERDIEK, *supra* note 430, at 257.
678 FINNIS, note 673, at 18.
679 *Id.* at 14.
680 Bix, *supra* note 669, at 98.
681 *Id.*
682 S.T.F., R.E. No. 405.386, Relator: Min. Ellen Gracie (opinion drafter Min. Teori Zavascki), 26.2.2013, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e], 25.3.2013 (Braz.).
683 THE DECLARATION OF INDEPENDENCE (U.S. 1776).
Also, in the course of this work I have pointed out some cases in which the Brazilian system of law allows reasoning based on moral (natural law) arguments. I have mentioned that, for John Finnis, the application of the golden rule clearly takes part in a process of identifying “a moral standard as one which anyone adjudicating a given case has the duty to apply even though it has not (yet) been posited by the social facts of custom, enactment, or prior adjudication.”

Let us turn now to Finnis’ theory. He asserts that there is a differentiation among focal conception of the law and actual law. The former is the ideal law and the latter is merely an approximation. The law is used in its focal (core) meaning when it secures the common good of society. This common good, “in the case of a political community, […] [is] the securing of a whole ensemble of material and other conditions that tend to favour the realization, by each individual in the community, of his or her personal development.” However, the personal development shall be trumped if it does not meet the common good of the political community in a wide sense.

There is an idea in Finnis that the individual considerations that should be respected are those in which there is individual collaboration with others. Finnis asserts that “there is a common good of the political community, and it is definite enough to exclude a considerable number of types of political arrangements, laws, etc.” He cites seven basic forms of human goods that fit this common collaboration with each other: life (self-preservation), knowledge, play, aesthetic experience, friendship (sociability, acting in the interests of others), religion and freedom in practical reasonableness (employing one’s intelligence to solve general problems of life).

The author states, nevertheless, that “[t]he principles that express the general ends of human life do not acquire what would nowadays be called a ‘moral’ force until they are brought to bear upon definite ranges of project, disposition, or action, or upon particular projects, dispositions or actions. How they are thus to be brought to bear is the problem for practical reasonableness.”

There are nine intermediate practical reasonableness principles “to guide the transition from judgments about human goods to judgments about the right thing to do here and now.” These principles are the acts of (a) recognizing the good of practical reasonableness, which allows one to choose commitments, projects and actions; (b) establishing a coherent plan of life; (c) setting no arbitrary preference amongst values; (d) setting no arbitrary preference amongst persons; (e) having certain detachment from all the specific and limited projects which one undertakes, but also committed to them; (f) performing efficiency with reason: one must not waste one’s opportunity by using inefficient methods; (g) respecting every basic value in every act, refraining from doing acts that does nothing but damage or impede realization of the basic forms of human goods; (h) favoring and fostering the common good of one’s communities; and (i) acting in accordance with one’s conscience.

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685 Finnis adds that “[t]his specific moral standard will usually be a specification of some very general principle such as fairness, of rejecting favourable or unfavorable treatment which is arbitrary when measured by the principle (the Golden Rule) that like cases are to be treated alike, unlike cases differently, and one should do for others what one would have them do for oneself or for those one already favours….” Finnis, supra note 530, at 10.
686 MEYERSON, supra note 10, at 39.
687 Id.
688 FINNIS, note 673, at 154
689 Id., at 155.
690 Id. at 100 and 155. See also WACKS, supra note 9 at 31.
691 Id. at 101.
692 JOHN FINNIS, FUNDAMENTALS OF ETHICS 70 (Georgetown ed., 1983).
693 FINNIS, supra note 673, at 100-126.
Wacks points out that these, in Finnis view, constitute the universal and immutable principles of natural law. He adds that:

“Finnis argues that this approach accords with the general conception of natural law espoused by Thomas Aquinas. It does not, he claims, fall foul of the non-cognitivist strictures of Hume [...] for these objective goods are self-evident; they are not deduced from a description of human nature. So, for example, ‘knowledge’ is self-evidently preferable to ignorance.”

Since Finnis’ theory does not intend to provide a justified conceptual framework for descriptive social science, as mentioned above, I will not make further comments on it.

Nevertheless, a final point to be made regarding natural law is that there has been an attempt to drawing a hierarchy among Brazilian C.F. norms, ranking them up in accordance to their compatibility to natural law.

This attempt was made through the filing of ADI 815. In the case, the Governor of the State of Rio Grande do Sul demanded the S.T.F. to hold unconstitutional parts of two provisions of the original text of the C.F. that set forth the minimum number of the Chamber of Deputies’ members per state. In Brazil, the C.F. guarantees at least eight representatives per state and four per territory. Therefore, there is overinclusion of representatives for some states and underinclusion for others. According to numbers of the 2010 census, a Deputy from São Paulo represents 432,000 citizens, whereas a Deputy from Roraima represents 33,000.

However, the S.T.F. dismissed the case because it understood that the proponent, the Governor of the State of Rio Grande do Sul, had failed to state a claim upon which relief can be granted. The Court held that this unequal treatment amongst states was established by the Framers of the 1988 C.F. and the Court could not judge this choice. This judgment would have to be made attributing a higher status to some constitutional norms—because they supposedly conformed with suprapositive norms—in comparison to others, which did not conform with this criterion. The Court held that, even if it admitted that suprapositive law exists, it lacked authority to exercise this control.

### III.5. Interpretivism

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694 WACKS, supra note 9, at 31.
695 Article 45 of the C.F. states that “[t]he Chamber of Deputies is composed of representatives of the people, elected in each State, Territory and the Federal District by a proportional system. § 1° The total number of Deputies, as well as the representation of each State and the Federal District, shall be established by complementary law in proportion to the population. The necessary adjustments shall be made in the year prior to the elections, so that none of the units of the Federation has fewer than eight nor more than seventy Deputies. § 2° Each territory shall elect four Deputies.” CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 45, §§ 1 and 2 (Braz.). The Governor sought that the Court declared the following parts unconstitutional: “so that none of the units of the Federation has fewer than eight nor more than seventy Deputies” of § 1 and “four” of § 2. The minimum number of representatives per state was established during the military dictatorship as a form of diminishing the opposition to the regime, by weakening the representation of the most populated and developed states, like São Paulo, Rio de Janeiro, Minas Gerais and Rio Grande do Sul.
Interpretivism is attributed to Ronald Dworkin. It is basically known for the idea that in *hard cases* propositions of law do not control the outcome of the cases, since there is theoretical disagreement among judges on what is the correct content of these propositions under the law.

For Dworkin, positivism, which has the main purpose of guiding conduct, fails in trying to be a mere descriptive theory of law, because in hard cases it offers no guidance. Any attempt to merely describe the law through social facts, as positivism aims, would not be successful in explaining what law really is, because law is essentially interpretive. The author argues that “propositions of law are not simply descriptive of legal history in a straightforward way, nor they are simply evaluative in some way divorced from legal history. They are interpretive of legal history, which combines elements of both description and evaluation but is different from both.”

He, therefore, stresses for a constructive interpretation of the law, which positivism, by linking laws to social facts, cannot offer.

Dworkin compares judicial interpretation to writing a novel, and states that when judges interpret the law, they are writing a new chapter of the story, which must be consistent to the material that has been construed so far—fit requirement—, but also creative to develop the story. Their creativity, however, has to respect a coherent conception of justice and fairness that provide the best constructive interpretation of the community’s legal practice. Therefore, judges are not really stepping outside the law for arguments, but just discovering solutions that are latent in the law.

Dworkin also disagrees with the ideas that propositions of law are either (a) “intended to be expressions of what the speaker wants the law to be;” or (b) “attempt to describe some pure objective natural law, which exists in virtue of objective moral truth rather than historical decision.” In this sense, he criticizes natural law, for assuming that moral claims can be true because they are in accordance with universal reason or God’s rules. Dworkin thinks that moral claims can be true independently of belief and desire; but correspond to more abstract substantive moral claims that are not linked to any sort of higher order.

Morality plays a role in Dworkin’s theory because he points out that judges, when solving an unsettled controversial issue—as writing the new chapter of the novel—, may decide in a way which is consistent with the community’s moral principles that best justify the previous cases. “What is law depends on moral judgments as to which principles best justify past political decisions, and legal standards are whatever body of standards provides the best moral justification for a society’s established legal rules and institutions.”

Although Dworkin denies the possibility of engaging in a descriptive-evaluation of a legal system, such as the one Hart proposed to do in *The Concept of Law*, some commentators see that Dworkin’s attempt to prove Hart wrong did not work, because what Dworkin developed is not a theory of what the law is, but a theory of the judicial decision. Therefore, they claim Hart won the debate.

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698 The expression *hard cases* was first used in Dworkin’s early articles. However, later in his life, he seems to have denied the distinction among *easy* and *hard cases*. As Stephen Guest points out, “the real focus is not on the difference between what is clear or unclear, but upon the quality of the underlying legal argument justifying the application of coercion by the community.” GUEST, supra note 541, at 68.


700 MEYERSON, supra note 10, at 79.

701 DWORKIN, supra note 436, at 225.

702 Dworkin, supra note 699, at 128.

703 Id.

704 Dworkin, supra note 296, at 654. See subchapter III.3.1.4.

705 Id. at 86.

because it is not the purpose of this work. What I do intend to do is to show that Dworkin’s interpretative view of describing the law is not accurate to explain the Brazilian current practices.

In subchapters II.5.1, II.5.2 and II.5.4., I went over some differences between the current views adopted in Brazil and Dworkin’s conceptions regarding the breadth of principles and the distinction among principles and rules. Therefore, I will not go deep in these issues again. Also, when explaining why I think inclusive legal positivism offers the most accurate explanations for Brazilian legal practices, I have, at least indirectly, refuted some of Dworkin’s theses. I think we can talk about a “Brazilian rule of recognition” to formulate statements of what is legal and what is not legal. Brazilians do not have a problem in writing moral principles into law and they still consider that these pedigreed principles serve the role of principles, not merely standards. They also do not think the role of their judges is confined into settling issues of principle and not of policy.

My goal for this chapter is to focus on four of Dworkin’s main points and to examine if they are pertinent to capture the Brazilian legal practice: (a) if his assertions as to why inclusive legal positivism fails compromise the framing of the theory in Brazil; (b) if the chain novel metaphor captures Brazil’s application of laws; (c) if his “rights as trumps” doctrine describes the practices that dominate Brazilian adjudication in similar cases; and (d) if his views as to how principles enter into judicial reasoning are appropriate to frame Brazilian practices.

It is important going over these points because Dworkin is certainly among the most cited—and probably misread—American jurisprudential authors in Brazil, and many of the jurists that cite his work refer to these points to explain Brazilian law.707

Finally, it is relevant to state that this thesis does not have the purpose of criticizing interpretivism as an accurate manner for capturing the American legal system and its practices. The fact that interpretivism may be a pertinent theory for explaining American law does not automatically make it a precise theory for depicting Brazilian law and the focus of this work is restricted to Brazil.

III.5.1. Dworkin’s Attack on Inclusive Legal Positivism

Inclusive legal positivism is traditionally seen as an accommodation of Ronald Dworkin’s criticism of Hart’s version of legal positivism because Hart had failed to address the role of principles in law.708 But, as noted, this compromise did not settle the debate. Dworkin also criticized inclusive legal positivism and denied the possibility of including value-laden principles in the rule of recognition, because social facts would not be able to grasp as a whole what these values mean. Therefore, positivism would not serve its major role, that is, guiding conduct and solving the uncertainty of law, which, for Dworkin, was the main problem targeted by Hart.709

In reading many provisions of Brazilian legal texts that were cited throughout this work, one may note that Brazilian legislators do not seem to worry about writing these broad and general provisions. The principles of morality, impersonality, equality and efficiency are set forth in article 37 of the C.F.. Do they provide clear reasons for deciding whether nepotism is unconstitutional, as the S.T.F. did in the cases mentioned in subchapter II.2.2?

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708 See, generally, DWORKIN, supra note 293; and DWORKIN, LAW’S EMPIRE, supra note 436.

709 DWORKIN, supra note 293, at 128. GUEST, supra note 541, at 46.
Indeed, Dworkin may be right. This article may offer poor guidance in some cases both for judges and for citizens. This will depend as to whether the factual situations to which judges apply it are considered hermeneutically controversial. If a public agent issues an administrative order in exchange for a bribe, that act will certainly be considered illegal and immoral. However, if he prints his daughter’s ten-page school assignment in the government department’s printer, the issue as to whether this act is immoral, illegal or if the principle of impersonality has been violated can be controversial. In the nepotism case, the S.T.F. said that banning the practice was in the core of the principles of morality and impersonality. Chapter V will examine whether this should be considered proper guidance.

If Brazilian legislators chose to insert broad words that do not provide clear instructions on how public agents and citizens shall behave, they are certainly not intending to furnish all the guidance that Dworkin argues positivism intends to supply. Indeed, as shown in subchapter II.4.1, the style of the civil legislation in general is less detailed than the U.S. style. Brazilian codes and laws do not attempt to “provide rules that are immediately applicable to every conceivable concrete case.”

Zagrebelsky notes that the choice of principles over rules improves flexibility and adaptation:

“In relation to rules, the legally relevant elements in a case are established in a more or less determined way. In contrast, principles, as already suggested, yield no such determined path, with the result that the relevant elements of the law are determined on a case-by-case basis. This characteristic renders principle-based jurisprudence particularly plastic and adaptable, whereas jurisprudence by rules aims at a greater rigidity and fixity.”

In this sense, Brazilian legislators seem simply to share Hart’s view that “even when verbally formulated general rules are used, uncertainties as to the form of behaviour required by them may break out in particular concrete cases.”

Indeed, Jules Coleman may have a point when he states that “legal rules can be understood in terms of the role they play in justifying decisions, not in causing or guiding action.” This assertion is certainly more accurate to express the type of guidance legal principles offer.

In addition, as Waluchow points out, Dworkin’s argument from the function of law “fails to adequately distinguish between what might thought to be desirable in a legal system and what might be thought essential to its very existence.” A system of general rules and principles, which obey the criterion of its rule of recognition, may be a bad system in offering guidance, but may still be law in accordance with the institutional tradition. As I stated before, Brazil, following this tradition of civil law drafting, does not have well-developed theories of fair notice, vagueness or overbreadth, for example. For a legal rule to satisfy the requisite of legality, it will not really matter if its terms are vague, broad or may not offer

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710 For more extended comments on this matter, see WALUCHOW, supra note 3, at 184-186.
711 DAVID & DE VRIES, supra note 125, at 88.
712 Zagrebelsky, supra note 26, at 647.
713 HART, supra note 43, at 126.
714 COLEMAN, supra note 1, at 147.
715 WALUCHOW, supra note 3, at 188.
good guidance to the citizens. There is a sort of general understanding that the terms will be made clear through a process of interpretation or concretization.\footnote{Waluchow offers the following example as the basis of a powerful critique of Dworkin:}

Therefore, although Dworkin may be precise in pointing out that a system that includes value-laden principles in its rule of recognition and in rules in general may not offer good guidance, this fact does not undermine the Brazilian institutional view of law, since the criterion of validity has been met. On the contrary, this circumstance is considered essential for providing the necessary flexibility established by the 1988 C.F. to guarantee “a just and fair judicial order”\footnote{Souza, supra note 24, at 156.} that the document sets as a general goal.

### III.5.2. Are Brazilian Judges Writing a Chain Novel?

The question to be answered in this subchapter is whether Dworkin’s famous chain novel metaphor is compatible with the practices of a country, like Brazil, that (in general) does not have \textit{stare decisis} as a rule.

In subchapter II.6, I cited an excerpt from Karl Larenz in which he stated that “courts, according to our legal organization, are not bound to precedents as they are to the [enacted] law. It is not the precedent, for being a precedent, that binds, but the norm that it contains, if this norm is considered a correct interpretation or concretization [of the law].”\footnote{Id. at 612.} The same practice exists in Italy\footnote{Laura Baccaglini, Gabriella Di Paolo and Fulvio Cortese, supra note 378} and in Brazil, save for the binding precedent exception in the case of the latter. Larenz’s observation makes clear that precedents do not hold the same status of enacted law and that is the typical view of a system that does not acknowledge judicial rulemaking.

Indeed, this approach seems to be the typical of countries that adopt a \textit{top-down} model of norms creation and interpretation.\footnote{See Reaume, supra note 11, at 115-123; HART, supra note 43, at 124-125; WALUCHOW, supra note 13, at 204-208.} This model, as Hart noted, employs a maximal use of general classifying words to offer guidance. In theory, as I have pointed out in subchapter II.3 and II.4., this model assumes that the enacted law fulfills general requirements of generality, equality of application and certainty, and respects the separation of powers.\footnote{See TAMANAH, supra note 113, at 119.} The fact that jurists do not deny that enacted law need to be interpreted does not shake this conviction, because they generally think that the legal methods will make
possible for them, through logical operations of technical characters, finding out what the law means.\footnote{722} In this sense, Brazilian judges traditionally do not picture themselves writing a novel, as Dworkin argues in his famous metaphor.\footnote{723} In fact, for the conventional notion, the romance is already written and judges are merely readers that interpret the story, and whose views will be authoritative in the cases they are adjudicating. They shall not modify the original novel, because it is copyrighted to the legislature.

Brazilian judges will try to understand the novel as a whole; they will assume that it has unity, consistency, coherence and it is a complete source of the story. If they admit some gaps, they will fill them because the author oriented them to do so.\footnote{724} But even if their interpretation does not adequately fit the original story when confronted with the plain meaning of the words, they consider it to be a mere reading of the story, not an addition of a new chapter. It can be a literal, historical, contextual or even teleological reading. This reading may change during times. But it is the same story that is being read over and over and interpreted each time by each judge.

Traditional judges are also not bound to other judges’ readings. In fact, they claim that, under the law, they owe respect solely to the original novel. Of course, their peers’ views may be persuasive, they may consider them appropriate and follow them, especially because starting a new interpretation all over again may be demanding and time consuming. Nonetheless, they may also consider the previous interpretations wrong and choose to disregard them, except in cases in which the author of the novel tells them to be bound by a prior interpretation.

Dworkin may be correct that the chain novel metaphor captures the American legal system. But the example Dworkin has in mind is the system interprets the U.S. Constitution, an Eighteenth Century legal text, whose words are sometimes broad, but whose principles are strong and must be continually updated to fit the current stage of the American Society—this is undisputable whether one is an originalist or a living constitutionalist or adopts any other constitutional interpretive view,\footnote{725} because contenders of all schools of thought must interpret the text to present facts, although in a different manner and range. \textit{Stare decisis} is also a rule of American law widely accepted by judges.

The literary novel example, nonetheless, may not be the best one to explain Brazilian practices, because the novel is, in general, written broadly—as stated in subchapter II.4.1., in which the civil legislation style was covered.

A post-impressionist painting,\footnote{726} with is focus on abstract qualities and avoidance of specific details, may provide a better idea of the civil law generality and certainty. Consider, for example, Van Gogh’s Starry Night,\footnote{727} which is part of The Museum of Modern Art - MOMA’s permanent collection in New York City. If one examines this work of art, the person will note that Van Gogh painted a starry night. She may observe that there is a city,
an arbor, a church and some mountains. But, she may not be sure as to whether there is a comet in the sky; if the sun has already risen; or if the moon is very bright in the night; if it is a windy night; or if she can see the northern lights: the aurora borealis. She will have to interpret it to determine what the painting displays.

Nevertheless, this work has shown changes on the Brazilian social facts regarding legal practices, especially after the enactment of the 1988 C.F.. Since the Constitution is not seen as mere political document anymore and judges confer normative force to the text and consider that it tells them to take part on the process of guaranteeing a fair and just society for Brazilians, judges may well now be writing some new chapters. Insofar as they play an active role in improving Brazilian society, assuring that fundamental and social rights are respected by the three levels of Government, a new vision of the metaphor may be pertinent today, at least for some areas of law.

The Judiciary acts in this new role by applying the law, after being provoked through the filing of actions. In these lawsuits, the causes of action invoked by the parties are commonly the broad constitutional principles, which they think need to be concretized in the situation at hand. The use of the word concretization, instead of interpretation, shows that judges are doing a different kind of work nowadays. As an excerpt from Barroso demonstrates that constitutional principles “do not put in detail the conduct to be followed for its concretization.” In this sense, as he notes, “the activity of the interpreter will be more complex, because [most of the times] it will be up to him to define the direction to take.”

Taking this new scenario into account, Dworkin’s chain novel metaphor starts to make sense to describe the reality of what Brazilian judges are doing, at least regarding constitutional law. And since, as noted in subchapter II.5.2, there is ongoing practice of constitutionalizing the law, this metaphor may even be pertinent to also describe other areas of Brazilian legal practice.

Indeed, due to changes in social practices, some of Brazil’s current norms—both constitutional and statutory—do not fit the top-down model anymore—at least those that need to be concretized by the Judiciary in a case by case fashion. By writing these broad principles into the law and affirming that they are self-enforceable and do not depend on the enactment of a statute to have force, Brazil also adopted a bottom-up model of lawmaking to deal with constitutional issues. As Gustavo Zagrebelsky observes, “[t]he concretization of the principles take place in the course of the work either of the legislator, through a rule that looks to future events, or of the judge, through a decision that looks back to past events.”

According to Professor Denise Reaume:

“[t]his model holds that although we may agree on and be deeply committed to certain abstract values or principles, we cannot anticipate all the fact situations in which they may be implicated, nor can we fully map out a comprehensive view of the concrete consequences implicated by those values. We want our legal system to be informed by principles of justice, liberty and equality, but these are multifaceted concepts whose

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728 Aurora borealis is the name of “[t]he bright dancing lights of the aurora are actually collisions between electrically charged particles from the sun that enter the earth’s atmosphere. The lights are seen above the magnetic poles of the northern and southern hemispheres. They are known as ‘Aurora borealis’ in the north and ‘Aurora Australis’ in the south.” See https://www.northernlightscentre.ca/northernlights.html.

729 BARROSO, supra note 27, at 151. Translation mine.

730 Id.

731 Gustavo Zagrebelsky, supra note 26, at 631.
meaning is contested. In such situations, it is wise not to attempt a comprehensive theory issuing a precise network of rules at the outset, but rather to let the implications of the abstract principles be revealed incrementally through confronting fact situations on a case-by-case basis.\footnote{The bottom-up method is based on the common law approach, although it has differences because in Brazil it is based on pedigreed sources, which originated from a clear social fact, the inclusion of principles in written norms, specially the 1988 C.F.. The method is addressed by Hart in \textit{The Concept of Law}, when he gives the “hat in the church example.”\footnote{Hart’s “hat in the church” example is the following: there are two ways of communicating standards of conduct in advance of successive occasions on which they are applied. For notifying his son that he needs to take off his hat on entering a church, a father may opt to expressly tell him that ‘Every man and boy must take off his hat on entering a church’ or may not say anything and except that his son would observe his attitude. For the second model to work, the son must regard his father as an authority on proper behavior, and would watch him to learn how to behave. Also, according to Hart, “much of the jurisprudence of this century has consisted of the progressive realization (and sometimes exaggeration) of the important fact that the distinction between the uncertainties of communication by authoritative example (precedent), and the certainties of communication by authoritative general language (legislation) is far less than this naïve contrast suggests. Even when verbally formulated general rules are used, uncertainties as to the form of behaviour required by them may break out in particular concrete cases. Particular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances. In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide. There will indeed be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable (‘If anything is a vehicle a motor-car is one’) but there will also be cases where it is not clear whether they apply or not. (‘Does ‘vehicle’ used here include bicycles, airplanes, roller skates?’) The latter are fact-situations, continually thrown up by nature or human invention, which possess only some of the features of the plain cases but others which they lack. Canons of ‘interpretation’ cannot eliminate, though they can diminish, these uncertainties; for these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation. They cannot, any more than other rules, provide for their own interpretation. The plain case, where the general terms seem to need no interpretation and where the recognition of instances seems unproblematic or ‘automatic’, are only the familiar ones, constantly recurring in similar contexts, where there is general agreement in judgments as to the applicability of the classifying terms.” HART, \textit{supra note 43}, at 125-126.} I will return to this subject in the following chapters.\footnote{WALUCHOW, \textit{supra note 13}, at 204-208.}

III.5.3. Are Brazilian Rights Trumps?

Dworkin famously argues that “rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole.”\footnote{Ronald Dworkin, \textit{Rights as Trumps}, in KAVANAGH & OBERDIEK, \textit{supra note 430}, at 308.} He claims that, for example, “if someone has a right to publish pornography, this

\footnotetext[32]{Reaume, \textit{supra note 11}, at 117.} \footnotetext[33]{Hart’s “hat in the church” example is the following: there are two ways of communicating standards of conduct in advance of successive occasions on which they are applied. For notifying his son that he needs to take off his hat on entering a church, a father may opt to expressly tell him that ‘Every man and boy must take off his hat on entering a church’ or may not say anything and except that his son would observe his attitude. For the second model to work, the son must regard his father as an authority on proper behavior, and would watch him to learn how to behave. Also, according to Hart, “much of the jurisprudence of this century has consisted of the progressive realization (and sometimes exaggeration) of the important fact that the distinction between the uncertainties of communication by authoritative example (precedent), and the certainties of communication by authoritative general language (legislation) is far less than this naïve contrast suggests. Even when verbally formulated general rules are used, uncertainties as to the form of behaviour required by them may break out in particular concrete cases. Particular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances. In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide. There will indeed be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable (‘If anything is a vehicle a motor-car is one’) but there will also be cases where it is not clear whether they apply or not. (‘Does ‘vehicle’ used here include bicycles, airplanes, roller skates?’) The latter are fact-situations, continually thrown up by nature or human invention, which possess only some of the features of the plain cases but others which they lack. Canons of ‘interpretation’ cannot eliminate, though they can diminish, these uncertainties; for these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation. They cannot, any more than other rules, provide for their own interpretation. The plain case, where the general terms seem to need no interpretation and where the recognition of instances seems unproblematic or ‘automatic’, are only the familiar ones, constantly recurring in similar contexts, where there is general agreement in judgments as to the applicability of the classifying terms.” HART, \textit{supra note 43}, at 125-126.} \footnotetext[34]{WALUCHOW, \textit{supra note 13}, at 204-208.} \footnotetext[35]{Although judges may be writing a new chapter, not having \textit{stare decisis} as a general rule in the system creates constant problems of coherence in adding new chapters to the novel. Each judge may add a new chapter in the development of the constitutional or any other area of law, but whether the next judge will continue the story or take a step back and rewrite the same chapter, is always an issue. The fact that there is a debate as to whether, for example, the practice of a specific an official act is a requirement for configuring corruption in Brazil, a practice criminalized in 1940, shows that adding solid chapters to the chain novel may not be an easy task. \textit{See subchapter V.5.4.} \footnotetext[36]{Ronald Dworkin, \textit{Rights as Trumps}, in KAVANAGH & OBERDIEK, \textit{supra note 430}, at 308.}
means that it is for some reason wrong for officials to act in violation of that right, even if they (correctly) believe that the community as a whole would be better off if they did." Dworkin’s struggle is against utilitarianism; his view is that rights protect individuals “in spite […] of the wider good.” The question to be answered in this subchapter is whether this is the Brazilian view of rights, as exposed in law adjudication.

In subchapter III.2.3.2.1., it was mentioned that the S.T.F has an understanding that “there are no absolute rights, even the fundamental rights set forth in art. 5 of the C.F., or in treaties or in human rights international conventions. The criteria and methods of reasonableness and proportionality are essential in this context because they reject the prevalence of one determined right or interest over the other of same or higher juridical-evaluative stature." Is this view incompatible with Dworkin’s?

This question is relevant for this work because Dworkin’s trump thesis displays his view that political morality arguments should prevail over other considerations. On the other hand, inclusive legal positivism asserts that those arguments will prevail if this criterion is set forth in the rule of recognition.

To answer the question proposed for this subchapter, it is necessary to take a step back and analyze some issues regarding the context of Dworkin’s work. Although the Hart-Dworkin debate is possibly Dworkin’s most famous struggle and Dworkin argued that he, as Hart, was providing a theory of law not tied to any particular system or legal culture, foreign critics seem to think that Dworkin’s theory is limited to the American reality, at least with respect to his rights thesis and his distinction among arguments of policy and of principle.

David Kennedy explains that, in the years after 1968, the liberal thought in the U.S. was under enormous pressure and that had several impacts in the legal field, especially after the Warren Court years. The methods of reasoning and the centrality of adjudication that prevailed during this period were attacked and became more evident. The rise of textualism gave strength to critics that called the liberal decisions judicial activism and that they usurped legislative powers. “Defending the liberal tradition seemed to require a defense of adjudication as an intellectual activity distinct from legislation—and utilitarian policymaking—while remaining open to the broad readings of legal texts and tradition favored by liberal judges.”

Kennedy affirms that “Dworkin […] took up the challenge of offering a theory of adjudication between textual fealty and legislative policymaking.”

Dworkin’s endeavor, nevertheless, was to offer a theory of adjudication in a country where there has not been any political rupture since its independence and where the core of the constitutional background for rights remained almost untouched after the Civil War

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737 Id.
738 Id.
740 See ALEXY, supra note 246, at 66. According to the Indian judge Upendra Baxi, “the Indian Supreme Court has a vast appellate jurisdiction, transcending the portfolio originally offered by the Bill of Rights. Necessarily, these background conditions situate the Indian Hercules very differently. Cultural contexts within which they perform often cast them in the image of an ambivalent “constitutional” Brahmin! All this aggravates the tasks of normative cross-cultural comparison.” Upendra Baxi, “A known but indifferent judge”: Situating Ronald Dworkin in contemporary Indian jurisprudence, 1 Int’l J. Const. L., 557, 565-566 (2003); See also Arthur Chaskalson, From Wickedness to Equality: The Moral Transformation of South Africa Law, 1 Int’l J. Const. L. 590, 609 (2003).
741 Id.
742 Id.
743 Id.
Amendments. This initiative was especially difficult because the U.S. was already a developed nation and could not be called a *society in transition*,\(^{744}\) in which the judicial branch was required to be a player in improving society, especially in discovering new rights. Arguing that rights were not always visible in pre-existing legal norms but could be discovered through principled-based reasoning and without resorting to policy considerations was certainly a very powerful move by Dworkin.

But in Dworkin’s late works, he seems to have felt that this American institutional reality left his theory too narrow in comparison to what was happening in the world. The new constitutions, equally in Europe, Africa and Latin America, included not only individual rights, but also many positive rights. In the continental legal theory, scholars call these “social rights”—which demand positive actions from the state to warrant substantive equality—*second-generation rights*. They differ from the *first-generation rights*, which are considered to be the traditional liberal rights that citizens have against the state, such as life, liberty and property. There are even a third and a fourth categories: the *third-generation rights*—that encompasses the rights to humanity self-preservation, such as environmental protection; and the *fourth-generation*, linked to the idea of biological research rights, like the ability to manipulate human genetics.\(^{745}\)

In subchapter II.5.4., I went over this issue and cited a quote from Dworkin in which he comments upon the South African former Supreme Court member Arthur Chaskalson. Dworkin’s remarks show that the tasks of adjudication and of recognition of rights in these countries are more complex and due to that fact it is very hard to sustain that positive (social) rights trump all other collective interests.

One of Chaskalson’s examples of the dominance of collective over individual rights was the *Soobramoney* case,\(^{746}\) in which the South African Supreme Court rejected the claim from a patient suffering from chronic renal failure to be provided with renal dialysis without charge. Chaskalson noted that the plaintiff did not fall into the preferable cases established by the state guidelines, which were the patients that could be cured—he was a diabetic in the final stage of chronic renal failure, suffering from ischemic heart disease and cerebrovascular disease. Since resources were limited and the Government should establish some criterion, the Court ruled that awarding preference to patients that had more chances of surviving was more important than simply spending funds to prolong Mr. Soobramoney’s life.

Dworkin, in commenting upon this ruling, asserted that the Court acted properly and that “Mr. Soobramoney was treated with equal concern [because] if the government cannot provide, out of its health care budget, dialysis for everyone in renal failure, then it does not deny equal concern to give priority to those who can benefit most from that technology.”\(^{747}\)

\(^{744}\) Several provisions of developing nations have established goals in their constitutions. In subchapter II.2.2.1. I mentioned that, in Brazil, the 1988 Framers expressly introduced a large number of rules and principles in the C.F., some of them reflecting social goals, others fundamental rights. This value-laden text includes, for example, as foundations of the Republic human dignity and the social value of labor, and as fundamental goals of the nation the eradication of poverty and marginalization, the reduction of social and regional inequality and the promotion of the good of all. The South Africa Constitution also declares that “[t]he state must take reasonable legislative measures within its available resources to achieve the progressive realization.” S. AFR. CONST. (1996) § 27 (2).


\(^{746}\) Chaskalson, *supra* note 740, at 602. See also *Soobramoney v. Minister of Health*, KwaZulu-Natal, 1998 (1) SALR 765 (CC) (S. Afr.).

\(^{747}\) Dworkin, *supra* note 296, at 653.
Dworkin claims that this approach is egalitarian—the court’s reading is “consistent with equal concern for all”—as opposed to substantive:

“Judges must choose between two strategies [when judging positive rights cases]. The first strategy is substantive. It requires judges to review at least the major decisions that government made in allocating resources to satisfy the basic needs specified in the Constitution, and to reject any such decisions they find unreasonable. This substantive strategy might require judges to declare that government policy is unreasonable because it spends too much on health care and, therefore, not enough on housing. The second strategy is egalitarian: it insists not that government must make any particular allocation of resources but that it must show equal concern for all in the allocations it does make. It cannot, for example, distribute what it does assign for health care in a way that ignores greater or more basic health needs in order to serve lesser or less basic ones, when there is no need for that allocation.”

This ruling shows how hard is to say that Mr. Soobramoney’s right to health protection trumps rival collective considerations. Dworkin argues that the rival considerations in Mr. Soobramoney’s case are egalitarian, not utilitarian; the wishes of a member of the community are not being discriminated because of the wishes of another member. But there is no doubt that, at the end of the day, his constitutional right to full health care assistance was compromised, because this egalitarian treatment neglected him the possibility of living the remaining period of life in the best possible way. This was probably an argument that would make a private health insurance company to lose a lawsuit if it had denied Mr. Soobramoney’s claim.

If one examines precedents regarding health claims against the state in Brazil, he will note that the Judiciary approach is more concerned with safeguarding human dignity, even of terminal patients. Indeed, there are several judicial decisions that grant injunctions to obligate the government to financially support individual treatments. These decisions are

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748 Id. According to Stephen Guest, in Taking Rights Seriously, Dworkin has already accepted a “version of utilitarianism which incorporates a reasonably robust egalitarian premise. It requires, though, thinking of an agglomeration of choices consistent with the right of each to be treated with equal concern and respect.” Guest, supra note 541, at 93. The passage he cited from Dworkin’s book is: “Utilitarian arguments of policy […] seem not to oppose but on the contrary to embody the fundamental right of equal concern and respect, because they treat the wishes of each member of the community on a par with the wishes of any other.” Id. See DWORKIN, supra note 293, at 275.

749 Id.

750 The grounds for these decisions are the general provisions of the C.F. that grant the right of health protection (art. 196) and article 2, paragraph 1º, of Lei No. 8.080/1990: “Art. 2º The health is a human being fundamental right and the State is obligated to fulfill the indispensable conditions to its full exercise. § 1º The duty of the State is to guarantee health protection consists in the formulation and execution of economic and social policies that aim the reduction of illness risks and of other grievances and in the institution of conditions that secure universal and egalitarian to the actions and services for the promotion, protection and recovery. § 2º The duty of the State does not exclude the duty of the people, of the family, of companies and of society.” Lei No. 8.080, de 19 de setembro de 1990, COL. LEIS REP. FED. BRASIL, September 1990.
generally upheld by the S.T.F. No doubt the subject is very controversial. In fact, there is an ongoing case in which the S.T.F. is trying to fix objective criteria for cases in which the public administration is compelled to supply medication to individuals. But it is likely that the South Africa Supreme Court approach, endorsed by Dworkin, would be regarded contrary the prevailing political morality in Brazilian law. The general understanding of the C.F. right to health protection—at least in accordance with the prevailing judicial decisions—seems to be more linked to the idea of no one left behind, at least concerning health and educational issues. It may sound romantic, but courts have been trying to enforce full health assistance coverage to those who file suits requiring it. If Mr. Soobramoney’s was Brazilian, the government would probably have been forced to provide him with the treatment, either directly in a public hospital or by paying his bills in a private hospital.

The following syllabus of a S.T.F. opinion regarding the right to day care for up to 5-year-old children is an evidence of the prevailing principle:

“- Youth education represents an inalienable constitutional prerogative granted to children, which, for allowing their development, as a first step of the process of basic education, warrants them attending day care and pre-school (C.F., art. 208, IV).

This high social significant legal prerogative requires the state to create objective conditions that allow, in a concrete manner, up to 5-year-old children (C.F., art. 208, IV), the effective access to day care and pre-school. An unacceptable governmental omission may unfairly frustrate the positive right that the text of the Federal Constitution granted to them. Youth education, being a fundamental right of every child, is not submitted, during the process of concretization, to mere discretionary evaluations of Public Administration, neither it is subordinated to pure pragmatical governmental reasons.”

This, in any sense, means that Brazilian law adopts a view that individual social rights always trumps community goals. In fact, these proceedings are analyzed by judges, in a case-by-case manner, in which they balance the individual interest and the state’s considerations for not fulfilling the social right obligation. Principles of reasonableness and proportionality are generally applied—as noted in subchapters II.5.5. and III.2.2.2.

751 See e.g. S.T.F., STA No. 860, Relatora: Min. Carmen Lucia, 24.11.2017, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e], 27.9.2017 (Braz.) (reaffirming a decision that determined that the Fundação Municipal de Saúde of the City of Niteroi provides the medication Canakinumab (Ilaris) to a patient that suffers from Mevalonate Kinase Deficiency - MKD); See S.T.F., R.E. No. 956.475, Relator: Min. Celso de Mello, 12.5.2016, DIÁRIO DA JUSTIÇA ELETRÔNICO [D.J.e], 13.5.2016 (Braz.) (reversing a Court of Appeals judgement and determining the immediate enrolment of a four-year old child in a public day care; asserted that the justification of the restriction of the possible clause is not an excuse for not complying with basic social rights, like the right to fundamental education).

752 The S.T.F. case numbers are R.E. No. 566.471 and R.E. No. 657.718. Until this moment, Justices Marco Aurélio, Luís Roberto Barroso and Edson Fachin have casted their votes. The court has not yet informed when this judgment will be adjourned.

753 For an article criticizing the current role of judges in making policy decisions in health protection cases, see Eduardo Appio, Não cabe aos juízes determinar a política pública de Saúde, CONJUR (Nov. 23, 2005 12:02 PM), https://www.conjur.com.br/2005-nov-23/nao_cabe_juiz_determinar_politica_publica_saudes.

Dworkin, in *Hard Cases*, drew a distinction between *absolute* and *less then absolute* rights, as well as between *abstract* and *concrete* rights. These distinctions show that his trumps theory may not be so strong as it sounds and he admits balancing, although he would probably only admit as rival considerations compelling circumstances that do not depart from his egalitarian framework. Nevertheless, there is a difference when one says that there are no absolute rights, and when one uses the vocabulary that rights are either *absolute* or *less absolute*. The latter, although not so strong, cannot be simply understood as *relative* and will not be outweighed for any type of social goal.

Waluchow makes a similar statement about the issue in Canada:

“[…] section 1 specifies that the [Canadian] Charter ‘ guarantees the rights and freedoms set out in the subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’ The subsequent history of the Canadian courts in developing section 1 attests to their belief not only that Charter rights can be qualified by greater good. This is anything but the suggestion that rights are trumps. It is a message that rights are not absolute, but they are not blunt instruments with which to demand selfish advancement of one’s own individual interests. It is also a message of which Canadians are well aware.”

Finally, in *The Judge’s New Role: Should Personal Convictions Count?*, of 2003, Dworkin once again stated the foreign constitutionalism phenomenon and the enlargement of the judicial role in many countries:

“In the decades after World War II, more and more of these democracies gave judges new and – except in the United States – unprecedented powers to review the acts of administrative agencies and officials under broad doctrines of reasonableness, natural justice and proportionality, and then even more surprising powers to review the enactments of legislatures to determine whether the legislatures had violated the rights of individual citizens laid down in international treaties and domestic constitutions. The impact of moral pronouncement on judicial argument thus became much more evident and pronounced. In recent years international courts, like the European Court of Human Rights, have become progressively more important, and the role and powers of judges have therefore acquired yet a further dimension.”

Dworkin noted that the new role was different from the traditional one in three ways. He asserted that judges had to confront moral issues in a more pervasive fashion in general administrative regulation and in a much more pervasive in constitutional and international subjects. He then acknowledged the need judges have to make *choices* and *balance interests*:

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755 See Dworkin, *supra* note 296, at 653.
756 Dworkin, *supra* note 428, at 571.
757 WALUCHOW, *supra* note 13, at 177.
“The role of moral judgments is pervasive and undeniable in administrative regulation […] because the standards of that task are themselves set out in moral language—the language of convenience and necessity, or reasonableness, or proportionality, for example—and because it requires judges to choose among contested conceptions of economic and administrative efficiency, and to fix an interaction and balance between efficiency and other moral values.”\(^759\)

Taking into account these new institutional choices and the moral language employed to translate them into the new constitutions, Dworkin then starts talking about choices—instead of one right answer—and balancing—instead of trumping. Also, Dworkin mentions the need that these choices be made taking into account typical arguments of policy—economic and administrative efficiency.

Dworkin calls this new role of the Judiciary in foreign countries government by adjudication. He says that this enterprise shall to be carried based on principled decisions, but he seems to understand how hard it is to create a theory that could describe this more complex interpretative task—such as his law as integrity for first generation rights—and acknowledges that the judge’s personal convictions will matter much more in these policy cases:

“Government by adjudication is newly appealing for a different reason as well: it seems better suited than the alternatives to the cultural and ethical pluralism that is so marked in modern political communities and associations. Adjudication is constructivist rather than oracular: though judges rely, as I have been insisting, on their own personal moral convictions, they accept an institutional responsibility for integrity with what other judges have done and will do, which means that the body of principle they together construct, by way of constitutional interpretation, is more likely to be abstract and less tied to any particular cultural tradition. The political rather than ethical character of these principles contributes markedly to that result.”\(^760\)

Dworkin’s approach regarding government by adjudication, which differs from his arguments used to describe the appropriate role of judges in American Law, is centered on specific social facts—the use of moral language in the constitutions and the prevalent official behavior that award powers to judges to apply these standards. There is no doubt that institutional history has always been very important to his rights theory,\(^761\) but his view that judges should play an active role in reviewing the acts of administrative agencies and

\(^{759}\) \textit{Id.} at 5-6.
\(^{760}\) Dworkin, \textit{supra} note 758, at 11.
\(^{761}\) In \textit{A Reply to Critics} in \textit{Taking Rights Seriously}, Dworkin wrote that legal rights, in his view, “are institutional rights, and these are genuine rights that provide important and normally very powerful reasons for political decisions. Background moral rights enter, in ways I have tried to describe, into the calculation of what legal rights people have when the standard materials provide uncertain guidance, and some positivists’ thesis, that legal rights and moral rights are conceptually distinct, is therefore wrong.” DWORKIN, \textit{supra} note 293, at 326.
officials under broad doctrines of reasonableness, natural justice and proportionality—matters more linked to arguments of policy—and through them build the body of principles in this government by adjudication enterprise, sounds different from what he argued in prior works. Since the matters are more complex, Dworkin even asserts that “judges shall rely [...] on their own personal moral convictions.”  

In making these remarks, it is unquestionable that Dworkin comes closer to describe the current active role of judges in these societies in transition in a very similar way as chapter II describes the role of Brazilian judges in interpreting the 1988 C.F.. And Dworkin’s remarks start to sound like Hart’s remarks on interpretation. This quotation of *The Concept of Law* demonstrates my point. Hart, as Dworkin, also mentions choice, balancing and principled reasoning:

> “Neither in interpreting statutes nor precedents are judges confined to the alternatives of blind, arbitrary choice, or ‘mechanical’ deduction from rules with predetermined meaning. Very often their choice is guided by an assumption that the purpose of the rules which they are interpreting is a reasonable one, so that the rules which are not intended to work injustice or offend settled moral principles. Judicial decision, especially on matters of high constitutional import, often involves a choice between moral values, and not merely the application of some single outstanding moral principle; for it is folly to believe that where the meaning of the law is in doubt, morality always has a clear answer to offer. At this point judges may again make a choice which is neither arbitrary nor mechanical; and here often display characteristic judicial virtues, the special appropriateness of which to legal decision explains why some feel reluctant to call such judicial activity ‘legislative’. These virtues are: impartiality and neutrality in surveying the alternatives: consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision. No doubt because a plurality of such principles is always possible it cannot be demonstrated that a decision is uniquely correct: but it may be made acceptable as a reasoned product of informed partial choice. In all this we have the ‘weighing’ and ‘balancing’ characteristic of the effort to do justice between competing interests.”

III.5.4. Dworkin’s Principles and the Brazilian View

This final session will examine if Dworkin’s view of principles matches the views of Brazilian judges and scholars regarding the same issue.

In subchapters II.5.1, II.5.2. and II.5.3, I stated that Brazilian judges usually adopt Dworkin’s logical distinction among rules and principles, that Brazilian legal texts have posited standards and called them principles and that, beside these written principles, judges also refer to implied principles and to general principles of law.

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762 Dworkin, *supra* note 758, at 11.
763 *HART, supra* note 43 at 204-205.
According to article 1 of the *Introductory Act to the Brazilian Norms*, the law enters into force after 45 days of its publication in the official gazette. This mark is important to establish the compliance of the requirements of article 5, II, C.F., which sets forth that “no one shall be obliged to do or refrain from doing except by virtue of [enacted] law,” and also article 5, XXXIX, of the C.F., which sets forth that “there are no crimes unless defined in prior law, nor are there any penalties unless previously imposed by law.” Therefore, regarding the requirements of legality and especially of criminal legality, the publication of an abstract norm satisfies the constitutional moral requirement of *nullum crimen sine lege* (“no crime without law”).

Since principles are also included in the body of the C.F. and of statutes, once these texts are published, the principles already exist in the legal system, are presumptively valid and, after the 45-day *vacatio legis*, may produce effects.

When in *The Model of Rules I*, Dworkin mentions that principles cannot have pedigree, it is because he considers that “we could not devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle, still less to fix its weight at a particular order of magnitude.” So, the legal norms that are called principles in Brazil would not be called principles for Dworkin.

Dworkin admits that “a rule and a principle can play much the same role [sometimes], and the difference between them is almost a matter of form alone.” He mentions that the use of words like “reasonable,” “negligent,” “unjust,” and “significant” often make rules perform the function of principles and says that “[e]ach of these terms makes the application of the rule which contains it depend to some extent upon principles or policies lying beyond the rule, and in this way makes that rule itself more like a principle.” Nevertheless, these standards will not be principles in his opinion, but the norms that contain them would be rules.

So, are these views irreconcilable?

To answer this question is necessary to stress that, in *Hard Cases*, Dworkin says that an adequate theory will make use of “a distinction between abstract and concrete rights and, therefore, abstract and concrete principles.” He states that an “abstract right is a general political aim the statement of which does not indicate how that general aim is to be weighed or compromised in particular circumstances against other political aims,” and claims that the grand rights of political rhetoric are in this way abstract. As examples, Dworkin cites the right of free speech, dignity and equality.

Concrete rights, and, therefore, principles, “are political aims that are more precisely defined so as to express more definitely the weight they have against other political aims on particular occasions.” He gives the following example:

“Suppose I say, not simply that citizens have a right to free speech, but that a newspaper has a right to publish defense

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766 Dworkin, *supra* note 17, at 41.
767 Id. at 25.
768 Id.
769 Dworkin, *supra* note 741, at 572.
770 Id.
771 Id.
772 Id.
773 Id. at 572.
plans classified as secret provided this publication will not create an immediate physical danger to troops. My principle declares for a particular resolution of the conflict it acknowledges between the abstract right of free speech, on the one hand, and competing rights of soldiers to security or the urgent needs of defense on the other. Abstract rights in this way provide arguments for concrete rights, but the claim of a concrete right is more definitive than any claim of abstract right that support it.\textsuperscript{774}

These abstract principles and rules would probably be the “rules and standards” of the “preinterpretative” stage of Dworkin’s process of constructive interpretation, mentioned in \textit{Law’s Empire}.\textsuperscript{775}

Dworkin’s distinction among abstract and concrete rights and principles in \textit{Hard Cases} helps us to understand what he means in \textit{The Model of Rules I} when he says that principles cannot have pedigree. He has in mind concrete principles and concrete rules. To be concrete, it means that these principles have survived the adjudication process and are taken to be the best solution to comply with the community’s political morality.\textsuperscript{776} The \textit{all or nothing} fashion of the rule follows the same line of thinking. After all political morality is evaluated in the interpretative stage, the concrete solution proposed by the abstract rule provides the best outcome for the case.

His \textit{Riggs v. Palmer}\textsuperscript{777} example shows this very well. The New York court famous case, decided in 1889, concerned whether an heir named in his grandfather’s will could inherit his part after killing his ascendant. Although the NY law did not have any provision that denied grandson to inherit in this situation, the court ruled against him by applying the principle that \textit{no one can benefit from his own wrong}.\textsuperscript{778}

Dworkin says that the rule that “one who murders is not eligible to take under the will of his victim […] [did not] exist before this case was decided.”\textsuperscript{779} Nevertheless, the court cited the principle above to create this rule. This principle was a part of the law for him, so judges did not have to reach outside the legal system to find a solution. Dworkin says that “[i]n \textit{Riggs}, the court cited the principle that no man may profit from his own wrong as a background standard against which to read the statute of will and in this way justified a new interpretation of the statute.”\textsuperscript{780}

But the pedigreed principles that are included in Brazilian legal texts are obviously abstract rules, not concrete ones. In fact, the concrete rule of the case, as the current vocabulary of principles in Brazil suggests, will only exist once the principle is \textit{concretized}.\textsuperscript{781} \textit{Concretization}, as the word signalizes, makes specifically what Dworkin says: turns a pedigreed abstract principle into a pedigreed concrete principle.

Therefore, if Dworkin admits that abstract principles may exist and they turn into concrete principles during adjudication, when they are interpreted, his denial of the possibility that principles enacted in the legislation be considered principles does not make sense. Abstract rights and principles also do not hold in their faces when they will be applied

\textsuperscript{774}\textit{Id.} at 572-573.
\textsuperscript{775} \textsc{Dworkin, Law’s Empire, supra note} 436, at 65.
\textsuperscript{776} \textit{See Neves, supra 21, at 61.}
\textsuperscript{777} 115 N.Y. 506, 22 N.E. 188 (1889).
\textsuperscript{778} \textsc{Dworkin, supra note 17, at 23.}
\textsuperscript{779} \textit{Id.}
\textsuperscript{780} \textit{Id.}
\textsuperscript{781} \textit{See subchapter II.4.2.1.}
or how. The principles inserted in legal texts operate exactly in the same way. They will be applied based on the criteria judges apply—in the Brazilian case, the most pervasive method is balancing.

This is an additional evidence that it is possible to make a distinction among law identification and adjudication. Abstract principles may be identified, but their concretization will be left to adjudication.

Alexy’s qualification of principles as optimization requirements, in this sense, makes more sense to describe the practice of principle application in Brazil. Generally, in Brazilian cases, judges will resort to written principles as initial grounds for adjudication, as prima facie norms, as Alexy states, or as non-conclusive norms, as Hart asserts. After balancing them with other principles and norms, they will solve the case. Brazilian judges and lawyers do not consider that only with the case solution in hand they may identify whether they have a principle or a rule. When they talk about principles and rules, they will mostly be talking about abstract principles or abstract rules in Dworkin’s vocabulary.

The following quote, from Justice Luís Roberto Barroso, makes clear that when Brazilian judges and scholars refer to the normative structure of principles and rules, they are referring to abstract rules and principles, which will involve judicial interpretation or concretization for the application in specific cases. Barroso notes that they give instructions, point out directions, provides details of the covered conduct:

“In relation to their normative structure, a rule specifies the acts to be performed for its adequate compliance. Although the interpreter activity cannot be qualified as mechanical—because he shall give the human touch that links the text to real life—the application of a rule does not normally demand a more sophisticated rational process. If the abstract fact occurs, the established effect shall be produced. Principles, on the other hand, point to aims, ideal states to be reached. As the norm does not get into detail the conduct to be followed for its compliance, the activity of the interpreter will be more complex, because he will have to decide which action to take.”  

Dworkin’s conception of the moment when one identifies if he is reasoning with a concrete principle—at the end of the argumentative chain—in fact, seems to be similar to when Brazilian official applies the closure rule, which states that “when the [written] law has a gap, the judge will decide the case by means of analogy, customs and the general principles of law.” The general principle of the law is also employed to close the argumentative chain.

A divorce lawsuit decided by the State of Rio Grande do Sul Court of Appeals in 2003 illustrates this assertion. The fact pattern is very similar to Riggs v. Palmer: a man killed his father-in-law and the debate was whether he should lose his share of the couple’s assets—a consequence not set forth under the law in force—because the father-in-law estate had been inherited by the daughter-wife and, under their marital regime—which universally communicated all assets—those assets should be divided.

In a majority opinion, the Court of Appeals ruled in favor of the wife and denied the husband’s part of the share. In the reasoning, the court invoked the rational legislator and

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782 BARROSO, supra note 27, at 151. Translation mine.

783 LEI DE INTRODUÇÃO ÀS NORMAS DO DIREITO BRASILEIRO [L.I.N.D.B.] [INTRODUCTORY ACT TO THE BRAZILIAN NORMS] art. 4 (Braz.).
extracted from the posited rules a coherent principle, identifying the purpose of the norm [which is to provide a deterrence effect for assassinations in order to get inheritance rights].

Since this specific situation was not directly covered by the Civil Code then in force, the Court asserted the existence of an axiological gap and, by applying the closure rule, decided the case grounded on the principle that ‘no one can benefit from his own wrong’, acknowledging both that it is a general principle of the law and an implied principle. The implied principles, as Nino and Raz asserted in the quotes cited in subchapter II.5.3.2., are sometimes proposed to summarily describe the content of norms of the system. Their field of reference, nevertheless, can reach “longer than the whole body of substituted rules and allowing new principles not included in the original system derive and fulfilling system gaps.”

The concurring opinion of Judge Maria Berenice Dias ratified these conclusions. She first acknowledged the lack of statutory provision:

“I agree with the judge rapporteur that the 1916 Civil Code did not state, among the hypothesis set forth in art. 1.595, the situation now handled, because it only excluded heirs from inheriting [in case they murder the testator or the intestate decedent, and the son-in-law murderer is not an heir of the decedent under the law].”

She then affirmed the need to apply the principle that orients art. 1.595 of the Civil Code. She also invoked the rational legislator dogma:

“However, I cannot see how someone may not apply the principle that oriented the issuance of this high moral legal rule [art. 1.595 of the 1916 Civil Code] to this case. When the legislator demonstrated his repulse in contemplating any inheritance right to someone that attempts against the life of the decedent, unequivocally, he rejected the possibility that, who behaves in this way, be benefited with his wrongful act. There was a clear omission of the legislator in not contemplating this act, performed by another, but that directly or indirectly may benefit from the decedent’s patrimonial assets, should bore the same legal penalty. […] The legislator intended to punish the performer of the criminal act removing the assets that he would have been entitled to.”

After, she made reference to the closure rule to justify deciding the case using analogy:

“We cannot forget that the legal order is not complete and an evidence of this is that art. 4 of the Introductory Act to the Brazilian Norms and art. 126 of the Civil Procedure Code [of 1973] determine that the Judiciary shall decide all lawsuits. In case of omission, evidently, the solution is not to deny the

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784 NINO, note 109, at 392. Translation mine.
786 Id.
plaintiff’s request because the law gives the path: analogy, customary law or general principles of law. The law does not allow that the person who killed the decedent inherit, excluding him from the succession. So, the fact that the appellant is not an heir, but the heir’s husband, and the fact that this is a divorce lawsuit, not an inheritance lawsuit, does not authorize the departure from the legislator’s orientation and does not permit the killer to receive the decedent’s assets that became part of the matrimonial assets after his death. This legislator gap does not exist in the new Civil Code, which, in article 1.814, expands the hypothesis of inheritance exclusion, when it says that heirs convicted by murder or attempted murder against the decedent, the decedent’s spouse or the decedent’s parents or siblings, cannot inherit. Although we cannot apply the new Code to the present case, the fact that it contains such provision shows the acceptance of this orientation that was argued by scholars. […]787

So, in this case, using Benjamin Zipursky’s terminology, the penumbra-extending rule,788 which is a secondary rule, permits the Brazilian judge to employ moral argumentation and to still reason inside the legal system, although, in fact, this rule did not provide the outcome, but merely oriented the judge to decide—since the system obligates him to make a decision—and the type of arguments he shall resort to—analogy, customary law, general principles of law.

Brazil could have opted for a Kelsenian rule of closure, which says that the system always has an answer—in this case the forfeiting of the assets would not have been permitted. But Brazilian law chose a different closure rule, one that still closes the system but allows for moral judgments. Judges that resort to it consider that they are still applying the law or at least they are applying moral reasons because authorized by the law. This is the heart of inclusive legal positivism.

Although Kelsen disagrees with legal systems that set a rule of closure such as the Brazilian—because he says that the law exists but the judges do not like the desired result—he correctly mentions that the rule of the case in civil law systems, in general, will only be valid for that specific case:

“This rule [the Swiss closure rule789 ] presupposes the possibility that Swiss law is inapplicable and is actually not possible, since a legal order is always applicable and actually applied even when the court must dismiss the action on the grounds that the legal order does not contain a general rule imposing upon the defendant the obligation asserted by the plaintiff, so therefore the supposition, on which the cited rule is based, is a fiction. The fiction consist is this: a lack, based

787 Id.
788 Zipursky, supra note 46, at 1201.
789 “Art. 1. 1) The law applies according to its wording or interpretation to all legal questions for which it contains a provision. 2) In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule it would make as legislator.” SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC][CIVIL CODE] Dec. 10, 1907, SR 210, RS 210, art. 1 (Switz.). See also subchapter II.4.2.1.
on a subjective, moral-political value judgment, of a certain legal norm within a legal order is presented as the impossibility of its application.

The legislator may be induced to use this fiction through the consideration that the application of a statute created by him may lead to an unsatisfactory result under certain unforeseen and unforeseeable circumstances; and that is desirable therefore to authorize the court, not to apply in such cases the statute that predetermines the content of its judgment, but to create an individual norm, whose content is not determined by a statute but adapted to the circumstances not foreseen by the legislator. If he were to formulate this authorization in a theoretically correct fashion, that is, without fiction, he would save to say: ‘If the application of the valid legal order is unsatisfactory according to the moral-political opinion of the court in the present case then the court may decide the case according to its own discretion.’”

Finally, it is relevant pointing out that in Britain, a case with a similar fact pattern present in Rigg was decided very similarly, by extracting the principle behind the rule and applying it to an uncovered case. Britain had a rule that prevents a sane murderer from benefiting under the will of his victim. The debate was whether this forfeiture rule also applies to a case in which the victim died intestate and the murderer, under the law, would inherit. The principle “[a] person cannot bring an action based on his own wrong” was applied.

III.5.5. Chapter Conclusions

The purpose of this chapter was to show why the inclusive legal positivism is the best Anglo-American jurisprudential theory to capture the current Brazilian legal practices.

Brazilian judges consider that the laws of the country are a product of institutions. Laws usually have pedigrees, are generally a product of social facts. The 1988 C.F. is the most important one, because it defines the criteria of what is law and what is not law. Evil laws, although incompatible with the current legal order inaugurated in 1988, were seen as legal in the past and are still seen, today, as valid laws in that time, although they would not be valid in the current legal order.

Since the legislator enacted a constitution with many provision that resort to moral principles, Brazilian judges feel authorized to employ moral reasoning when adjudicating

790 Kelsen, supra note 184, at 247-248.
791 “[…] The question, however, which I have to decide is whether the principle grounded on public policy which prevents a sane murderer from benefiting under the will of his victim applies with equal force to the case of the victim dying intestate so as to preclude the murderer (or his personal representative) from claiming, under the provisions of s 46 of the Act, the property in respect of which his victim died intestate. In my judgment the principle of public policy which precludes a murderer from claiming a benefit conferred on him by his victim's will precludes him from claiming a benefit conferred on him, in a case of his victim's intestacy, by statute. The principle (to quote the language of Fry LJ) must be so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to the principle must be read and construed as subject to it. This view of the law is adopted by Fry LJ in Cleaver's case [1892] 1 QB 147, 156 and by Farwell J in In re Pitts [1931] 1 Ch 546, 550, and must in my judgment prevail over the view taken by Joyce J in In re Houghton [1915] 2 Ch 173, 177; and whether or not the opinions so expressed are binding on me, I agree with them and adopt them as my own. ‘A person cannot bring an action based on his own wrong. As to the doctrine of judicial precedent ‘we fill in the gaps.’’ Re Sigsworth: Bedford -v- Bedford [1935] Ch 89.
cases. But there is not an official practice that moral reasoning should always be employed. On the contrary, social policy goals, economic, even political arguments may be used in adjudication because the C.F. also have provisions that determine these interests to be taking into account.

In this sense, Brazilian judges are not bound to a legalist view as some of the country’s judges could have been before the current C.F.. They consider that their interpretation can be more creative. They currently decide more controversial questions than their forerunners. Even before the 1988 C.F., the law already authorized, although more narrowly, moral reasoning in adjudication. This was essentially done through the closure rule, but also through social practices such as the rational legislator.

Nevertheless, in solving these moral cases, judges still do not think they are writing a new chapter of a novel. They consider to be merely applying the posited law. The fact that their decisions are authoritative, although sometimes the abstract rules and principles which they invoke are not so clear does not mean that they consider that law does not exist. On the contrary, the law exists from the moment that it enters into force, and this moment is fixed by statute. Judges, to define the content of existing law in individual cases, employ interpretative methods, cannons and balancing techniques, to harmonize conflicting values and provisions. They do so not because they think this is the best possible answer, but because official practice tells them that this is the legal way to reason.

Taking that into account, neither exclusive legal positivism, modern natural law theory or interpretivism correctly explain the Brazilian legal system. Inclusive legal positivism is more precise, because Brazilians view their legal system as a product of social facts and they claim to identify the legal materials through this institutional moments, even though they are aware that these social facts will often only provide the path to solving controversial cases, not the solution of these cases.
IV. BRAZILIAN POST-POSITIVISM

IV.1. Short Explanation of Chapter Goals

As noted in chapter I, legal positivism was, for decades, the most prominent school of jurisprudence in Brazil. In the last 20 years, however, some jurisprudential scholars have argued that positivism has been defeated and now post-positivism is the prevalent school in the country.

The purpose of this chapter is to explain post-positivism as it is understood by Brazilian scholars and to illustrate why I consider it to be inadequate to the task of explaining and describing Brazilian law.

IV.2. Post-Positivism Roots

First of all, there is an irony in the use of post-positivism as a way of capturing what is special about Brazilian law, since it did not arise first in law and it is not a product of Brazilian legal scholars. Post-positivism is essentially a method of social scientific inquiry that rejects empiricism. The post-positivistic message is to deny that all the knowledge comes from empirical facts.

The first author to use the expression in law was the German Scholar Friedrich Muller in 1971. Muller developed the structuring legal theory and argued that this “theory developed a new post-positivistic concept of legal theory according to which the legal norms [...] have not already been written into legislation.” He claimed that:

“Enactments are but norm-texts [...], that is, formulations that precede legal norms; and they differ significantly from the eventual, “actual” legal norms generated, constructed, or completed for each successive concrete case in order to arrive at judgment.

Furthermore, the normative domain [...] belongs to the legal norm in a constitutive sense. The legal norm is, in other words, a complex phenomenon of a norm-programme [...] as well as

792 See supra text accompanying note 14.

793 “Postpositivism is [...] neither antipositivism nor a continuation of positivism by other means. Its essence is an attempt to transcend and upgrade positivism, not the rejection of all positivist ideas and postulates of the scientific method. It has incorporated ideas of falsificationism (Popper), fallibilism and Feyerabend’s methodological pluralism (Hetherington 2000). Postpositivism also does not reject quantitative methodology, but it does attempt to harness it within a more complex research design.

It also needs to be said that one only rarely encounters explicit (post)positivistic principles, but we can ascertain the existence of a hidden frame of reference and an implicit epistemological position (Hetherington 2000). Most sociologists and economists are not concerned with the philosophy of science and with epistemological issues, but all of them must work with data and use certain methods for measurement and knowledge production. As it is understood by the author of this book, Postpositivism distinguishes itself from the different variants of positivism mainly through the view that the quantification and use of sophisticated statistical methods and mathematical models in itself and a priori do not enable the attainable of scientifically relevant insights. These methods and models are useful as research tools, yet they cannot be taken as a sufficient and necessary basis for the production of valid empirical evidence and a theoretically relevant interpretation of this evidence. They cannot be applied in a routine and simple way and cannot be a substitute for theoretical elaboration. The social sciences need a more integrated and deliberative methodological approach.” FRANE ADAM, MEASURING NATIONAL INNOVATION PERFORMANCE – THE INNOVATION UNION SCOREBOARD REVISITED 5-6 (Springer, 2014).

794 Muller, supra note 29, at 331.
a normative domain […]. ‘Concretization’ no longer means that a general legal norm, found in a statute book, is made ‘more concrete’. Realistically seen and reflected on, concretization is a step-by-step *construction* of legal norms, for each individual case, through which working elements within the text become even ‘more concrete.’”

Muller argued that he overcame positivism because he distinguished *text* and *norm*. According to Georges Abboud and Rafael Tomaz de Oliveira, a theory must make this differentiation to develop under the post-positivistic paradigm. 796 Although Muller’s doctrine opens the path to the post-positivism debate, it does not describe the sense in which post-positivism is employed in Brazil and it does not reflect the current understanding of Brazilian legality.

Thomas Vesting also gives insights about Muller’s theory:

“[The structuring theory of law] attacks the idea of *lex ante casum*, the supposition that the norm exists before it is confronted with the case. [Muller] criticizes legal positivism because it is little involved with objective structures and because it excludes ‘objective implications of legal norms and its own regulatory fields’ of the interpretation process. Both are unacceptable for the structuring theory of law. For this theory, the ground for legal meanings is in the practical use of rules, not in being a rule (ought to be) dissociated of reality (is). The practical work of jurists—some reference to the work of courts is made—‘creates in a non-soluble manner in regulatory determination’. The structuring theory of law aims to clarify this element of determination of law interpretation through a model of “normativity determined by the factual ambit”, in which the norms are drawn as ‘an orderer model oriented by the factual ambit.”

Muller’s theory, by separating norm and text, essentially rejects syllogism, which he associates with positivism. He also criticizes Alexy’s theory—explained in subchapter II.5.5. when referring to the prevailing approach regarding principles and rules in Brazil—because the latter does not draw a clear distinction between text and norm and considers abstracts principles and rules to be norms. 798 Therefore, now I turn to examine what are the main claims that Brazilian scholars appeal to justify post-positivism. 799

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795 Id.
798 Alexy qualifies principles as optimization requirements and rules as definitive requirements. See II.5.5. See also Abboud & Oliveira, *supra* note 796, p. 206.
799 In Anglo-American jurisprudence, Neil MacCormick addressed the concept of post-positivism. He claimed that if the legal positivism excludes “the possibility that there is any moral minimum that is necessary to the existence of law as such,” then his version of institutional theory should be considered “non-positivist” or “post-positivist.” Although MacCormick was a very well-known legal thinker [he died in 2009], his theory did not achieve great popularity in the Anglo-American academy. Therefore, I will prefer not to make further comments on his views, especially because I think my justifications for contending inclusive legal positivism would serve to justify why I agree with his main arguments.
IV.3. The Brazilian Post-Positivistic Claims

The expression legal positivism “is used in many senses referring to clearly distinguishable and sometimes mutually incompatible theses.”\(^{800}\) One of them is that “the law consists only of standards explicitly enacted by centralized organs (i.e. statutes).”\(^{801}\) Nino adds that two other conflicting senses may also be used to explain legal positivism: (a) “legal systems are self-sufficient in providing solutions for any possible case; the law has no gaps, contradictions, linguistic vagueness or ambiguities, etc.”;\(^{802}\) and (b) “the legal system may not contain a determinate solution for some cases.”\(^{803}\) These versions are linked to Kelsen’s pure law theory, which is also considered a positivistic theory.

In addition, Nino says that positivism may be associated with the idea that “a legal system in force in a certain society can be identified only by taking into account empirical facts, just as the judicial recognition of its standards, disregarding any consideration about moral value or justice.”\(^{804}\) I consider this final view may be related to Hart’s definition.

Brazilian post-positivists that attack positivism commonly use arguments to knock down these senses of positivism.

Indeed, these are the main characteristics that Justice Luís Roberto Barroso, Brazil’s most important post-positivist exponent, points out when referring to positivism: “(a) an almost fully approximation between the law and the norm; (b) an affirmation of the institutional character of the law: the law is undivided and emanates from the state; (c) the legal order completeness, which has sufficient concepts and adequate instruments for solving any case, without gaps; and (d) formalism: the validity of a norm depends on following the necessary procedure for its creation, despite its content;”\(^{805}\) and (e) the adjudication is made by subsumption.\(^{806}\)

Barroso notes that these statements about the law disclose the positivist idea of law’s scientificity. “The legal system was considered to be a perfect system and, as any dogma, it did not need any further justification despite its own existence.”\(^{807}\) The author’s view of why positivism was defeated is centered on the fact that the positivistic ideal of objectivity and neutrality was impossible to be accomplished. Law could not describe the reality. Law must have the aim to act over the reality, shaping it and transforming it. Therefore, law is not given, it must be created.\(^{808}\)

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MacCormick argued that he subscribed to positivism in 1973, but he changed it to one of post-positivism. He contended that “[l]aw as institutional normative order is, of course, dependent on human customs and on authoritative decisions, and is in this sense a ‘posed’ or ‘positive’ phenomenon. As such it is conceptually distinct from morality, according to any moral theory in which the autonomous moral agent plays a central role in determining moral obligations This distinctiveness however does not entail that there are no moral limits to what it is conceptually reasonable to acknowledge as ‘law’ in the sense of ‘institutional normative order’. There are such limits, Extremes of injustice are incompatible with law.” NEIL MACCORMICK, INSTITUTIONS OF LAW – AN ESSAY IN LEGAL THEORY 278 (Oxford, 2007).

\(^{800}\) NINO, supra note 109, at 520.

\(^{801}\) Id. As I have stated in subchapter II.3.2., this is a version of legal positivism called legislative positivism.

\(^{802}\) Id.

\(^{803}\) Id.

\(^{804}\) Id.

\(^{805}\) Id.

\(^{806}\) BARROSO, supra note 27, at 119. Translation mine.

\(^{807}\) Id. Translation mine.

\(^{808}\) Id. Translation mine.
Moreover, Barroso argues that positivism gave the philosophical background for strengthening totalitarian movements such as Nazism and Fascism in Europe.\footnote{809} Therefore, after World War II, the idea of a legal order indifferent to ethical values was no longer tolerated. Post-positivism emerged after the downfall of these regimes and pathed the way for important legal debates regarding the social functions and the interpretation of the law.

Barroso observes that “post-positivism is a diffuse ideal, in which the relationship among values, principles and rules is included and defined. These are new facets of the new hermeneutics and of the new theory of fundamental rights.”\footnote{810} Post-positivism, in this sense, does not want to totally strike down positivism, but to improve it. This improvement is made through the approximation of ethics and law—something that was argued by the classical natural law. This new proximity is handled through the insertion of principles, especially human dignity, reasonableness, solidarity and judicial review, in the law.\footnote{811}

In an article published in the U.S., Barroso summarized this view:

“The philosophical milieu in which the new constitutional law blossomed can be referred to as post-positivism. The debate surrounding its characterization lies in the convergence of two major currents of thought offering opposite views of law: natural law and positivism—opposite, but sometimes uniquely complementary. Society’s competing demands for legal certainty and objectivity (on the one hand), and for legitimacy and justice (on the other) have expanded beyond the confines of the ‘pure’ and ‘encompassing models.’ Instead, these demands now give rise to a broad and diffused set of ideas that are still in their systematization phase.

In a way, post-positivism is a third path between positivism and the natural law tradition. Post-positivist thinking does not ignore the importance of the law's demands for clarity, certainty, and objectivity, but neither does it conceive of the law as being unconnected to a moral and political philosophy. Post-positivism grapples with the positivist postulate of separation between law, morality, and politics. It does not deny the unique nature of each of these fields, but it does acknowledge the practical impossibility of treating them as distinct 'spaces' that do not affect one another. If the complementary articulation between them is undeniable, the theory of separation—which is at the core of positivism and has dominated legal thought for many decades—pays tribute to hypocrisy.”\footnote{812}

\footnote{809 Id. This affirmation is controversial. Thomas Vesting claims that “the very spread understanding that legal-scientific positivism cultivated a blinding dogmatic, immune from all non-legal elements, or, in a more general mode, excluded social and historical dimensions is a Post-War myth. A false reduced view only may emerge if we take as truth some legal positivism auto-comments, like, for example, the Laband's preface to \textit{Das Staatsrecht des Deutschen Reiches} [The Public Law of the German Empire], but, on the other hand, one may not profit from any of the contributions of this author.” VESTING, supra note 131, at 221-222. Translation mine.}
\footnote{810 Id.}
\footnote{811 Id.}
\footnote{812 Barroso, supra note 37, at 585-586.}
IV.4. Brazilian Post-Positivism Virtues

Brazilian Post-Positivists have certainly raised important criticism against features that were prevalent in Brazilian positivism and that seemed incompatible with the judicial practice after the enactment of the 1988 C.F.: (a) the dominance of legalistic decisions; (b) the fact that subsumption could not explain all types of reasoning in adjudication, and (c) their criticism on the legal system dogmatics’ attributes, such as unity, completeness, coherency and consistency; and (d) the fact that morality and law may overlap.

In this sense, by arguing that Brazilian positivism was defeated because of these attributes, post-positivists did an important job.

Nevertheless, in subchapter III.2, I drew attention to the fact that these characteristics cannot be associated with Hart’s view of positivism, which I here subscribe. I indicated that Hart’s positivism targeted Blackstone’s formalistic view of law. He considers mechanical reasoning an ‘error’, calls mechanistic judges ‘automatic’ or a ‘slot machine’ and says that it would be better to ‘toss a penny in applying a rule of law.’ Therefore, in relation to this specific point, there is no controversy among Hart’s version of positivism, which I take to be accurate for the Brazilian system, and the post-positivism view.

The same conclusion goes to post-positivism’s criticism of subsumption. Hart, in criticizing formalism, accused it of failing to recognize penumbral cases, in which linguistic conventions do not control the outcome. He also censored the formalist judge for deciding based on logic, and for not confessing that he is not dealing with the standard case and is in an area of penumbra. Therefore, in this penumbral zone, the general terms of the rule are susceptible of different interpretation and the decision is most likely to be determined by the judge’s discretionary choice. The result is uncontrolled by linguistic conventions.

Hart’s criticism on excessive logic reveals a lot of his unromantic view of law and his unwillingness to accept illusory descriptions of what effectively takes place. He considers Roscoe Pound, Ronald Dworkin and Karl Llewelyn [and probably Hans Kelsen] noble dreamers. ‘Therefore, framing dogmatics’ attributes, such as unity, completeness, coherency and consistency, in my reading of Hart, is not compatible with his “veracity” view of law, a term referred by Zipursky that precisely captures his ideas.

Finally, the view that morality and law must necessarily be kept apart is also contradictory to Hart’s soft-positivism. Hart clearly took the position that “in some systems of law, as in the United States, the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional restraints.” Therefore, absolute separation of law and morals was not among one of Hart’s soft-positivistic claims.

IV.5. Brazilian Post-Positivism Defects

Hart’s goal in the book The Concept of Law was to provide an accurate depiction of what law is. His theory was intended to be both general, in the sense that it was not tied to

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813 Id. at 610-611.
814 HART, supra note 442, 104-105.
815 Id.
816 See HART, American Jurisprudence through English Eyes: The Nightmare and the Noble Dream, supra note 442, at 123-145. Hart, of course, knew Llewelyn was a realist exponent. But he considers his grand style example of the judicial decision, in which he draws a metaphor of the judge having to ‘carve’ his decision with the ‘grain’ of the system as a whole the example of the Noble Dream. Id, at 137.
817 HART, supra note 442, at 309-342 (Hart criticized Kelsen’s analysis of the unity of law).
818 HART, supra note 43, at 247.
any particular legal system, and descriptive, which sought to give an explanatory account of what being governed by law means.\footnote{HART, supra note 43, at 239.} Hart stressed that he had the intention of providing a descriptive account that was morally neutral and had no justificatory aims: “it does not seek to justify or commend on moral or other grounds the forms and structures which appear in [his] general account of law.”\footnote{Id. at 240.}

In comparing his enterprise with Dworkin’s, Hart stated that legal theory conceived in this manner was very different from Dworkin’s conception of legal theory. He said that Dworkin’s interpretive theory was partly “evaluative, since it consists in the identification of the principles which both best ‘fit’ and cohere with the settled law and legal practices of a legal system and also provide the best moral justification for them, thus showing the law ‘in its best light.’”\footnote{Id. at 241.}

In this thesis, I have tried so far to provide Brazilian law through the descriptive eyes. I intended to address what is law in Brazil, what is the role of rules and principles in Brazilian law and whether there is a predominant criterion judges employ when adjudicating cases in Brazil.

Although the enactment of the 1988 C.F. changed the relevance of the legal materials that judges enforce and the general understating of what the text means has put the Constitution at the center of the system, establishing that the moral concepts it brings serve as causes of actions—therefore, approximating ethics to law, as the post-positivists argue—not much has really changed in terms of the descriptive account in Brazilian law.

Despite advocating for an approximation of law and morals, post-positivism still does not deny the institutional view of the Brazilian legal system. For the proponents of this legal thought, law is essentially a product of the legislatures. They will not diverge that criminal legality is achieved, for example, once Congress enacts a statute establishing that a conduct constitutes a crime. The moral principles they employ in judicial review and in enforcing individual and social rights are the principles set forth in the C.F., a legal text. Some of them are implied principles, but the recognition of these principles is commonly justified in provisions of the C.F., as being a result of the concretization of the text. The reason they justify these principles is a social fact: the existence of written laws.

Also, in spite of the fact that post-positivism argues for a connection of law and moral philosophy, it is not certain whether this connection is always necessary to have law or if it is contingent to the areas they consider it most sensible, such as fundamental rights, areas in which they unequivocally think morality plays a role.

Post-positivists will not deny that Brazilian had legal systems during the Imperial Period, in which the 1824 Constitution was in force, or even during the last military dictatorship, in which the 1967 Constitution was in force. They will not say that there was not law under these regimes. They will only argue that some of the laws in force in those periods were bad law and that some of them are incompatible to the current legal [some of which are moral] standards posited in the 1988 C.F. and that the country’s modern views of human dignity, democracy and liberty would not conceive returning to these moments.

As I stated in subchapter II.2.2.3.1., it is common to draw a line between what Brazilians called a state of law (estado de direito) and a democratic state of law (estado democrático de direito). The first concept is commonly associated to the 1964-1985 dictatorship period, while the second concept is used to describe the current constitutional regime, installed after the enactment of the 1988 C.F.. Both, nevertheless, are legal systems. Some of the laws of the former, such as the amnesty law, are still valid under the conditions of legal validity determined by the latter.
The fact that post-positivism is linked to democratic values in Brazil will not also mean that their proponents will negate the status of system of law to the Chinese system, even if China is not currently authoritarian. The same will be said of Cuba, Venezuela or Russia, for example.

Not all judicial decisions that post-positivists would take as valid will provide moral outcomes. In fact, there are many decisions that can be called formalists or mechanical—exactly one of the movement’s main target—but they still would consider acceptable by them. Post-positivism does not deny that rules are generally applicable by subsumption. In subchapter III.2.2.3.2., I mentioned, for example, that if a negligent judge denies a claim related to a legal issue that is unequivocally covered by a statute, and the losing party lawyer files her appeal after the statutory deadline, no appellate judge will hear the case. The fact that the sentence adopted an unconstitutional, illegal, unfair or immoral reasoning, will not matter. They will apply the literal rule of the Civil Procedure Code that states that appeals should be filed within 15 days of the sentence’s publication in the official court report.

Indeed, since post-positivism acknowledges society’s demands for legal certainty and objectivity, as well as legitimacy and justice, as Barroso asserts, at some point, to meet with the needs of legal certainty, the post-positivism may have to compromise the value of justice, at least in some individual cases. This is exactly the case of the late filed appeal of the example above.

Post-positivists would also agree with utilitarian decisions that seek to give higher weight to collective interests in comparison to individual ones, if they consider that the individual interests were not disproportionally compromised. If this decision emerged from reasoning that balanced conflicting rules, principles and social goals, in which all of them were weighed, it would still be a correct one.

Barroso precisely points out that post-positivism in Brazil is still in their systematization phase. To be provide an accurate description of what they think law is, post-positivism will still have to provide answers to many questions.

**IV.5.1. The Merger of Law Identification and Adjudication**

Brazilian post-positivists criticized positivism because it argued for “an almost fully approximation between the law and the norm [the text].” Muller also reproved this closeness and drew the distinction among norm-texts and the actual norm. This point is described in the following excerpt from a S.T.F. opinion, written by former Justice Eros Grau:

“The current legal thought distinguishes normative text and legal norm, textual dimension and juridical phenomenon normative dimension. The interpreter creates the norm as of the texts and of the reality.”

Grau closes his argument affirming that:

“If this is right—and it is—, all texts are obscure until its interpretation, that is, until its transformation into norm. That is why I stated, in other context, that it is necessary ‘that we

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822 BARROSO, supra note 27, at 119.
observe that the clarity of a law is not a premise, but the result of an interpretation [...]”

The S.T.F. Justice Gilmar Mendes, in the same line, asserts:

“The fact is that, sometimes, due to the evolution of a factual situation to which the norm applies, and also due to a new legal view that starts to be dominant in society, the Constitution changes without the modification of its words. The text is the same, but the sense that is attributed to it is different. Since the norm and the text are not the same, one may note the modification of the norm, but the text did not change.”

These writings expose the post-positivistic problems emphasized all along. Without acknowledging judicial lawmaking and trying to avoid literal/legalistic decisions, post-positivists started to justify their creative judgments in properties of language, asserting that the results they reach are inevitable because of interpretative necessity. Therefore, the results are justified, even though they diverge from the enacted texts, because legal texts and legal norms are not the same thing.

Hart, on the other hand, states that enacted norms “may exist as legal rules from the moment of their enactment before any occasion for their practice has arisen.” Also, he argues that “where the texture is open, individuals can only predict how courts will decide and adjust their behavior accordingly.” In this sense, it is clear that Hart differentiates the content of rules and the content of decisions. The fact that he makes this separation, however, does not undermine his hermeneutical approach regarding the content of the rules, as opposed to a semantical one—see subchapter III.2.1.3..

This is a sensitive part of this work because it draws the line among positivistic and post-positivistic thought. In fact, this matter is also important to understand why many Brazilian authors frame Dworkin as a post-positivistic author, since, as noted in subchapter III.5.4., he takes the position that principles and rules can only be defined at the end of the argumentative chain—therefore rejects the possibility of pedigreed principles.

Indeed, I consider that this controversy exists due to the post-positivistic merger of law identification and law adjudication. As Wil Waluchow notes, “the question ‘What is the present law on this matter?’ is logically distinct from questions concerning how citizens and judges should both morally and, in the case of judges, legally, respond with respect to the law.” Waluchow draws a distinction among the law and the institutional forces of the law. He adds that “Hart, Raz, Kelsen, Austin, and Aquinas all offer theories of law and have only a secondary interest in a theory of adjudication, that is, a theory about how judges do or should decide legal cases. Dworkin has it the other way round, i.e., he is primarily interested in a theory of adjudication from which he attempts to derive a theory of law.”

The first clear problem that post-positivists face in trying to distinguish the text from the law is regarding criminal legality. The prevalent understanding both in Brazil and elsewhere is that the requirement of legality is met at the moment the statute is enacted. Once

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824 Id.
825 MENDES & BRANCO, supra note 305, at 134. Translation mine.
826 HART, supra note 43, at 256.
827 Id. at 138.
828 WALUCHOW, supra note 3, at 31.
829 Id.
830 Id.
the statute is published and the *vacatio legis* period, the norm setting forth a crime is already in force. Taking Justice Eros Grau’s writings and Muller’s theory into consideration, the norm only exists once the text is applied. When then citizens have notice of the forbidden conduct? Marcelo Neves points out the problems of this theory for not being able to answer this question:

“A way would be to simply affirm that the constitutional principles are not legal norms, because they only emerge at the end of the concretization process. In this perspective, the legal norms would only be complete rules in the moment that they are reasons to decide in a particular case. This thesis, […] although attractive, does not take into consideration an important question: if the legal norm only emerges at the end of the concretization process, judges and interpreters in general will not be subordinated to any legal norm in its activity of law concretization.”

The reason post-positivists want to distinguish *text* and *norm* is because they need to explain why sometimes it seems that posited law is not applied by judges in some cases. These are cases in which moral reasons may conflict with plain meaning. Therefore, by separating the norm from the text, they are able to justify their creative decisions, while claiming they are simply applying the law, and distinguishing their practice from the practice of legislating. As I pointed out in chapter II, Brazilian judges in general are unwilling to recognize that they make law.

Take the party loyalty case cited in subchapter II.2.3. as an example. The Court, without any alteration of the constitutional text, overruled an old precedent and asserted that members of the Chamber of Deputies may not leave the party by whom they were elected, save for specific cases. Post-positivists would, then, claim that from the text of the constitution—principle of democracy—in conjunction with reality, they found the norm and, hence, the law.

However, in the same case, the Court ruled that most Chamber of Deputies’ members that had changed party affiliation before this decision did not lose their seats because the S.T.F. decided that the new interpretation would apply only to those who had switched affiliation after the date the T.S.E. asserted for the first time the need for party loyalty in disagreement with the previous S.T.F. precedent.

How would post-positivist judges explain this situation? They would say that, despite the old S.T.F. ruling, switching parties was never constitutional—they would not

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831 NEVES, supra note 21, at 126. Muller’s theory, in this sense, comes close to Kelsen’s positivism, although he would certainly deny that proximity. Both of them share this idea that the norm will only exist at the end of the concretization process, although Kelsen would call the enacted text ‘general norm’ and Muller would simply call it a norm-text. Zagrebelsky precisely describes Kelsen’s thoughts: “For Kelsen, every time the law is enforced it represents, on the one hand, the application of laws bound by existing norms and, on the other, a discretionary creation of new laws. In the development “by degrees” of the legal system, the constitution’s initially generic limitation becomes progressively more stringent, culminating in a fully determined rule articulated in the decision of the judge and in the law’s administration. Legal rules become increasingly and ever more precisely codified, while the discretionary role of the interpreter is correspondingly reduced to the point where it disappears. Gradually, the links between the set of rules and its application to each concrete case becomes tighter. According to this way of thinking, the creative nature of jurisprudence depends on the language used in the different “degrees of development” of the set of rules, or, in other words, on the structure of law itself. The structure of the law and the discretionary power of judges fit together.” Zagrebelsky, supra note 26, at 624.

832 Id.
acknowledge judicial lawmaking in this decision—but by applying the democratic principle to the facts of this case and considering that there was a S.T.F. precedent, the judges would have to take every aspect into account and, therefore, rule that party switching did not lead those specific Chamber of Deputies’ members to losing their seats.

This portrayal of the law, nevertheless, is unrealistic. Any jurist that frankly describes the social fact related to these rulings would assert that the S.T.F. upheld the T.S.E. decision that party switching is now unconstitutional but chose not to apply this new ruling to members of the Congress that had changed party affiliation before the T.S.E. decision because they relied on an S.T.F. precedent. In this sense, they would say that the S.T.F. has set a new rule of conduct but decided not to impose this new rule to previous facts, because Deputies could not have known this rule in advance.

This is a typical case in which a Court inserts a rule in the system—the rule that party unloyalty is unconstitutional—but, in adjudication, chooses not to apply it to a specific case due to other relevant considerations.

Another unrealistic justification was the example I mentioned in subchapter II.4.2.2.. Justice Eros Grau, to allow an ill person precedence over the general public to receive her indemnization, despite the existence of any legal support, asserted that the Court should apply the rules that did not grant this right “by disapplying, that is, removing it from the exception.” 833 So, starting from the text, analysing the context, it was possible to reach the legal norm.

Grau’s approach is evidently a post-positivistic one. It is not legalistic in the sense it did not deny the ill person’s claim because of lack of institutional support. Nevertheless, it is still tied to logical and mechanical explanations of law adjudication, exactly what Hart fought against. It is clear that the law did not control this case—Grau asserted that it did not—but that sometimes judges simply try to accommodate justice in individual cases, under compelling circumstances, while adjudicating the dispute. 834

Easier cases may also be cited. In subchapter III.2.2.3.2., I mentioned, for example, that if a judge denies a claim that is unequivocally granted by a statute, and the losing party lawyer files her appeal after the statutory deadline, no appellate judge will hear the case in Brazil. Nevertheless, the fact that the Court, in this particular set of facts, has to rule against the appellant does not mean that, in abstract, she does not have the legal right under law.

Benjamin Cardozo criticized this post-positivistic view of separating text and law:

“Today there is rather danger of another tough an opposite error. From holding that the law is never made by judges, the votaries of the Austinian analysis have been led at times to the conclusion that it is never made by anyone else. Customs, no matter how firmly established, are not law, they say, until adopted by courts. Even statutes are not law because the courts must fix their meaning. That is the view of Gray in his ‘Nature and Sources of the Law.’ ‘The true view, as I submit’, he says, it that the Law is what the Judges declare; that statutes, precedents, the opinions of learned experts, customs and morality are the sources of Law.’ So, Jethro Brown in a paper on ‘Law and Evolution’, tell us that a statute, till construed, is not real law. It is only ‘ostensible’ law. Real law, he says, is

833 T.F., Rcl.-AgR. No. 3.034/PB, Relator: Min. Sepúlveda Pertence, 21.9.2006, 191, Diário da Justiça [D.J.], 27.10.2006, (Braz.) (Grau, E., concurring). Translation mine. The same rationale was also adopted by the S.T.F. in the following case, whose opinion was also written by Justice Eros Grau: S.T.F., A.D.I. No. 3.489/SC, Relator: Min. Eros Grau, 09.05.2007, Diário da Justiça [D.J.], 03.08.2007, (Braz.).

834 TAMANAH, supra note 113, at 120.
not found anywhere except in the judgment of a court. The court may overrule them. For the same reason present decisions are not law, except for the parties litigant. Men go about their business from day to day, and govern their conduct by an *ignis fatuus*. The rules to which they yield obedience are in truth not law at all. Law never is, but is always about to be. It is realized only when embodied in a judgment, and in being realized, expires. There are no such things as rules or principles: they are only isolated dooms.”

Next, Cardozo asserts that “[a] definition of law which in effect denies the possibility of law since it denies the possibility of rules of general operation, must contain within itself the seeds of fallacy and errors. Analysis is useless if it destroys what it is intended to explain. […] Statutes do not cease to be law because the power to fix their meaning in case of doubt or ambiguity has been confided to courts.”

The fact is that, as Waluchow notes, by mixing what is law with what is decided in cases, “we run the risk of entirely missing these features of legal norms.” That is why he emphasizes the need to distinguish between a theory of law and a theory of adjudication, what post-positivist undoubtedly wrongly blend altogether:

“The law is instrumental, on their account, in determining what our adjudicative rights against judges are, if only because the judicial decision to which we have an adjudicative right is often the one which accords with existing law. But this is clearly not always true and so the law cannot be identified with adjudicative rights. Nor are legal rights necessarily co-extensive with adjudicative rights, as we saw earlier in our discussion of primary and secondary rights. To suppose that the law is to be identified with our rights to particular judicial decisions would, once again, be to confuse a theory of law with a theory of adjudication.

Although it has not been expressed explicitly in these terms, our positivistic theory can easily be made sensitive to the varying institutional forces law can have in different courts. The suggestion that the law be identified with a subset of the norms which all courts within a legal system are bound to apply or change does not mean that the institutional force of law is one and the same for all judges, nor, obviously, that it is always strictly binding. To be bound by a norm is not necessarily to be absolutely bound. It makes perfectly good sense to say that one might be bound by a norm from which one sometimes is free to depart, or which one has the power to

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836 Id. at 122-123.
837 WALUCHOW, supra note 3, at 77.
change under certain defined conditions and for certain special reasons.  

The necessity of justifying the separation of text and norm also escorts post-positivists to unrealistic justifications. In the article *Constitutional Concretization*, Muller mentions an example regarding the former wording of article 82 of the Brazilian Constitution.  

The provision stated that “[t]he period of office of the [Republic] President is four years, beginning on the first of January of the calendar year following the election. Any re-election for the office of the [Republic] President for a subsequent period is precluded.” Muller, although stating that the provision is a clearly formulated text, enticing one to conclude that the synoptic wording suffices, claims that “only the full set of elements of ‘concretization’, weighed against one another in accordance with their methodological status, can lend convincing effect to the limits of the norm-programme.” He adds that “this applies even to, relatively speaking, the most simple of numerically determined norm-texts.” This explanation, nevertheless, seems unrealistic and artificial to clarify a provision whose wording and general understanding is not controversial.

### IV.6. Post-Positivism or Different Laws and Practices?

The quotation below, written by Justice Luís Roberto Barroso, shows that the main concern that Brazilians had before the installation of the 1988 constitutional assembly was the lack of effectiveness of their old constitutions in transforming reality:

“Two days before the summons of the 1988 constitutional convention, it was possible to identify one of the chronic factors of the failure in the realization of the *State of Law* (*estado de direito*) in Brazil: the lack of seriousness concerning the Constitution, the indifference to the distance between the text and the reality, between what reality was and what it should had been. Two emblematic examples: the Constitution of 1824 established that “the law will be equal for everybody,” provision that coexisted, without perplexity or embarrassment, with the nobility privileges, the vote based on property and the slave regime. Other: the Constitution of 1969, imposed by the Army Force Minister, ensured a broad list of public liberties that did not exist and promised to the workers an odd list of social rights not enjoyable, that included ‘summer camps and retirement homes’. It was sought, in the Constitution, not the

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838 *Id.* at 77-78. Waluchow also mentions that Raz points out that being legally bound by a norm is consistent with the power to change or expunge it. *Id.* Raz writes that: “A rule which the courts have complete liberty to disregard or change is not binding on them and is not part of the legal system. But the courts in common law jurisdictions do not have this power with respect to the binding common law rules. They cannot change them whenever they consider that on the balance of reasons it would be better to do so. They may change them only for certain kinds of reasons. They may change them, for example, for being unjust, for iniquitous discrimination, for being out of step with the court’s conception of the purpose of the body of laws to which they belong, etc. But if the court finds that they are not best rules because of some other reason, not included in the permissible list, it is nevertheless bound to follow the rules.” *RAZ, supra* note 284, at 114-115.

839 The provision was modified by a C.F. amendment of 1997. *See* Muller, supra note 29, at 341.

840 Translated by Friedrich Muller. *Id.*

841 *Id.* at 342.

842 *Id.*
way, but the detour; not the true, but the disguise. The most serious disfunction of the Brazilian constitutionalism, in that final moment of the military regime, was the lack of effectiveness of constitutional norms. Indifferent to what the Constitution prescribed, dominant classes built their own reality of power, insubordinate to a real democratization of the society and the State.  

There is no doubt that post-positivists aimed to draw a line between the background philosophy of the old constitutional regimes and of the new one. They felt that law lacked efficacy, that the former constitutions were not truly enforced and did not promote the desired social changes. Post-positivists thought that it was necessary to empower judges and prosecutors, because they would make the checks and balances system more effective. Post-positivists acknowledged Brazil was a society in transformation and considered that law to be an important and active tool for achieving the necessary social and political changes.

This empowerment was made through the insertion of principles, basic foundations and goals in the Constitution and other legal norms and also through granting more powers to the Judiciary to enforce these pre-commitments. Contemporary scholars qualify the 1988 C.F. as a directive-constitution, as opposed to a warranty-constitution, such as the U.S. Constitution, which merely organizes the division of powers and stipulates individual rights.

But, in terms of descriptive-explanatory jurisprudence, an external observer would simply affirm that Brazil has simply changed its primary and secondary rules—especially the rules of adjudication which specify the powers of judges. With the modification of the rules of adjudication, judges gained the power to be more effective in securing the achievements of the new social goals the C.F. chose to pursue and of the moral rights it chose to protect.

Indeed, instead of having a mere political-organizational constitution, Brazil opted to write a document that grants wide protections of individual and social rights, including environment, family and health rights and that sets goals for the government. Since the country also chose to use open-texture language to regulate these areas, to keep the text alive and updated, and adopted, as an official practice result, a secondary rule that judges have the power to enforce it, it is not surprising that the role of the Judiciary branch in Brazilian democracy has grown so much in the past 20 years.

Since the official practices regarding the interpretation of the law changed, judges have a more active role. These new practices, nonetheless, are a mere new type of secondary rules of adjudication.

In subchapter III.2.2.2., there is a quote in which Patricia Perrone noted that, although the C.F. text was very different from the text of former constitutions, it took time for the S.T.F. to assimilate the new role of principles. This only occurred in the mid-1990s. According to Perrone, this new phase was distinguished for (a) the recognition that constitutional principles had the status of enforceable norms; (b) the use of reasonableness and proportionality principles; (c) the consolidation of the balancing technique as the leading interpretative approach. All of these characteristics are essentially new rules of adjudication that were adopted in Brazilian law through official practice, as a product of a
new understanding. Even political parties with Congress representation file abstract actions before the S.T.F. to have those rights enforced on behalf of the rights' holders, requiring the Court to use these adjudicatory techniques. Congress rarely reacts to these decisions by passing amendments and laws to overrule them. This demonstrates that it is likely that Congress agrees with this new model of governmental functioning.\textsuperscript{846}

In this sense, post-positivist philosophers may be right for wanting to depart from the old positivistic outlook that prevailed in Brazil and in the continental civil law countries during the first part of the 20th Century. Indeed, mechanical decisions were common, the legal dogmas were dominant and the efficacy of the legal system was questioned, at least in terms of social goals achievement.

By implementing this departure, however, post-positivism did not realize that they target some specific concepts associated with positivism by continental scholars and judges, not its philosophy, at least in the manner argued and explained by H.L.A. Hart.

Positivism, at least in the sense understood by Hart, contends that law is a product of human events, social facts, and official behavior. Hart does not argue that to be a positivistic system, the legal system should be self-sufficient in providing all solutions for any possible cases. On the contrary, Hart is a strong proponent that law will mostly not cover all situations and judges will probably have to make discretionary decisions, because there will be no answer under the posited laws, maybe only a direction. In addition, Hart says that the social fact criterion to identify what is legal and what is not legal may incorporate moral standards. In this sense, Hart’s positivism does not claim “the practical impossibility of treating [law and morality] as distinct spaces that do not affect one another.”\textsuperscript{847}

In fact, morality and law may overlap in a legal system, but that is a product of a choice, of human achievement, not of some natural or inherent characteristic that a system must have to be considered a legal one. If there is one thing that Brazil’s constitutional history failures reveal is that fictions and dogmas in relation to inherent substantial properties of law only contribute to mechanicism, to formalism and to judges not taking seriously relevant questions of law.

The separation of law and morality thesis supported by Hart has an important message: that systems of law should avoid considering that only because something is legal, it is automatically moral. This automatic association of two distinct concepts removes clarity and candor in law identification and in legal interpretation and blunts the need that politicians, jurists and judges constantly evaluate the moral quality of the law, to either conclude whether it should be respected, renewed, revised or rejected.\textsuperscript{848} Although not precise, Jeremy Bentham’s famous remark captures the idea of the separation thesis: “[u]nder a government of Laws, what is the motto of a good citizen? To obey punctually; to censure freely.”\textsuperscript{849}

\textsuperscript{846} Several actions decided by the S.T.F. regarding controversial political issues were initiated by political parties with Congress representation. As examples, (a) A.D.P.F. 186, filed by the Democratas – D.E.M, discussing whether racial quotas are unconstitutional. See S.T.F., A.D.P.F. No. 186, Relator: Min. Ricardo Lewandowski, 26.4.2014, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e], 20.10.2014 (Braz.) (the court unanimously ruled that the quotas are constitutional); (b) A.D.I. No. 5543, filed by the Partido Socialista Brasileiro – P.S.B., arguing that unequal treatment of homosexual regarding the condition of blood donors is unconstitutional. The judgment has not been concluded yet; and (c) A.D.P.F. No. 347, filed by the Partido Socialismo e Liberdade – P.S.O.L., arguing for the recognition of a state of unconstitutionality compliance in the current conditions of the Brazilian jail system. The judgment has not been concluded yet.

\textsuperscript{847} See Barroso, supra note 37, at 585.

\textsuperscript{848} Zipursky, supra note 46, at 1171.

\textsuperscript{849} JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT xvi (Royal Exchange, 2nd ed. 1823). Hart, regarding this excerpt, comments that: “But Bentham was especially aware, as an anxious spectator of the French revolution, that this was not enough: the time might come in any society when the law's commands were so evil
IV.7. If Post-Positivism fails, can Neoconstitutionalism Survive? (The Bottom-Up Model)

Neoconstitutionalism is a global political-juridical phenomenon that emerged after the World War II and that oriented the drafting of the new constitutions. Barroso notes that, “[a]s part of the movement toward new constitutionalism, three major transformations have subverted conventional knowledge about the application of constitutional law in the Roman-Germanic World.” These transformations were:

“a) recognition of the constitution's legal force and justiciability;
b) expansion of constitutional jurisdiction, especially of judicial review; and
c) development of new ideas and new concepts in constitutional interpretation.”

Neoconstitutionalism, as noted, is the most popular way of understanding the role of the Judiciary in interpreting the C.F. in Brazil. The question I want to answer in this subchapter is: is it possible to frame these transformations under Hart’s positivistic theory and, if so, how? In other words, can neoconstitutionalism, as depicted in Brazil, survive under inclusive legal positivism? My opinion is that it only cannot survive but also it can be better explained by inclusive legal positivism, since the latter solves many of the problems that scholars attribute to neoconstitutionalism today, such as judicial activism and usurpation of legislative power.

I believe I have partially answered the questions above in subchapter III.2.2. and III.5.2., but I will go into the issue in more detail now.

The recognition of the constitutional legal force and its justiciability is achieved through the definition of primary and secondary rules in a legal system. A legal system may opt to write a constitution creating not only individual liberties, but also imposing duties on

that the question of resistance had to be faced, and it was then essential that the issues at stake at this point should neither be oversimplified nor obscured. Yet, this was precisely what the confusion between law and morals had done and Bentham found that the confusion had spread symmetrically in two different directions. On the one hand Bentham had in mind the anarchist who argues thus: ‘This ought not to be the law, therefore it is not and I am free not merely to censure but to disregard it.’ On the other hand, he thought of the reactionary who argues: ‘This is the law, therefore it is what it ought to be,’ and thus stifles criticism at its birth. Both errors, Bentham thought, were to be found in Blackstone: there was his incautious statement that human laws were invalid if contrary to the law of God, and ‘that spirit of obsequious quietism that seems constitutional in our Author’ which ‘will scarce ever let him recognise a difference’ between what is and what ought to be. This indeed was for Bentham the occupational disease of lawyers: ‘[I]n the eyes of lawyers - not to speak of their dupes—that is to say, as yet, the generality of non-lawyers—the is and ought to be . . . were one and indivisible.’

There are therefore two dangers between which insistence on this distinction will help us to steer: the danger that law and its authority may be dissolved in man's conceptions of what law ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism.”

Hart, supra note 431, at 597-598.

There are many versions of neoconstitutionalism. The one I will examine in this subchapter is the most articulated version in Brazil, which is developed by Justice Luís Roberto Barroso, grounded in Robert Alexy’s works. This is the version that I have summarized in subchapter II.5, in which I dealt with the role of rules and principles in Brazilian law. See also Lenio Luiz Streck, E is porque abandonei o “neoconstitucionalismo” (Mar. 13, 2014 8:00 AM), https://www.conjur.com.br/2014-mar-13/senso-incomum-eis-porque-abandonei-neoconstitucionalismo.

Barroso, supra note 37, at 587.
the state through a catalog of fundamental social rights, such as the obligations of treating people equally, with dignity and providing minimal conditions for subsistence. Legal provisions and/or the official practices may also establish that these duties are programmatic norms that shall be implemented by the legislative through the enactment of statutes and by the executive through the regulation of these statutes. Therefore, under this scheme, these constitutional rights cannot be enforced directly through the judiciary branch, but only through statutory review.  

But this is not the only possibility. A country may also choose to write this catalog of fundamental rights into a constitution, consider that the enactment of statutes is not necessary to make them enforceable, and confer courts the power to enforce these rights and also to overview their compliance by the other branches. This granting of judicial power may not be explicit but may be a matter of official behavior; officials understand that those powers were granted by the constitution. Courts, in this sense, by reading the constitutional abstract rights can recognize causes of action in a case-by-case fashion, in abstract or concrete review. This, of course, will be done concomitantly with legislative and executive action. A dialogue among branches is established. The question of who has the final decision on the issue may depend on whether the constitution entrenches some constitutional norms as immutable. But it is likely that these entrenched clauses will be limited to exceptional situations—individual rights, democracy conditions and separation of powers—and will be construed strictly. In cases of amendable clauses, the legislative branch may have the final word due to democratic legitimacy. As Waluchow notes, “[i]t is possible to have judicial review without granting judges the final say.” Rosalind Dixon would generally call this weak-form judicial review. Nevertheless, the legislative will also have the political burden of explaining why it is overruling a judicial decision.

Mark Tushnet, in the book Weak Courts, Strong Rights, writes about this topic:

“The political developments I have sketched made judicial review more attractive. By the mid-1960s or so, most designers of modern constitutional systems concluded that some form of judicial review is the best means of ensuring that policies

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852 As I noted above, a very influential doctrine in a book written in the sixties, entitled Aplicabilidad das Normas Constitucionais by José Afonso da Silva, argued for this view. Silva classified constitutional norms focusing on their efficacy. For Silva, there are three types of constitutional norms: (a) norms that have full efficacy; (b) norms that have limited efficacy and demand statutory regulation; (c) norms that have full efficacy but may be limited in part by statutory law. See Silva, supra note 95.

853 In the Brazilian case, one may argue that this recognition is explicit, due to the powers granted by the C.F. to the Judiciary branch in many articles, such as article 102, I, q, which establishes jurisdiction to try and to decide mandates of injunction, an action that might be filed when the absence of a regulating statute makes the exercise of a right or liberty related to nationality, sovereignty or citizenship impracticable (art. 102, I, q, C.F.), for example. On the other hand, one also can contend that the recognition of judicial power it is implicit, due to the praxis of politicians and political parties to file suits before the Supreme Court in matters relating to the regulation of social rights, in order to make them enforceable, and of the praxis of Congress in complying with the Court’s decisions and not opting to reverse them in many cases. See also note 846.


855 The Brazilian C.F., for example, has an entrenchment clause: In accordance with article 60, § 4º, of the C.F.: No proposed constitutional amendment shall be considered that is aimed at abolishing the following: I. the federalist form of the National Government; II. direct, secret, universal and periodic suffrage; III. separation of powers; IV. individual rights and guarantees. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 60, § 4º, I-IV (Braz.). Translated by Keith Rosenn, Constitutionproject.org https://www.constituteproject.org/constitution/Brazil_2014.pdf.

856 WALUCHOW, supra note 13, at 12.

inconsistent with the constitution will not be implemented. Yet, giving judges the power to enforce constitutional limitations can threaten democratic self-governance. The reason is that constitutional provisions are often written in rather general terms. The courts give those terms meaning in the course of deciding whether individual statutes are consistent or inconsistent with particular constitutional provisions. But, as a rule, particular provisions can reasonably be given alternative interpretations. And sometimes a statute will be inconsistent with the provision when the provision is interpreted in one way, yet would be consistent with an alternative interpretation of the same provision. […]

Courts exercise strong-form judicial review when their interpretative judgments are final and unrevisable. […]

Weak-form systems of judicial review hold out the promise of reducing the tension between judicial review and democratic self-governance, while acknowledging that constitutionalism requires that there be some limits on self-governance. The basic idea behind weak-form review is simple: weak-form judicial review provides mechanisms for the people to respond to decisions that they reasonably believe mistaken that can be deployed more rapidly than the constitutional amendment or judicial appointment process.*858

Although Tushnet mentions that weak-form of judicial review refers to more rapidly responses than a constitutional amendment, in Brazil, the C.F. amending process is much simpler than the U.S. Constitution’s process, because it does not require the approval of the States and is carried out by Congress alone, although in a more burdensome manner than the required for statutes.859 Therefore, the enactment of constitutional amendments can serve the task of implementing weak-form review because “judicial interpretations can be revised in the relatively short term by a legislature using a decision rule not much different from the one used in the everyday legislative process.”860

Countries that adopt this second constitutional model commonly consider themselves societies in transition, such as some European nations after World War II, Portugal, Spain and some countries in Latin America after the end of dictatorships in the last quarter of the 20th Century.

Nevertheless, as Tushnet noted, countries who chose this form of enforcing rights will not write down rights in detail in their constitutions. They will usually write them very broadly, through the use of moral language, by means of principles, goals and basic foundations, as Brazil did. In this sense, if the official practice adopts a view that these rights are causes of action and that judges may enforce them even in the absence of statutory

*858 MARK TUSHNET, WEAK COURTS, STRONG RIGHTS 20-22 (Princeton, 2008).

*859 According to the C.F., “Constitutional amendments may be proposed by: I. at least one-third of the members of the Chamber of Deputies or the Federal Senate; II. the President of the Republic; III. more than one-half of the Legislative Assemblies of units of the Federation, each manifesting its decision by a simple majority of its members. A proposed amendment shall be debated and voted on in each Chamber of the National Congress, in two rounds, and shall be considered approved if it obtains three-fifths of the votes of the respective members in both rounds. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 60, I-III, § 2º (Braz.).

*860 TUSHNET, supra note 858, at 24. Tushnet adds that “as the amendment process becomes easier, judicial review becomes weaker—and, conversely, as the legislative process becomes more difficult (with respect to specific issues, perhaps), judicial review becomes stronger. Id, footnote 18.
regulation, no doubt judges may have discretion as to how to enforce them. Since these are societies in transition, those countries may entrust their judiciary with great responsibility and will have confidence that this branch will guarantee that the constitution does not remain a symbolic document. Nonetheless, this responsibility will be shared with the legislative and the executive.

Under a soft-positivist scheme, both of these models of separation of powers are permissible, because they result of choices made by authorities that, according to secondary norms (rule of recognition), may draft the rights and duties (primary norms) and shall implement and enforce them (secondary norms, rules of adjudication).

Dworkin, as noted in subchapter III.5.3., calls this second approach government by adjudication and acknowledges that some countries have adopted this model, which he believes is more suitable for these nations.

Georges Abboud and Rafael Tomaz note that, by choosing this model, a country will depart from Montesquieu’s classical tripartite idea of government to better seek the ideal of effective limitation of political power. These authors also point out that through a prescriptive viewpoint of the separation of powers the country will ask if the adopted model effectively carries out its desideratum:

“In this sense, the concept of division of powers may be presented in different forms and it is possible the coexistence of organisms and functions that do not perfectly frame the classical tripartite, but, even so, pursue the ideal of a limited government concretization.”

It is interesting to note that this model of division of powers is also dynamic. As noted in subchapter III.5.2, by observing this dynamic relationship of the branches of the government, focusing on the role of judges in constitutional and statutory interpretation, based on the neoconstitutionalist approach, Brazil does not fit the pure top-down frame anymore, even though some judges may think it still does.

By writing these broad principles into the C.F. and by affirming that they are self-enforceable and do not depend on the enactment of a statute to have force, Brazil also adopted a bottom-up model of lawmaking to deal with the concretization of principles—which works concomitantly with the classical top-down model.

Since Brazil chose its legal system to be informed by the constitutional principles of justice, liberty and equality and decided that these principles are enforceable by courts and do not need to wait for government regulation to make them effective, courts gained an important role in implementing rights that are grounded in this principles and also in reviewing them when the implementation is made by the legislature and the executive. These rights are recognized by courts in a case-by-case fashion and also in abstract proceedings that are decided directly by the S.T.F..

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861 Dworkin, supra note 758, at 5.
862 Id. See subchapter III.5.3.
863 Abboud and Tomaz, nevertheless, note that “[a]t the moment that the structural modifications—which modify jurisdictions, organisms and functionalities—announce themselves not as techniques of government power limitation, but, as artifacts for autocratic exercise of government, we would have, in this case, a violation of the separation of powers and, as a consequence, of the constitutional state.” Abboud & Tomaz, supra note 796, at 205.
864 Id. at 204. Translation mine.
865 Id. at 203.
866 Reaume, supra note 11, at 117.
The bottom-up method is based on the common law approach, although in Brazil it is grounded on pedigreed sources, originated by a distinct social fact, the enactment of the 1988 C.F.. As I have previously observed, the method is addressed by Hart in *The Concept of Law*:867

“In fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case.”868

In the U.S., for example, at least regarding administrative law, it has been possible to note the flexibility in the selection of methods for policy determination in the administrative process:

“One of the most distinctive aspects of administrative process is the flexibility it affords in the selection of methods for policy formulation. While a legislature must normally confine itself to the declaration of generally applicable standards of conduct, and a court must deal with a problem as defined by the particular controversy before it, an administrative agency may often choose between these approaches or may even reject them in favor of more informal means of regulation.”869

Waluchow also argues that the Canadian Charter of rights should be concretized in a bottom-up method of lawmaking.870 He attributes a moral sense in defining what is the philosophy behind the implementation of charters of rights871 and argues that these rights should be considered pre-commitments for that community:

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867 Hart’s remarks continue as follows: “In some legal systems at some periods it may be that too much is sacrificed to certainty, and that judicial interpretation of statutes or of precedent is too formal and so fails to respond to the similarities and differences between cases which are visible only when they are considered in the light of social aims. In other systems or at other periods it may seem that too much is treated by courts as perennially open or revisable in precedents, and too little respect paid to such limits as legislative language, despite its open texture, does after all provide. Legal theory has in this matter a curious history; for it is apt either to ignore or to exaggerate the indeterminacies of legal rules. To escape between extremes we need to remind ourselves that human inability to anticipate the future, which is at the root of this indeterminacy, varies in degree in different fields of conduct and that legal systems carter for this inability by corresponding variety techniques.” HART, supra note 43, at 130-131.

868 Id. at 130.


870 WALUCHOW, supra note 13, at 204-208.

871 Waluchow points out the reasons why countries opt for charter protections: “We recognize that we are limited beings who are influenced, in both our everyday lives and in our political decisions, by a range of factors that often lead to less than desirable conduct. Furthermore, we recognize that our majoritarian procedures, though well designed to advance our collective interests in most cases, sometimes produce results to which we could not all agree in advance. They can lead to decisions that flout democratic conditions presupposed in either
“I am going to suggest that we instead view Charters as representing a mixture of only very modest pre-commitment combined with a considerable measure of humility about the limits of our moral knowledge. The latter stems from recognition that we do not in fact have all the answers when it comes to moral rights, and that we should do all we can to ensure that our moral short-sightedness do not, in the circumstances of politics, lead to morally questionable government action. Far from being based on the (unwarranted) assumption that we have the right answers to the controversial issues of political morality arising under Charter challenges, the alternative stems from the exact opposite: from a recognition that we do not have all answers, and that we are best off designing our political and legal institutions in ways that are sensitive to this feature of predicament.”

The fact that these constitutional rights are pre-commitments and that they will be concretized as the situations occur—either in concrete or abstract review lawsuits—reveals the importance of courts, as well as the legislative and the executive, in the enterprise. Since countries that adopt this constitution model using moral principles to define rights do not anticipate all the situations they covered—they may anticipate some situations; some cases that judges decide only grounded on principles may be easy cases, as I observed in subchapter III.3.1, all branches may play a concomitant role. “Judicial decisions of this kind—normally referred to as ‘decisions of principle’—do not eliminate the legislative problem, but rather recast it, setting limits on acceptable solutions.”

In Canada, as Waluchow notes, “the idea of a shared partnership, involving a dialogue between Parliament and the courts, has begun to take hold in both public debate and judicial decisions.” This shared partnership, nonetheless, to succeed, shall be based on an important set of virtues pointed by David Strauss: “[i]ntellectual humility, a sense of complexity of the problems faced by our society, a respect for accumulated wisdom of the past, and a willingness to rethink when necessary and when consistent with those virtues.”

Waluchow gives an interesting example of a Canadian Supreme Court precedent in which this shared partnership may be noticed. In Newfoundland (Treasury Board) v. N.A.P.E., the Court sustained a provincial parliamentary decision and held constitutional a statute that postponed the start of equal rights payments to women in the health care sector due to fiscal constraints. The pay equity obligation was established in an agreement entered into three years before the legislation was enacted. The Provincial Government argued that the procedural conceptions of democracy with its emphasis on self-determination or the much stronger constitutional concepts and its more substantive ideals, such as the ideal of equal concern and respect. This, we recognize, can occur even when our majoritarian procedures are functioning as designed—that is, when no one is denied his right to participate on an equal protection footing with everyone else and decisions are not motivated by discreditable forces like fear and prejudice. In recognition of these limitations in ourselves and our procedures, we structure our constitution so as to overcome them. We opt for constitutional arrangement involving judicial review.”

Waluchow, supra note 13, at 152.

Id. at 127.
Bix, supra note 453, at 176.
Zagrebsky, supra note 26, at 645.
Waluchow, supra note 13, at 146.
Newfoundland (Treasury Board) v. N.A.P.E., 2004 SCC 66.
the deferral was necessary because it was facing a severe fiscal deficit. The Court had to analyze whether “this kind of consideration [the deferral of payment] was enough to justify an infringement of equality rights under the Section 1 “reasonable limits” clause of the Charter.” Zagrebelsky also gives an example of the dialog in the Italian Constitutional Court decisions:

“In some cases, when it is a question of safeguarding ‘rights that have a price,’ ‘the minimum content’ of the relevant principles must be taken into consideration, thus limiting the discretionary power of the legislator concerning expenses and budget. For example, in a 1988 decision, the Italian Constitutional Court compared the involuntary unemployed person’s right to social assistance to the legislator’s autonomy over the budget and declared that a law that provided for an unemployment benefit of a few thousand lire per month was unconstitutional. The Court deemed that such an amount was below a minimum acceptable under law but left further future decisions to the legislature.”

In the U.S., Abner Greene points out that much of the SCOTUS “work indicates […] a willingness to engage in dialogue with government officials and at times to defer to them,

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878 WALUCHOW, supra note 13, at 268. The opinion stated that: “Section 9 of the Public Sector Restraint Act is justifiable under s. 1 of the Charter. The need to address the fiscal crisis was a pressing and substantial legislative objective in the spring of 1991. The crisis was severe. The cost of putting pay equity into effect according to the original timetable was a major expenditure. A lower credit rating, and its impact on the government’s ability to borrow, and the added cost of borrowing to finance the provincial debt, were matters of great importance. Moreover, the government was debating not just rights versus dollars, but rights versus hospital beds, layoffs, jobs, education and social welfare.

Courts will continue to look with strong scepticism at attempts to justify infringements of Charter rights on the basis of budgetary constraints. To do otherwise would devalue the Charter because there are always budgetary constraints and there are always other pressing government priorities. Nevertheless, the courts cannot close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis.

The government’s response to its fiscal crisis was also proportional to its objective. First, as the pay equity payout represented a significant portion of the budget, its postponement was rationally connected to averting a serious financial crisis. Second, the government’s response was tailored to minimally impair rights in the context of the problem it confronted. Despite the scale of the fiscal crisis, the government proceeded to implement the pay equity plan, albeit at a slower pace. In addition, the government initiated a consultation process with the union to find alternative measures. There were broad cuts to jobs and services. The exceptional financial crisis called for an exceptional response. In such cases, a legislature must be given reasonable room to manoeuvre. Third, on a balance of probabilities the detrimental impact of a delay in achieving pay equity did not outweigh the importance of preserving the fiscal health of a provincial government through a temporary but serious financial crisis. The seriousness of the crisis, combined with the relative size of the $24 million required to bring pay equity in line with the original schedule, are the compelling factors in that respect. The fiscal measures adopted by the government did more good than harm, despite the adverse effects on the women hospital workers.” In Brazil, recently, a very similar case has been decided in the opposite direction. In a decision rendered in A.D.I. 5.809, on December 18, 2017, Justice Ricardo Lewandowski suspended a statute that increased taxes and postponed the raise of payments for public employees which was granted by a previous statute. He claimed that failed to justify the postponement since, although under a fiscal crisis, had granted tax exemptions to several economic sectors. See S.T.F., A.D.I. No. 5.809, Relator: Min. Ricardo Lewandowski, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e], 1.2.2018.

879 Zagrebelsky, supra note 26, at 645.
either completely or partially." 

This intellectual humility attitude is a quality that, according to Strauss, common law judges, familiarized with the bottom-up model, have:

"The first attitude at the foundation of the common law is humility about the power of individual reason. It is a bad idea to try to resolve a problem on your own, without referring to the collective wisdom of other people who have tried and solved the problem."  

The mix between natural and posited law and the alleged likelihood of law assuring clarity, certainty and objectivity argued by post-positivists do not provide the necessary candor to acknowledge that not all situations were anticipated by the C.F., neither the catalog of rights is universal.

Therefore, explaining neoconstitutionalism through the inclusive legal positivist eyes, as a legal system’s chosen—not inherent—method, elucidates the different role of courts in implementing individual social rights and reviewing the legislative’s choices on the matter, being also much more honest and accurate to what actually takes place in comparison with how post-positivism explains it.

Inclusive legal positivism allows, then, an empirical or descriptive model of neoconstitutionalism. The phenomenon exists because of the way positive law is figured out in a system. Neoconstitutionalism is simply an “evidence of the existence of a social practice among judges of resolving [constitutional] disputes in a particular way” in Brazil.

The Italian scholar Tecla Mazzarese shares the same opinion regarding the compatibility of positivism and neoconstitutionalism:

“Now, simple and plain as it may sound, to conceive of neo-constitutionalism as a form of natural law is nevertheless unsatisfactory and misleading. It is unsatisfactory since it actually misses the very point which grounds the demand for a neo-constitutionalist understanding of law, namely: the radical change positive law has been going through since the implementation and protection of fundamental rights have been taken to be purported as the main distinguishing feature of a legal system. Further, to conceive of neo-constitutionalism as a form of natural law is misleading since, to use Hans Kelsen's words, it actually ignores that similarly to King Midas transforming in gold whatever he was touching, law provides with an ultimate legal character whatever may happen to be its specific concern. That is to say, it ignores both that what is taken to be a matter of legal implementation and protection depends upon the catalogue of fundamental rights which may happen to be

880 ABNER GREENE, AGAINST OBLIGATION 247 (Harvard, 2012) (Greene makes this observation although acknowledging that in some cases such as Marbury, Cooper and Boerne the SCOTUS spoke as if the interpretive challenge were a mistake; he cites engagement in interpretative exchange in cases like Thompson v. Oklahoma, Gregory v. Ashcroft and Boumediene v. Bush). Id.
881 Strauss, note 876 at 41.
882 BARROSO, supra note 37, at 585-586.
883 See Mazzarese, supra note 25.
884 Id.
885 Coleman, supra note 43, at 160.
selected in a given legal system, and that the greater or lesser extent to which such a catalogue of fundamental rights is secured legal implementation and protection depends, once again, upon what any given legal system may happen to adopt as their guarantees. In other words, it is misleading since, far from making it clear, actually conceals that both the values to be legally protected and the extent to which secure them depend, either of them, upon the contingent choices adopted by different legal systems. 886

Waluchow also mentioned the compatibility of inclusive legal positivism with more liberal and active approaches of constitutional interpretation. He says that there are various approaches, but he summarizes three categories: “(a) those who think that judges should be faithful to the text of the constitution; (b) those who believe that the proper object of deference is the intent of the original framers; and (c) those who claim that judges should view the constitution as a ‘living tree’ and interpret it in ways which express an ever-changing and developing political morality.” 887 He claims that “the judge will be more likely to follow adjudicative approach (c), which is similar to neoconstitucionalism, if he accepts inclusive legal positivism:

“If, by way of contrast, a judge is thought to be discovering the existence or content of pre-existing valid law in a charter case involving appeal to considerations of political morality (because there is nothing in the nature of law which precludes this possibility, as inclusive positivism suggests), then such a retreat seems far less likely. The judge and others will view his decision, not as one which encroaches upon forbidden territory reserved for legislators, but as which is required by his normal legal-adjudicative obligation to discover and apply the law that exists and has institutional force over his decisions. There will be little danger that the archetypal image of the judge will be confused with the very different image of judge as legislator, politician, or moral reformer. So the judge will be more likely to follow adjudicative approach (c), as opposed to the more ‘conservative’ approaches represented by (a) and (b), if he accepts inclusive positivism.” 888

IV.8. Nepotism, Cruelty Against Animals and Party Loyalty Again

Returning to the three cases we first examined in subchapter II.2., the role of the S.T.F. is much better explained once we understand the Brazilian system of concretization of constitutional principles as a bottom-up system.

Regarding the nepotism cases, the fact that S.T.F. banned nepotism in all three branches of government shows that the Court, in a bottom-up fashion, acknowledged a fact—not anticipated by the 1988 Framers as so serious or maybe anticipated but not confronted in the C.F. due to corporativism—as causing damaging consequences to the country. The Court also noticed that the unfairness of allowing appointment of relatives privileged politicians,

886 Id.
887 WALUCHOW, supra note 3, at 67.
888 Id. at 71-72.
judges and other public officials in detriment to the whole population, who can only have access to public positions by public competitive examinations. Problems of unequal treatment, public inefficiency and excess of privileges were addressed. Therefore, the Court, grounding the prohibition in the principles of morality and impersonality (neutrality), ruled it unconstitutional.

As Justice Barroso—who was then the lead attorney of the case—commented, the “conventional knowledge” of respected scholars was that the only constitutional permissible manner to ban nepotism was through the enactment of a statute. However, to circumvent this conventional knowledge argument to say that no statute was necessary, the Court framed nepotism within the core of the concept of administrative morality and impersonality, in a top-down fashion. Therefore, the argument about the need of a statute prohibiting nepotism did not prevail, since the court claimed that nepotism offended the nucleus of principles of morality and impersonality.

By using the “core argument” the Court wanted to avoid any allegation of activism, lawmaking or undue interference with the separation of powers. The use of the “core argument” is certainly an attempt to justify the outcome as a process of logical deduction from a pre-established unequivocal conception of morality, which, based on the huge disagreement that existed even among judges, reveals not to be true.

It would have been more honest and sincere if the S.T.F. had asserted that, under the choices made by the 1988 C.F. Framers, the Court has an active role in construing the Constitution and in helping develop their principles such as equal treatment and assert that nepotism was a recurrent problem, not resolved by Congress, which had incentives not to deal with it. In this analysis, concrete experience plays a role and the concretization of the content of principles that inform S.T.F’s conclusion is less abstract and more down-to-earth.

In addition, a clear message is also sent: that legislative inertia in handling important issues is not an excuse for the absence of immediate C.F. enforcement. I will talk more about this case in the next chapter.

The dialogue approach was even clearer when the S.T.F. reviewed the constitutionality of the State of Ceara statute that allowed the vaquejada. The C.F. had a provision that declared that practices that submitted the animals to cruelty were not allowed. But the constitutional text also assures that popular cultural manifestations shall be protected. Therefore, under the neconstitutionalism approach, the Court acted correctly to decide the controversy initiated by Brazil’s Chief Federal Prosecutor. In doing so, the Court reviewed the concretization of the principles that had been done by the State of Ceara Assembly and, after gathering evidence in the case file, granting the opportunity for amicus curiae to join in the case, disagreed with the State’s choice, because, in its opinion, it did not give proper weight to the animal cruelty prohibition.

Nonetheless, I pointed out in subchapter II.2.2. that an Amendment to the C.F. has been passed by the Federal Congress and, in the new text of article 225, § 7º, provided a new definition for cruelty, excluding from the concept the cultural sports practices that use animals, such as the vaquejada. Brazil’s Chief Federal Prosecutor challenged this new provision through abstract review, but the S.T.F. has not yet decided the case.

889 Because Congress members could appoint their relatives and the burden of these appointments was diffused.
890 See Dixon, supra note 857, at 2214-2216.
891 CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225, § 1º, VII, (Braz.).
The debate is certainly of a different kind now because the constitutional challenge is framed on the violation of constitutional immutable clauses,\footnote{Article 60, §4º, of the C.F. says that “[n]o proposed constitutional amendment shall be considered that is aimed at abolishing the following: I. the federalist form of the National Government; II. direct, secret, universal and periodic suffrage; III. separation of powers; IV. individual rights and guarantees. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 60, § 4º, I-IV (Braz.). Translated by Keith Rosenn, Constituteproject.org https://www.constituteproject.org/constitution/Brazil_2014.pdf.} what is certainly highly questionable in the case, considering that the issue is about animal rights, not individual rights.

But even if the Court defers to Congress’ divergent choice, there is no doubt that the dialog among the branches is likely to have been relevant. Congress is likely to have carefully scrutinized the S.T.F. reasons and to have stated clearly why it disagreed with them. If Congress has not done this attentive examination, the political pressure on the issue will probably not settle.

Finally, regarding the party loyalty case, it is clear that a \textit{bottom-up} model of judicial lawmaking also took place. The T.S.E., taking into account the dreadful consequences that party-switching caused for democracy, ruled the practice unconstitutional. Party unloyalty basically corroded the opposition parties’ strength, since the parties in the governmental coalition, using the government structure, had a lot of power, both political and financial, to attract Congressmembers to them. The problem was worsened because party public funds and campaign television time is proportionally divided according to the number of members in the Federal Chamber of Deputies. The facts revealed by the \textit{Mensalão} trials proved these concerns were right.\footnote{S.T.F., A.P. No. 470, Relator: Min. Joaquim Barbosa, 17.12.2012, DÍARIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 19.4.2013 (Braz.).}

Both the S.T.F. and the T.S.E. did not wait for Congress to solve the problem, especially because the governing parties had no incentive to fix it and the functioning of Congress, as the result of popular vote balance, was under threat due to the arbitrary disequilibrium of forces and the fraud to the popular will.\footnote{See supra note 86.}


\textbf{IV.9. Chapter Conclusions}

Post-positivism is inadequate to the task of explaining and describing Brazilian law. Although post-positivists succeeded in attacking specific characteristics of that were prevalent in Brazilian positivism, which seemed incompatible with the judicial practice after the enactment of the 1988 C.F, they went too far in acknowledging an inherent relation among legality and morality and by trying to frame in law identification specific questions of adjudication.

Inclusive legal positivism, by asserting that morality can be a condition of validity if the rule of recognition says so, is much more accurate with Brazilian legal practices. And by
explaining that law identification and adjudication are separated tasks, inclusive legal positivism offers clarity on why judges sometimes do not apply the laws in particular cases, without trying to affirm that a norm is being applied by being disapplied.\textsuperscript{899}

\textsuperscript{899} S.T.F., Rcl.-AgR. No. 3.034/PB, Relator: Min. Sepúlveda Pertence, 21.09.2006, 191, Diário da Justiça [D.J.], 27.10.2006, (Braz.) (Grau, E., concurring). Translation mine. The same rationale was also adopted by the S.T.F. in the following case, whose opinion was also written by Justice Eros Grau: S.T.F., A.D.I. No. 3.489/SC, Relator: Min. Eros Grau, 09.05.2007, 425, Diário da Justiça [D.J.], 03.08.2007, (Braz.).
V. PROBLEMS AND REMEDIES FOR INCLUSIVE LEGAL POSITIVISM

V.1. Short Explanation of Chapter Goals

In the introductory chapter, I mentioned that showing that inclusive legal positivism well captures the Brazilian legal norms and practices would throw light on the country’s legal system upsides but would also clarify most relevant downsides. I also stated that highlighting these positive and negative features will be important because they are not evident and, therefore, are not usually noticed.

There is a famous quote, attributed to the former Ministry of Finance Pedro Malan, that “in Brazil, even the past is uncertain.”900 This phrase is used in at least two contexts: (a) sometimes it is related to the lack of clarity in the government financial records and (b) sometimes it is related to the unforeseeability of legal decisions and to legal uncertainty.

This chapter intends to (a) analyze problems of guidance that may occur with the inclusion of moral principles as condition of validity of laws and acts and to (b) suggest some remedies that can minimize this effect in Brazil.

V.2. Uncertainty, Unintended Deterrence and Efficacy

According to Fernando Guimarães, Brazilian public administrators have been, bit by bit, “giving up deciding.”901 He remarks that due to excessive control of administrative actions and to general legal uncertainty, administrators simply do not want to “run risks:”902

“Since the enactment of the 1988 Constitution, which inspired a model of control that strongly inhibited the liberty and the autonomy of the public administrator, we have been watching an amplification and a sophistication of the control over the administrator’s actions. Making every day administrative decisions started to attract legal risks of every order, that can even lead to the criminalization of the conduct. Under the paws of all this control, the administrator gave up deciding. He saw his risks being amplified and, under a self-protecting instinct, has circumscribed his actions to a ‘comfort zone’. In this sense, an inefficiency crisis due to control has been put in place: cornered, the administrators do not only perform acts trying to achieve the best administrative solution, but also to protect themselves. The adoption of heterodox or controversial administrative actions means exposing oneself to unimaginable risks. And this administrator inhibition towards this scenario of amplification of his legal risks is comprehensible. At the end of the day, sensitive decisions may purport the risk of being criminally prosecuted. As an inevitable consequence there is administrative inefficiency,

902 Id. Translation mine
which clearly harms the functioning of public administration.\textsuperscript{903}

Guimarães is not alone in this criticism. Professors Joel and Pedro Niebuhr, in an article entitled “Public Administration of Fear,”\textsuperscript{904} make similar comments. They mention that public servants should only be punished if they acted with gross negligence or malice. But that is not what in fact happens:

“Administrative agents should only be penalized when they had acted with malice or grave negligence, what would only take place in glaring and exceptional cases. They should not be penalized when law enforcement offices merely disagree on the merits with their decisions or with their legal interpretation on technical or juridical controversial issues. The interpretation of law enforcement offices should not be taken as absolute truth, what would lead to application of sanctions to administrative agents due to mere interpretive disagreement. This all seems obvious, very obvious. But it is not what happens in practice. Administrative agents are penalized, with harsh sanctions, even when they act in good faith, even in cases in which no one questions their honesty. They are penalized by pretense mistakes, which, in truth, reverts to interpretive disagreement or because of neglect of formalities prescribed by law. Some call this a hermeneutical crime.

The law enforcement offices’ excesses gain relevance because administrators work with a fuzzy legislation, which gets lost in bureaucratic formalist regulations, whose most representative example is the unfortunate Lei No. 8.666/1993, that regulates the making public biddings and the execution of administrative contracts.\textsuperscript{905}

Regarding this specific law, Joel and Pedro Niebuhr add that the prevalence of open textured principles has the effect of providing justifications for subjective and lose decisions:

“This defective legislation is filled of various principles, which, by nature, are more open and, due to this reason, end up serving as pretense justification for any type of decisions, that goes to all sides, all subjective and loose. Furthermore, in a general manner, law enforcement offices do not worry about articulating arguments to justify that a given principle leads to one or another conclusion. They simply decide and use principles for allegedly furnish grounds to a decision, without

\textsuperscript{903} Id. Translation mine
\textsuperscript{904} Translation mine.
explaining the reasons and circumstances the stated principle applies to that situation.906

In this sense, they conclude that “public administrators do not want to create, do something different, or think about other solutions. The new can go wrong and the mistake is severally punished.”907

Carlos Ari Sundfeld also observes:

“It is true that, in abstract, nobody in the legal world discusses that the administrative action has to be efficient and effective. Even the Constitution demands ‘efficiency’ from the public administration (art. 37). But let’s speak the truth: the good public management is not a priority of the Brazilian legislation, nor of its interpreters. The priority has been another: limiting and controlling—even threatening—as much as possible the administrators, which are, in principle, suspected of having done something.

[...] Our problems in the public government do not come from simple technical imperfections of laws and persons. They come from a deeper issue: the legal preference for the maximum of rigidity and control, even if this means compromising the public administration efficiency. Good management can and shall live together with limits and controls, but not with this maximalism. If we do not invert the priorities, there is not administrative reform capable of unlocking the public administration.”908

In resorting to the economic analysis of law, one may understand the practical consequences of a legal system that chooses to write laws with the prevalence of moral principles as criterion of legal validity and as tool to construe the meaning of rules and to create of causes of action. The option for an analytical constitutional text that employs, in its provisions, undetermined legal concepts, fundamental rights and principles—all understood, in most of contexts, as non-conclusive or prima facie norms—was important to allow better protection of some individual and social rights, but certainly has raised ambiguities and left difficult issues for future resolution by public administrators and by courts.909 Since administrators do not have immunity—only judges and prosecutors do for negligence cases910—they, in fact, may run high risks in their day-to-day activities.

906 Id. Translation mine.
907 Id. Translation mine.
909 See MELLO, supra note 160, at 29.
910 Judges and Prosecutors only respond in their personal capacities in cases in which malice or fraud is proved. See e.g. Article 49 of Lei Complementar No. 35, de 14 de Março de 1979, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], de 14.3.1979 (Braz.). See also S.T.F., R.E. No. 228.977, Relator Min: Néri da Silveira, 5.3.2002, DIÁRIO DA JUSTIÇA [D.J.], 12.4.2012 (asserting that judges are immune from being prosecuted and the damaged party must sue the state in order to recover damages; the state can, eventually, file a suit against the judge to recover damages paid to the harmed party if proved the judge acted with malice or fraud).
Principles, as non-conclusive or *prima facie* norms, are similar to standards. They may be “vague; costly to administer because open-ended; and difficult to monitor compliance with by the court or other body that enforces the standard.”\(^{911}\) As Richard Posner also notes, “law’s vagueness […] create[s] a risk that legitimate conduct will be found to violate it.”\(^{912}\) So, vagueness can create an *unintended deterrent effect* “when the legitimate activity that is deterred is more valuable socially than privately.”\(^{913}\) This unintended deterrent effect is exactly the consequence described by Fernando Guimarães above and is also pointed out by Carlos Sundfeld:

“The consequences of failure and the consequences of legal uncertainty cannot fall into the administrator’s back. The administrator must be protected from the enforcement extremes. On the contrary, due to the fear of becoming a defendant in a proceeding, he crosses his arms and keeps waiting for retirement. Our public administration becomes even less effective. What law has to do is to multiply the incentives for the public action, and not create new risks for those who act, because these new risks generates accommodation and paralysis.”\(^{914}\)

Zagrebelsky agrees with Posner’s remarks regarding rulemaking. He affirms that principle-based *bottom-up* jurisprudence is *plastic* and *adaptable*:

“In relation to rules, the legally relevant elements in a case are established in a more or less determined way. In contrast, principles, as already suggested, yield no such determined path, with the result that the relevant elements of the law are determined on a case-by-case basis. This characteristic renders principle-based jurisprudence particularly plastic and adaptable, whereas jurisprudence by rules aims at a greater rigidity and fixity.”\(^{915}\)

Empirical research would be necessary to understand the full extension of these problems. That is far more than the scope of this work. Nevertheless, I am certain that some of these criticisms and theoretical considerations of the concurrent problems in legal systems like the Brazilian are problems that may be associated with the possibility of moral criteria as condition of law validity. In fact, Posner’s comment, read in conjunction with observations made in (a) subchapter II.4.1., regarding the civil law legislation style and the status of vague norms in German law, in (b) subchapter II.5.5., with respect to the concretization of principles, especially under the neoconstitutionalism paradigm, may provide traces that Pedro Malan’s well-known phrase and that the administrative scholars’ observations are somewhat true.

Another example is Brazil’s approach towards disciplinary punishments, referred in subsection III.3.. Maria Di Pietro asserted that “in administrative law, vagueness prevails.


\(^{912}\) Id.

\(^{913}\) Id.

\(^{914}\) Sundfeld, *supra* note 908. Translation mine.

\(^{915}\) Zagrebelsky, *supra* note 26, at 647.
There are few infractions clearly described by the law, as it happens with ‘public employment abandonment’. Most of the infractions are left to administrative discretion when dealing with a concrete case; it is the sentencing authority that will frame the act as a serious fault, irregular proceeding, service inefficiency, public disobedience, or other infractions set forth in an undetermined manner by the statutory legislation.”

916 Therefore, this is another example of punitive norms that use standards for justifying decisions. Of course, the use of standards does not imply that all situations to which they should apply will be controversial. But it raises the possibility that controversy will exist, because the intent of writing standards is exactly to leave some situations open to be settled in a case by case manner.

The general use of standards, thus, may not only lead to inefficiency in governmental action, but also may raise fairness problems, because it runs counter to the values of certainty and predictability, values that are within Brazil’s political morality. In summary, it may catch the party by surprise. 917 Mauro Cappelletti takes this position:

“Creative judges should never lose sight of this first ‘weakness’ of law-making through the courts. Of course, it would not be easy for them to object that statutory law, whether codified or not, is itself never complete, never unambiguous, and never easily accessible to all. Difficulty of information is, in particular, a permanent obstacle to full access to the law in every legal system, especially for underprivileged persons and groups. Yet this problem must be seen—once again—as a matter of degree. Case law is arguably subject to that difficulty to a somewhat higher degree than statutory law.”

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Therefore, there is a risk that Brazilian law, in some cases, may treat the citizens in the same way described in Jeremy Bentham’s notorious metaphor: “It is the Judges [as we have seen] that make the common law: — Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him off, you wait till he does it, and then beat him for it.”

919 Problems of vagueness of the law have an additional complicating aspect in systems like Brazil: the fact that concretization of rules and principles by judges look back to past events. 920 Retroactive application of new creative court’s understandings of principles and rules are the rule of the system. That is why Zagrebelsky points out that in some areas of law this should be avoided:

“In certain determined fields, [regulation by principles] is expressly excluded. That is predominantly the case in criminal law, where it is preferable that the legislator establish crimes and punishment through prospective and predictable rules.”

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916 DI PIETRO, supra note 18, at 515. Translation mine.
917 CAPPELLETTI, supra note 61, at 36.
918 Id.
920 Gustavo Zagrebelsky, see note 26, at 631. In tort law, Benjamin Zipursky mentions that retroactive law is a rule. See supra note 142.
921 Id.
As a matter of fact, even the word *concretization*—that is used to describe the interpretative work done by the judge regarding principles—discloses this possibility, since, according to scholars, the results are adopted “in conformity with, but not determinable by, the Constitution.”

V.3. The Interactionist View of Law

The American legal theorist Lon F. Fuller is mostly known in Brazil for the book *The Case of the Speluncean Explorers,* but his most important jurisprudential work is certainly *The Morality of Law.* Because the latter book was never translated into Portuguese, it has not made its way into Brazilian jurisprudential thinking. Yet *The Morality of Law* provides an important analytical framework for thinking about how to traverse the difficulties that accompany open-textured and inclusive legal positivist systems. Fuller remarked that he wrote this book because of his “dissatisfaction with the existing literature concerning the relation between law and morality.”

Fuller starts *The Morality of Law* by drawing a distinction between the two types of moralities: the *morality of aspiration* and the *morality of duty.* The morality of duty lays down “the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark.” The morality of aspiration is the “morality of excellence, of the fullest realization of human powers. […] A failure to realize one or more of these powers would not be wrongdoing, it would be shortcoming or a failure to actualize potential.”

After developing these concepts, Fuller presents his imaginary Kingdom, which is ruled by a fictitious King Rex, who, by making eight basic mistakes, ends up failing to make law:

“Rex’s bungling career as legislator and judge illustrates that the attempt to create and maintain a system of legal rules may miscarry in at least eight ways; there are in this enterprise, if you will, eight distinct routes to disaster. The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a to publicize, or at least to make available to the affected party, the rules is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in

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922 Brugger, *supra* note 33172, at 398.
923 Fuller, *supra* note 309.
925 *Id.*
926 *Id.* Fuller talks about the differences among imposing penalties—for violation of the morality of duty—and granting rewards—for achieving the morality of aspiration: “[…] Nevertheless there is a great difference in the procedures generally established for meting out penalties as contrasted with those which grant awards. Where penalties or deprivations are involved we surround the decision with procedural guarantees of due process, often elaborate ones, and we are likely to impose an obligation of public accountability. Where awards and honors are granted we are content with more informal, less scrutinized methods of decision. The reason for this difference is plain. Where penalties and deprivation are involved we are operating at lower levels of human achievement where a defective performance can be recognized, if care is taken, with comparative certainty and formal standards for judging it can be established. At the level where honors and prizes become appropriate we see that there would be little sense, and a good deal of hypocrisy, in surrounding a decision that is essentially subjective and intuitive with the procedures appropriate to the trial of a law suit. *Id.* at 31.
effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.”

Fuller, then, introduces the eight characteristics that a system of law should have to deserve being called law. The law should be “(1) general; (2) public; (3) prospective; (4) clear; (5) compatible with one another; (6) possible to obey; (7) stable; and (8) consistently applied.” These principles constitute “the inner morality of law” and are inherent and necessary to make a legal system possible. Without them, a certain legal system should not even deserve to be called a legal one for the author. Fuller does not think that non-compliance with few of these moral principles would automatically make a system non-legal. But he thinks that this may lead the system to fail and not endure. As Denise Meyerson notes:

“Because it is not possible for citizens to obey rules suffering from procedural defects like these, these defects would be ‘routes to failure’ in the enterprise of creating law […]. And a total failure in all of these ways would result in something that is not simply bad law but not law at all. Just as we would not describe something that is totally incapable of cutting as a ‘knife’, so we would not describe a system of rules which is totally incapable of guiding conduct as a ‘legal system’.”

If the departures of the eight inner principles of law are so strong, at some point, the system will cease being law. That is what Fuller thinks happened with the Nazi legal system.

Fuller’s theory was severely attacked by Hart because Fuller takes a natural law jurisprudence position—the author argues that these properties are not contingent, but are inherent to law, whereas Hart thinks that these principles only contribute to maximize law’s efficiency. Even if Fuller’s theory is philosophically wrong in describing what law is, his theory conveys an important message: it is likely that a legal system that has these procedural guarantees will have better chances to succeed in comparison to systems that disregard some or all of these requirements. In fact, systems in which rules (a) are enacted employing vague norms; (b) are issued with the purpose of affecting specific citizens of a community; (c) are

927 Id. at 39.
928 KAVANAGH & OBERDIEK, supra note 430, at 93.
929 MEYERSON, supra note 10, at 42.
930 Fuller states that: “[f]or me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system. When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality - when all these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law. Fuller, supra note 307, at 660.
931 See supra note 553.
932 HART, supra note 460, at 357.
drafted to retroactively punish citizens or to demand more than they can comply; and (d) are applied in an inconsistent manner and (e) are constantly changed; are not likely to succeed in the long run. As an example of the relevance of Fuller’s remarks, his defenders argue that both of the legal systems invoked by his critics to attack his theory—Nazi German and Apartheid in South Africa—did not endure for long.933

These principles that, for Fuller, are inherent to the concept of legality, confer an idea of what law represents for the author. Fuller asserts that law should be understood as “the enterprise of subjecting human conduct to the governance of rules.”934 He insists that law should be viewed “as a purposeful enterprise, dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it, and fated, because of this dependence, to fall always somewhat short of a full attainment of its goals.”935

According to Kristen Rundle, “[w]hen Fuller speaks of law and its existence, he has in view a particular quality of relationship between the lawgiver and the legal subject, one that is reflected in the observance of his eight principles but which is not exhausted by them.”936 She adds that to gain a deeper appreciation for Fuller’s theory, it is crucial that we focus deeply on his “repeated references to the relationship of ‘reciprocity’ that a legal system constitutes and which signals the equal presence and responsibilities of lawgiver and legal subject alike, as well as his gestures to how the enterprise of lawgiving implicates a ‘sense of trusteeship’ and a ‘relationship with persons’.”937

Therefore, for Fuller, the legal system obedience to the eight principles of morality reflects a relationship of reciprocity and respect among the state (the lawgiver) and the citizen (the law’s subject).938 That is why his theory is called interactionist, as opposed to directional.939

V.4. The Importance of Fuller’s theory

This work has shown that inclusive legal positivism is the theory that best captures the Brazilian legal system. Since inclusive legal positivism argues that the relationship of law and morals is merely contingent, but not inherent, I cannot side with Lon Fuller’s assertion that a system that does not observe his eight inner morality principles of law (or at least most of them) should not be considered law. As mentioned in subchapter III.2.1., I agree with Hart and believe that what matters for defining the existence of a legal system is the introduction of Hart’s secondary rules, with the purpose of solving problems of uncertainty, staticity and inefficiency.940 The combination of primary rules—rules that impose obligations and duties—and secondary rules is the real “key to the science of jurisprudence,”941 as Hart observes.

However, the fact that Fuller’s theory might be inappropriate to describe what the law is does not mean that it is not important to identify the goals that a system that aims to endure and to be fair—such as the Brazilian constitutional regime inaugurated after 1988—should seek.

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933 Paul Cliteur, Fuller’s Faith in Rediscovering Fuller, in ESSAYS ON IMPLICIT LAW AND INSTITUTIONAL DESIGN., 101 (Amsterdam University Press, 1999).
934 FULLER, supra note 924, at 124.
935 Id. at 145.
936 RUNDLE, supra note 665, at 92.
937 Fuller, supra note 307, at 660.
938 Id.
939 RUNDLE, supra note 665, at 122. She cites Neil MacCormick for making this claim.
940 Id. at 92-94.
941 Id. at 81.
Additionally, it is important to stress that Hart is criticized by some scholars that claim that he did not ascertain the relevance of Fuller’s legal theory. Jeremy Waldron, in a powerful article entitled *Positivism and Legality: Hart’s Equivocal Response to Fuller*, after carefully analysing various of Hart’s works, concludes that the British scholar demonstrated an apparent inconsistency when dealing with the concept of legality, which, in some degree, Waldron considers that might be a prerequisite of law. And, for Waldron, legality inevitably links morality and law, although not in the sense of observing “the demands of morality.” Hart, in Waldron’s opinion, did not elucidate if legality is a topic worthy of jurisprudential analysis.

In the mentioned article, Waldron observes that Hart, in the quote below, acknowledges the importance of ‘principles of legality’, which are roughly what Fuller referred to as the ‘inner morality of law’:

> “Law, however impeccable their content, may be of little service to human beings and may cause both injustice and misery unless they generally conform to certain requirements which may be broadly termed procedural (in contrast with the substantive requirements discussed above). These procedural requirements relate to such matters as the generality of rules of law, the clarity with which they are phrased, the publicity given to them, the time of their enactment, and the manner in which they are judicially applied to particular cases. The requirements that the law, except in special circumstances, should be general (should refer to classes of persons, things and circumstances, not to individuals or to particular actions); should be free from contradictions, ambiguities, and obscurities; should be publicly promulgated and easily accessible; and should not be retroactive in operation are usually referred as to the principles of legality. The principles which require courts, in applying general rules to particular cases, to be without personal interest in the outcome or other bias and to hear arguments on matters of law and proofs of matters of fact from both sides of a dispute are often referred as natural justice. These two sets of principles together define the concept of the rule of law to which must modern states pay at least lip service.”

Waldron notes that these formal principles referred by Hart and by Fuller, combined with “the principles about the broad character of the procedures that should be used in their application,” which Hart terms “principles of natural justice”, and Americans call “procedural due process,” are what is sometimes called “the rule of law.” The New Zealander author adds that Hart was not so modest about the term ‘principle of legality’.

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943 *Id.* at 1169.
944 *Id.* at 1138.
945 *Id.* at 1145.
946 *HART*, supra note 442, at 114.
948 *Id.*
when he criticized the English decision *Shaw v. Director of Public Prosecutions*,\(^949\) in which the House of Lords decided that the common law crime *conspiracy to corrupt public morals*, although not set forth in any statute, was still a crime in the U.K.. In the case, the defendant was convicted for publishing a catalog which listed the names, addresses and phone numbers of prostitutes with accompanying photographs:

“[The House of Lords] seemed willing to pay a high price in terms of the sacrifice of other values for the establishment … of the Courts as *custos morum*. The particular value which they sacrificed is the principle of legality which requires criminal offences to be as precisely defined as possible, so that it can be known with reasonable certainty beforehand what acts are criminal and what are not.”\(^950\)

I do not have the intention of evaluating whether Waldron’s claim against Hart regarding his response to Fuller is correct or not. My intention in citing Hart’s remarks was mainly to show that he also acknowledged the importance of the principles articulated by Fuller, if not to define the concept of law, at least to assure how to reach a better and efficient legal order. Fuller, as noted, identifies law as a purposeful enterprise, dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it.

The most impressive aspect of Hart’s acknowledgement is that it comes close to be a unanimous point among all authors referred in this work—the unequivocal importance of the principles of legality for law’s effectiveness. In making a claim of the existence of some logical connection between principles of legality and the concept of law, Waldron points out that the term is also relevant for John Finnis and Joseph Raz, although for different reasons than Fuller’s:

“Laws are what principles of legality are designed to evaluate; perhaps principles of legality are (as John Finnis argues) principles for keeping legal systems in good shape; or principles of legality may be designed (as Joseph Raz seems to think) to remedy or mitigate evils that only law makes possible.”\(^951\)

Ronald Dworkin also recognizes the importance of principles of legality and exemplify why some of them are part of his *integrity* concept. In the passage below, he refers to the need of fair notice in criminal law:

“[…] But if reasons that argue against prosecution in one case are reasons of principle—that the criminal statute did not give adequate notice, for example—then integrity demands that these reasons be respected for everyone else.”\(^952\)

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\(^950\) *Id.*

\(^951\) *Id.*

\(^952\) *Dworkin, Law’s Empire*, supra note 436, at 224.
In the article *Political Judges and the Rule of Law*, also commenting the English case *Shaw v. Director of Public Prosecutions*, Dworkin invokes that individuals have a moral right of “not to be punished except for committing a crime clearly published in advance”: 954

“[…]. It would then have been strenuously argued that individuals have a moral right, at least in principle, not to be punished except for committing a crime clearly published in advance, and that in virtue of that right it would be unjust to punish Shaw. […]”

Therefore, although agreeing with Hart that the principles of legality are not conditions for law to exist, there is no doubt that a legal system that wants to be fair, just and more effective, like the Brazilian legal system after the 1988 C.F., must take these consensual moral remarks into account. These remarks are part of the country’s political morality.

The previous subchapter emphasized the problems that a system in which principles—and not unequivocal clear rules—play a good part in defining behavior. There is no doubt that this system may grant the Judicial branch a prominent role in the discovery and effective enforcement of individual and social rights but may also lead to unfair punishments—due to lack of fair notice—and unintended deterrence.

V.5. Solutions for Legal Uncertainty

Throughout this work I have stated that the option for a system of top-down rules, instead of bottom-up principles, does not prevent uncertainty regarding the content of law. Even if one were to draft a rule to cover all possible situations, it is likely that new situations would arise and there would be doubts as to whether the rule should apply or not to the new case. Of course, the choice for rules in areas such as criminal or administrative punishment laws, for example, help to better orient conducts. But we need to remind ourselves that uncertainty is unavoidable due to our inability to anticipate the future. Hart makes this remark:

“In fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case. In some legal systems at some periods it may be that too much is sacrificed to certainty, and that judicial interpretation of statutes or of precedent is too formal and so fails to respond to the similarities and differences between cases which are visible only when they are considered in the light of social aims. In other systems or at other periods it may seem that too

955 Id.
much is treated by courts as perennially open or revisable in precedents, and too little respect paid to such limits as legislative language, despite its open texture, does after all provide. Legal theory has in this matter a curious history; for it is apt either to ignore or to exaggerate the indeterminacies of legal rules.” 956

Since Brazil, following the civil law tradition, adopts a declaratory theory of judging in which judges do not to create but merely declare the law, to avoid situations of unfairness that are caused by law’s unescapable uncertainty, it is essential to turn to important Anglo-American law doctrines that deal with similar problems. These doctrines are not currently part of Brazil’s law, but certainly could help the country’s system escaping problems of sometimes not complying with some of Fuller’s inner morality principles.

These concepts are important because, as Hart puts, they help to circumvent “the oscillation between extremes and remind ourselves of our human inability to [at least sometimes] anticipate the future, which is at the root of this indeterminacy.” 957 These doctrines are, then, relevant due to the fact that they help to cure the problems pointed out by the Brazilian scholars in subchapter V.2. and they provide more respect for the Brazilian citizens in their reciprocal relations with the state. In Brazil’s current stage of law, none are well developed—save for the prospective overruling technique. 958 In this sense, if Fuller was right, by curing them, Brazil’s system has more chances of succeeding as least in a moral sense.

V.5.1. Fair Notice, Vagueness and Overbreadth

The need of informing the citizen about the official rules of conduct is a concern present in Brazilian posited laws. Article 1 of the Introductory Act to the Brazilian Norms declares that, except otherwise provided, the law enters into force in the whole country after forty-five days of its official publication. 959 Article 11 of Lei Complementar No. 95/98 sets forth that legal provisions shall be written with clarity, precision and logical order. For achieving precision, the law must “articulate technical or common language in a manner that permits the perfect comprehension of the law’s goal and allows that its text points with clarity the content and the reach the legislator wants to give to the norm.” 960 The problem is that these attributes are not always obtained, and this is particularly troublesome when dealing with criminal and punishment norms, which affects the citizens’ liberties. As observed in subchapter III.5.4., regarding the requirements of legality and also of criminal legality, the publication of an abstract norm is generally considered by Courts to satisfy the constitutional moral requirement of nullum crimen sine lege (“no crime without law”).

Due to the recognition of the consequences that vague criminal statutes may have in interfering with the citizens’ liberties in the U.S., the SCOTUS has held that the Due

957 Id.
960 LEI COMPLEMENTAR no. 95, de DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 27.2.1998, art. 11 (Braz.).
Process Clause demands that citizens have fair notice of the content of criminal laws. In this sense, the Court requires that the citizens shall be unequivocally informed of what is prohibited:

“No one may be required, at peril of life, liberty or property, to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”

This precedent shows that the Court understands that law should have a guiding function, at least when life, liberty or property are at peril:

“That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”

The SCOTUS has also ruled that “judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.”

It is, then, established that “a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.” As the Court notes, “the objection of vagueness is two-fold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact.” In these cases, the application of the void for vagueness may hold the law unconstitutional or at least rule it inapplicable to

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967 Barron’s Legal Guides dictionary defines the void for vagueness doctrine as follows: “a criminal statute is constitutionally void for vagueness when it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. 269 U.S. 385, 391. A statute is void when it is vague either as to what persons fall within the scope of the statute, what conduct is forbidden, or what punishment may be imposed. Due process requires that criminal statutes, administrative crimes, and common law crimes be reasonably definite as to persons and conduct within their scope and the punishment which may be imposed for their violation. In determining whether legislative, judicial or administrative definition is void for vagueness, the following inquiries are appropriate: (1) Does the law give fair notice to those potentially subject to it? (2) Does the law adeqauly guard against arbitrary and discriminatory enforcement? (3) Does the law provide sufficient breathing space for First Amendment Rights?” La Fave, Criminal Law § (5th ed. 2010). Use of this doctrine as a constitutional attack is based upon an assertion that the meaning of the statute in question is so uncertain and unclear as to render it void. The due process clause of the Fifth Amendment requires that criminal statutes give reasonably certain notice that an act has been made criminal before it is committed. Every person
the case in which the meaning is clearly defined.968 “[T]he touchstone is whether the statute, either standing alone or as construed by the courts, made it reasonably clear at the time of
the charged conduct that the conduct was criminal.”969

Overbreadth, on the other hand, “is a term used to describe a situation where a statute proscribes not only what may constitutionally be proscribed, but also forbids conduct which is protected.” 970 Overbreadth problems raise concerns because it may create chilling effects, making individuals “fearful of the possible or threatened application of laws or sanctions and subsequent prosecutions, whether or not successful, indirectly resulting from the exercise of those legitimate rights.”971

Fair notice concerns resemble Fuller’s ideas that laws should be clear, possible to obey and prospective. By curing vagueness and overbreadth problems in law application and still applying the statute retrospectively, punishing the citizen, there is no doubt that there is a violation of what legality demands. To avoid these fairness problems, Brazilian law should develop doctrines of fair notice, void for vagueness and overbreadth.

It is important to stress that the notion of fair notice has appeared in Brazilian law in some decisions. Although Article 11 of Lei Complementar No. 95/98 demands clarity of legal provisions, the official practice does not set aside rules that do not comply with it.

An administrative proceeding that adopted a similar approach to fair notice notion was decided by the Tribunal Regional Federal da 4ª Região [T.R.F.-4]. The respondent was Judge Sergio Moro.972 In a criminal investigation, Moro had issued an order authorizing the police to monitor former President Lula’s telephone conversations. One of the captured audios was a conversation between Lula and the then President Dilma Rousseff. It could be concluded from that conversation that Dilma was appointing Lula to be her chief of staff, because she wanted him to evade Moro’s jurisdiction—the S.T.F has original jurisdiction to trial the president and the chief of staff.973 By removing the secrecy to this investigation, Moro disclosed the audios and the press published them.

President Dilma’s attorneys filed a claim before the S.T.F. arguing that the Court’s original jurisdiction to trial had been offended by Moro, because only the S.T.F. could have made the conversation public, since the Court had original jurisdiction over her. The S.T.F. ruled that Moro’s decision was unconstitutional and declared it void.974 Several attorneys, then, filed a disciplinary complaint against Moro before the Inspector’s Office of T.R.F.-4. There was no debate as to whether Moro’s act had violated the C.F., because the S.T.F. had already asserted that he had. But the court decided not to punish Moro and upheld the Inspector’s decision that had dismissed the complaint on the grounds that the law did not provide fair notice and clear guidance to judges on that issue. The T.R.F.-4 observed that the S.T.F. had precedents that had held that the secrecy of personal communications was not

should be able to know with certainty when he or she is committing a crime.” Void for vagueness, BARRON’S LEGAL GUIDES LAW DICTIONARY (2016).

968 See Bouie, 378 U.S., at 354.
971 Chill [Chilling Effect], BARRON’S LEGAL GUIDES LAW DICTIONARY (2016). The dictionary adds that “[i]n recognition of the chilling effect of statutes that may be constitutionally overbroad, a facial attack on such statutes is permitted by any person properly before the court even if he or she lacks personal standing to assert the facial invalidity of the statute because his or her own conduct falls squarely within some valid application of the statute.” Id.
972 Judge Sergio Moro was the judge that convicted the former President Lula in the case mentioned in subchapter II.6; see note 395.
973 Constituição Federal [C.F.] [CONSTITUTION] art. 102, I, c (Braz.)
an absolute right and that, in extraordinary cases, it could not be invoked as safeguard to illicit actions\textsuperscript{975} and concluded that:

\[\text{“[i]n this context, a judge may not be censored in adopting preventive measures to avoid obstruction of the Operation Car Wash Investigations. Only after the S.T.F. ruling (Claim No. 23.457) Brazilian judges, including the respondent judge, have had clear and safe guidance with respect to the limits of the telephone communications secrecy in criminal investigations.”}\textsuperscript{976}

Therefore, the T.R.F.-4, by dismissing the claim against Judge Moro, examined the ability as to whether the state of the law before the S.T.F. ruling allowed the judge to clearly assert whether his act of removing the secrecy of then President Dilma and former President Lula’s communication was unlawful or not, and concluded that the judge had not had fair notice. This type of reasoning, although desirable, is, nevertheless, rare in the country and should be developed.

\textbf{V.5.2. Rule of lenity}

The rule of lenity is an old common law rule of statutory interpretation. Eskridge defines it as: “[i]f the punitive statute does not clearly outlaw private conduct, the private actor cannot be penalized.”\textsuperscript{977} He adds that “while criminal statutes are the most obvious and common type of penal law, many civil statutes have been so classified by at least some jurisdictions.”\textsuperscript{978}

In England, courts have long used the rule of lenity “vigorously for humanitarian reasons ‘when the number of capital offences was still very large, when it was still punishable with death to cut down a cherry-tree.’”\textsuperscript{979} In the U.S., the justification of the rule of lenity is commonly associated to fair notice and also to proving the intent requirement for committing a crime. “Although ignorance of the law is no defense to a crime, the inability of the reasonable defendant to know that his actions are criminal undermines the justice of inferring a criminal intent in some cases.”\textsuperscript{980}

Eskridge points out that a third justification is separation of powers and cites the conclusion of an opinion written by the former Chief Justice John Marshall, in 1820:

\[\text{“After much debate, the Marshall Court adopted the proposition that Congress cannot delegate to judges and}\]

\textsuperscript{975} The T.R.F.-4 referred to the S.T.F. precedent H.C. No. 70.814, Relator Min: Celso de Mello, 1.3.1994, Diário do Judiciário Eletrônico [D.J.e], 24.6.1994 (asserting that communications between prisoners serving sentence may be accessed by jail guards).


\textsuperscript{977} ESKRIDGE JR. ET. ALL, supra note 136, at 693.

\textsuperscript{978} Id.

\textsuperscript{979} Id. The authors mention that “among the statutes to which this canon has been applied are (i) statutes whose penalties include forfeiture; (ii) statutes providing for ‘extra’ damages beyond those needed to make the complaint whole, including punitive damages, treble damages, attorney’s fees, penalty interest (often part of the remedy under usury laws); (iii) statutes permitting revocation of a professional license or disbarment of lawyers; (iv) statutes against extortion or discrimination; (v) statutes declaring certain acts to be per se negligence; and (vi) others.” Id.

\textsuperscript{980} ESKRIDGE JR. ET. ALL, supra note 136, at 693.
prosecutors’ power to make common law crimes, because the moral condemnation inherent in crimes ought only to be delivered by the popularly elected legislature. If the legislature alone has the authority to define crimes, it is inappropriate for judges to elaborate on criminal statutes so as to expand them beyond the clear import of their directive words adopted by the legislature. There is also a separation of powers concern that judicial expansion of criminal statutes, common law style, risks expanding prosecutorial discretion beyond that contemplated by the legislature.”

The rule of lenity is an antique common law rule and has lost its relevance over the last years, since it has been revoked in many states, such as New York and California. Nonetheless, according to Zachary Price, the rule has been revitalized in SCOTUS’ precedents over the last thirty years.

It is far from the reaching of this work to propose a precise solution as to how the rule of lenity should be adopted by Brazilian law. Nonetheless, for reasons of fairness and due process, it is important that Brazilian judges and scholars begin considering to incorporate a similar approach when dealing with vague punishment norms.

The rule of lenity does not seem to be present in other civil law countries, such as Germany—as shown in the works of Giacomolli and Aflen—and as it may be perceived from the precedent below, in which former East German spies that performed activities on West Germany were punished based on a West German statute that became the unified country’s law:

“The BVefG had to decide whether after reunification East German spies could be punished for their activities directed against the former West German state under previously West German criminal law which was now applicable to the unified state. Their activities (for example, eavesdropping and instructing agents in West Germany) had been conducted from the territory of former East Germany. They argued that the extension of former West German criminal law to former East Germany was for them a case of retroactivity because under former East German Law their activities had—naturally—been lawful. The court rejected this argument. Under West German law their activities had been defined as criminal offences before they had been merely committed. Thus no

981 Id.  
982 Lawrence M. Solan, Law, Language, and Lenity, 40 Wm. & Mary L. Rev. 57, 58-59 (1998). Eskridge says that, “as of 2013, twenty-eight of the thirty-six states that have codified the rule of lenity have abolished or reversed the rule by statute.” ESKRIDGE JR. ET. AL., supra note 136, at 695.  
983 Price writes: “[o]ne of Justice Antonin Scalia’s many contributions to Supreme Court jurisprudence was to revitalize the rule of lenity — the ancient maxim that ambiguous penal statutes should be construed narrowly in the defendant’s favor.” Zachary Price, The Court after Scalia: The Rule of Lenity, SCOTUS BLOG (Sep. 2, 2016 2:14 PM), http://www.scotusblog.com/2016/09/the-court-after-scalia-scalia-and-the-rule-of-lenity/. See also Zachary Price, The Rule of Lenity as a Rule of Structure, 72 Fordham L. Rev. 885 (2004) (arguing that “[t]he overbreadth of American criminal law is one of its most widely recognized problems and that a toughened rule of lenity could be one of the problem’s most congenial solutions.”)  
legitimate expectations were violated. The spies had merely relied on the expectation that they would never be prosecuted for their activities as long as they were sheltered by their state which—unfortunately for them—had disappeared after reunification. Article 103 II GG was thus not applicable. This was not a case for retroactivity of criminal laws. However, the court acquitted some of the accused on the basis that a penalty would no longer be proportionate.*

The fact that criminal and administrative punishment laws can be interpreted as to determine their scope—sometimes taking into consideration broad principles—must be accompanied by a humble reflection on the part of judges as to whether this interpretation could have been reasonably made by the affected parties in the case. An example of a criminal case where this approach was not even cogitated was the Ellwanger case, mentioned in subchapter II.5.6., in which the S.T.F., applying various principles including proportionality, ruled that the publication of a Holocaust denial book configured racism, a non-bailable and imprescriptible crime in Brazil. The S.T.F. did well in settling the issue but did not acted properly at least in analyzing whether, after the great disagreement among the Justices, the defendant did or did not have fair notice due to the status of Brazilian law regarding the crime at that moment.

It is important to mention that, sometimes, this approach is adopted in cases in which public employees have received unlawful payments, but not due to their fault. The S.T.F., in the cases in which the scope of the law is controversial, the Court settles the issue, develops the law, rules whether the payment is unlawful or not, fixing a prospective criterion to be followed, but does not determine reimbursement because of good faith. So the development of a rule of lenity doctrine would not be totally original and without any analogical precedential support.

As Hart asserted in Punishment and Responsibility: “[a]t present the law which makes liability to punishment depend on a voluntary act calls for the exercise of powers of self-control but not for complete success in conforming to law.” Hart concludes that “[i]f we contrast this system with one in which men were conditioned to obey the law by psychological or other means, or one in which they were liable to punishment or ‘treatment’ whether they had voluntarily off ended or not, it is plain that our system takes a risk which these alternative systems do not. Our system does not interfere till harm has been done and has been proved to have been done with the appropriate mens rea. But the risk that is here taken is not taken for nothing. It is the price we pay for general

985 Id. at 183. The case reference is BVerfGE92, 277—DDR-Spione (Ger.). The authors mention that “[t]his reasoning left some academics with doubts as to its justice whereas others were convinced by the court’s logical approach. The debate shows that although the idea of non-retroactivity of criminal laws is generally accepted, different interpretations of this principle are possible in times of changes affecting a political system—often because the topic itself is highly ‘political’ rather than a strictly legal one.” They add that “in a similar case concerning the soldiers shooting fugitives from the German-German border the court explicitly held that legitimate expectations based on non-retroactivity had to make way for basic event justice (Radbruch’s sche Formel).” Therefore, based on Radubruch’s works, the Court held East German border troops were punished for shots made before reunification. See BVerfGE 95, 96—Mauerschützen (Ger.). Id. at 271-272.


987 See, e.g., M.S. 31.294 AgR, Relator: Min. Dias Toffoli, 5.2.2018, DIÁRIO DA JUSTIÇA ELETRÔNICO [D.J.e.], 6.3.2018 (asserting that if the public employee receives undue values in good faith, the initial term for reimbursement of the values shall correspond to the date in which he is notified of the act that held the payment unlawful).

illuminating to look at the various excuses which the law admits, like accident or mistake, as ways of rewarding self-restraint. In effect the law says that even if things go wrong, as they do when mistakes are made or accidents occur, a man whose choices are right and who has done his best to keep the law will not suffer.”

V.5.3. Qualified Immunity

Qualified immunity is a doctrine construed by the SCOTUS that holds that “[p]ublic officials are immune from [civil actions for deprivation of rights] suits […] unless they have ‘violated a right that was clearly established at the time of the challenged conduct.’” For establishing the clearly established criterion, the SCOTUS holds that “an officer ‘cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it.’” […] meaning that ‘existing precedent … placed the statutory or constitutional question beyond debate.’”

The SCOTUS notes that “[t]his exacting standard ‘gives government officials breathing room to make reasonable but mistaken judges’ by ‘protect[ing] all but the plainly incompetent or those who knowingly violate the law.’” It is also interesting that the Court adopts a humble criterion for examining whether an official broke the law. In case of police officers, the Court notes that it analyzes the “question from the perspective “of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, […] allow[ing] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."

The adoption of qualified immunity does not prevent courts to impose forward-looking relief such as injunctions and declaratory judgements and, therefore, to develop the law. But it is certainly an honest and humble approach that avoids unfair application of laws that are only made clear during the case adjudication.

In this sense, it resembles the interactionist view of law articulated by Fuller, because it respects the law subject by examining if the law giver effectively has complied with its burden to enact rules that are possible to obey, in a prospective manner. As the SCOTUS has held “[i]f judges thus disagree on a constitucional question, it is unfair to subject police to money damages for picking the losing side of the controversy.”

Qualified immunity is also adopted for policy reasons: by providing legal certainty in regard to law compliance, the doctrine gives incentives to citizens to choose public careers. Also, by not making them worry so much about lawsuits in which they could lose their property, the doctrine aims that public servants develop their service more efficiently, avoiding the deterrence effects mentioned in subchapter V.2.

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989 Id.
992 Id. at 11.
994 These observations were gently provided to me by Professor Abner Greene and I am thankful for them. See also, Greene, supra note 880, at 164, 206-207.
996 Greene, supra note 880, at 164, 206-207.
A U.S. case similar to Judge Moro’s proceeding referred above, in which the doctrine was applied, was Wilson v. Layne,997 decided by the SCOTUS in 1989. Police officers were sued under their personal capacity because while executing a warrant to arrest, they invited a newspaper reporter and a photographer to accompany them. The warrant made no mention of such a media “ride-along.” The Court held that “[i]t was not unreasonable for a police officer at the time at issue to have believed that bringing media observers along during the execution of an arrest warrant (even in a home) was lawful.” It asserted that “the constitutional question presented by this case is by no means open and shut,”998 and that “[t]he state of the law was at best undeveloped at the relevant time, and the officers cannot have been expected to predict the future course of constitutional law.”999 Nonetheless, the SCOTUS concluded that “[i]t violates the Fourth Amendment rights of homeowners for police to bring members of the media or other third parties into their home during the execution of a warrant when the presence of the third parties in the home was not in aid of the warrant’s execution.”1000 Therefore, it developed and settled the law on the case, giving notice to law subjects, as Justice David Souter pointed out:

“Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public.”1001

It is important to clarify that I am not taking the position that there may not be problems with the adoption of a qualified immunity doctrine because that exceeds the scope of this work. I am just making the case that the doctrine has important arguments for fairness and, for this reason, is worth of analysis and, maybe, development in Brazil.1002

V.5.4. Stare Decisis

In subchapter II.6. I mentioned that stare decisis is not a cultural tradition in Brazil and that only certain precedents have binding effect. I stated that the absence of a consolidated stare decisis doctrine makes the evolution of the law more complicated in the country.

Richard Posner writes that “[t]he body of precedents in an area of law can be thought of a stock of capital goods—specially a stock of knowledge that yields services over many years to potential disputants in the form of information about legal obligations.”1003 He adds that:

“Deciding a case by applying a precedent economizes on the judge’s time and effort; he doesn’t have to rethink the issue in

997 Wilson, 526 U.S, at 618.
998 Id. at 604.
999 Id. at 605.
1000 Id.
1001 Id. at 609.
1002 As a matter of fact, there is a Bill—Projeto de Lei do Senado nº 349/2015, introduced by Senator Antonio Anastasia—under analysis by Brazilian Congress—that intends to add the following article to the Introductory Act to the Brazilian Norms: “Art. 28. ;The public agent shall be held personally liable for his technical decisions and opinions in cases of malice or grave fault. § 1º. The decision or opinion based in general orientation, or in reasonable interpretation, in unsettled caselaw or doctrine, even if later does not prevail, shall not be considered grave fault.” Translation mine.
1003 POSNER, supra note 911, at 743-744.
the case from the ground up. In addition, a precedent project a judge’s influence more effectively than a decision that will have no effect in guiding future behavior. This is a reason judges follow as well as make precedent and therefore why lawyers argue cases on the basis of precedent. If the current generation of judges doesn’t follow precedent, the next generation is less likely to follow the precedents of the current generation because the next generation’s judges are less likely to be criticized for not following their predecessors’ precedents.”

In addition to these concerns, two moral arguments have to be made. *Stare decisis* treats people equally and judges who have a practice of following precedents show humbleness about the power of individual reason. As Strauss observes “it is a bad idea to try to resolve a problem on your own, without referring to the collective wisdom of other people who have tried and solved the problem.”

The consolidation of a *stare decisis* doctrine in Brazil—which has been advanced with the enactment of the new Civil Procedure Code, as mentioned in subchapter II.6.—is essential to allow citizens to understand what the law demands of them. If every judge is authorized to make its own interpretation of the broad C.F. text and statutes, guidance may always be compromised in Brazil, even if we adopt theories such as the rule of lenity and qualified immunity. As the SCOTUS, citing Benjamin Cardozo, observed “no judicial system could do society's work if it eyed each issue afresh in every case that raised it.”

### V.5.5. Prospective Overruling

Among the solutions mentioned in this subchapter, the only one that is well developed in Brazil is the prospective overruling technique. This is “the judicial technique by which a court—eager to overrule an outmoded precedent but reluctant to disappoint the expectations of the parties—applies that precedent in deciding the particular case before it but simultaneously announces that it shall consider the precedent as overruled in all future cases.”

An example of the application of this doctrine took place in the party loyalty case referred in item II.2.3.. As stated, most Chamber of Deputies’ members that had changed party affiliation before the S.T.F. decision did not lose their seats. The Court held that the new interpretation would only apply to those who had switched after the date that the T.S.E. decided the first case which asserted the need for party loyalty in disagreement with the

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1005 STRAUSS, *supra* note 876, at 41.
1006 See text accompanying note 380.
previous S.T.F. precedent. This basically means that only representatives that changed their party after the first T.S.E. ruling could lose their seats.

V.6. Nepotism Once Again

To provide a clear example of application of sanctions in a case decided under vague norms, I will once again resort to the nepotism cases, mentioned in subsection II.2.3. In those cases, the S.T.F. ruled that nepotism was unconstitutional within all three branches of government because it offended the principles of morality and impersonality (neutrality). In the concrete review case that was adjudicated by the Court, the Chief Prosecutor of the State of Rio Grande do Norte sought to annul the administrative appointment of a vice-mayor’s relative and did not request the application of any sanctions. Therefore, the mayor was not punished, only the office’s appointment was declared void.

Nonetheless, due to these decisions, several lawsuits were filed to impose administrative improbity sanctions against politicians and public administrators who had appointed relatives to public offices before the S.T.F. decisions. Since, according to Brazilian social practices, judges do not make law, but only apply the law, technically there was no law creation in the case and the S.T.F. was merely concretizing the C.F. text enacted in 1988 when ruled nepotism unconstitutional.

The two S.T.J. panels that adjudicate public law cases split regarding the issue. The First Panel ruled that appointments made before the S.T.F. decisions did not configure administrative improbity because there was no intent to violate the C.F., but only negligence:

“[...] 5. In casu, the lower courts acquitted the defendants because they understood that nepotism does not characterize administrative improbity.

6. The defendant’s conduct is grave negligent, but it does not show the specific intention of harming the public treasury or gaining undue advantage, indispensable requirements for breaching the Lei de Improbidade Administrativa, especially considering that at the time the contracts were entered into (in the years 2005 and 2006), there was no law forbidding nepotism in such city, and the contracts were executed before the S.T.F. approved the Binding Precedent No. 13 (DJe Aug. 29, 2008).”

There are two statutory articles that are usually referred to when the theory is applied: (a) article 27 of Law 9.868, of 11 of November of 1999, states that “when declaring a law or a normative act unconstitutional, the Supremo Tribunal Federal, by a vote of two-third of its members, based on reasons of legal certainty and exceptional social interest, may restrict the effects of the declaration of unconstitutionality or decide that it shall only have effect after the case cannot be appealed or in any other moment determined by the Court.”; (b) article 2, sole paragraph, of Lei No. 9.784, 29 de Janeiro de 1999, establishes that “in the administrative proceedings it shall observed, among others, the criteria of “interpretation of the administrative norm that better respects the public interest, being voided the retroactive application of a new interpretation.”

The case shows that, as a practical matter, the first court to overrule the S.T.F. decision was actually the T.S.E., but the High Court agreed with their new holding.


The S.T.J. Second Panel, on the other hand, ruled contrariwise and stated that the practice had always been forbidden by the principles of morality and impersonality, which are also reproduced in art. 11 of Law No. 8.429/1992 and asserted the existence of knowledge to break the law:

“[...] 2. In the present case, the practice of nepotism is effectively configured and, as so, offends gravely the principles of the Public Administration, in special, the principles of morality and equality, being framed, in this sense, in art. 11 of Law No. 8.429/1992.

3. The appointment of relatives to positions of confidence, even if has taken place before the publication of the Binding Precedent No. 13 of the [S.T.F.], configures an act of administrative improbity, which offends the principles of the Public Administration, as set forth in article 11 of Lei No. 8.429/1992, being dispensable the existence of an explicit rule of any nature regarding the prohibition.”

An appeal filed in this second case, to a higher panel, is now pending. Taking this split into account, I intend to answer in this chapter the question I wrote in the last phrase in subchapter II.2.1: should public administrators be punished for having committed an administrative improbity act because they made unconstitutional (immoral) appointments? Should the public administrator’s readings of the administrative morality clause be considered a plausible or a truthful reading of the C.F. text, independently of their beliefs or personal desires?

It is interesting to point out that the S.T.F, by affirming that it was grounding the banning of nepotism in the core of the morality principle, made in fact a positivistic reading of the principle, stating that it is apprehended as a morally incorrect practice within positive morality. The Court did not justify its decision based on what it thought to be the best reading of the C.F., but on the current status of the community’s apprehension of morality. The fact that, under the new constitutional regime, public positions are generally awarded through public competitive contests is seen as one of the main conquests of the C.F. in terms of behavioral change and democratization of the public jobs access and shows that the unconstitutionality could be understood as a matter of social fact. Therefore, the Court’s decision was justified.

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1014 The technical portuguese name for this appeal is embargos de divergência. For checking the current stage of this appeal, see https://ww2.stj.jus.br/processo/pesquisa/?tipoPesquisa=tipoPesquisaNumeroRegistro&termo=201300093460&totalRegistrosPorPagina=40&aplicacao=processos.ea. Last update: “04/07/201615:53 Conclusos para julgamento ao(à) Ministro(a) SERGIO KUKINA (Relator) com certidão e r. decisão retro.”

1015 The term “positive morality” was used by Hart in the book Law, Liberty and Morality. This is a concept employed by John Austin. For Hart, positive morality is not the individual morality; it is the social morality, the morality of a social group that is socially integrated. It is the morality that in fact is accepted and shared by a certain group, which is capable to apprehend it as a matter of fact. See NEIL Maccormick, see supra note 447, 63.
However, it is clear that there was huge disagreement as to whether nepotism was or not forbidden. This disagreement existed both regarding (a) the compliance with the criterion of legality—if a statute was necessary to outlaw the practice or whether the C.F. principles were enough—and also (b) if the practice ran against positive morality. Although the S.T.F. held that nepotism violated administrative morality, even the Court of Appeals of the State of Rio de Janeiro had filed an amicus curiae brief sustaining the contrary argument. So, with all this disagreement, it is questionable whether citizens had fair notice as to whether the practice was allowed or forbidden. The authoritative example provided by many members of the Judicial branch that incurred in nepotism communicated to the ordinary citizen that there was nothing wrong with the practice. Courts are generally regarded as “an authority on proper behaviour, and [citizens turn to them] […] in order to learn the way to behave.”

The S.T.F. ruling correctly developed the law by holding the practice unlawful. However, punishing officials, such as the Second Panel of the S.T.J. did, neglects the fact that the state—the lawgiver—did not comply with its obligation to enact clear rules and to provide proper guidance.

Justice Barroso was the lawyer that argued the case before the S.T.F.. In his book, he tells a very interesting story about social situations that happened after the case was decided. The frankness of the comments shows that, as a matter of social fact, the state of the law was not settled until the S.T.F. ruling:

“Cases that have an impact on the popular belief and on particular interests generate different feelings and reactions. After the nepotism trials, I lived two opposing situations. In the first one, I attended a conference with a respected Court of Appeals Judge to talk about a case in which I was the leader counsel. After discussing the professional issues, the Judge walked me to the door and said: ‘I cannot thank you enough. Until days ago, my wife worked in my chamber and ‘guarded’ my office. Well, now I am free of that external control.’ One week later, I made a speech in an event organized by a state court. During lunch, I notice that a young lady, who was very nice to everyone, stared madly at me. To resolve this situation, I went to her and asked: ‘What do you do?’ The answer came in a very mad tone: ‘until last week I worked for the Court of Appeals Judge ‘Jane Doe’, my mother. Now, thanks to you, I am unemployed.’ Life is full of ups and downs.”

V.7. Chapter Conclusions

According to Hart, “all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case.”

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1016 See A.D.C. 12, case files, p. 93-130.
1017 HART, supra note 43, 125.
1018 BARROSO, supra note 27, at 393.
1019 HART, supra note 43, 130.
Brazilian jurists must understand that their system has opted to insert broad constitutional principles in the C.F. and has asserted that these principles must interact with rules in adjudication, due to the belief that judges may issue better decisions. The advantages of a system disposed in this way for the development of individual and social rights are unequivocal. Nevertheless, poor guidance may also be offered in some moments and this may be a problem in some areas, especially in criminal and in administrative law when punishments may be applied.

That does not mean that guidance problems and judge law-making will always exist when deciding based on principles. As Hart observed, it is important to distinguish The scholar notes that it is important to distinguish: [(a)] when applying rules to instances different that legislators considered or could have considered represents a deliberate choice or fiat of the interpreters from [(b)] when the inclusion of the new case under the rule is a natural elaboration of the rule, as something implementing a purpose which seems natural to attribute (in some sense) to the rule, rather to an intention of the law drafter.\textsuperscript{1020} There is no technical formula to give a precise general answer to this distinction and this will have to be done by judges in each case. Judges must have candor, humbleness, to understand this problem. This interactionist view, worrying about the relationship among lawgiver and law subject, although not essential to the existence of law, certainly makes it fairer and better.

As Mario Cappelletti points out “the creative adjudication is supposed to be retrospective, for a new doctrine applies also to situations which had occurred previously. Since it has retroactive effect, creative adjudication runs counter to the values of certainty and predictability, indeed, it is ‘unfair’, for it catches the party by surprise.”\textsuperscript{1021} But, as he adds, citing Lord Diplock, “[t]he rule that a new precedent applies to acts done before it was laid down is not an essential feature of the judicial process. It is a consequence of a legal fiction that the Courts merely expound the law as it has always been. The time has come, I suggest, to reflect whether we should discard this fiction.”\textsuperscript{1022}

\begin{footnotes}
\footnoteref{1020} Hart, supra note 431, at 627.
\footnoteref{1021} See CAPPELLETTI, supra note 61, at 37.
\footnoteref{1022} Devlin, supra note 62, at 16.
\end{footnotes}
VI. CONCLUSION

H.L.A. Hart’s jurisprudential approach to law is unromantic and it does not provide us with all the answers we may desire about legal disputes. Hart’s positivistic conception admits that evil systems can still be considered legal systems. It acknowledges that, in some cases, judges will have nowhere to resort to and will have to come up with a discretionary decision that will innovate, bringing a new rule to the legal system. In being honest and realistic about what truthfully happens, about law’s limitations and about the fact that law does not necessarily have moral value—it may or may not have—, no wonder Hart’s theory is not the most attractive one for many scholars.

Nonetheless, as this work intended to do, demonstrating that Brazilians identify law in a similar manner as the inclusive legal positivists do is important for diverse reasons. It helps to answer criticisms as to whether moral argumentation should take part of legal reasoning and, if so, whether this is always the case. It helps to comprehend if judges are being activists or if they are simply doing what the legal system in the past decided they should now do. It permits showing that problems of guidance happen in any legal system, but that they can be greater in some systems, due to choices that are specifically made on law drafting and on law adjudication. Moral criteria in the rule of recognition can be controversial, can raise disagreement and may be only settled when legislators enact a statute or, in most times, when courts rule on the issue. In a civil law country, settling a controversial legal question can be even harder.

Lon Fuller was right when he argued that some basic moral qualities are necessary for a system to endure. His King Rex example showed that the system will probably not get very far without them. His only problem was to tie these efficiency qualities to the concept of law. Many systems of law will never solve these problems and persons will still be living under the rules of these systems. Not to call this law is unrealistic. Some of these problems may seem apparently solved at some point, but they may come back at a different time. His longed-for enterprise of morally subjecting human conduct to the governance of rules, therefore, can always be in danger.

In proposing an unromantic view of law, Hart keeps our eyes open for the legal system’s great achievements, but also for its worse defects. He shows that participants in the practice may accept and obey the legal norms as reasons for action, without endorsing them;¹⁰²³ that bad laws may be part of the system and that good laws may not, and that, in many cases, you cannot blame the citizen for obeying the former and not the latter.

If there is candor and humbleness to acknowledge these issues and will to start thinking about law in this way, the Brazilian legal system may improve in a fair and just manner. Permanent evaluation of the law, as to whether it should be “respected, or reviled, renewed, revised or rejected,”¹⁰²⁴ must be a constant goal. As Aristotle once said, “knowing yourself is the beginning of all wisdom.”¹⁰²⁵

¹⁰²³ See Bix, supra note 453.
¹⁰²⁴ Zipursky, supra note 46, at 1171.


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