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Expropriation and the Challenge to Liberal Thought: Multinormative Management of State Intervention beyond the Conflict Liberty vs. Authority: (Brazil, 1826–1930)

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Basis of Liberal Thought: Introduction

Two capital trends unfolded in nineteenth-century legal thought. On the one hand, thinkers overvalued property: one's own goods were seen as the defining precondition of the action of men in the world,[1] in a kind of "owner-oriented anthropology" (*antropologia dominical*):[2] to be a person meant to own things and use them according to the will. The very base of liberty, the defining value of nineteenth-century philosophy, was property, as it allowed the transformation of will into real change in the material world. On the other hand, the state seized the law, in what has been called legal absolutism:[3] only what the public power defines as valid law can be applied as such. The project of classical liberalism[4] of a society of "equals"—even if this only meant formal equality—was realized and the state was elevated to a superior position, from which it could change the previous order to achieve the dreams of the ruling elite.[5]

Those two trends were kept strictly separated by the so-called "great dichotomy":[6] the transformation of public and private law in two intrinsically different realms—one regulating the State, based on public supremacy, while the other regulated society, based on private autonomy—destined to never meet. Kept in their own dominions, both mighty powers would never clash. Yet, on a few occasions, they could enter on collision course: expropriation[7]—the takeover of private property by the state based on public interest—was one of the most dramatic examples of an opportunity for the two driving forces of nineteenth-century law to battle each other. The purpose of this article is to understand how Brazilian legal culture treated this very fundamental institute—and, by doing so, to grasp how the liberal thought was confronted with the administrative state and was ultimately changed by it.

It is not possible to understand the legal community as a homogeneous body: each actor has its own interests, knowledge, and intentions, which condition their worldview. Therefore, this article seeks to identify how different jurists—who could say something about expropriation—positioned themselves regarding the institute, particularly within the theoretical framework of the opposition between state and property. However,

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even if I used this interpretation as an approach to collect data, we will see in due time that the research itself has questioned such a simplistic opposition.

The main analytical tool I will use is the concept of multinormativity, which states that different forms of regulation of individual and collective action can coexist in the same space. As Thomas Duve[8] puts it, this concept allows us to see the different forms of interaction between regulatory regimes, which are not restricted to constant opposition. Collaboration, though tense, is very important. Peter Collin,[9] for example, showed how ideas of honor can be incorporated into legal arguments to determine the application of state law; similarly, my text will work on how the moral conceptions and philosophical anthropology underlying the idea of property were fundamental to the formation of interpretative parameters for the application of law. The notion of multinormativity emphasizes precisely the existence of regulatory bodies that lie beyond the state,[10] but which are relevant even to state actors during the decision-making process and determine how legal texts are read.[11] At the same time, by avoiding the term *legal*, this concept fulfills John Griffiths'[12] concern not to over-open the concept of law, letting the empirical data itself define what is or is not considered law in each context.

The sources I used in this work were, first and foremost, the texts of jurists who discuss expropriation and the parliamentary records, which show the ideas at stake during the legislative process. Second, I analyzed the judicial decisions related to expropriation in 12 Brazilian law journals of the period,[13] which allowed me to confront the ideas discussed by the intellectuals with how the Brazilian state effectively applied them. This investigation was complemented by the analysis of newspapers, which eventually gave indications about the daily functioning of the public administration.

From Laws to Reasoning: Building the Animosity between State and Property in Theory and Practice

The abstract rift between state and individual was not restricted to theory. On the contrary, it entailed a complex structure of laws that admitted and developed its principles and guided the reasoning of the jurists that interpreted and applied such rules. By the end, this dualistic mentality was able to produce tangible results and provide a path the state and the legal community were eager to follow in the nineteenth century. In this section, I will describe the main laws regarding expropriation enacted in Brazil in nineteenth and early twentieth centuries, the main debates they spawned among jurists, and how both were deeply embedded in the duality between state supremacy and liberal individualism.[14]

The first Brazilian law on expropriation was the 9 September 1826 act, enacted in the very first session of the Brazilian parliament after the 1822 independence: telling information on the importance of the institute. Reinventing French[15] terminology, the deputies determined that private property could only be taken by the state if it was a case of public *necessity* or public *utility*. The debates on this bill were mostly intended to restrict the application of the institute: there was a precise list of the cases that could count as necessity or utility; in the former, only an act of parliament could authorize the abduction of private property by the state. In the end, this law was not meant to be applied: so many obstacles were created by it, that expropriation turned into something almost impossible. Property was regarded as an absolute good that must be protected; something very understandable in an agrarian economy, in which rural needs governed the destinies of the nation and land-based wealth determined the destinies of the empire. This mentality was summarized by senator Viscount of Caravelas: "If in all laws we must proceed with great maturity, this one deserves even greater attention from us than any other, because its object is the most important for the citizen, which is to take away his property.".[16]

However, in the 1840s and 1850s, slow, though steady economic transformations would provide the conditions for new tensions to arise, and, consequently, for law to change. In 1845, the need for urban modifications in the city of Rio de Janeiro prompted the parliament to draft a new national law on expropriations: the capital needed to be developed, and expropriations could help it cope with the increasingly complex urban landscape.[17] After the legislative decree 353 of 12 July 1845, a new procedure was installed for expropriations based on public utility,

which could be triggered by a be triggered by a decree – a much easier path than an act of parliament. However, at the same time, the amount of compensation would be defined through an expropriation jury, mirroring the French legislation: it became not only easier for the state to acquire private property but also more costly. The sacrality of property was still tangible but became slightly easier to be attacked.

In the next decade, the urban needs of Rio de Janeiro would again demand a new, speedier law – and, this time, without the expropriation jury. The legislative decree 806 of September 23, 1854 created a special procedure for the remodeling of one street in the court by a private company. This procedure was extended in the next year to the railroad works through the legislative decree 816 of July 10, 1855. Now, swaths of land throughout the whole country could be taken to provide public infrastructure for the still underdeveloped Brazilian economy. In addition, in the following years, this special procedure was extended to public works for water supply in Rio de Janeiro.[18] However, those modifications met severe criticism and important resistance in the Brazilian parliament. Some said that the new laws violated the »fullness with which the Constitution protects property«[19] and would »tyrannize the owners.«[20]

Such clashes are a consequence of slow, though important changes in the Brazilian state: restrict and strategic areas were beginning to be targeted by state intervention to develop the economy.[21] Urban reforms were one aspect of those middle nineteenth-century transformations, but the major change came with railroads. In the 1830s, European states started to build a stronger network of infrastructure for trains,[22] and Brazil followed them in the next decades. In the 1850s, the first Brazilian initiatives on this regard succeeded, mostly due to the guarantee of interests by the empire, which made profit certain,[23] and legal changes, such as the enactment of the commercial code, the act on public companies, and the bank reform.[24]

Brazilian economy was still agrarian: most of those railroads were actually meant to take coffee from production zones to the ports.[25] Nevertheless, as the state's role changed, property also suffered transformations. Precisely in 1850, the parliament enacted the land law (*Lei de Terras*). Between 1822 and 1850, the foundation of property in Brazil was possession;[26] after 1850, one could only acquire land by buying it, and all nonoccupied territory was to be considered as public land.[27] After the land law, property became, at the same time, more consistent and a less accessible good. In this more certain environment, expropriation could be better carried on, as it would be easier to find the lawful owners of land. Moreover, with registration of private land and the assumption that all nonoccupied land was public, the state took a more prominent role in the definition of property. After all, the years between 1840 and 1860 are the *Saquarema* times, when the consolidation of the empire was lead by the conservatives under the concept of ›order‹: the development of the landlord class (*classe senhorial*) and their grip over land favored the stabilization of the empire and the very state after the troubled times of the regency.[28]

Finally, between 1871 and 1888, the capital problem of abolition of slavery was solved through a set of laws that gradually eroded and finally destroyed without indemnity slave property;[29] this process was regarded by owners as an interference on private property and was a turning point in the role or Brazilian state in the dispute between individual rights and social reforms.[30]

For most of nineteenth century, the story of expropriation can be seen as progressive, cautious increase of state power, always coupled with strong protections for property. Every advance of the public prerogatives was accompanied by fierce opposition from landowners. However, the driving force behind those changes were economic needs that did not threaten the big rural properties in which Brazilian economy was based: expropriation was intended either for urban renewal or construction of railroads needed by major rural owners. From this situation, a tension rose: on the one hand, the property dependence of the national economy, as well as mainstream contemporary legal and economic theories from Europe, encouraged thinkers to overvalue property; on the other hand, new economic needs induced greater state interventionism. This lead, for example, to the inexecution of some aspects of the 1850 law, such as the registry.[31] In the next few pages, we will see how Brazilian jurists dealt with this tension.

Liberalism was the main trait of nineteenth-century Brazilian legal thinking; therefore, the sacrality of property was the main premise from which almost all reasonings departed, in parliament, courts, and law books. Property was frequently equated to life or freedom as the greatest right that the citizen can have:[32] just as liberty is the enjoyment of personality and human faculties, in the same way, »property rights are the use, enjoyment and disposition of the fruits of human faculties.«[33] Those rights were treated with respect and deference – a judicial decision even described them as a »sacred« (*sagrado*) right and »most respectable« (*respeitabilíssima*).[34] Pimenta Bueno, the most important publicist of the empire, said: »property [...] has its origins in nature, and is sacred because, as we have said, it is the fruit of efforts, fatigues and sacrifices of man«.[35]

As a result, expropriation was faced with the utmost distrust. Jurists described state takeover of private goods as a »violence« (*violência)* against property.[36] It entailed a »hateful« (*odiosa*) interference with the rights of the individual; therefore, when doubts arise about how expropriation law should be applied, jurists hurried to say that the interpretation should always be restrictive.[37] There should be an »iron circle« (*círculo de ferro*) protecting property against probable state overstep.[38]

Essentially, property should be unlimited and absolute; therefore, expropriation placed the state in opposition to that sacred right[39] to achieve the public interest. State takeover of private property is described alternatively as a derogation,[40] limitation,[41] sacrifice[42] or as a form of time-limited property.[43] Despite some variation, the authors agree that, in expropriation, citizen and state are in opposite fields. An eloquent example of this »opposition mentality« is the work of Deleuze,[44] in which he proposes that the expropriation should be the result of a »balance« between individual and collective rights: a sign that, in principle, state and property are at odds with each other. The whole book is structured around the idea of establishing »guarantees to property« against the interference of public power. Behind all those discussions, lies the idea that property deserves a higher moral consideration, which conditions how jurists read the law.

This perspective from doctrinal and judicial writings was frequently at odds with the legislative initiatives previously described. As we could see, Brazilian legislation was modified frequently in the middle of the nineteenth century, which generated a high level of distress: because expropriation was an attack on such an important right, the laws should be fixed and stable, the jurists said.[45] Only in this way, a true respect for that fundamental right could be guaranteed.

The owner-oriented anthropology was born in the late eighteenth century, but remained active in Brazilian mentality well into the twentieth century; the previous pages are full of examples from the 1850s to the 1920s where the premises – sacrality of property, hatefulness of expropriation – were shared. But, at the end of the nineteenth century, the ever-growing reality of the administrative state knocked on the door, and jurists were prompted to explain this new situation.

The first attempt to reconcile State and property came in the late nineteenth century; it tried to leave the legal premises on expropriation untouched, generating important tensions. The trick was to define expropriation as a sort of forced sale (*venda forçada*). In fact, in Italy, these private conceptions were constantly employed in the second half of the nineteenth century.[46] The reference to the contract of sale can be understood, in the view of Wladmiro Gasparri,[47] when one remembers a doctrinal tendency typical of the time that placed at the theoretical center of contracts not the consensus between the parties, but the obligation that came from it. Hence, it was not strange to think of a contract of forced sale, such as expropriation, in which the will of the contractor was replaced by the legal command. This allows a fictitious preservation of individual will, even if it did not come from a declaration of the owner, but was defined by law. The single citizen remained in his throne, according to this perspective, though his voice was replaced by the command of the state – he reigned, but did not rule.

Some Brazilian authors embraced this understanding, such as Vicente Pereira do Rego.[48] Until the 1920s, one can read that »expropriation takes the form of a forced sale,«[49] or that »expropriation really implies a sale.«[50] Sometimes, provisions concerning sales were employed to solve expropriation-related issues.[51] This way of thinking, however, began to be disputed from the beginning of the twentieth century. There were even explicit confrontations of the old theory.[52] Nevertheless,

they took a long time to be accepted, as shown by a case judged by the Supremo Tribunal Federal (STF – Supreme Federal Court) in 1906: in the initial petition, the lawyer strongly rejects the idea that expropriation is a forced sale;[53] the court, however, in the final opinion, decides that the legislation on sale should apply to expropriation.[54]

This conciliatory attempt, however, did not succeed. This experimental compromise between the owner-oriented anthropology and the interventionist state felt like a forced marriage doomed to bear no fruit, as it was not able to satisfactorily explain what was happening in the Brazilian reality. After the overthrow of the monarchy in 1889, the new republican regime attempted to modernize the country: Brazil must catch up with civilization, which meant to become more similar to the main European nations. Expropriation would be instrumental in this process, which spawned the last expropriation law in the country before the 1941 decree still in force nowadays.

In 1903, the new mayor of Rio de Janeiro, Pereira Passos, and the Brazilian president, Rodrigues Alves, intended to modernize the capital city of Rio de Janeiro.[55] Many expropriations should follow to allow for new streets to be carved, new public buildings to be erected and a renewed city to be created, and the old, confusing legislation would be an obstacle in the pursuit of such objectives. The government proposed a bill expanding the procedure of the 1855 law for railways to all expropriations for public utility, allowing it to be used for the urban remodeling of Rio de Janeiro in the following years. The new law was enacted in August 26, 1903; the resistance it faced was fierce and coupled with some accusations that this norm was made not with the general interest in mind, but only for the immediate interests of the government in the ›Pereira Passos Reform.‹ Nevertheless, the opposition was much less significant than in the 1850s, indicating that the legal mentalities were undergoing significant changes.

Once again, the particular conditions of Rio de Janeiro spawned widespread legal changes. However, the transformations in the capital city reflected wider processes, as other parts of Brazil were being subject to more variated types of public works. From the last decade of the nineteenth century to the 1920s, public and private needs were pursued through the reformation of ports (such as those of Belém,[56] Salvador,[57] Santos[58] and Porto Alegre[59]), construction of slaughterhouses,[60] water reservoirs, new railways,[61] public buildings, tramlines,[62] installation of public lighting, and many others.[63] Brazil was being transformed, and the state was leading the change. Now, in the beginning of the twentieth century, even though the economy was still much reliant on agriculture, much other needs must be fulfilled: a bigger population and a more dynamic economy demanded a more robust infrastructure. At the same time, bigger cities,[64] though not the most common feature, demanded a more rational, structured planning. More spots beyond Rio de Janeiro were turning into modernized spaces and prefigurated the major transformation of Brazil into an urbanized global economy that took place between the 1930s and the 1970s.

The material bases of Brazilian life were changing and were closely followed by the laws and some court rulings. The legal culture as a whole could only grasp what was happening and reach a more adequate perspective on those changes when the very notion of property was relativized. Pedro Cantisano[65] links this process to the implementation of the major urban reforms in Rio de Janeiro, in which systematic expropriations and a reduction in the home protection[66] provided the conditions for a more state-centered view in legal doctrine. At the same time, the mainstream legal thinking started to absorb the concept of social function of property, which was gradually been more used by Brazilian public opinion since the late nineteenth century.[67] By the early twentieth century, this new way of thinking about property disputed with the traditional legal liberalism the dominion of the law.

Viveiros de Castro is one of the first important jurists to suggest the need to overcome the opposition between state and property, as Cantisano himself points out: »the formula […] of a dispute between private property and public interest is not a happy one, because there can be no collision but among equal or similar rights.«[68] For him, the basis of expropriation is the supremacy of the public interest over the private one; therefore, from his point of view, there is a difference between the natures of these two elements, which means that it makes no sense to think of them in opposition. The conscience of the ›social question‹ and the extensive publicization of private law through the new ›social law‹ had cemented

the supremacy of collective needs over private property.[69] As a matter of fact, between the 1910s and the 1920s, one can see a change in the language of the sources. Eurico Sodré,[70] for example, rejects that expropriation can be considered a destruction of property, and the existence of compensation would prove this: state takeover of property only transforms the good, which cease to be a concrete thing and become a certain amount of money. Astolpho Rezende even speaks of a new ›social conception‹ of property.[71]

However, this new, social vision of property remained in dispute for a while. Some authors bizarrely described this flexibilization of private property as a form »state socialism« (»socialismo de Estado«).[72] A decision issued by the state court in Rio de Janeiro is quite eloquent in this regard, and not only revisits the issue of expropriation as socialism, but also describes it as confiscation as late as 1927.[73]

We can understand these disputes as reverberations of changes in the philosophical and moral normativity that guided the interpretation of law. Throughout the nineteenth century, a worldview that placed property in a privileged position conditioned the way jurists read legislative texts and understood legal concepts. Between the decades of 1900 and 1920, transformations in the way the state acted began to affect the approach of jurists toward the law itself. Property continued to be highly valued, but it was not the only relevant value anymore: it was necessary to absorb the consequences of the progress stimulated by the interventionist state. The constitutional basis of property would only be changed in 1934, as the influx of Weimar and the social conception explicitly entered the legislation. Until then, two different, moral normativities remained in dispute: the liberal one (valuing property) and the social one (valuing collective needs and legitimating state interventionism). From the same baseline of legal texts, many of which came from the early days of the empire, each philosophy could generate different decisions, different ways of understanding a single law that was mostly formed under the shadow of liberalism.

Could expropriation be understood as a sale? Was property the most important good, after life? Which amount of compensation would be fair? Should State powers be understood restrictively? All those questions are legal. However, when the same legal texts were approached in the early twentieth century by jurists with different philosophical backgrounds, their answers could differ widely, as the underlying moral normativity behind law was changing.

Was Property in True Opposition with Expropriation? Evidence from Case Law

Champions of liberalism and proponents of social views were at odds when it comes to value state interventionism. However, most of them could agree on one thing: in expropriation, state and individual were in opposition against each other. Such view is strictly connected to the liberal axioms, which see, in administrative law, a constant clash between authority and liberty—the foundational assumption of the nineteenth-century administrative model.[74] Was this a good description of expropriations carried under the new, complex tasks of the state in the early twentieth century?

In this section, we will see that, contrary to what the doctrine hoped to see, expropriation often favored the interests of (certain) private individuals. This inconsistency allows us to capture the insufficiencies of the liberal discourse, which emphasized the role of the individual and saw freedom simply as protection against the state. Furthermore, case law shows how the mainstream, liberal assumptions embedded in the doctrine and pervasive in the rooms of parliament is not capable of explaining phenomena that appeared in the daily life of the courts and the administration. Let us look at some emblematic cases judged by the Brazilian courts that could hardly be satisfactorily explained by early twentieth-century doctrine.

In the first one, from 1897, a public office in Ouro Preto had used parts of a property without the owner's authorization to create a building; the owner then applied to the courts for the act to be considered as expropriation,[75] rather than simply bringing a damages action. The judge ruled that this would be equivalent to the person requesting the expropriation of his own good, which was not feasible.[76] The judge stated that arbitration should only be used when extremely

necessary and authorized by the court. The plaintiff, by proposing an expropriation action, tried to start the procedure with the arbitration, subverting the due process. This may be an explanation of why he preferred to resort to the expropriation procedure: in it, the arbitration would come automatically, whereas in an action for damages, it would be necessary to request the arbitral evidence, leading to further delay.

In addition to this case in which the plaintiff asked to be expropriated, I found four lawsuits in which landowners try to prevent the state from giving up on an expropriation it had already begun:[77] a sign that taking of property would sometimes be profitable for the citizen it fell upon.[78] Some rulings are surprising due to the audacity of the plaintiff, which eagerly seeks to be expropriated. In one case from 1923,[79] the government described in an incomplete way the property in the declaration of public utility, and a neighbor requested in court that his good, and not the one that the government originally had in mind, should be expropriated. In another case,[80] the administration promoted a friendly expropriation but abandoned the lawsuit at some point. The expropriated citizen challenged this attitude in court, and the judges decided that this type of transaction was equivalent to a quasi-contract and, therefore, the public power could not have unilaterally given up on it.

In the situations I just mentioned, the government gives up on expropriation, but the takeover of private property remains in the interest of the citizen. There is still a confrontation between the state and the owner, although in inverted positions: the citizen benefits from the use of state authority against him, while the public power does not have interest anymore in the private property. However, it is possible to revolve the liberal assumptions even further: there are court rulings that show evidence of negotiations between the public power and individuals, in which the latter seeks to obtain some advantage in exchange for expropriation.

A case from the end of the 1910s,[81] for example, shows a great entanglement between the actions of infrastructure companies authorized to expropriate in the name of the state and private individuals expropriated by them. In this lawsuit, the *Leopoldina Railway Company* had negotiated a reduction in the price of compensation in exchange for buying certain materials from the expropriated citizens and passing the railway near the soap factory of one of the former owners of the terrain it would take. In another case,[82] the state of São Paulo had promised, in a contract, to extend the tramway line to the tissue factory of a private individual in exchange for the free transfer of a plot of land from him. Another trial[83] shows the owner giving part of his land to the city council for the renovation of a street in exchange for favors not related to expropriation. A final example is a report that several landowners had ceded parts of their land to carry out sanitation works, in the hope that the remaining part of their properties would gain value, compensating the donation made to the state.[84]

These are all events that go beyond the legally established *desapropriação amigável*. This »friendly expropriation« made it possible for the private individual to accept the financial offer of the state and to transfer the property without the need for legal proceedings, but after the declaration of public utility; in other words, it was a sale carried out under the threat of expropriation. The four cases I mentioned in the previous paragraph are not based on that premise: they show that, underneath the legal constructions, there was an exchange of favors involving expropriations. Public works – especially railroad construction – could suffer deviations in their route so that they could help the flow of production of some local member of the elite in exchange for the land in which the trains would circulate: expropriation was a legal form that guaranteed this merger between public and private interests that would be beneficial for both – and, at first, without involving money, which was the distinct mark of the legal concept of friendly expropriation.

This indicates that in nineteenth- and twentieth-century Brazilian reality, there was not exactly an opposition between state and private citizens, as the classical liberal thought proposes – and the text of expropriation laws accepted. The exercise of state power could not always be reduced to a pure and simple opposition between superior authority and the freedom of the subject. In fact, the individual, in many moments, benefits from the abduction of his property. Expropriation and property are not in necessary opposition: they are part of the same *continuum*. As one newspaper said by the end of the nineteenth century: »for the sale, if it was attempted, the imminent

expropriation, very far from being a threat, would certainly be a promise.«[85] In addition, in several moments, expropriation makes property more real and valuable, as an asset of little use, or in a precarious situation, could be converted into money through the providential aid of the state. The crossing of a railway line, the sanitation of a region, the opening of a street: all public actions encamped by the state that, especially in the partial expropriations, contributed to increase, and not to damage the value of neighbor properties. Expropriation was often an opportunity:

> *Beyond the circumstances that we have just pointed out, the commission does not ignore that there are unscrupulous landlords, who just after becoming aware that their buildings would be expropriated for public use, have increased the rent of these buildings, although paying the land tax for some time, for the sole purpose of obtaining greater profit, when the expropriation would have to be carried out*[86] *[the compensation was legally bound by the registered rent of the building].*

The many examples in which the treasury appeals against the indemnity evaluations claiming that the price was excessive can be remembered as situations in which the state was unsatisfied by the results of expropriation procedures. All of this indicates that, in fact, the discourse of opposition between property and the state was a mechanism that contributed to create an image of the suffering owner, attacked by the state, and enhance an attitude of piety toward him by judges and jury members – both of them usually owners on themselves. In other words, it was a convenient legitimation of astronomical compensations made in the interest of private individuals. After all, according to the traditional liberal reasoning, they were being deprived of a sacred right, and, therefore, deserved significant pay.

In addition to the subtle forms of collusion between the public administration and private citizens, there was plain corruption. A newspaper article from 1875, for example, criticizes the excessive compensation established in a process of expropriation – and, more seriously, the fact that the crown prosecutor did not appeal against it. The owner was apparently powerful and exerted influence over the judges,[87] for he had secured himself a large compensation. The collusion between the state and the owner could occur in various ways; for example, between owners and the state against tenants.[88]

Moreover, expropriation worked as a threat in favor of property owners. The possibility of a procedure whose outcome tended to financially favor the landlord and whose delay jeopardized the action of the public authorities stimulated public officials to offer large sums of money for the purchase of the buildings, in the hope that the landowners would accept the offers and let the state act.[89]

It is true that this entanglement between the state and certain citizens does not rule out situations in which oppositions are more obvious. However, probably not in the same way in which the doctrine read the problem. This is shown by a case reported by the press in the early 1850s. An anonymous article[90] defends the construction of a square next to the *Pequeno Rossio* in Rio de Janeiro. This region was close to a swamp and needed more infrastructure for the sale of groceries. The author of the article states that the area was poor and occupied by »miserable houses,« which is why expropriation would be easy. He, however, does not even mention the interests of the owners. Most likely because they were of low income – the concern with the property, in some moments, appear to be restricted to the goods of certain social classes. Only the properties of few citizens were truly sacred.[91]

Even at the end of the nineteenth century, expropriation can still be employed as a form of property protection. This appears in a press article in the penultimate year of the empire (1888), in which a citizen criticized the procedure adopted in the acquisition of land in the *Cabeça de Porco* slum. He said the government was threatening the residents by saying that the addresses were unhealthy and irregular– legal reasons for taking over the properties without indemnity. As a result, the owners sold their property to the government at derisory prices. However, the accusations of irregularities were apparently false, and so the text called for the land to be retroactively expropriated: this would be the only legitimate procedure for the government to achieve its objectives. This shows how the expropriation procedure could,

in another dimension, serve to guarantee and make property effective,[92] protecting even impoverished tenants against government action. As a matter of fact, the press itself viewed favorably when the owners negotiated with city hall–letting things get to the point where the lawsuit needed to be proposed was seen with suspicion and as the owner's fault.[93]

By now, we can understand that there is a lot of reality in the old doctrinal idea that expropriation *transforms* property, instead of annihilating it. Often, this transformation favors the private individual. Beyond the official law of the state, there was an influential normativity made of daily practices that saw state agents and workers of private companies entitled to expropriate collaborating (or colluding) with landowners. The conflict between public and private was sometimes transformed into an alliance at this hidden level. However, this marriage between state and owners, hidden under a cloak of apparent violence and embedded in a discourse of justification results from whether one belongs or not to the ruling class: this is the most important factor determining whether authority clashes with liberty or enhances it. The doctrine, blind to how differently the state could act, saw only opposition in an otherwise complex relationship and made the official law of the state follow those philosophical considerations. It was incapable of realizing that, under the generic name of "citizen," laid a multitude of concrete subjects belonging to different social classes: each one would inevitably be treated in a different way.

Reality did not fit in the straitjacket of liberalism.

State-Level Expropriations: A Complex System

Brazil was founded as a unitary state in 1822. However, throughout the nineteenth century, there were strong debates about administrative decentralization.[94] In 1834, when the central power was weakening, the Additional Act to the Constitution was approved, increasing the powers of the provinces. The newly created provincial legislative assemblies were empowered, among other things, to expropriate. The law books dealing with local government in the Empire, however, did not pay much attention to the issue,[95] which may be a sign that tensions between the national system and the provincial systems were not quite dramatic.

Later, in the republic (1889), the form of government was changed to a federation, with more powers for local governments. The new federal states continued to be able to expropriate, but there was a heated debate about the constitutionality of this situation. This issue was discussed in several judicial decisions.[96] The main foundation was article 34, 23 of the Constitution of 1891, which attributed to the union the exclusive competence to legislate on civil, criminal and procedural law and the federal justice procedure. Therefore, the only branches of law left to the states were the civil and criminal procedures[97] of their own courts. It was then argued that, since expropriation belonged to civil law, it could not be regulated through state legislation. Therefore, their laws would be unconstitutional and could not be applied. The STF's common response, however, was that expropriation belonged to both administrative law and civil procedure, falling therefore under state responsibility.

Finally, in 1938, the state laws of expropriation were extinguished in favor of a single, federal system.[98] It is remarkable that the existence of subnational systems was deemed unproblematic while Brazil was a unitary state, but was contested when it became a federal entity. This can complexify our understandings of decentralization and normative production within the state itself: the multiplicity of centers of normative production is not obvious, and even formally unitary states can have overlapping jurisdictions in activity. The existence of multiple entities producing norms on a single subject – expropriation –on the same territory testifies the fluidity of the very normative order of the state.[99]

In addition to the debate on the very constitutionality of state laws of expropriation, there were some points of disagreement between the federal government and the local powers regarding expropriation. There were two main sources of tension: the possibility of the judge to change the amount of compensation established by the arbitrator and the competence of the fiscal judge to rule on cases of expropriation. The existence of those differences enables us to say that the federal and the state regimes were part of different orders, despite some contact between them, and the fact that both belonged to the state.

First Difference between the Systems: Appeals on Indemnity

As ironic as it may seem, at the federal level, expropriation actions did not discuss the taking of private property itself: the debates should deal only with the magnitude of compensation. More than that, there could be no appeal against the price determined by the arbitrators, except to cope with eventual nullities. This architecture had a clear objective: to set a straightforward procedure that did not expose the flanks to the traps of shrewd lawyers.[100] Speed was the foundation of this order, for the government not to be delayed in obtaining the good.[101] The justification, diffused in several judicial pronouncements,[102] was that the guarantee of the property and the source of justice of the procedure did not lie in the content of the decision, but in the freedom of the parties to choose the arbitrators.

The strength of the restriction was well expressed in art. 29 of the 1903 expropriation decree: »From the ruling that ratifies the arbitration, an appeal may be filed [...]. The appeal will only have a devolutive effect,[103] and can only be provided to void the process for lack of essential formalities.« In these last two words, lied all the opportunities and all the limits of the owners. Depending on the more restricted or more open interpretation of the expression »essential formalities« (*formalidades essenciais*), almost all of the arbitrator's report could be re-discussed by the judge, or only grotesque flaws would be taken into consideration.

The STF (Supreme Federal Court), however, developed a looser interpretation than article would suggest. An example of this are cases in which the court decided that the expression »essential formalities« included legal commandments regarding the criteria for evaluating the compensation,[104] and even what are the cases of total and partial expropriation.[105]

In the states, however, the possibilities for challenge within the process were broader.

In Minas Gerais, for example, the state code of procedure established, in its article 1272: »in cases of expropriation, it shall be admissible the exceptions of illegitimacy of the plaintiff, suspicion and incompetence of the judge, with suspension of the process.« The illegitimacy of the plaintiff could be claimed against the state government if the individual had filed an action for annulment of the decree of public utility, and it had not yet been judged.[106] However, the violation of public utility should be explicit, and therefore was not easily granted by judges.[107]

However, the most controversial situation could be found in the state of São Paulo. If, for the federal process, such »essential nullities« caused controversy, the São Paulo process also had a vague expression destined to generate conflict; this time, in art. 5 of the 1836 expropriation act: »this whole process [of expropriation] shall be carried administratively without judicial formalities; and there will only be an ordinary appeal on the quantitative of compensation arbitrated, and appeal to the legislative assembly for the restitution of property; one and the other without suspension.« The whole problem was in defining what this appeal on the quantitative (*recurso sobre o quantitativo*) meant, because article 4 of the São Paulo law stated that »the decision of the arbitrators will be final.« The first provision made it appear that it was possible to modify in court the value of the compensation, while the second did not. Judges disagree whether they could only void the evaluator's reports with which they disagreed and order a new evaluation[108] or they were able to go further and directly impose a new value.[109] Over time, the magistrates developed an intermediate interpretation: the evaluation report was final only for the first-level courts, and, at the appeal level, the price to be paid for the asset could be changed by the second level judges.[110]

The quest for appeals was not a mere procedural conflict. It is a consequence of how the relationship between the administrative and the judicial systems is seen. Both the federal and the São Paulo systems were based on legislation that tried to avoid judicial intervention. However, their different wording led to different solutions when the judges tried to seize power and meddle in administrative affairs.

Second Difference between the Systems: Competence of Fiscal Judges

The second difference between the federal system and the state systems was the competence of fiscal judges (*Juiz dos Feitos da Fazenda*). Once again, the point of

discussion was São Paulo on the one hand; on the other hand, the city of Rio de Janeiro, which was under the jurisdiction of federal legislation due to its status as the capital of the republic.

The São Paulo court lived a situation of uncertainty regarding this problem. Traditionally, the fiscal judges dealt only with cases involving the state or national treasury, but never the municipal one. The city halls had no privilege of jurisdiction; a special law had granted it to the municipality of the state capital, but it did not expressly mention the expropriation processes: it dealt only with the collection of the debt of São Paulo. A restrictive interpretation should then be made: the expropriations promoted by municipalities would be processed in the common court.[111]

A similar discussion was undertaken in Rio de Janeiro.[112]

At the federal level, this debate was solved more easily, with a change between the monarchy and the republic. For the monarchic period, there is a case[113] of expropriation promoted by the National Treasury. The competence of the fiscal judge to prosecute it was discussed. The plaintiff claimed that there was no jurisdiction because the regulation of the fiscal judge from 12 January 1842, stated that the judiciary could only rule on the cases processed under the 1826 expropriation act. As this act had been revoked by the law of 1845 with respect to expropriations for public utility, the plaintiff claimed that the fiscal judge was no longer competent.[114] The state court agreed with him. Later, in in Republican times, a ruling[115] established the competence of Federal Judges based on art. 12, § 2 of law No. 221 of 1894, which transferred to federal judges the cases that were previously processed before the extinct national fiscal judge, among which was expropriation.

Once again, we see federal and local legislation regulating differently an issue that is common to both. In São Paulo, the fiscal judge could not act on expropriation, while in Rio de Janeiro, he was the one responsible to process those cases.

A Multitier System: Conclusions

Expropriation in Brazil was managed by a multinormative system with two legal levels, which were guided by a moral and an economic normativity.

The first legal level is the set of federal acts on expropriation and their interpretation by Brazilian courts and jurists. The second legal level, which can be called the regional one, is composed of state laws and their application in court. The moral normativity consists of the philosophical axioms of liberalism, which defended property as the most important right. The economic normativity consists in the negotiation practices between expropriators (both state agents and directors of companies authorized to expropriate) and individual.

The first conclusion of this research: the ideas of legal pluralism and multinormativity are useful not only to explain the relationship between the state and external entities but also to rethink what is the law of the state itself, and how different parts of the state interact with each other. The observation that there is a variety of legal orders within public power would be prosaic if we thought only of federal states. However, the Brazilian empire was unitary, and yet there are differences between national laws and provincial laws in overlapping fields. Moreover, the effective application of the rules by the agents leaves room for negotiated practices that would not be allowed if there were a direct application of the federal laws. This corroborates Peter Collin's[116] observation that there can be multiple normative levels in a legal order that is meant to be unitary, as it is the case for the law of the liberal world. At the same time, what opens this possibility is the practice of legal actors, and not the contemporary theorizations about how the legal world works.

The second – and central – conclusion is that there was a fundamental divergence in how the jurists of the period understood expropriation and how state and private agents used it. The lawyers perceived the takeover of private property as a result of a fundamental opposition between state and property, while everyday practices relied extensively on negotiation and collaboration between those poles. At stake in the way with which the doctrine dealt with expropriation was the meddling of a customary normativity marginal to the official law: the moral and philosophical ideas that perceived property as the main expression of the individual in the world, and therefore saw it as the most important individual right. Legislation embodied this normativity creating time-consuming procedures

that were difficult to execute; judges applied it ordering high indemnities; and academics reinforced those ideas through a widespread distrust of expropriation.

However, from the beginning of the twentieth century onwards, the discrepancy between this moral normativity and the new economic pressures demanding a more interventionist state led to a crisis in this worldview, which was being replaced by a social conception of property – and, consequently, by a less negative view of expropriation. In other words, the tension between the general normative level and the customary practices generated a departure from the liberal vision embodied in the legislation. This, however, did not lead to a replacement of the acts then in force, which continued to exist at the federal level until 1941: what changed were the interpretative parameters applied to the texts by the courts and the public administration. Modifications in economic pressures and philosophical interpretations changed the law, even though the statutes themselves remained mostly untouched.

At a more theoretical level, the transformations in early twentieth century state stimulates a rethinking of some assumptions on the very nature of public law still circulating in Brazilian jurisprudence nowadays – a third conclusion of this research. The nineteenth- century doctrine suggests as an axiom that the administrative action is defined by a constant tension between authority (of the state) and liberty (of the citizens); even today, this dichotomy is seen as one of the "foundations of public law"[117] and defines Brazilian administrative law.[118] However, twentieth-century expropriation did not work as a clash between an all-powerful state and an abstract ›private citizen.‹ Frequently, there was more than a single citizen, such as in expropriations of rented buildings; in other situations, the expropriation could favor both the state and the subject, as in the negotiated expropriations; the institute could also promote the individual's interest against the state's one. More dramatically, the expropriator could be a company authorized by law to take private property. Differently empowered citizen, therefore, could manipulate the state action to use public power in their favor, and sometimes, against other citizens. In other words, public and private action can work in various directions, and a single state intervention can operate differently over different citizens at the same time. Authority, therefore, can enhance the liberty of certain citizens against others, even contradicting the interests of the state itself.

The study of (administrative) law as the interaction of abstract structures, such as the single, faceless individual and the ethereal, unreal state, as it is still frequent in legal doctrine today, can be terribly misleading. The concrete reality, with its dazzling complexity, can often contradict what would be ›logical‹ from an abstract standpoint; the study of concrete relations is the only way for a more faithful reconstruction of the state and what its actions meant and mean to real people.

Behind the apparently monotonous legal landscape of late nineteenth- and early twentieth-century law, laid a complex normative world. The visible features of law books, legislation and case law were connected by deep structures made of both legal and philosophical ideas and economic practices that were often at odds with each other. The rise of the administrative state spawned an earthquake that would challenge the prominence of liberal thought and open space for a new way of thinking about property and the relationship between the state and the individual for most of the twentieth century – and still reverberates today.

The references to the court rulings are made through the abbreviation of the court they come from. Federal courts: STF (*Supremo Tribunal Federal* – Supreme Federal Court); STJ (*Supremo Tribunal de Justiça* – Supreme Court of Justice). The state/provincial courts are referred by their current name, since their designations varied widely during the period we are dealing with: TJSP (*Tribunal de Justiça de São Paulo* – Court of Justice of São Paulo); TJRJ (*Tribunal de Justiça do Rio de Janeiro* – Court of Justice of *Rio de Janeiro*); TJMG (*Tribunal de Justiça de Minas Gerais* – Court of Justice of *Minas Gerais*); TJRS (*Tribunal de Justiça do Rio Grande do Sul* – Court of Justice of *Rio Grande do Sul).*

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2 Bartolomé Clavero: Les domaines de la proprieté, 1789-1914: propriedades y propriedade em el laboratório revolucionário, in: Quaderni Fiorentini 27 (1998), pp. 269–278, p. 279.
3 Grossi: Assolutismo giuridico e diritto privato, Milano 1998.
4 Pietro Costa: Il progetto giuridico, Milano 1974.
5 Antônio Manuel Hespanha: Hércules confundido. Sentidos improváveis e incertos do constitucionalismo oitocentista: o caso português, Curitiba 2009, p. 17.
6 Bernardo Sordi: Diritto pubblico e diritto privato. Uma genealogia storica, Bologna 2020.
7 I am referring to the institute called *Desapropriação* in Portuguese, and translated in other European languages as *espropriazione per pubblica utilità*, *expropriation pour cause d'utilité publique*, *Enteignung* etc. The common word for this institute in English is *eminent domain*; however, this is the literal translation of one the theories that justify expropriation in Brazilian law (*domínio eminente*), which is mostly seen by Brazilian jurists as obsolete. To avoid confusion, and considering that most of the ideas of Brazilians on the issue are built in dialogue with continental European rather than common law discussions, I will use *exprorpriation* instead of *eminent domain*.
8 Tomas Duve: Was ist Multinormativität? Einführende Bemerkungen, in: Rechtsgeschichtee – Legal History 25 (2017), pp. 88–101.
9 Peter Collin: Ehrengerichtliche Rechtsprechung im Kaiserreich und der Weimarer Republik. Multinormativität in einer mononormativen Rechtsordnung?, in: Rechtsgeschichte – Legal History, 25 (2017), pp. 138–150.
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11 Heinz Mohnhaupt: Formen und Konkurrenzen juristischer Normativitäten im »ius commune« und in der Differentienliteratur (17./18. Jh.), in: Rechtsgeschichte – Legal History 25 (2017), pp. 115–126.
12 John Griffiths: What is legal pluralism?, in: Journal of Legal Pluralism 24 (1984), pp. 1–55.
13 Those were the journals with editions before 1930 available at the library of the Law School of the Federal University of Minas Gerais: Arquivo Judiciário (1927-1930), Fórum: Revista Mensal (1897, 1901, 1917); O Direito (1873-1913), Revista de Crítica Judiciário (1925-1927), Revista de Direito Civil, Comercial e Criminal (1906-1929), Revista de Jurisprudência Brasileira (1928-1930), Revista de Jurisprudência, Revista do Supremo Tribunal Federal (1916-1925), Revista dos Tribunais (1912-1930), Gazeta Jurídica (1875-1887), Gazeta Jurídica de São Paulo (1893-1912) e Revista Forense (1907-1930).
14 I further developed this argument in my master's thesis: Costa Arthur Barrêtto de Almeida: Desencontro marcado. Desapropriação, eficiência administrativa e absolutismo proprietário no Brasil (1826-1930), Universidade Federal de Minas Gerais, Master thesis, Belo Horizonte 2019.
15 Luigi Lacche: L'espropriazione per pubblica utilità. Amministratori e proprietari nella Francia dell'Ottocento, Milano 1995.
16 Brasil: Anais do Senado Imperial, 1826, livro 3, Rio de Janeiro 1826, p. 30.
17 Brasil: Anais da Câmara dos Deputados, 1843, livro 2, Rio de Janeiro 1843, p. 473.
18 Specifically, law 1832 of 9 September 1870, law 2639 of 22 September 1875 and law 3396 of 24 November 1888.
19 Brasil: Anais da Câmara dos Deputados, 1844, livro 3, Rio de Janeiro 1844, p. 214.
20 Brasil: Anais da Câmara dos Deputados, 1854, livro 3, Rio de Janeiro 1854, p. 239.
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22 Hobsbawm Eric: A era das revoluções: 1789-1848, São Paulo 2010, pp. 83 ss.
23 Odilon Nogueira de Matos: Café e ferrovias. A evolução ferroviária de São Paulo e o desenvolvimento da cultura cafeeira, São Paulo 21974, pp. 50–51.
24 Eliza Anna Finger: Um século de estradas de ferro. Arquiteturas das ferrovias no Brasil entre 1852 e 1957. Universidade de Brasília, PhD thesis, Brasília 2013, p. 31.
25 Caio Junqueira de Souza Albuquerque: As primeiras concessões ferroviárias na Argentina e no Brasil. Análise comparativa da evolução e desempenho de quatro empresas, 1850-1888, Universidade de São Paulo, Master thesis, São Paulo 2015, p. 59.
26 Júnior Sérgio Said Staut: Posse e dimensão jurídica no Brasil. Recepção e reelaboração de um conceito a partir da segunda metade do século XIX ao código de 1916, Curitiba 2015; Mariana Armond Dias Paes: Escravos e terras entre posses e títulos. A construção social do conceito de propriedade no Brasil (1835-1889), Universidade de São Paulo, PhD thesis, São Paulo 2018, Citar Staut Jr.
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31 José Murilo de Carvalho: A construção da ordem – teatro de sombras, Civilização Brasileira 2007, pp. 346–351.
32 »A propriedade depois da vida vem a ser o direito mais sagrado que nós temos« Brasil: Anais do Senado Imperial, 1855, livro 2, Rio de Janeiro 1854, p. 190.
33 Joaquim Rodrigues de Sousa: Analyse e comentário da Constituição Política do Império do Brazil. Teoria e prática do governo constitucional Brazileiro, São Luíz do Maranhão 1870, p. 475.
34 »Devastaçóes praticadas sem o menor sinal de deferencia ao proprietário e de respeito ao sagrado direito de propriedade« TJRJ: Todo terreno do domínio particular tem a seu favor a indenização,

in: O Direito 40 (1886), pp. 155–170, p. 158; » não era menos Digna de toda atenção a defesa do sagrado direito da exequente, que representava uma santa instituição« STJ: Revista cível nº 10240, Gazeta jurídica, 37 (1887), pp. 382–387, p. 40; TJSP; J. M. Marques: Azevedo (comentário). Apelação cível 8885, in: Revista dos Tribunais 26 (1918), pp. 394–399, at p. 399.

35 José Antônio Pimenta Bueno: Direito público brazileiro e análise daconstituição do Império, Rio de Janeiro 1857, p. 429.

36 The Viscount of Olinda says with regard to the Rua do Cano: »os particulares que têm casas naquelas ruas sofrerão também violência no seu sagrado direito de propriedade« Brasil: Anais do Senado Imperial, 1854, livro 4, Rio de Janeiro 1854, p. 744; almost 70 years later, the STF expresses itself similarly. STF. Agravo de Petição 3.273. Revista do STF 47 (1922c), pp. 85–87.

37 »por ser excepção, e unica, contra o sagrado direito de propriedade, a desapropriação é odiosa e de applicação restrictissima« TJRJ. Questão de desapropriação para o abastecimento de água à capital do Império, in: O Direito 28 (1882), pp. 539–593, at p. 579.

38 »A desapropriação, fica desde logo subentendido que uma tal excepção, odiosa como todas as excepções, é que deve ter um circulo de ferro inquebrantavel traçado em volta de si, além do qual não possa ir mais uma linha, e que, inversamente, ao principio geral é que deve ser facultada, na medida possivel, toda a amplitude de garantias e de movimentos« STF. Agravo 571, in: O Direito 95 (1904), pp. 60–84, at p. 77.

39 »E da essência do direito de propriedade ser livre e exclusivo« Leite Solidônio: Desapropriação por utilidade pública, Rio de Janeiro 1921, p. 7; it is the State who limits it: »a desapropriação é o direito que tem o Estado de extinguir, limitar ou restringir, mediante justa indenização, o direito individual«, Rio de Janeiro 1921, p. 12.

40 »O domínio é um poder absoluto e exclusivo sobre a coisa [...]. Este princípio fundamental sofre apenas uma derrogação, determinada por motivo de interesse público — a da desapropriação« Lafayette Rodrigues Pereira: Direito das Coisas, Rio de Janeiro 1943 [1877], pp. 112–113.

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43 Lourenço Trigo De Loureiro: Instituições de direito civil brasileiro, Rio de Janeiro 1871, p. 225.

44 Gilles Deleuze: Theoria jurídica da desapropriação, Rio de Janeiro 1920, pp. 3–4.

45 »A propriedade não é um qualquer direito, não é uma medida transitória, é preciso portanto que a desapropriação seja matéria fixa, que assente em uma verdadeira base constitucional« Brasil: Annaes do Parlamento Brasileiro: Câmara dos srs, Deputados, sessão de 1855, vol. 2. Rio de Janeiro 1875, p. 190.

46 Wladimiro Gasparri: Il punto logico di partenza, Milano 2004, p. 7.

47 Wladimiro Gasparri: Il punto logico di partenza, Milano 2004, p. 5.

48 Rego: Direito adminisitrativo brasileiro, p. 132.

49 STF: Agravo de Instrumento 3.282 in: Revista do STF 50 (1923b), pp. 78–79.

50 TJRJ: Revista cível nº 8830, in: Gazeta jurídica 11 (1876), pp. 57–82.

51 »Regulando-se em geral a desapropriação pela compra e venda, uma vez entregue a cousa e recebido ou depositado o seu preço, não cabe ao terceiro que vem reclamar a mesma cousa, á vista da Ord. liv. 4°, tit. 6° e tit. 7°, outra acção senão a de reivindicação" STJ, Revista cível nº 10240. in: Gazeta jurídica 37 (1887), pp. 382–387.

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53 »É bem verdade que devido á perniciosa influencia do direito civil não faltaram escritores que, em tempos passados, fizeram tentativas para explicar a desapropriação como um contrato de compra e venda« STF: Recurso Extraordinário 391, in: O Direito 100 (1906), pp. 153–186, at p. 169.

54 »Sendo o instituto da desapropriação por utilidade publica regulado pelos principios do contracto de compra e venda embora seja esta forçada pelos direitos da soberania nacional ou JUS IMPERII«, STF: Recurso Extraordinário 391, in: O Direito 100 (1906), p. 185.

55 Some important Works on the significance of the reforms are: André Nunes Azevedo: A reforma Pereira Passos. Uma tentative de integração conservadora, in: Tempos Históricos 19 (2015), pp. 151–183; André Nunes Azevedo: A Reforma Urbana do prefeito Pereira Passos e o ideal de uma civilização nos trópicos, in: Intellèctus 14/2 (2015); Jaime Larry Benchimol: Pereira Passos, um Haussman tropical. A renovação urbana da cidade do Rio de Janeiro no início do século XX., Rio de Janeiro 1992.

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59 Supremo Tribunal Federal: Desapropriação. Declaração de utilidade pública. Quando é desnecessária. Inconstitucionalidade do art. 10 do decreto n. 4.956 de 1903. Excesso da desapropriação. Reclamação. Tempo útil., in: Revista de Direito Civil, Comercial e Criminal 41 (1916), pp. 537–540.

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social, que se opõe a que o proprietário possa fazer da propriedade um exercício tão ilimitado quanto a sua vontade. Assim também a liberdade« Astolpho Rezende: limitações do direito de propriedade e o poder de polícia das municipalidades, in: Revista de Jurisprudência Brasileira 5 (1929), pp. 427–429, at p. 427.

72 TJSP; J. M. Azevedo Marques (comentário): Apelação cível 8885, in: Revista dos Tribunais 26 (1918), pp. 394–399, at p. 399.

73 »E note-se como tem crescido com o tempo o menosprezo do Estado pelo direito de propriedade particular. A lei 553 de 12 de julho de 1845 confiou sem peias, ao critério do júri de indenização a avaliação da propriedade. Passado um decênio, veio o decreto 1.664, de 1855, inventor do novo sistema de socialismo do Estado, determinar que nenhuma indenização poderia ser inferior nem superior para os prédios urbanos desapropriados, ao valor de 20 anos do rendimento respectivo [...]. Agora a República, menos cerimoniosa que o Império, aperfeiçoou o sistema, estabelecendo na lei 1.021, de 1903, o máximo do valor locativo de 15 anos, e ainda por cima desfalcado da importância do imposto predial. Neste andar, prosseguia, se os tribunais de justiça, no desempenho da mais elevada e salutar das suas funções, não puserem freio à disparada do corcel legislativo, dentro em pouco chegaremos talvez à sublimidade do quase confisco« TJRJ. Agravo de petição 4.324, in: Archivo judiciário (1927), pp. 206–209.

74 Cf. Bernardo Sordi: Al di là del nesso autorità e libertà. I nuovi sentieri della divisione dei poteri, in: Sergio Perongini (ed.): Al di là del nesso autorità/libertà. Tra legge e amministrazione, Torino 2017, pp. 11–16.

75 TJMG: Apelação cível nº 1583, in: Fórum 4 (1897), pp. 663–666.

76 He mentions that the only authorities authorized to carry out expropriation are the Fiscal Attorney of the National Treasury (general utility), that of the Provincial Treasury (provincial utility), and the Municipal Councils (municipal utility), or the companies authorized by concessions to expropriate.

77 TJRGS: Revista Cível 10.240, in: O Direito 37 (1885), pp. 573–574; STF: Agravo 666, in: O Direito 98 (1905), pp. 518–521; STF: Nº 1934, in: Revista Forense 16 (1911), pp. 229–230; STF: Apelação Cível 1.934, in: O Direito 120 (1913), pp. 289–291.

78 In another one, the government gives up expropriation, and the tenant starts to pay the rent to the former owners; however, the latter refuse to receive, suspicious that this attitude would mean recognition of the end of the expropriation, which he tried to avoid. TJSP. Apelação cível 8658, in: Revista dos Tribunais 22 (1917), pp. 348–349.

79 STF: Agravo de Instrumento 3.282, in: Revista do STF 50 (1923), pp. 78–79.

80 TJRJ: Revista Cível 10.240, in: O Direito 35 (1884), pp. 550–551; STJ. Revista cível nº 10240, in: Gazeta jurídica 37 (1884), pp. 382–387.

81 STF: Apelação Cível 2.381, in: Revista do STF 15 (1918), pp. 292–294.

82 TJSP: Desapropriação, in: Revista dos Tribunais 1 (1912), pp. 456–457.

83 TJSP: Apelação cível 3115, in: Gazeta jurídica 36 (1904), pp. 124–127.

84 TJSP: Desapropriação, in: Revista de Direito Civil, Comercial e Criminal 80 (1926), p. 524.

85 Jornal Do Comércio: Abastecimento de água. Desapropriação, in: Gazeta jurídica 30 (1881), pp. 221–265, at p. 230.

86 Anonymous: O melhoramento da cidade do Rio de Janeiro, in: Jornal do Commercio, 26. 03. 1875, p. 2.

87 »Dizem mais que esse feliz, além de tudo, é protegido de um mandão que dispõe de grande preponderância e é o tutu da freguesia, e acrescenta-se que até manda em juízes e desembargadores e faz o que quer«, in: Anonymous: Ao sr ministro do Império, in: A Reforma. Órgão democrático, 4. 11. 1875, n.p.

88 This is exemplified by a case in which the municipality attacked the building before completing the expropriation while the tenant of the land was still economically exploiting the site. The tenant published a press release against the city government's action and claimed that the owner had gone to the government with a potentate, seeking in the municipality guarantees that the tenant would not turn against him. In other words, the landlord seeks to make a profit in association with the administration, even if it caused damage to his tenant. tenant. See: Caetano Garcia: A demolição da fábrica de papéis pintados de caetano Garcia, in: O País, 4. 9. 1906, p. 6.

89 A newspaper report from 1903 shows this. It reports that all the buildings in Rua da Prainha, in the city of Rio de Janeiro, had been obtained amicably by the city hall, except for one, whose owners forced the municipality to expropriate them, what would turn into profit. See: Anonymous: Untitled, in: Gazeta de Notícias 18. 11. 1903, n.p.

90 Anonymous: Untitled, in: Diário do Rio de Janeiro, 24. 3. 1852, p. 3.

91 Which does not rule out instances in which the liberal discourse helped poorer owners. The thesis of Cantisano shows precisely how, in the 1904 urban reform, liberal lawyers allied with less affluent tenants against the perceived authoritarianism of the government. Cantisano: Rio de Janeiro on Trial.

92 Antônio Francisco de Faria / Felicidade Perpetoa Jesus: Estalagem Cabeça de Porco, in: Jornal do Commercio 3. 5. 1888, p. 2.

93 An owner had been submitted for a lengthy expropriation procedure for over a year. The newspaper said that the most fault fell upon her, due to her refusal to amicably negotiate with city hall, as others had been doing. Anonymous: Prefeitura Municipal, in: Gazeta de Notícias, 6. 4. 1905, p. 1. She later published a text arguing against those observations and saying she was a victim of abuse. Marie Leoni Robin: Desapropriação, in: Gazeta de Notícias, 21. 4. 1905, p. 3.

94 For a first historiographical account, cf. Ivo Coser: Visconde do Uruguai. Centralização e federalismo no Brasil (1823-1866), Belo Horizonte 2008.

95 The Viscount of Uruguay, in his "Studiues on the Administration of Provinces« (»Estudos sobre a administração das províncias«), says only that the Additional Act created the difference between municipal and general public utility. But his work, with over a 1000 pages, mentions expropriation in only two of them. Paulino Soares de Sousa: Estudo sobre a administração das províncias. Vol. 1, Rio de Janeiro 1865, p. 205. Aureliano Tavares Bastos: A província. Estudo sobre a descentralização no Brasil, Rio de Janeiro 1870.

96 TJSP: Agravo cível nº 6213, in: Gazeta jurídica 58 (1912), pp. 118–119; STF. Desapropriação, in: Revista dos Tribunais 3 (1912), pp. 65–66; STF: Desapropriação por utilidade estadual ou municipal, in: Revista Forense 18 (1912), pp. 192–193; STF: Desapropriação por utilidade pública, in: Revista Forense 18 (1912), pp. 397–398; STF: Desapropriação, in: Revista dos Tribunais 6 (1913), pp. 456–457.

97 On the debate regarding the criminal procedure, see: Ricardo Sontag: Unidade Legislativa Penal Brasileira e a Escola Positiva Italiana. Sobre um debate em torno do Código Penal de 1890, in: Justiça e história nº 11 e 12 (2014), pp. 89–124.

98 As determined by the *decreto-lei* 496, of 14. 6. 1938.

99 Some authors even use the notion of legal pluralism to describe the dynamic federalism – when the state and federal competences are not strictly separated, but are constantly overlapping. Cf. Erin Ryan: Federalism as legal pluralism, in: Paul Schiff Berman (ed.): Oxford Handbook of Global Legal Pluralism, Oxford 2020.

100 »O processo de desapropriação é rápido e expedito; não pode ser entravado por nenhum recurso suspensivo; seus termos essenciais

hão de correr normalmente, seguindo-se uns aos outros, sem procrastinações prejudiciais ao direito da coletividade. Ao mesmo tempo, porém, ele assegura ao expropriado todas as garantias de defesa« Sodré: A desapropriação, p. 77.

101 »O processo de arbitramento judicial para desapropriação por utilidade pública, sumaríssimo por sua natureza, não admite exceção dilatória e protelatória, cabendo apenas o recurso de apelação uma vez findo o arbitramento« STF: Desapropriação, in: Revista de Direito Civil, Comercial e Criminal 12 (1909), pp. 516–517, at p. 516.

102 STF: N. 3871, in: Revista Forense 47 (1926), pp. 88–91.

103 In Brazilian law, this means that the appeal has the only effect of making the case to be reviewed by another court; it would not stop the ruling to be applied. Otherwise, it would also have a »suspensive effect« (»efeitos suspensivo«).

104 STF: Desapropriação. Nº 1575, in: Revista Forense 16 (1911), pp. 125–126.

105 STF: Apelação Cível 1.575, in: O Direito 120 (1913), pp. 171–172.

106 TJMG: N. 4049, in: Revista Forense 54 (1930), p. 152.

107 TJMG: N. 3993, Revista Forense 54 (1930), pp. 113–114.

108 TJSP: Apelação cível 6905, in: Revista dos Tribunais 13 (1915), pp. 243–245.

109 Whitaker: Desapropriação, pp. 208-209. TJSP: Apelação cível 13145, in: Revista dos Tribunais 54 (1925), pp. 239–240; TJSP: Apelação cível 6905, in: Revista dos Tribunais 13 (1915), pp. 243–245.

110 TJSP: Apelação cível 7839, in: Revista dos Tribunais 15 (1915), pp. 195–198; TJSP: Embargos 7973, in: Revista dos Tribunais 22 (1917), pp. 227–230; TJSP: Agravo 12186, in: Revista dos Tribunais 45 (1923), pp. 290–291; TJSP: Apelação cível 13145, in: Revista dos Tribunais 54 (1925), pp. 239–240; TJSP: Apelação Cível 13761, in: Revista dos Tribunais 57 (1926), pp. 140–141.

111 TJSP: Apelação cível 7139, in: Revista dos Tribunais 7 (1913c), p. 64.

112 STF: Recurso Extraordinário 938, in: Revista do STF 36 (1922), pp. 79–81; STF: Apelação Cível 2.555, in: Revista do STF 39 (1922), pp. 77–79; STF: N. 938, Revista Forense 38 (1922), pp. 506–507; STF: Desapropriação, in: Revista de Direito Civil, Comercial e Criminal 67 (1923), pp. 496–497.

113 TJRJ: Agravo cível de petição 2730, in: Gazeta jurídica 33 (1881), pp. 122–126.

114 Moreover, the plaintiff also said that the regiment was a simple ministerial order, and should not prevail over art. 3 of the law of 1826 and art. 11 of the legislative decree of 1845, which were of higher normative instance.

115 STF: Apelação Cível 1.688, in: O Direito 115 (1911), pp. 603–604.

116 Collin: Ehrengerichtliche Rechtsprechung, p. 148.

117 Carlos Ari Sundfeld: Fundamentos de direito público, São Paulo ^{5}2010, pp. 109–118.

118 Celso Antônio Bandeira de Mello, perhaps the most important Brazilian administrativist since the 1990s, defines the administrative legal regime as an opposition between administrative prerogatives and private rights; Hely Lopes Meirelles, the defining Brazilian administrativist from the 1970s and 1980s, not only accepts this dichotomy, but states that the equilibrium between those two poles is one of the main tasks of the interpreter. Cf. Bandeira De Mello Celso Antônio Bandeira De Mello: Curso de direito administrativo, São Paulo ^{32}2015, p. 57; Hely Lopes Meirelles / José Emanuel Burle Filho / Carla Rosado Burle: Direito administrativo brasileiro, São Paulo, ^{42}2016, p. 52.

Abstract

Nineteenth century features the supremacy of the administrative state and the absolutized conception of property, expressing liberalism. By then, lawyers thought of expropriation as a clash between these two values. However, in early twentieth century, as the interventionist state expanded, the public power colludes with private citizens, and the subjects profited from expropriations. This challenged the liberal opposition mentality and was followed by the incorporation of a social conception of property. Throughout one century, the interpretation of expropriation changed as the underlying moral normativity on property changed, prompted by economic modifications, even though the legal texts remained mostly the same.

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