The Standing of Economic rights: A Brazilian case study

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Abstract

Research about economic rights has become ever more relevant as the numbers of those suffering from poverty, social inequality and austerity policies increases. Economic rights have been the focus of revived debates in recent years in academic and legal contexts.

How are economic rights understood by different actors that are responsible for applying them, and how do these different understandings affect the effectiveness and applicability of these rights? These are the questions that this thesis seeks to answer, using an innovative approach. This thesis explores the understandings of economic rights held by politicians, administrative and juridical officials within government, and civil society actors. These are the primary actors responsible for applying economic rights within the national system. The thesis also examines the consequences that their interpretation has on the implementation and protection framework. It is an innovative approach since existing research on economic rights does not study how the understanding of these actors affects the application and effectiveness of the rights.

To understand why economic rights struggle to be implemented in practice it is necessary to question these participants on what they understand economic rights to be, why are they so difficult to achieve, and how cultural expectations affect their realisation. Therefore, this research brings to light the interpretation of those who are responsible for applying and protecting these rights, and consequently, emphasize the importance that these interpretations have on the whole economic rights system.

Brazil was chosen to be the case study for this thesis because it is a country with unprecedented natural resources and wealth, entrenched inequality, and a Constitution that significantly and materially safeguards socioeconomic rights. Thus, the recognition and protection of these rights that are embedded in the Brazilian Constitution creates an inclusive and emancipatory legal order based on human dignity. Yet, in societies that are rooted in slavery and exploitation, the constructed cultural history comes from the perspective of elites, implicating the understanding of rights through the lens of that group. Hence, the present research intends to understand how these subjects interfere in the standing of economic rights.

In memoriam of Professor David Held, Gilda and Ayrton Costa.

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I would like to thank and dedicate this thesis to my family. They always believed in me and were always by my side in good and bad times. To my mom, who is my rock. To my dad, my sisters, grandma, my aunts, uncle, cousins, and my godfather for the love showed me during this time. To Alice and Rodnei who helped me to write my first thesis proposal and get the scholarship. To my little brother, who made me smile during the darkest times. To my grandparents Ayrton and Gilda, you are missed.

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To everyone who has helped me along this path, I say OBRIGADA.

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LIST OF ABBREVIATIONS

AGU	Attorney General Office
BF	Family Grant Program
CF	Brazilian Federal Constitution
EC	Constitutional Amendment
ESR	Economic and Social Rights
IACHR	Inter-American Commission on Human Rights
IBGE	Brazilian Institute of Geography and Statistics
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRL	International Human Rights Law
IPEA	Institute of Applied Economic Research
MPF	Federal Prosecution Office
OAS	Organisation of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
PNAD	National Household Sample Survey
RE	Extraordinary Appeal
STF	Brazilian Supreme Court
UDHR	Universal Declaration of Human Rights
UN	United Nations

CHAPTER 1: INTRODUCTION

The multiple crises affecting the world are symptomatic of a broken system constructed on the back of socio, cultural and economic inequalities. Social and economic rights lie at the heart of this problem and are key to understanding the nature, causes, and potential solutions of these crises. This is because the different ways individuals comprehend and interpret these rights affects the effectiveness of the rights embedded in any framework, consequently generating a broken socioeconomic system.

According to Oxfam, 26 billionaires own as many assets as 3.8 billion people. The gap between the super-rich and the rest of the population has increased exponentially since the 2008 financial crisis, with the middle class and the poor bearing the brunt of the impact. Governments have applied brutal austerity policies and cuts to social programs whilst providing tax cuts to the rich, as seen in the cases of Greece, Spain, Portugal, United Kingdom, Brazil, the United States and so forth. In this capitalist system there is an unequal distribution of advantages and disadvantages, with the burden nearly always falling on the most vulnerable (OXFAM, 2019).

That there are issues surrounding economic rights is not a recent phenomenon. They have continuously been treated as second class rights by the political class compared to political and civil rights. Asbjørn Eide and Allan Rosas state that "taking economic, social, and cultural rights seriously implies, at the same time, a commitment to social integration, solidarity and equality, including the issue of distribution income. The social, economic, and cultural rights include as a central concern the protection of vulnerable groups. [...] Fundamental needs must not be made contingent on charity from state programs and policies, but rather defined as rights" (Eide, Krause and Rosas, 2001: 17-18).

Economic rights are a key part of political discourses today. The question of the right to health, to the right to enjoyment of just and favourable conditions of work, to social security and so on, are in the (un)heard scream of people from north to south from east to west. From the USA to Chile, UK to South Africa, we see populations tired of a system which benefits a small number of people while exploiting the rest. But the question remains: what are economic rights? Until there is a clear understanding of what they really are, and why it is essential to build economic rights as a form to achieve

human dignity and a just society for all, society will remain prisoner to endless circles of moral and identity crises stuck in an elitist pact, with its corresponding symbolic and material violence. Thus, the objective of my research is to analyse the understanding of economic rights through the interpretation of the people who bear the responsibility to protect and apply them: politicians, juridical actors, and civil society members. Doing so will enable me to uncover how their understanding affects the applicability and effectiveness of economic rights in a sociolegal system.

To remain within a narrow scope the thesis will focus on Brazil as the case study for the empirical research. Brazil is a country of juxtapositions. It's beautiful and diverse nature coexists with never-ending chaos and destruction. It thrives on the free creativity of its people but is imprisoned by a culture of colonialism and slavery, with vast inequality and its violence separating people by iron grids, whether they are from an extravagant building or overcrowded and dilapidated prison. Through the thesis, it will be shown how the history, culture, and values of the country and its people connect with the history of economic rights. Equally, it will be shown how different understandings of economic rights together with Brazilian historical and cultural characteristics affect the protection, effectiveness, and the use (or not) of the international and national legal systems for the applicability of economic rights in Brazil.

According to the World Inequality Survey 2018, Brazil has the highest concentration of income in the world: almost 30% of Brazil's income is in the hands of only 1% of the country's inhabitants, and the country continuously suffers from economic rights violations, despite being the 9th biggest economy in the world. After the austerity programmes established in 2016, extreme poverty has risen and today there are 13.5 million people surviving with less than R$145,00 Reais per month[1] (IBGE, 2019). A more detail explanation of the reason why Brazil was chosen will be featured in Chapters 2 and 4.

Different ideologies, cultures, and conceptions of society and history have influenced both domestic and international understandings of economic rights, and the relationship between the individual, state, and the international community in establishing and

[1] $1=R$5,58 in September 2020.

protecting them. Due to these differences, the implications of economic rights as human rights have been misunderstood for a long time. It will be shown throughout this research that numerous individuals have never heard of the concept of economic rights, that some believe that they are merely an example of charity, and still others that the State should not be involved in their implementation and/or protection. It is because of this misunderstanding and the implications it has on how different societies function that is important to study and understand the evolution of the concept economic rights. This importance extends to considering how they can be politically and legally implemented within and across a nation and beyond it internationally.

Although the United Nations and relevant international documents do not specifically establish which rights from the UDHR and ICESCR are economic rights, for the purpose of narrowing the object of the thesis, this research lists: the right to property, the right to work, the right to form and join a trade union, the right of everyone to social security, the right to health, and the right to an adequate standard of living as economic rights. Thus, every right that has a relationship with the economy and the production, distribution and consumption of goods and services and which is present on the ICESCR.

Research purpose and Questions

This thesis is about the understanding of economic rights by politicians, juridical actors and civil society in Brazil, and the consequences this has on the implementation and protection framework. Research about economic rights has become ever more relevant as the numbers of those suffering from poverty, social inequality and austerity policies increases. Economic rights have been the focus of revived debates in recent years in academic and legal contexts. However, the perspectives of those who are responsible to implement them in the national sphere are not researched in-depth.

To understand why economic rights struggle to be implemented in practice it is necessary to ask these participants what they understand economic rights as, why they are so difficult to achieve, and how cultural expectations affect their realisation. The findings that will be discussed are significant because existing empirical research has not investigated how economic rights are defined by those responsible for their implementation and protection. As will be shown in chapter 5, national institutions still bear primary responsibility for the application and implementation of economic rights.

Therefore, uncovering their interpretation of what these rights mean is essential to understanding how we can make economic rights more efficient and relevant.

This research will outline theories of liberalism, socialism, and neoliberalism to show how they guide the interpretation and focus that will be given to the rights established in the economic rights structure, whilst engaging with the questions of what they are and how they should be achieved. Consequently, the research will highlight the prominence of the right to property, the most protected economic and human right of all as the bedrock of liberal society, even to this day seen as a form of freedom, independency, and self-worth. Also analysed will be the question of the impact of and connection between historic values, principles, and ideologies in a certain country, in this case Brazil, and what impact this has on the protection and effectiveness of economic rights.

Additionally, this research will investigate the international framework of economic rights as the documents and covenants of the international order are where the concept and phrasing of economic rights first appeared. Due to their nature as legally binding documents, analysis of the international system is essential to the development of the thesis as this form the philosophical and legal basis for economic rights everywhere. Therefore, chapter 5 will investigate the difference between the international and regional legal frameworks of economic rights. It will ask how these systems of protection for economic rights are applied in practice, focusing on participants' interpretations of the nature of the disconnect between what the international documents establish and what is practiced on a daily basis within Brazil.

As will be outlined, explained, and examined in the chapters that follow, this thesis applies a hermeneutic analysis to the concept of 'economic rights', asking how people understand the concept; how their socioeconomic backgrounds affect their interpretation; how they are educated, and the effect this has on their cultural expectations; and the consequent impact this has on the protection and application of economic rights. In other words, it will ask how Brazilian participants understand economic rights, whilst foregrounding considerations of how the historical and cultural aspect of the country combines with individual sociocultural positions in the process of the interpretation and application of economic rights. As such, it offers novel

perspectives on the situated nature and (in)effectiveness of theoretical and legal conceptions of economic rights.

Thesis Structure

Chapter two of this thesis presents the methodological framework that will guide the research. This methodological framework captures and illuminates the approaches considered to create this thesis, before offering a justification for the hermeneutic approach pursued throughout. After justifying these broad methodological concerns, this chapter also outlines the relevance and importance of Brazil as a case study, before offering some considerations on the overall importance of the topic.

Having provided these justifications, the thesis then proceeds to present empirical findings from research participants on the topic of economic rights. By presenting relevant theoretical concerns alongside research data, these chapters explore confluences and tensions between the theoretical and legal concerns surrounding economic rights and participants' understandings. As such, chapter three begins with historical and theoretical framings of economic rights, beginning with liberalism of the 18th century and proceeding until the introduction of neoliberalism in the contemporary day. From chapter four onwards, each chapter therefore presents a legal-theoretical analysis of a theme followed by participants' understandings.

The first of these themes, found in chapter four, presents the conditions and context of Economic Rights in Brazil, responding to the surprisingly complex research question of 'What are economic rights?' It does so by analysing how participants understand and define economic rights, and how the different theoretical interpretations outlined in chapter three and the Brazilian sociocultural and economic contexts presented in chapter four form these comprehensions.

Chapter five then turns to the position of economic rights within the framework of international human rights law. It seeks to understand how participants view this system specifically regarding the application and protection of economic rights, how the international order constructs the protection of economic rights, and how such rights are applied. Therefore, the chapter commences with a brief historical account of international law, followed by analysis of the documents comprising the primary set of publications and normative frameworks of economic rights. Particular attention will be

paid to the International Bill of Rights and the human rights documents of the Inter-American system due to their pertinence to the case study. Having presented this theoretical background, the chapter analyses this system through the understandings of participants due to being the parties with primary responsibility for the application of economic rights within the national and international systems. It will focus on the themes they introduce, particularly the lack of international justiciability and the local assimilation of 'international values'.

Chapter six is dedicated to situating economic rights within the constitutional framework. As such, it describes how economic rights are established in the Brazilian legal system, and how the system implements international treaties of human rights. This chapter analyses the Brazilian constitutional framework with a hermeneutical approach and elucidates the difference between economic rights in the Constitution and in practice. This chapter takes the question of 'how (or not) have economic rights been implemented in the Brazilian legal system?' Thus, this chapter analyses participant interviews to understand the thorny issues surrounding the applicability of economic rights within Brazil, and the causes thereof.

The seventh and concluding chapter draws together the findings of the empirical research presented in the preceding chapters. In doing so, it brings together current concerns about economic rights in Brazil with ongoing developments and findings relevant to the larger and international legal frameworks as put forth by the international community's renovated awareness of these important issues. The chapter then concludes the thesis with the outlines of the main thematic and methodological findings from the empirical research, touching upon limitations of the research, before finally considering how these findings add to existing knowledge in the area of economic rights.

Taken together, these chapters support the thesis conclusion that the implementation of economic rights depends greatly on the values and backgrounds of those responsible for implementing them. As such, it provides novel perspectives to our knowledge surrounding the relationship between legal texts and their practical applications. The principal contribution is therefore twofold: firstly, the thesis presents an empirical analysis of economic rights from the perspective of those responsible for implementing them, and secondly, it engages deeply with how the interpretations, cultural

expectations, and values of these individuals affect the justiciability and protection of economic rights. It therefore plugs a much-needed gap in our knowledge surrounding economic rights.

CHAPTER 2: METHODOLOGY

This chapter sets out the methodological approach of the thesis, which contains some unique elements in its research design. These include the research questions; the case study itself, which constitutes the pillar of the project; and finally, the core stages of research and methods that will be employed.

The objective is to conduct a case study on economic rights in Brazil from a hermeneutical perspective. This will focus on how three groups of subjects – from juridical, government administrative and politicians (the political group), and civil society – understand what economic rights are, how they see the issue of justiciability, and how they create and assess public policies in regard to respecting and protecting both these rights and the international system. In other words, the analysis will uncover the way their comprehension of these topics affects the implementation and protection of economic rights systems.

The study will engage with three principal research questions:

- What is the understanding of economic rights?
- How do the diverse interpretations of economic rights affect their implementation and protection within the Brazilian framework?
- To what extent do these interpretations affect the application of these rights in practice?

To answer these questions, this research will develop an empirical analysis of how the interpretation or understanding of economic rights affects the relationship between the international economic rights system and the national Constitutions and local institutions which bear primary responsibility for their protection and application. To approach this, a principal and necessary aim of this research will be to establish what economic rights are in the views of the subjects interviewed.

A core argument of this thesis is that differing theoretical comprehensions of economic rights affects their protection and implementation. This in turn impacts the relationship between the international community and the state, and subsequently between the state and its citizens. To situate this argument, it is crucial to note that the concept of economic rights was created by the international system and as such suffers from the political influence of international parties. This characteristic has an impact upon how

participants comprehend the influence of third parties on the use of economic rights within the international system, a topic examined further in section 5.6.

The project will track and understand some of the most important of these concerns as they play out between economic rights issues and institutional settings. It will consider how local institutions respond to calls for the protection of economic rights and new policy approaches, and how both cultural expectations and socioeconomic backgrounds affect this implementation and comprehension.

The originality of the research is based on the empirical study on how three groups of subjects – juridical, political, and civil society – understand what economic rights are. It lays out the consequences of these different interpretations in answering the issue of implementation and applicability of economic rights. Additionally, the hermeneutic approach used in the empirical analysis also brings novelty.

The methodological approach begins with a brief overview of two approaches to social science that were considered for this research followed by the explanation of what a case study is, and an explanation of the method employed in this project. Lastly, this chapter presents the research design and methodological tools employed, illuminating the process adopted for preparation and implementation of the field research, including an elucidation of how this research will accomplish its objectives.

2.1 APPROACHES CONSIDERED

There is a myriad of methods which could be used in social science research, and therefore even more debate about the suitability of each. In this area, there are many forms in which a researcher might allocate and classify the different schools of thought. This research will focus on two general approaches: constructivism and hermeneutic.

These two methodological approaches are sub-groups of the interpretivist framework. The ideas of the interpretivist paradigm can be traced to Greek and Roman philosophies, but the idea of interpretivism as a real method of social science research was established and developed by Max Weber and others after him(Schwandt, 1994; Denzin and Lincoln, 2005; Glesne, 2005, 2011). The core idea of the interpretivist paradigm is that social science is about accessing a range of different interpretations of social facts and analysing them to understand society, communities, individual actions, behaviours, and intentions. Interpretivist philosophers “are referred to as idealists in

that, unlike realists, who believe a world exists independently of the knower, idealists believe that the world cannot exist independently of the mind- or ideas" (Glesne, 2011: 8). They therefore believe that "the world is always interpreted through the mind" (Schwandt, 2007: 143).

There is an ontological principle within interpretivism which portrays the world as socially constructed, multifaceted, and in constant change. According to interpretivists, what is important is how individuals interpret and make sense of a phenomenon. Such phenomena may be objects, events, actions, perceptions and so forth. Corine Glesne (2011: 8) says:

> "These constructed realities are viewed as existing, however not only in the mind of the individual, but also as social constructions in that individualistic perspectives interact with the language and thought of wider society. Thus, accessing the perspective of several members of the same social group about some phenomena can begin to say something about cultural patterns of thought and action for that group."

Because my goal is to interpret the social phenomenon of economic rights from the perspective of actors in the Brazilian social environment, interpretivism's crucial emphasis on interaction with people in their social context, and interest in their perceptions, renders it an ideal avenue by which to research this issue. The research thus instigates dialogue with chosen actors about their experiences of and views on the subject at hand to answer the research questions.

2.1.1 Constructivism

The constructivist school maintains that the world cannot be disassociated from people's social experiences of it. Thus, "constructivists focus on the role of ideas, norms, knowledge, culture, and argument in politics, stressing the role of collectively held or 'intersubjective' ideas and understanding of social life" (Finnemore and Sikkink, 2001: 392) That is to say, constructivism attempts to reveal the truth about subjects, about 'social facts', and therefore emphasises the social meanings attached to objects and practices. Wendt (1992: 296-297) posits that "a fundamental principle of constructivist social theory is that people act toward objects, including other actors, on the basis of the meaning that the objects have for them".

Within this framework it is only possible to understand the behaviour of individuals in their social contexts and environments. In a socially constructed world, the existence of patterns, cause-and-effect relationships, and even states themselves depend on webs of

meanings and practice that constitutes them (Kratochwil, 1989). These meanings might occasionally be stable, but they are never static and should not be mistaken for permanent object as ideas and practice vary over time. Patterns that once looked firm and predictable may change as well. By seeking to understand the emergence of these meanings *in situ*, constructivism enables the researcher to engage with the sociological perspective of societies. The approach stresses the significance of normative as well as material structures, the role of identity in the formation of interests and movements, and the shared Constitution of agents and systems. Following these insights, constructivists elaborate and explore three core ontological characteristics:

The first characteristic emphasises the importance of normative and material structures. Constructivists believe that systems of meanings specify the ways in which actors interpret their material environment. As Wendt (1995: 73) argues, "material resources only acquire meaning for human action through the structure of shared knowledge in which they are embedded". The second characteristic stresses that individuals and peoples' engagements create interests and actions. Therefore, understanding how interests are created is the key to explaining a wide range of facts and experiences that other theories have either misinterpreted or ignored. The third and final characteristic states that agents and structures are jointly constituted. Constructivist theorists says that normative structures "define the meaning and identity of the individual actor and the patterns of appropriate economic, political, and cultural activity engaged in by those individuals" (Stack *et al.,* 1989, p.12). Wendt (1992: 406) argues "that we create and instantiate the relatively enduring social structures in terms of which we define our identities and interests".

Proponents of constructivism claim it is the best way to illuminate the constitutive impact of intersubjective values on the nature and behaviours of individuals or actors in society. As society is seen as socially constructed, the researcher places a greater role on interpreting norm development and identity. Social construction embodies all the forms wherein actors' values and identities are influenced by their interactions with both their social environments and other individuals. Thus, how actors think and behave in this world is presupposed on their comprehension of the society around them, including by their own beliefs about society, how they perceive the identity of others and themselves, and the shared understandings and practices in which they participate.

2.1.2 Hermeneutics

Traditionally, hermeneutics can be understood as the science of interpretation, in that interpreting has to do with decoding and seeking to understand senses (Häberle, 1997; Gadamer, 1999, 2001; Palmer, 2002). Being in the world requires interpreting it, and as we are a part of the world such interpretation is an exercise in making sense of it. Denial of this amounts to a rejection of one's own being, and denial of human exploration. It is important to understand, therefore, that hermeneutics differentiates between the view *of* the world and the view *in* the world.

The researcher is the interpreter of the social reality that lies before them. In fact, the researcher weighs the many realities, theories, and experiences they are confronted with against other realities, theories, and experiences. An example of this is a researcher from the north researching about the south, he confronts his experience and realities with those he encounters outside of his circle. One could say that the researcher has a pre-comprehension of what is real, but only the relationship established between the subjects (researcher and researched) allows another understanding. Using the same example, a researcher starts the research process with a pre-comprehension coming from his reality and experience. When he is hit with a different reality, in this case the research, he finds a new understanding informed by the constant dialogue between different perfectives. It is this pre-understanding that empowers us to justify a research topic, whilst the process of research creates the dialogue that will permit the researcher to interpret the subject with the tools that he has. The researcher is an interpreter of a reality or context that is before him, and of how it is expressed in both the distinctiveness of the subjects and the disparities that exist between different contexts.

Neither the researcher nor the subject of the research is a predetermined result of a setting. They reveal a series of relationships which enable them both to understand the world and themselves in one way or another. For the researcher, these understandings become meaningful for the research. It is at this point that hermeneutics can constitute a meaningful methodology as it allows an interpretation that contemplates a dialogue between different realities. Indeed, Gadamer (1999) illuminates this process through highlighting that as we are all rooted in tradition, our scopes of understanding are permanently limited by our language. We only exceed the limits of our understanding by engaging in another language and other traditions. In other words, if you are only

embedded in one language and one culture, you will only know the world inside the scope of that language, and the traditions that are part of that way of speaking and thinking.

Hermeneutics have shown us, from bible readings and literary analysis, that our comprehension is always one sided, partial, and rooted in the traditions within which we form part, and thus, are unavoidably constitutive of our understanding. The individual is always part of a given society and cannot be regarded as an abstract and impartial being. The hermeneutic circle (Gadamer, 2001) defines this circle of life. We comprehend the partial that can be a text, a fact, or a subject in relation to an expectation of the whole, which we conceive with the language and traditions from where we come from. We change our comprehension as we go further and further into the text. In the end, a dialect between the partial and the whole forms our comprehension (Häberle, 1997; Gadamer, 2001).

This dialect is located within a framework. Knowledge is produced within the framework of traditions; the judgement of truth has a temporal construction. In this way, a single correct answer or understanding does not exist. The meaning of an interview or a text is always exposed to new interpretations and perspectives. As we are founded by history and traditions the process of understanding the world through hermeneutics is also a contribution to our self-understanding, a process which can never be complete. To understand this circle of life we can neither focus on an ideal of human experience nor a method; it is the singular form of being in the world, and therefore the hermeneutic is the universal principle of human thought.

Philosophical hermeneutics is used by judges and academics in Brazil regarding human rights as a tool which enables dialogue between the text and new interpretations and perspectives[2]. This topic will be further developed throughout the thesis but specially in Section 6.1. The issue with philosophical hermeneutics being used in a social-legal framework raises the question of the 'correct decision' and 'difficult cases'[3](Dworkin,

[2] Hermeneutics was used by the Brazilian Supreme Courts Judges to decide important cases regarding LGBT rights and equality. See (STF, 2008, 2017)

[3] 'Difficult cases' are the ones in which the legal order does not predispose a clear solution for a judgment. When there is no rule that solves the concrete case because of a gap or when it is not possible to specify which standard or principle should be applied, as they can lead to different decisions, or even when the rule that it addresses does not sufficiently define the effects and consequences.

2010) since in philosophical hermeneutics the correct answer does not exist because the process of decision will vary according to an individual's traditions and experiences. Thus, two judges can get the same case and give two different decisions since their processes of pre-comprehension come from different traditions and culture, as was explained in the paragraph above. For Alexy (2010b, 2010a) the answer to each decision taken will depend on the path decided by the various possible interpretations. He argues that there would be a question for a possible meaning that would be answered by the choice of one of several possible interpretations. For him, hermeneutics involves a methodology and a structure of understanding, having as an object, the rules of explanation, the art of interpreting and the conditions of possibility of understanding. However, for Miguel Calmon (2009, 2011, 2019), this interpretation is incorrect because by admitting several possible interpretations, Alexy reinvigorates the positivist thesis that interpretation is an act of content and not of knowledge, which refers to judicial discretion (Alexy, 2010a).[4]

As Calmon argues, Alexy does not adequately adhere to the enabling frameworks of the paradigm of hermeneutic reflection, admitting a conception of interpretation deeply rooted in positivist conceptions in which discretion is admitted in the face of a possible plurality of interpretations (2009, 2011, 2019). While invoking hermeneutics and defending its importance in regard to the clarification on the conditions of the possibility of interpretations, Alexy disregards that amid these circumstances there is no leeway to seek the will of law or of the legislator, nor the justification of the justice of interpretation in the correspondence with other methods and arguments.[5]

In the scope of this discussion, it is important to highlight the work of Ronald Dworkin and his conception of legal hermeneutics. In contrast to Alexy, Dworkin clarifies that in a concrete case there is only one interpretation possible. He supports his conception about the judgement in an understanding of the process of interpretation, which he argues that the very existence of law is based. This process is understood and lived by

[4] See also Himma (1999) and Steiner (1976).

[5] To read more about Alexy and Hermeneutics see Alexy, R. (2001). *Teoria de los Derechos Fundamentales*. Madrid: Centro de Estudios Políticos y Constitucionales and Alexy, R. (2007). Sobre los derechos constitucionales a protección. In R. Alexy (Ed.), *Derechos Sociales y ponderación.* (pp. 45–84). Madrid: Fundação Colóquio Jurídico Europeu and Alexy, R. (2008). *Constitucionalismo Discursivo*. Porto Alegre: Livraria do Advogado.

judges, lawyers, legislator and the community as an interpretative concept (Dworkin, 1999b). It an exposure of a social phenomenon whose complexity, structure and role depend on its entirety as an argumentative practice. Dworkin posits:

> Everyone involved in this practice understands that what it allows or demands depends on the truth of certain propositions that only acquire meaning through and within itself; the practice consists, in large part, in mobilizing and discussing these propositions. People who have a right create and discuss claims about what the law allows or prohibits, which would be impossible - because without meaning - without the right, and much of what their rights reveals about them can only be discovered through observation on how they justify and defend those claims. (Dworkin 1999b, p.17)[6]

According to Dworkin, the admissibility of judicial discretion would be inconceivable, since it would be incompatible with the rule of law and violates democracy and legality.[7] With the intent of rejecting the occurrence of judicial discretion, Dworkin (Dworkin, 1999b) describes the understanding of the legal system as being constituted of rules, principles and political guidelines. Additionally, he distinguishes between principles and rules using two criteria: a) principles have an element that rules lack, that is the dimension of burden or importance; b) and unlike rules, principles do not define the conditions for their application. Miguel Calmon (Calmon Dantas, 2011) elucidates that the adoption of a legal system constituted by rules and principles is essential since principles will be the standards for resolution, dodging circumstances in which the judge makes use of discretion, as the activity should be led by the law and not by political arguments.

To explain his position, Dworkin (Dworkin, 1999b) invokes the mythological figure of Hercules. Hercules would be put in the position of judge, and with his political and communal responsibility, decides cases (difficult or not) without the use of judicial

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[6] Original text in Portuguese: "Todos os envolvidos nessa prática compreendem que aquilo que ela permite ou exige depende da verdade de certas proposições que só adquirem sentido através e no âmbito dela mesma; a prática consiste, em grande parte, em mobilizar e discutir essas proposições. Os povos que dispõem de um direito criam e discutem reivindicações sobre o que o direito permite ou proíbe, as quais seriam impossíveis – porque sem sentido – sem o direito, e boa parte daquilo que seu direito revela sobre eles só pode ser descoberta mediante a observação de como eles fundamentam e defendem essas reivindicações"

[7] For Dworkin "A conception of legality is … a general account of how to decide which particular claims are true…. We could make little sense of either legality or law is we denied this intimate connection." In Dworkin, R, 2004, "Hart's Postscript and the Character of Political Philosophy", *Oxford Journal of Legal Studies*, 24: 1–37.

discretion. Judge Hercules is responsible for interpretative work. He is a philosopher judge, who once was a lawyer gifted with skill, intellect, patience, and herculean wisdom, who accepted juridical norms and standards. It is up to him to foster a theory of constitution from a perspective of political morality and on the basis of principles and political guidelines that underlie the government system, supporting other theories that confirm the political standard and allow the answer of controversial concepts. Respecting this framework, Hercules could not judge on the basis of his conception or his personal understanding of principles, he should seek the sense of political morality that is socially and commonly shared. Nonetheless, he should not be subject to or seek to please the public opinion and the majority.

Although Dworkin uses the mythical figure of Hercules, he does not ignore that different social and cultural contexts involve diverse interpretations. He states that "[…] interpretation only takes different forms in different contexts because different undertakings involve different criteria of value or success."(Dworkin, 1999b). Dworkin (Dworkin, 1999a) invokes Gadamer to emphasize that the impositions of tradition are proposed for the task of promoting the best possible interpretation. Dworkin receives a lot of criticism because he does not support any scheme or methodological model of interpretation (Rodrigues, 2005). There are those who consider that he remains attached to a conception of discretion since he establishes the correct interpretation in superhuman endowment and qualities focused on the person of the judge (Rodrigues, 2005). Dworkin (Dworkin, 1999b) admits the possibility of errors, because judges are not Hercules, and humans are fallible. Dworkin's theory enables both the relevance of hermeneutic reflection and the existence of a single suitable interpretation of a particular case and its contexts. It also raises the role of numerous dialogue instances and the occurrence of overlapping and transversal dialogues when referring to a community of political values, in the manner of a community of rights that is open and composed of an array of interpreters, all of them in the diffuse exercise of constituent subjects (Canotilho, 1994b, 2008a, 2008b).

What, then, would be the best possible interpretation to be positively established from the processes of interpretation and in view of the legal tradition and the community sense of political values, which form and conform the understanding of principles?

Could economic rights be considered principles that are standards within international and national society?

It cannot be denied that different judges (or politicians, or individuals) in different contexts come to different decisions and interpretations, which philosophical hermeneutics also admits. If they are properly intertwined by the human rights paradigms and principles, and committed to moral virtue and political responsibility, they always ought to seek the best possible interpretation. For philosophical hermeneutics the best interpretation within the framework of international law and constitutionalism, is the one most appropriate to preserving coherence and consistency whilst enabling innovation and the construction of the sense of law in harmony with the political values of the community.

The contrasting views of hermeneutics by Alexy and Dworkin have an impact on the research in that they represent what is and what ought to be. That means that while analysing the interviews, Alexy's interpretation of hermeneutics was the one identified in the empirical work. This was because the answer of participants during the interviews in regard to their understanding of economic rights depended on the path decided by the various possible interpretations and this will also have an impact on the protection and effect of economic rights. However, Dworkin's interpretation will appear when the empirical work focus on the legal documents and sources of economic rights in chapter 5 and 6 since human rights and consequently economic rights ought to be used as guidelines and principles so judges could find the correct answer and political actors could create policy protecting them.

The axiological dimension of economic rights, which is related to meeting the needs of the individual and the collective, provides the moral foundation for the principles of human rights as a whole, in particular to the minimum core obligation (Section 5.5.1).Thus, not only is a critical dimension asserted by the reflexive movement of practical reason oriented by the dialogue between text and interpreter, but also by the dialogue in which all members of the open community of interpreters are integrated, with specific connotations regarding doctrine and jurisprudence.

If the law, treaties, or the constitution itself, as a textual and normative expression of responsibilities and utopias, are deficient and flawed (Gadamaer, 1999: 474), they are because human reality is insufficient and deficient, so is reason and the finite capacity

for human understanding. However, the unit of understanding, interpretation, and application gives interpreters the possibility of constructively acting on the pertinent meanings, which can only be those that best represent the referential of economic rights to the maximum existential.

It is noticed that the contempt for economic rights (See chapter 3,4 and 5) has repercussions on the lack of specific legal guarantees, whether primary or secondary, which are structured in the legal nature of socioeconomic rights, and which can, therefore, make their effectiveness viable. Thus, there is a mutual implication between the lack of understanding and contempt regarding economic rights in Brazil, and the inexistence of specific jurisdictional, legislative, and educational guarantees (See Section 4.6 and 6.2).

As for the misunderstanding, Aniza Garcia Morales (2009: 11) in turn, recognizes that the traditional doctrine usually considers socioeconomic rights as posterior, axiologically subordinate and structurally distinct from civil and political rights, being no more than aspirations or principles of a programmatic nature, considered as second-rate rights, of gradual realization and weakened legal protection. As will be seen in this research, many respondents understand economic rights as second-rate rights (See section 4.6, 5.7 and 6.2).

Therefore, it is necessary to break with the myths and realities, which will be exposed in this research, which delay the development of a social, economic, and legal dogmatics committed to the effectiveness of the norms of economic rights. This mission becomes imperative when it comes to the will of human rights treaties and the Brazilian constitution referring to socioeconomic rights and the affirmation of the right to the existential maximum, being the open society of interpreters (HABERLE, 1997) and, mainly, the science of human rights.

Furthermore, Mario Bunge (1980: 67-68) points out that the researcher cannot ignore social responsibility, and should, among other references of research legitimacy, criticize unscientific or pseudoscientific beliefs and cannot "[...] serve the economic, political and cultural oppressors". Moreover, it is also ideologically oriented, linking to the matrices of liberal thought (See chapter 3, 4 and 6), which honour freedoms over economic rights from an autonomous conception of the market (See section 4.3 and 6.2) and its self-regulation capacity, supporting paradigms arising from liberalism.

Given this, it is necessary to recognize the capacity not only to regulate economic rights, but also to transform it, which is conditioned and depends on the legal theories that can be developed, and which aim at solving the serious problems that challenge the social sciences. Hence the hermeneutical pertinence for whom socio-juridical revolutions derives from the expressive change expressed, first, to understand and analyse the reality of each interpreter so that what economic rights are in their view is understood, and how this understanding affects their applicability. Thus, the researcher can develop forms or doctrines that allow economic rights to be applied to their fullest potential.

The legal-normative potential of this fundamental right is conditioned to the adoption of the epistemological and theoretical premises mentioned above, integrating meaning horizons in which the hermeneutic reflection is established. Such premises are *condition sine qua non* for the emergence of a true constitutional revolution in human rights Brazil (See chapter 6) through the introjection of respect for socioeconomic rights and the indivisible understanding (See section 5.2, 5.3 and 5.5) of fundamental rights.

2.1.2.1 The hermeneutic reflection

The hermeneutic reflection is important for ruling out any perspective of adopting metaphysical and definitive meanings for economic rights to the maximum existential, since both its understanding and its realization (interpretation/application) must be guided by the recognition of the finite character of human reason, its limitations and conditionings of different orders and realities. This does not mean that there is not a productive character of continuous and constructive meaning, responsible for conferring the effectiveness to economic rights.

And it is precisely the difficulty of establishing the contours of the material content of economic rights that challenges the limits of human reason, as a concept that does not deny the emancipatory and constructive dimension of the human person's self-realization(See section 5.2 , 5.3 and 5.5).

Thus, in the absence of any method that leads to the adequate or correct interpretation or application of the norms related to economic rights, hermeneutics can unveil the potential character of understanding, which always contains a projection of meaning arising from pre-understanding.

Although the importance of pre-understanding must be recognized as a condition for the possibility of knowledge, it is not a subject entirely subjugated by the prejudices that inhabit it and that make up its hermeneutic horizon. It should even be recognized the occurrence of inauthentic prejudices that distort understanding (See Chapter 3 and 4). This would be the case when the minimum core (See Section 5.5.1) is uncritically admitted as a reference for the satisfaction and justiciability of economic rights by the State.

As will be demonstrated by the results of the data analysis and interviews, the minimum core is the unreflective admissibility of a prejudice regarding economic rights that does not retain any legitimacy and pertinence with the unveiling of the historical horizon of the present and its projection for the future.

Precisely for this reason, Gadamer (1999: 505) observes that all consciousness presents a reflexive structure insofar as, despite forming, in part, the effect, it has the aptitude to "raise itself above what it is consciousness. The structure of reflexivity is fundamentally given in every form of consciousness". But this suspension of prejudice can only be given to the stimulus of the hermeneutic horizon when merging with tradition through dialogue with the text and/or fact.

Therefore, the relevance of the formative moment of understanding, which occurs with the fusion of realities and horizons, must be recognized. There would then be several realities and two horizons, the one arising from the text, which brings with it the tradition and the temporal dimension in which it was produced; and the present, in which understanding is given, without losing sight of the future projection of meaning. Tradition operates from the linguistic dimension of the text, which in the case of this research, are international documents on human rights and the Brazilian constitution, which enable it to be deciphered, allowing the subject-object dichotomy to be studied.

Thus, it depends on a limited understanding of human rationality that leads to the association of economic rights, in the quadrants and according to the paradigms of hermeneutic reflection, to a framework of limited rationality, highly fertile to an adequate and understanding dimension of the normative presented in this research.

The meeting of realities, through merging, enhances the meaning and reflection on the effects of historical consciousness, responsible for putting into suspension prejudices

by the encounter with the object itself. This is nothing more than the text, which, by bringing tradition, with its respective historical reality, starts to challenge the interpreter in the manner of dialogue. In this way, the present is always subject to the potential that builds the meaning of understanding, given the tension with the past and the direction towards the very object, which is the text. Thus, "The horizon of the present is not formed as the margin of the past" (Gadamer, 1999: 457).

This fusion of horizons marks the circular movement of understanding. It results from the encounter of the projection of meaning that comes from the pre-understanding with the meaning produced in the present, being submitted to a constant reflection. There would be a continuous projection and re-projection of meaning, allowing for assessing previous opinions with what the text challenges and brings to the forefront.

However, once the comprehension is formed, the interpretation and the application operate simultaneously, marked by the subjectification of the relationship then understood by the subject-object dichotomy. Interpretation represents nothing more than understanding itself. It manifests itself from the language, which allows the text to come to dialect and question the interpreter in the way of a productive dialogue of meaning that leads to reflection. The text-only challenges the interpreter from its application, which is a moment of the hermeneutic process as necessary as understanding and interpretating.

Nonetheless this moment does not operate in a temporal sense. There is a unity between understanding/interpreting/applying, which was ignored by the jusnaturalist, positivist, realist, systemic-functionalist and analytical conceptions. These doctrines sometimes forget or reduce the applicative dimension and sometimes give it relevance that absorbs and suppresses the others. Thus, the application is a moment of the hermeneutic process, as essential and integral as understanding and interpreting.

The text, bringing with it the respective historical horizon, meets the interpreter, inhabited by his prejudices, and productively challenges him in a dialogical activity that leads to the fusion of horizons and gives rise to the circular movement of understanding, revealing the interpretive dimension through reflection from the questions that are put to it, in a concrete context of the application. The application is relevant because it allows the integration of reality, of the substantial existential dimension in which the

manifestation of meaning takes place, nuanced by the expansion of horizons provided by the circular movement of understanding.

The unity between understanding, interpreting and applying denote the integration of reality in attributing meaning to the constitutional text and economic rights. Therefore, the actual moment of hermeneutic reflection, notably for legal science, which constitutes practical knowledge, focused on problems and legal practice, is the application, which guides the dialogue between the sides, between the text that the questioned and the interpreter himself. And it is a condition of possibility for the answer, within the productive plurality of the question, to be the most adequate to the applicability.

Thus, not only is a critical dimension established by the reflexive movement of practical reason guided by the dialogue between text and interpreter, but also by the dialogue in which all members of the community of interpreters are integrated, with specific connotations regarding doctrine and jurisprudence.

Any reflection on economic rights must not lose sight of the reality they refer to. This is because, despite the generality of the problems, with the nuances presented, being global and local (Santo, 2002: 46-50), contemporary constitutionalism also encompasses such dimensions by virtue of its expansive character, extending beyond borders and demanding the refinement of reflections and the projective and emancipatory capacity of economic rights through the intersection with human rights.

The affirmation of the economic right to its maximum existential demands the verification of public policies' insufficiency and state actions regarding fundamental rights' effectiveness. The insufficiency is also perceived by the misunderstanding of doctrinal and jurisprudential instances about the conditions and possibilities for the effectiveness of economic rights, especially by the exaltation, defence, and circumscription of justiciability to what would be the minimum core.

Accordingly, the choice of a hermeneutic framework in this research project reflects important points. It shows the character brought to the research by the researcher in which the hermeneutical procedure requires the researcher to test an action-expectation and have an interpretative understanding and significance for self-understanding. Indeed, such nuance points to the unsuitability of positivist approaches to research such

as this. Given the aim of the study to understand the role of interpretations within the legal context, a positivist approach which seeks to uncover social facts would be ill-equipped to capture the nuance contained in our reality. Instead, by considering the way our realities are constituted through dialect, this research will emphasise the interpretations and perspectives of participants, enabling perception of how such interpretation impacts economic rights.

The hermeneutical approach is in fact more in tune to understand the stand of international economic rights in the Brazilian society, as they were constructed both internationally (Chapter 5) and nationally (Chapter 6) as standards and principles that should be protected. In the section that follows, the case study method will be evaluated.

2.2 THE CASE STUDY

Case study research brings us to an understanding of a complex issue or object. It underlines comprehensive contextual analysis of a number of events or circumstances and their interactions (Macedo, 2015). Case studies as a qualitative method have been used by researchers as a research method for a long time and across a variety of disciplines to understand and assess contemporary real-life experiences and situations, providing the foundation for the presentation of ideas and extension methods. Case studies can be managed individually or in comparative modus.

In building the research design for this study various methods were considered. The choice of a case study in this project reveals important things: the researcher believes that understanding our reality is dependent upon the intersubjective values employed in an empirical socioeconomic-historical situation. The reason why the researcher chose the hermeneutic approach was because while doing the research project it became clear that the effectiveness of economic rights was linked to the culture and values of communities and people, the dialogue between the whole and the part that was discussed in 2.1. Furthermore, a qualitative approach is more beneficial to understanding the means in which the interpretation of economic rights regime has altered and shaped the responsibility of the state in relation to protection and appliance efforts. As institutions are constructed by people, it is important to listen to their comprehensions and analyse their views. People are the ones that make decisions not the institutions, people are the ones who make policies not institutions, thus institutions

are the mirror of the people who work within their ranks. People reflect the experiences, values, and sociohistorical background of the society that they are part of.

Thus, the case-study will be a descriptive, exploratory, and qualitative approach based on "an empirical investigation of a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly defined" (Yin, 2001: 32). Accordingly, the case study investigated in this thesis it is an empirical study of subjects' understandings of economic rights and how these understandings affect the applicability and effectivity of these rights. By focusing on the empirical dimension, the content under analysis places us before one of the most contentious themes of economic rights: what are their content? Why is this question important? And what are their effects?

Per Bogdan and Biklen (1994), the case study can be understood as a funnel whose broadest part is the starting point: as the researcher finds what corresponds to their research interests, they delimit their work by "defining as a focus an individual, a group, a context, a single document source, or a specific event. The choice of a specific focus "is always an artificial act, since it implies the fragmentation of the whole process where it is integrated" (1994: 91). However, although such a delimitation may always run the risk of distortions, what is proposed in a case study is not, in any case, to reduce a broad context in its constituent parts (Yin, 2001; Flick, 2009; Gibbs, 2009). Exploratory research habitually transpires before the researcher knows enough to make conceptual distinctions or to theorise an explanatory correlation. Thus, it is a useful process to develop clearer concepts, establishing priorities, developing effective definitions, and improving the research design. It also helps to determine the best research plan, data-collection method, and selection of subjects.

Qualitative research can provide a complementary view to the more traditional quantitative methodologies and is an important method to explain social phenomena. According to Denzin and Lincoln (2005: 43):

> "qualitative research is a situated activity that positions the observer in the world. It consists of a set of interpretive and material practices that make the world visible. These practices transform the world by making a series of representations, including field notes, interviews, conversations, photographs, recordings, and personal notes. At this level, qualitative research involves an interpretative and naturalistic attitude towards the world.

> This means that researchers in this field study is in their natural contexts, trying to understand or interpret phenomena in terms of the meanings people attribute to them."

For the researcher, being able to work qualitatively means creating a bond with the research that is more than analysing data alone and without social-historical context. Instead, it means observing and interpreting the real world as it is. For Flick (2009), qualitative research aims to approach the 'outside world' and to understand, describe, and sometimes explain social phenomena 'from within' in various ways.

Within this style of research, concepts or hypotheses are established and refined during the construction of the research itself, stressing the role of the researcher alongside the context of research and language. This context is understood in its multiplicity of forms, whether is in writing, in documents, gestures, transcriptions, interpretations and so forth. As data are obtained in an immersed environment, the researcher is the principal instrument of study with their understanding constituting the key instrument of analysis. The researcher's understanding is not neutral or immune but based on theoretical references, empirical analysis, and specific bibliographies about qualitative methods, which permits the participation and conduct of this type of proposal (Scorsolini-Comin, 2016).

The description above regarding the method that was chosen to be implemented must be supported with an explanation on why it was chosen in the first place. Primarily, the viability of the case study must be addressed. Given that time was restricted, and funding availability was limited, it was necessary to consider various approaches. It is true that the easiest method to this project would have been to focus wholly on the legal international community and legal documents, thus dispensing of the need for field research. Nevertheless, the aim is and always has been to produce research that unites the involvement of a local sphere, whether that would mean individual or institutions, in the context of international human rights norms, and in this specific case, economic rights norms. The local sphere is where the violations and/or protection of economic rights first occur. It can move from local to global, but the facts always start in a local sphere. In this regard, field research was considered the best option.

In this research it will be seen that the case study is a fertile ground for conceptual and theoretical development, and its framework is and was valuable and promising. Promising, because this project has the potential to raise and promote important issues

about economic rights norms and local effects in developing countries in a way often missing from both literature on international human rights law and protection of economic rights regarding the fundamental rights of each and every one. Reflecting this, previous research investigating economic rights has generally utilised normative and legal-case approach and focused mainly on the international sphere[8].

The existing research base generally lacks in-depth insights into the interpretation and 'values' behind the people that work with and apply the law, and how their different positions affect the justiciability and protection of these rights. As Iain Levine, former Executive Director of Human Rights Watch argues, it is necessary to listen to the voice of local people who work with economic rights or suffer violations of economic rights daily. He says: 'I used to hear people say that the African people are voiceless, I don't agree with that, I think we are not listening to them[9], we have to learn to listen to them, we (International Organisations, INGOs, United Nations and so forth) live in a bubble far away from them and their problem.' Having considered this lacuna in the existing research, this thesis will analyse international and national economic rights systems through the constant dialogue between the participants' views and interpretations, and the text and context. It will do this to analyse how the subjects understand what economic rights are and how their interpretation affects the practical implementation of them.

Nonetheless, it is also important to highlight the limitations of a case study approach. To focus on only one country, with a particular cultural and historical background limits the generalisation of the results since the data are focused on one population. Additionally, as the data is mainly not numerical it is more difficult to establish probability. Yet, a study of this magnitude could still produce valuable outcomes. Although it is hard to generalise some aspects of the research, it is possible to understand, especially in today's global society, important trends that could be seen in every part of the world. The lack of protection of economic rights and their violations are key to answer some of these trends. Thus, the selection of Brazil is crucial to reach

[8] See: Trinidade (2011), Jovanovic (2012), Felice (2010), Puta-Chekwe and Flood (in Merali and Osterveld, 2001), Hertel and Minkler (2007), Ramcharan (2005), and Ssenyonjo (2009).

[9] When he says them in this part of the interview, he meant all the people who suffer socioeconomic violations. From people in the Global south to the western wealthy countries.

this conclusion. Hence, it is essential to comprehend why Brazil was selected as the subject of this case study.

The following section provides an explanation of why Brazil has been selected for this study.

2.3 A BRAZILIAN CASE

The role of this section is to explain why Brazil was chosen to be the case study for this research. Therefore, this section describes the role of the country in the international geopolitical landscape, as well as the importance of researching emerging countries and countries from the global south. Lastly, this section highlights practical reasons for this decision.

The geopolitical landscape of the last thirty years is completely different from the one that surfaced after the end of Second world war. While the international institutions formed seventy years ago have been a key figure in advancing peace and prosperity throughout the world, their complexity and incapability to cope with the emergence of a multilateral order, inequality, and new players created what scholars call a gridlock[10]. As David Held noted, gridlock is not unique to one issue domain but appears to be becoming a general feature of global governance: cooperation seems to be increasingly difficult and deficient at precisely the time when it is needed most (Hale, Held and Young, 2013).

The economic rights regime is no exception to these trends. The Committee on Economic, Social and Cultural Rights (CESCR), whilst being an actor of the human rights regime, is beset by a complex structure, struggles over influence, and therefore it is a fragile system with weak justiciability since the mechanism of protection is a report made by the countries and with no power by the committee to impose strong condemnations. Thus, the perception is that measures taken to face the crises are submissive to external authorities (such as the United Nations Security Council and the

[10] This phenomenon is explained, among other factors, by the increasingly multipolar and fragmented character of global governance, which implies difficulties on decision-making, functions overlapping in several institutions (overlaps) and at the same time situations as to which is uncertain as to whom has responsibility to deal with (gaps).

World Bank) which suffer from a democratic deficit, privileging the interests of the financial elite and deteriorating social safety nets[11].

Nonetheless the most significant transformation of the early 21st century was the emergence of developing countries whose growing economic strength arguably changes the world centre of economic gravity eastward and southward. In 2001, Jim O'Neil from Goldman Sachs created the term BRIC – which in 2010 became BRICS – referring to Brazil, Russia, India, China and, later, South Africa. Since then, the acronym has been widely used as an example of a shift in global economic power, which was seen to be distancing itself from the developed economies of the G7 in relation to the developing world. In the World Top 15 economies, four BRICS countries are present – China (2), India (7), Brazil (9) and Russia (13) (World Bank, 2020).

In July 2014, during the sixth BRICS summit, an agreement was signed formalising the creation of the New Development Bank, also referred to as the "BRICS Bank," whose main objective is to finance infrastructure and sustainable development projects in poor and emerging countries. The extensive recognition of the heterogeneity of the economic interests of the emerging powers has been accompanied by vigorous debate on their range and influence.

There are some scholars and experts who remain sceptical of the degree to which a change in economic influence translates into an alteration in the power structure of international order[12]. They claim that is too early to project sustained economic development among emerging powers since many of them have grown by exploiting low-cost labour and a weak welfare state. The other view asserts that this change in global power is a permanent long-term trend and that the international order is undergoing a profound transformation [13].

[11] This perception was taken from the analysis of the interviews and will be present throughout the thesis but specially in chapters 5 and 6.

[12] See, for example, Pant, 2013; Peruffo and Prates, 2016.

[13] See for example, Ikenberry, 2008; Higgot, 2010; Kupchan, 2012; Hale et al.,2013; Acharya, 2014

The socio-political dissatisfaction of significant parts of the population in developed countries is causing significant changes in the global order[14], and the human rights development of the last 70 years are also going through transformations. However, the nature, range, and implications of these changes remain disputed and complex. The countries of the global south are not immune to these changes. Rather, their populations and institutions are more are more fragile, and thus more susceptible to setbacks and regressions in regard to the protections of human rights.

In this way, economic rights are key issues in the domestic agendas of emerging powers. Workers' rights, trade unions, social security, and so forth are important rights everywhere, but the lack of protection and implementation of these rights in developing countries are impediments to their becoming more just and equal, and thus, to their pathways to becoming a developed country. Having the fifth economy largest economy in the world means nothing if the majority of the money is in the hands of the top 1% of society, whilst social security rights are being weakened, people have precarious jobs, are dying of hunger, and living in poverty.

The reasons for the choice to focus on an emerging power than an established one were twofold. First, there are fewer empirical studies regarding the understanding of economic rights in the global south. As Boa Ventura de Sousa Santos argues "an epistemology of the South is based on three orientations: to learn that there is the South; learn to go to the South; learn from the South and the South."[15] (1995: 508). Second the implementation of economic rights is more problematic and complex in an emerging power that once was a colony.

But the question is which emerging power should be the focus of the research?

To understand why Brazil was chosen as an ideal prospect for this project it is necessary to briefly present 6 considerations: essential information about the country; the presence of an international and national community operating inside the country regarding the

[14] See for example the cases of Bolivia, Chile, Argentina and the social, political and economic transformation that is occurring because of the dissatisfaction of the population in regard to the lack of a social net. The Chilian people, for example, are demanding a new Constitution that have socioeconomic rights norm and that erase the neoliberal norms established by the Pinochet Constitution.

[15] Original text in Portuguese: "(…)uma epistemologia do Sul assenta em três orientações: aprender que existe o Sul; aprender a ir para o Sul; aprender a partir do Sul e com o Sul. "

protection of economic rights, the current geopolitical context of Brazil, the practical concerns of conducting field research, the knowledge that the researcher has about the political-social-economic context of the country, and the language.

The following sections will briefly introduce Brazil, highlighting relevant aspects. However, chapter 4 will look more closely at the historical-economical background of the country, as this context was brought up by the participants as a principal reason why the implementation and protection of economic rights in Brazil are challenging. The subsequent sections will also address the six considerations stressed in the previous paragraph.

2.3.1 Brazil

Brazil is the fifth largest country in the world in territorial area and is sixth in population with more than 208 million inhabitants. It is by far the largest country in South America, occupying the majority of the continent's[16] territory at 8.516 million km^2 with 7.491 km of coastline. It is the only country in America where Portuguese is spoken and the largest Lusophone country on the planet. Due to strong immigration from various places in the world, Brazil is one of the most multicultural and ethnically diverse nations on the planet.

Brazil is a founding member of the United Nations (Itamary, 2018), the Organisation of American States (OAS, 2015) and MERCOSUR (MERCOSUR, 2018) (Mercado Común del Sur[17]). As the ninth largest economy in the world, the country is also an important participant of the G20 and BRICS. Brazil also became an important international actor in the last decade regarding the combat of poverty through the development and protection of socio-economic policies. The country is also signatory to the International Bill of Rights, the San Salvador Protocol and the Pacto of San Jose da Costa Rica, regional instruments for the protection of economic rights. The purpose of presenting this brief context here is to establish the fact that the country has always been engaged with the international community.

[16]The Brazilian territory is equivalent to 47.3% of the South American territory. See https://agenciadenoticias.ibge.gov.br

[17] In English: Southern Common Market.

Additionally, Brazil is a country with enormous inequality and in the last decades have developed socioeconomic policies, such as the *Bolsa Familia*[18], and the *Fome Zero* (Zero Hunger) program[19][20] that helped the country leave, in 2014, for the first time the United Nations hunger map (Food and Agriculture Organisation, 2015). Moreover, more than 36 million people left the UN extreme poverty line[21] in the early 2010s.

However, since June 2013[22] Brazil has been facing a political crisis which has further developed to an economic crisis, halting the economic development of the last decades (Carvalho, 2018). The country is facing the possibility of going back onto the United Nations' hunger map[23], poverty is growing again (see figure 2.1), and the federal government is implementing austerity programs which violate social and economic rights. It is thus disrespecting both international human rights law and the fundamental norms of the Constitution. This topic will be further discussed in Section 5.6.1.

Brazil is also the home of the majority of the Amazon rainforest and other natural biomes that maintain the global environment in equilibrium. The issue is that because of the violations of economic rights in Brazil and by the Brazilian government this natural environment and its accompanying cultural environments are in danger. The consequences of its destruction will be immeasurable for humanity.

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[18] Bolsa Família is a conditional cash transfer program created in in 2003 by the Federal government. It was established by Provisional Measure (Médida provisória) 132, dated October 20, 2003, converted into law on January 9, 2004, by Federal Law (lei federal) n. 10,836. It consists of financial aid to poor families (defined as those that have a per capita income of R$ 89.00 to R$ 178.00{$24 to $48 dollars}). The money is given to the woman and the counterpart is that the beneficiary families keep children and adolescents between 6 and 15 years old with the minimum of 85% of attendance at school, and adolescents between 16 and 17 years old with minimum of 75% of attendance at school. Pregnant women, women who are breastfeeding, and children have to do periodical health follow up, and children between 0 to 7 years old must also have the vaccination up to date. The contribution varies from R$ 89.00 ($24,00) per month for the basic benefit, and from R$ 41.00($10,00) to a maximum of R$ 205.00 ($55,00) for the variable benefit, for each family unit. The program aims to break the generational cycle of poverty in the short and long term(See Brasil, 2004a ;2004b).

[19] The Zero Hunger Program was created in 2003 by the Brazilian federal government to combat hunger and its structural causes, which generate social exclusion, and to guarantee food security for Brazilians (See IPEA, 2013).

[20] These programs also had an impact in the economic sphere. When the beneficiaries received the money, they became consumers, buying food, clothes, and basic instruments. This flow of money helped the development of small markets and subsequently boosted the national economy, creating more jobs and opportunities(See IPEA, 2013).

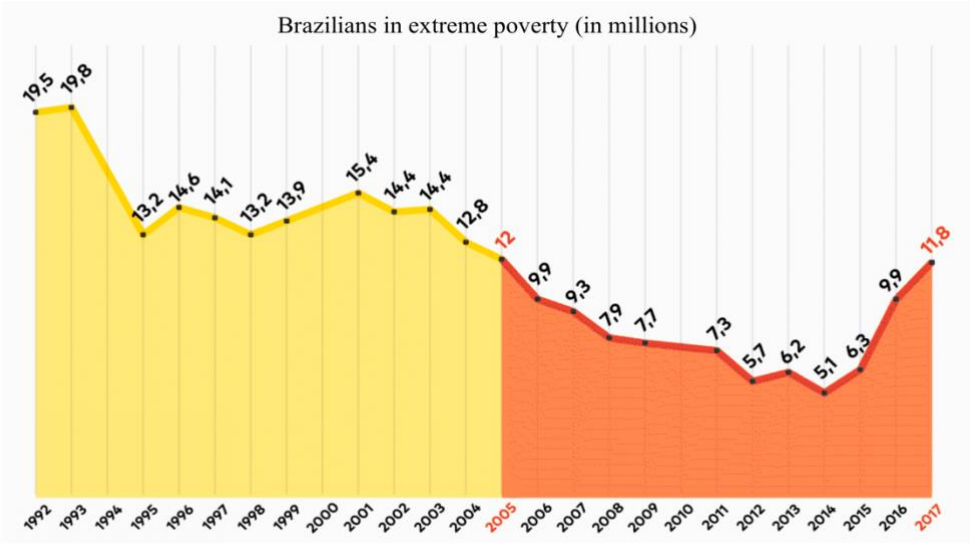
[21] The UN poverty line is below US$1.90 a day. See United Nations. Ending Poverty. Retrieved May 16, 2019, from https://www.un.org/en/sections/issues-depth/poverty/

[22] See Saad Filho (2014) and Watts, J. (2013).

[23] See Redação, (2018) and COMISSÃO DE DIREITOS HUMANOS E MINORIAS, C. (2019).

These issues make Brazil an ideal single case study for this project.

Figure 2.1 Extreme Poverty in Brazil



Source: ActionAid and Ibase (2018)[24]

2.3.2 The Practical Concerns of Conducting Field Research

Other than historical and empirical dimensions, the selection of Brazil was also motivated by pragmatic reflections. As previously mentioned, the limitations of time and resources made me organise the study case along the lines of potential empirical opportunities for research in Brazil. Firstly, the fact that Brazil is the country of the researcher, with an accompanying vast knowledge on the legal and socio-economic context therein. Secondly, the researcher has a passion regarding the standing of economic rights in Brazil and believes it an important topic which could lead to critical discoveries. Third, the official language of Brazil is Portuguese, the native language of the researcher, and thus improving the accuracy of document analysis, awareness of norms, and precision in interviews. There is also a lack of this kind of study about Brazil available in English.

2.4 RESEARCH DESIGN

The research design undertaken in this project was mainly of a qualitative nature. More precisely, it was constructed predominantly on semi-structured interviews and location

[24] See Domenici, T. (2018).

visits in Brazil. In addition to conducting semi-structured interviews the case study includes legal analysis and document analysis, using various sources as evidence: academic literature, primary documents, and archival sources.

The data collected during the field research will be interconnected with a series of legal documents (national and international) and official policy documents from Brazilian institutions, international governmental organisations, international non-governmental organisations, civil society, and local non-governmental organisations. Furthermore, the completed case study will also integrate theoretical information on economic rights, including their justiciability and protection, to interpret and understand the findings with the contemporary context in Brazil. Additionally, it will consider the current understanding of this challenging issue in today's problematic society.

This section will demonstrate efforts that the researcher made to prepare the project for the field research, in other words, the process she conducted, comprising the deliberations that have been made to try to create valid, legal, and solid outcomes. The section will also explain how the chosen techniques will help achieve the objectives of the research.

The dates of the field research visits were between June-August of 2017. More than thirty hours of sound recording were gathered during this period. As mentioned, given the limitations encountered regarding both the accessibility of funding and availability of time, efforts were made to develop a structured plan before arriving in Brazil. It was outlined that the field research would be limited to up to 3 months in-country. That decision was made as neither the PhD Sponsor Agency: CAPES[25] nor the United Kingdom Government allow Tier 4 Visa Holders to stay away from the country more than three months. Furthermore, a return ticket to Brazil is very expensive, which made impossible for the researcher to go back as often as she would like. Thus, the plan was to organise and conduct all the interviews and data during those months.

From February to May 2017, the researcher established goals that should be accomplished before the start of the field study. First, together with her supervisor, it was decided that the best approach would be semi-structured interviews. Semi-

[25] CAPES (Coordenação de Aperfeiçoamento de Pessoal de Nível Superior)- Brazilian Education Agency

structured interviews allow the participants to have a freedom when replying to the questions. This topic will be further discussed in section 2.4.2.

Next, a database of the relevant actors that would be crucial for conducting this research was established. Actors in this framework included: organisations, civil society, lawyers, politicians, and government agents. Why those actors were selected will be fully discussed in the next section.

Parallel with this process, it was decided that these actors would be divided into two groups: a) legal and b) government officials, NGO and civil society; and each group would receive different types of script (see index III)[26]. Following, two scripts containing semi-structured questions were created. There are basic and general questions that are the same in both scripts, but because one part of the thesis contains important legal aspects, it was decided to create one set of questions to legal subjects and other to government officials and civil society representatives. It is important to highlight that while doing the interviews, when the researcher thought it was important, she would ask questions from both scripts, or would ask new ones, present in neither.

Those scripts were constructed in a way which enabled participants to provide critical data through their response first to how and to what extent, the diverse interpretation of economic rights affect the implementation and protection within the Brazilian framework? And second on how, and to what extent, did the international regime of economic rights affect State protection and policy efforts?

For example, interviews with lawyers highlight the importance that was given to economic rights in the constituent of 1987/88 and could uncover how and whether the Brazilian Constitution had any influence in the protection and justiciability of economic rights. Conversely, interviews with government officials could shine a light on the influence that international regime has on local capacity for protection and application of economic rights policy. Additionally, interviews with local civil society and NGO actors were essential to comprehend the international-local policy interactions more fully as well as to triangulate the responses received from the government officials.

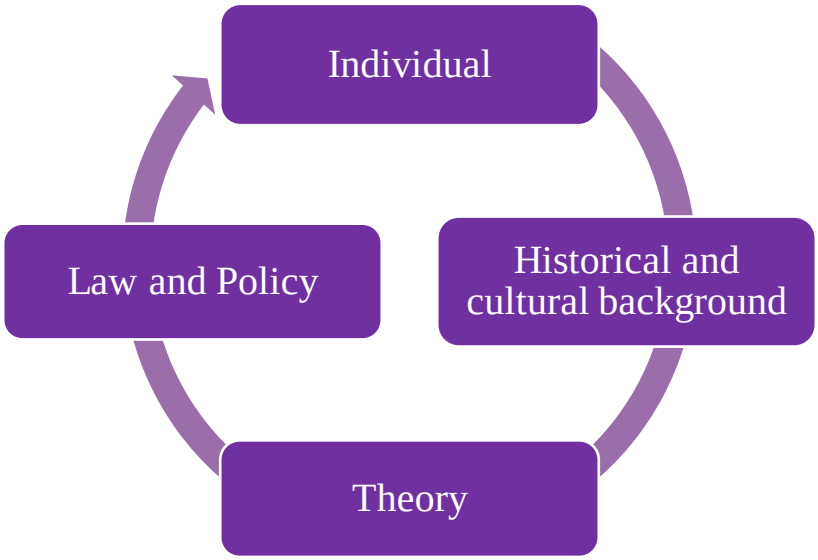
[26] The translated scrips can be found in appendix I of the thesis.

While conducting the interviews in Brazil, it was also decided to do an analysis of primary documents from the Brazilian Constituent Assembly of 1987/88, the Brazilian Constitution (doctrine and jurisprudence) and Brazilian legislative norms related to the protection and implementation of economic rights. Thus, it was established that it was necessary to go to Brasília to conduct a documental analysis of the texts and the discussion of the national constituent assembly regarding economic rights. This goal was achieved, and important data was obtained in the archive of the Brazilian Congress[27]. It was possible to find original text from the proposals, documentary films, iconographic, and electronic documents from the Constituent Assembly of 1987/88. Also gathered while in the country were important data of economic/development statistics, legal documents and Brazilian legislative norms related to the protection and implementation of economic rights.

The objective of this process was established to create a hermeneutic dialogue between the subjects- norms-cultural/historical background (see figure 2.2) that would allow me to create an empirical study and answer the research question. As was stated previously, there is an absence of qualitative and empirical research investigating economic rights focusing on the analysis of the interpretation and in-depth comprehension into people's understandings of economic rights, and how they impact justiciability and protection. The person is part of the world, so theory, law and policy are an interpretation of the person.

[27] Archive of the Chamber of Deputies documentation and information centre.

Figure 2.2 Methodological Framework



Source: Developed by the Researcher

The figure above shows how the research design was structured. There is a constant dialogue between the individual and the text, between theory and reality, between law and practice. The text here will be configured between three settings: a) historical and cultural background; b) theory; c) Law and Policy. All these dialogues will be present throughout the thesis.

The objective of the field research was to answer the research questions of how participants understand economic rights, how their different interpretations affect the effectiveness of these rights, and, to use the opportunity to assess the validity of the project. Thus, it was important to triangulate the evidence obtained through interviews, theoretical, and documental analysis to produce a rigorous and complete process which would better approach and understand the political and legal world of the standing of economic rights in Brazil.

After the field work was finished, the researcher started to work on the transcription of the interviews. This process was tiresome and meticulous, almost thirty hours of audio became approximately 500 pages of text. The researcher also wrote the intonation of the words and the tone of participants when she understood it was important for the research and the analysis.

It important to highlight that all the translations in the thesis, when not informed otherwise, were made by the researcher. All translations will be followed by a footnote containing the original text. This decision was made because the researcher believes that it is important to the reader to see the original text, giving the reader freedom to read the original fragment and compare.

2.4.1 Participants

This Section discusses the people participating in the empirical research. Beginning with an outline of participant recruitment in Section 2.4.1.1, Section 2.4.1.2 then discusses the demographic profiles of the participants.

2.4.1.1 Participant recruitment

This section summarises the process for participant recruitment for the research. It starts by describing the process of choosing the participants, and then outlining the process for recruiting participants for the empirical research.

The process of selecting participants is a very important phase in any research. In writing the research project, the researcher worked with two criteria: a) inclusion, which described the characteristics of who could participate in the study; b) exclusion, which defined the aspects that could not be observed in the participants and, therefore, excluded them from the research process (Scorsolini-Comin, 2016).

As the objective of the research is to understand how the comprehension of economic rights affects the implementation and protection in the national and international system, it was decided that the participants of the study would come from three different spheres of society: legal subjects, political and civil society. The focus on these three groups was decided because they are the primary actors who ‘work’ to protect and implement economic rights.

Once the criteria for participating in the study were defined, it was also necessary to outline which criteria would not be observed or, in other words, characteristics that were not considered important for the research objective and its purpose. For example, in the research there are no requirements regarding the participant's gender, sociodemographic background or even degree of education for the political and civil society participants. All of this was conditional upon the characteristics for which we intended to control in the study.

As in any research, there are characteristics that are considered more important and others that are not so relevant (Scorsolini-Comin, 2016). However, during the research, it was verified that the degree of instruction had some interference in the views and interpretations of the participants. Thus, it was not a question of controlling the variable, but of considering it for further discussion and verification of implications.

For the project, defining these characteristics was fundamental because it created a framework which offered conditions for the investigation to be carried out, and that the actors were approached in the best possible way; in other words, a well-defined plan with which to achieve the proposed objectives.

To reach potential participants, two processes must occur. The first one is called recruitment. Recruiting participants for researcher is an endeavour that "should be well planned: where one can find potential volunteers? This will depend on the subject investigated and also on the objectives outlined[28]" (Scorsolini-Comin, 2016: 68). First, the researcher must create a database of possible participants. These possible participants were chosen from a range of sources: national relevance, political affiliation, reports and websites (which have staff lists) produced by IGOs, INGOs, NGOs and Brazilian governments; from online media outlets that report on issues of development, human rights and economic rights; from personal consultation with colleagues and academics from the Human Rights Watch, Universidade Salvador, Universidade Federal da Bahia, Universidade de São Paulo and Durham University.

The groups of actors established for the interviews were: Lawyers, Judges, prosecutors, INGOs representative, government officials, civil society, and local NGO actors. Approximately one hundred and twenty potential participants were identified, containing forty potential participants from each group.

The criteria utilised to identify the interviewees were very simple: they had to be a member of the juridical, political and the third sector. The idea was not to select people from one group of thought or political affiliation. It is important to highlight that while one can infer what another person's political view could be by reading interviews or following their social media, that it is not a given. Any individual has multitudes of

[28] Original Text in Portuguese: "(…) é uma atividade que deve ser bem planejada: onde poderei encontrar possíveis voluntários? Isso vai depender do tema investigado e também dos objetivos delineados."

interpretations and one can only analyse them when asking direct question on the subject.

As mentioned above, the people selected to participate in this research process were chosen by an analysis of a range of sources, such as media outlets that report on socioeconomic rights issue, from personal conversation with academics from Brazil and the United Kingdom to political parties from left to right. To try to mitigate the bias from this research, politicians, political representatives, and workers from the third sector from all ranges of polls were pre-selected.

Regarding the juridical participants, it is important to explain that the researcher does not and cannot know what their views are beforehand. This is because when they are working within an institution, they must be as impartial as possible. As it will be demonstrated in this research, that does not happen in practice for reasons that will be revealed as the thesis goes on. But the hermeneutic approach explained in section 2.1.2 demonstrates an important difference: the issue of what is and what ought to be. This issue permeates the whole thesis and is one of the reasons why economic rights are hard to apply in practice[29].

After the creation of the database of potential participants, the recruitment process started. E-mails were sent out, contact was made through social media, telephone and so forth. From the sixty potential participants, almost all of them replied with positive or negative answers. Denials are understood as a natural process in the selection of participants. Among the reasons for denial were difficulty in talking about the topic, unavailability of schedules or location, lack of interest in participating in a scientific study, and not feeling comfortable in interview situations.

It is important to highlight that when doing human rights research in Brazil, more specifically with socioeconomic rights, one is likely to encounter pushback from people who have a more right-wing, neoliberal view, particularly in Brazil post 2016 and post Rousseff impeachment. Therefore, possible participants that were identified with a more right-wing view from the political and civil society groups declined or never answered the interview request. Some examples are politicians like Ricardo Caiado,

[29] See Chapters 5 and 6.

Alváro Dias and Geraldo Alckmin. Likewise, interview requests were sent to members of the Brazilian Supreme Court and Judges of Brazilian Court of Justice, but never answered and/or declined.

Indeed, the lack of more participants from the right political sphere could have impacted in the result of this research but because the analysis of the data was made using the hermeneutic methodology and thus, interpreted the whole circle of dialect, it was possible to mitigate the research bias. Yet, as it will be explained in Section 2.6.1, and it was mentioned in the hermeneutic segment, even a researcher brings it bias in their study because they are also part of a society, reality, cultural that impacts on their understanding of the subject that they investigate.

Finally, a total of thirty-seven participants replied positively to the interview request and were recruited to participate in this research. They were from three different countries. Twenty-seven participants were recruited from Brazil, across the states of Bahia, São Paulo, Rio de Janeiro, and the federal district, and three participants were recruited from the United States, England, and Australia. Twelve participants were from the legal sphere, fourteen from political sphere and eleven from civil society (see figure 2.3). Interviews were planned and pursued three months before the arrival date in the country

Figure 2.3 Participants

Political	Legal	Civil Society
Ana Túlia de Macedo	Alberto Amaral Junior	Aluã do Carmo
Bete Wagner	Caroline de Mendonça	Augustino Pedro Veit
Eduardo Sales	Debora Dubrat	Caio Bandeira
Eduardo Suplicy	Dirley da Cunha	Caio de Souza Borges
Fabiana Muniz de Barros	Fabio Moreira Ramiro	Cedro Costa
Guilherme Bellintani	Fabiola Veiga Corte Real	Jeferson Nascimento
Juca Ferreira	Gustavo Renner	Jerry Mataluê

Leandro Ferreira	Miguel Calmon Dantas	Maria Laura Canineu
Marcelino Galo	Maria Paula	Iain Levine
Mário Sanchez	Nina Ranieri	Samuel Moyn
Ney Campelo	Rubens Beçak	Philip Alston
Randolfe Rodrigues	Saulo Casali	
Regina Souza		
Yulo Oiticica		

2.4.1.2 Participant demographic

This Section presents the demographic profiles of the people participating in the research, outlining their age, gender, nationality, country of residence, and occupation. This data was collected during the interviews.

One of the criteria established by the researcher was that all participants had the age of eighteen and over. As outlined in Figure 2.4 below, participant ages ranged from thirty to seventy-eight, with most participants being between forty-one to fifty years old. The decision not to have participants between the ages of eighteen and twenty-nine was not deliberate, but naturally occurred as those who had some kind of knowledge on the topic were older.

Figure 2.4 Age of Participants

Ages in Years	Number	Percentage
30-40	10	27,02%
41-50	11	29,72%
51-60	9	24,32%
61 or more	7	18,91%

In terms of gender, the researcher tried to have a fairly even balance between male and female, but this was not possible for two reasons: 1) Brazil is still a patriarchal society where man has a privileged position in the social hierarchy. An example of this is in the Brazilian Congress, where congresswomen represent only 15% (Montesanti, 2018); Second, as Brazil still is a patriarchal society, there are few women in leadership roles. Their agendas, at least among those contacted, were full during the time that the researcher would be in Brazil.

As outlined in Figure 2.5, there was a significant disparity between male and female participants. Although it would be good to have at least a more even split, the reality is that the disparity between men and women, in the circumstance of the research, does not affect the empirical work because the focus was simply to find participants who represent the three groups: legal, political, and Civil society.

Figure 2.5 Gender

Gender of Participant	Number	Percentage
Female	10	27%
Male	27	73%

It is important to highlight that the researcher decided not to ask directly about the political or religious background of the participants. This stemmed from a desire not to pose questions likely to scupper the flow of conversation during the interviews, thus ensuring the exchange of information remained friendly, allowing space to pursue greater understanding of the participants, their histories, positions, and opinions.

Throughout this thesis and the analysis of interviews it will be possible to understand why the researcher thought that a looser approach enabled the participants to be open with their positions.

2.4.2 The Semi-structured Interview

Semi-structured interviews are widely used in qualitative research. The idea is to not create a script whereby the answers will be pre-defined, but nor is it that the answers will be constructed in a random manner. The semi-structured interview must instead have a minimal script with a basic list of themes and subjects that will be explored

through the interview. The goal is to ensure the important themes established through the research objectives be correctly introduced and worked in the interview.

Fabio Scorsolini-Comin (2016: 58) explains the idea of semi-structured interviews:

> "the script of the semi-structured interview script indicates questions that "can", "should" or are "desirable" to be addressed to participants in a particular research. This involves the possibility that these questions are adapted, articulated in different ways or even not uttered because of specific questions observed in the course of the interview. A semi-structured script allows the researcher to make adjustments during the interview, depending on the characteristics of the interviewee, the answers obtained in other questions, or even depending on the progress of the interview, the greater or lesser willingness of the volunteer to respond, among others elements that may present themselves during the interview[30]"

The semi-structured interview therefore allows the researcher to make changes in the script to verbalise issues, ensuring greater comprehension for the interviewee. In other words, it enables the researcher to use the interview as an instrument which offers greater flexibility and freedom.

By employing semi-structured interviews in the research, the researcher sought to create flexibility during the dialogue, ensuring the capacity to follow new and relevant lines of questioning as and when necessary (Macedo, 2015). Furthermore, this method allowed interviewees to question the interviewer as well, an occurrence which potentially opens new lines of conversation and causes greater reflexivity in the researcher. Indeed, when this occurs the researcher can question their own predispositions and assumptions and potentially address these issues, therefore enhancing both the exchange and findings. Taking this approach follows from the interpretivist assumption that individual subjectivities and ways of being constitute the self, and therefore the way both interviewer and interviewee behave is important in

[30] Original text in Portuguese: "Na prática, o roteiro semiestruturado indica perguntas que "podem", "devem" ou são "desejáveis" para serem dirigidas aos participantes de uma determinada pesquisa, por exemplo. Isso envolve a possibilidade de que essas perguntas sejam adaptadas, enunciadas de modos distintos ou mesmo não proferidas devido a questões específicas observadas no acontecer da entrevista. Um roteiro semiestruturado permite que o pesquisador estabeleça ajustes durante a própria entrevista, em função de características do entrevistado, das respostas obtidas em outras perguntas, ou mesmo em função do andamento da entrevista, da maior ou da menor disponibilidade do voluntário em responder, entre outros elementos que podem se apresentar durante a entrevista."

evaluating qualitative empirical research. This topic will be further discussed in Section 2.6.

It is also important to highlight that when employing interviews as a method, a relationship also develops between the researcher and participant, or interviewer and interviewee. Although this relationship may only be a short-term one, lasting maybe only an hour or two, the process of construction and analysis of the data can greatly outlast this short interaction. As such, these relationships form a constituent element of the eventual analysis, rendering the process vital for qualitative research. This association guides what will be said, how, why and for whom (Scorsolini-Comin, 2016).

These interviews were conducted with the aid of a recording device, and it is important to note that recording only happened with the granting of prior consent and with respect to expected ethical norms. For example, all informants were presented with the possibility to remain anonymous. To facilitate the research, all interviews were recorded without participant objection.

Ethical rules will be discussed further in section 2.5.

2.4.3 Data Analysis

Data analysis is the process of data collection, evaluation, and interpretation. During the process of analysis of the data collated, patterns were looked for. Upon recognition of these patterns, the researcher interpreted them, moving from simple description of empirical data to interpretation of meaning. Thus, qualitative data analysis encounters the challenge that each researcher may interpret the data in different ways.

As a pluralist procedure, qualitative research is grounded in the theoretical and methodological values of interpretative science. In the last 40 years, it has developed new methods and accepted old ones. One example of this pluralist procedure is grounded theory. This theory was introduced by Glaser and Straus (1967) and comprises the construction of theory through the analysis of data. However, Buehler-Niederberger (1985, cited in Flick, 2009: 406) has a different view and sees qualitative analysis as a process of working around a hypothesis, trying to decide whether and to what degree such a hypothesis corresponds to the facts identified in each case studied. Barton (1979: 30) believes that the process of qualitative analysis “involves the study

of single cases, which are expected to lead to the establishment of classes of similar phenomena, and to systematic comparisons; these are in turn expected to lead to identification of factor that influence relationships or behaviours process, leading in that way to more integrated answers to the research question." Another example of this pluralistic procedure is critical analysis. Critical research sees qualitative research as a critical evaluation of reality.

For the purpose of this thesis, data provided by the interviews, transcripts and the official documents was interrogated via thematic analysis. As already mentioned, the analysis also made use of official and primary sources and documents from national government institutions, such as the Brazilian Institute of Geography and Statistics and the Ministry of Development, as well as supranational institutions like the UN, World Bank, and the Inter-American Development Bank. Thematic analysis is the identification and examination of patterns or "themes" within collected data. Such themes are encountered within datasets and are an essential component of the description of a phenomenon and the capacity to relate data to a particular research question.

Despite this diversity of approaches, researchers agree that data analysis encompasses several keys, interrelated elements through a process which allows the establishment of conclusions. It is therefore important to highlight the general rules and principles to be followed by the researcher, first when conducting the fieldwork and then when analysing the data. First, the analysis will occur in an ongoing and cyclical process of data reduction, data organisation, and interpretation. Second, awareness that this process was long and diverse, covering both time with participants and time between and after sessions. Thirdly, that analysis and collation of data will occur simultaneously, continuing on after cessation of the defined period of field research until the end of the writing process.

The first stage of this research therefore consisted of data reduction. Data reduction is a "process of manipulating, transforming, integrating and highlighting the data while they are presented" (Sarantakos and Stevens, 1998: 315). The researcher thus transcribes, summarises, and codes the data from the semi-structured interviews and documents. Data reduction helps to identify important aspects regarding the research question and objectives, such as the significance of understanding the participants'

backgrounds, and therefore constitutes an important first step in structuring the thesis between its conceptual stage and eventual implementation.

Data reduction is directly governed by research objectives. Undergoing this process enabled specific themes to emerge from the empirical research. As will later become apparent, the themes which emerged from data gathered through the process outlined above were a) how participants understood economic rights and b) how their interpretation affected the effectiveness of economic rights.

The second part of the cyclical process is data organisation. This involves organising information around these themes, categorising them into more specific terms, and finally presenting the results in the form of text, charts, and graphs, depending on the findings of the analysis offered throughout the thesis.

The last part of the cyclical process is interpretation. After identifying patterns and themes in the material collected, the researcher interprets the data, trying to draw valid conclusions related to the research questions. The conclusions must make sense, be plausible and fit into the logic of the research objectives. The process of identifying patterns and themes allows the researcher to develop views which guide the research going forward.

As such, after concluding and recording the interviews, the process of data analysis begins by following these four steps: 1) transcription of the data from audio onto paper, editing the transcript by eliminating typographical errors, irrelevant conversation and contradictions; 2) individual analysis of the transcript, evaluating the information; 3) generalising the findings of individual interviews, whilst identifying differences and similarities; 4) analysing the interviews twice more, verifying information and details, establishing themes and patterns to draw conclusions.

This method allowed the researcher to refine, confirm and test the validity of the conclusion drawn during the whole PhD process. The findings were then examined by the researcher to illuminate key similarities and points of contrast between the interviews, transcripts, and documents. Following this stage, these observations were drawn upon to identify the trends and patterns that emerge relating to understandings of economic rights, the international regime, and the national constitutional and local institutions that continue to bear the principal responsibility for protection and

application of these rights. At every stage of the thesis, these findings will elucidate the importance of understanding of what participants thinks economic rights are and how this comprehension affects the implementation and protection of the international and national system of economic rights.

2.5 ETHICS

This section outlines the relevant ethical concerns informing the empirical research design and implementation. The ethical framework for the research is in direct accordance with the University's Statement of Ethical Practice.

In a semi-structured interview, it is necessary to identify ethical issues that can arise from this sort of work. This firstly involved obtaining permission from the University to conduct interviews. According to the guidelines, research undertaken by students at Durham University's School of Government and International Affairs (SGIA) which involves live human participants and/or raises ethical issues or risks for the student, for SGIA, or for the University requires approval for those activities by the Ethics and Risk Committee before the activity is undertaken. This approval was granted in 2017.

To ensure compliance with the rules established by the Durham University, a formal contract was created (Appendix II) which requested written consent in Portuguese from the subjects. This contract provided each participant with a summary of the project and information on how data obtained from the interview was to be stored and used, as it is essential to "*adequately inform participants of the nature and requirements of the empirical research"* (Esterberg, 2002: 93). These steps are necessary when conducting ethically sound research. The contract was written in Portuguese because all, but three interviews were conducted in the Portuguese language and in Brazil. Moreover, thirty-four participants were Brazilian nationals and do not speak English. Consequently, if the contract were in English, it would be null and void.

Participants read and signed the contract form at the beginning of each interview. For the three participants that are not Brazilian, consent was sought and provided through e-mail, and verbally confirmed before recording the interview. It is important to highlight that this research did not take place with 'vulnerable' groups, as all respondents are adults and juridically capable of answering the questions. This process

is conducted to provide participants with agency over how they are recorded and represented in the research.

Thirty-four interviews were conducted face to face and three via Skype. Throughout these interviews and other correspondence an amiable and professional approach and manner was maintained. As a power structure is habitually implicit within the research-interviewee dynamic, the researcher sought to guarantee that the participants felt at ease, safe, and valued as agents within both the interview framework and the research process. All participants gave permission to record the conversation, yet occasionally asked to stop the recording and provide some information anonymously. In these cases, the researcher assured the participant that data processing and storage procedures would be conducted in a way that would warrant that their anonymity and answer would be maintained securely throughout and that anything said 'off record' could not be traced to a particular individual.

At the start of each interview, participants were encouraged to take breaks or stop the interview when required. The recording was made on two devices, an *AngLink - Digital Voice Recorder* and the *iPhone 6S,* using the *Voice Memos* app. Two recording tools were used to secure the recording in case of apparatus malfunction. All interviews took place in a safe environment. The interviews were conducted at their places of work, such as the offices of the Senate house in Brasilia, the University of São Paulo, or in some cases, at the interviewees home. Interviewees were free to ask to be removed from the research after the interview if they felt threatened or found themselves in a difficult position. However, nobody asked to be removed from the research. Creswell (2003) recommends that data, after it is examined, needs to be held for a reasonable period of time. Seiber (1998) establishes a period of five to ten years to be a reasonable time to keep the data. Data will be securely stored for five years after the submission of the thesis.

These rigorous ethical stipulations ensured that the procedures for the research were well thought-out and safeguarded the data collection phase. These steps are extremely necessary when conducting ethically sound research.

2.6 REFLECTIONS ON THE RESEARCH PROCESS

This section discusses the researcher's experiences of and reflections upon the research process. To engage oneself in research is never a product of chance or a strictly rational initiative; sustaining otherwise would be an illusion, perhaps even a deception (Macedo, 2015). The decisions about the themes we choose to understand and the groups we choose to study are the consequence of a journey connected to our own personal histories and influenced by our most familiar experiences (Defreyne *et al.*, 2010). According to these authors, the way we observe and analyse our data depends on deep, oscillating, mutable and often contradictory convictions that arise at the moment of writing. They maintain that "from the premises to the conclusion of an investigation, from the first contact with the field to the last word lying on paper, a research is and remains closely linked to the person and the course of the one who undertakes it and relates it[31]" (Defreyne *et al.*, 2010: 6-7). Thus, this section will display the researcher's background, followed by reflections on the research process. Thus, the subsequent sections will be from the researcher's point of view.

2.6.1 The Researcher

There is in anthropology a well-defined academic tradition dealing with the foundation of the process of describing one's own personal history, thus revealing how we bring biases to our investigative interpretation (Okely and Callaway, 2001). As Creswell (2010) points out, a researcher must be aware and keep in mind, "explicitly and reflexively their biases, their values and their personal origins, such as gender, history, culture and socioeconomic status that can shape their interpretations during a study[32]" (Creswell, 2010).

Much like my participants, I am a part of society and I understand the world according to the morals and values experienced from birth until the present. As mentioned in section 2.1, there is no impartial researcher. This conviction was reflected in my choice of the hermeneutic approach for this thesis, as it demonstrates that I too am in an

[31] Original text in French: 'Des prémices à l'achevement d'une enquetête, du premier contact pris sur le terrain au dernier mot couché sur le papier, une '

[32] Original text in Portuguese: "explícita e reflexivamente os seus vieses, seus valores e suas origens pessoais, tais como gênero, história, cultura e status socioeconômico que podem moldar suas interpretações durante um estudo"

ongoing process of deconstructing-constructing my views. No interpretation starts from zero, on the contrary, it starts from a pre-comprehension that involves our own relation to the whole. Thus, I appear here presenting the researcher.

I was born in Salvador de Bahia, Brazil to a middle-class family. Salvador was the first capital of Brazil and outside Africa; it is the city with most African descendant (Moreno, 2016). Nevertheless, I grew up in a space in which it was rare to see people of colour. As the great majority of middle-class kids in Brazil, I went to private school, and it was very rare to see teacher or students that weren't white; yet, almost all, if not all, the security and cleaning staff were of African descent. The same structure could be seen in every environment: from shopping malls to restaurants. No owner or manager was of African descent, finding one was rarity.

Like everywhere in Brazilian society, inequality and poverty was usual. It was common to see kids (mostly black as well) in the street working instead of in schools studying. Near every neighbourhood you could see *favelas*. It was impossible not to see the two realities. I was lucky that I was born in the "right one". And as a "lucky person" you either become the person that doesn't care, numb to the reality around you, or you start to question everything.

I won't lie and say I always questioned everything from the beginning. That would be false. What allowed me to start to see that I lived in a privileged society compared to most other people was when my nanny/care taker/maid told me one day that her daughter was sick and she had to take her to the doctor and when she arrived there at dawn, the doctor said to her: "*is this the time for poor people to be sick?"*

The role of the nanny/caretaker/maid in Brazil has some distinctive characteristics. There, labour is extremely cheap, thus almost every middle-class house used to have at least one person working in their house. My home was no different. However, because my mother was a divorced woman, she had to work the whole day and I stayed with my caretaker the whole day; thus, I created a strong relationship with her. After she told me that story, I started to question the two different realities and started to really look around my environment. What I saw made me want to become a judge so I could try to do something. And that's how I went to law school, with the naive idea that I could change things.

It was during law school that I had a second eye opening experience. I was interning for a law firm, representing a big brand in a case in a consumer rights arbitration jurisdiction, in a case of a malfunctioning mobile telephone. In Brazilian law, if you buy a phone, and it comes broken, according to the Consumer Law Code you have the right to choose between receiving the money back or receiving the same or a better device[33]. So that the courts don't receive a high number of requests regarding this kind of case, it is recommended that consumers go to an arbitrary Court first to claim their right. The plaintiff bought a mobile for R$100 *reais*[34] to use for work communication. Since the problem occurred months before, she had to get money from friends to buy a new one while waiting for this arbitration and thus she was only interested in receiving the money back. This woman was a maid, and she was very poor. The company told me to offer the same (new) phone but no money. The woman cried and explained that she didn't need the phone anymore, but still had to pay her friend back. She added that this was why she wanted her money, and that she had that right. The company told me that they would only offer another phone, that if she really wanted her money then she could start a judicial process. In the end, she accepted the phone because she could not afford to waste more time and she didn't have the money for a lawyer or to start a process in the judicial sphere. The company knew that, and they used it as leverage. As an idealistic person, I saw for the first time, but not the last, the imbalance of power in the juridical system.

The last experience reflected in this research is a miscellaneous day like any other in the academic world. Since deciding to work in human rights I was bombarded with theories and doctrines that mainly focus on the experience of western society. During my MA the focus was always on civil and political life and the understanding of western society and practice on human rights. I never understood how you can focus so much time speaking about the right to freedom of speech and not on the right to work or social security. From my little life experience, a person with hunger didn't care about speech or freedom of press, they wanted to survive. I am in no way saying that they aren't important, but merely highlighting that my academic life was constructed in totally

[33] Articles 18 and 26 of the Consumer Defence Code (CDC). *Código de Direito do Consumidor*. (Brasil, 1990)
[34] R$1 Real ≅ £ 7,59 pounds or $5,64 dollars in April 2021.

different surroundings than my personal life and thus with a distinction of perceptions. While I studied law in Brazil, my MA and doctorate were in Europe, with professional experience working in the USA. I believe that all the diverse approaches I experienced prepared me to analyse and write about peoples' understandings of economic rights.

I realised that all these experiences were important steppingstones that enabled my research in the field. In time, I began to allow myself to be in the places where I could meet the other, taking different positions and experiencing this confluence.

As a researcher who is writing about different understandings and comprehensions, I could not leave out of my research my own pre-conceptions and conceptions about the world.

2.6.2 The Process

While overall the process of conducting the research was a fascinating and invaluable experience, difficulties were nonetheless encountered during the study.

The first difficulty was in the securing of participant recruitment. Having identified the three groups that would be core to my research, at times it felt there was hesitance from potential participants and lack of time on their agenda. As previously highlighted, I only had three months to do the field research. Therefore, to organise time with potential subjects whilst travelling around four cities in an enormous country was highly challenging. Trying to interview political actors was especially difficult at the time since the turmoil that was Brazilian politics following President Roussef's impeachment in 2016 and Operation Car Wash[35], a corruption investigation which targeted and arrested important figures in Brazil. Thus, some politicians, like now ex-congressman Jean Wyllys[36], although very open to participating in the interviews, were unavailable on the dates I was in Brasília.

The second – and most personally meaningful – difficulty I faced related to the nature of the research undertaken, and speaking about economic rights in-depth in an interview context with participants from different backgrounds. The experience conveyed emotional reactions and, in some instances, was very demanding. Some days it was a

[35]See Watts (2017).
[36] In 2019, Wyllys wrote a letter from overseas stating that he would not return to Brazil due to alleged death threats. He relinquished his position as congressman.

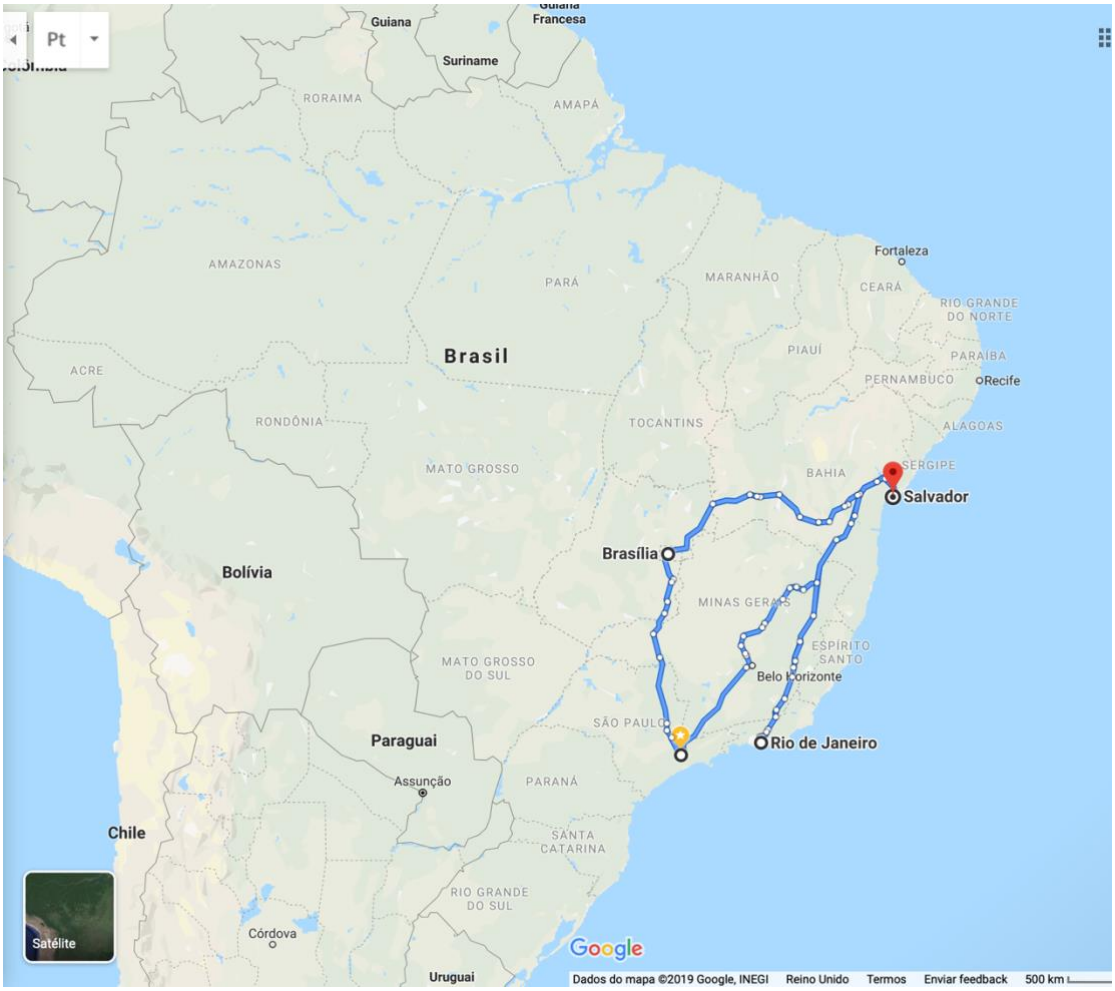
real challenge to sit in a room with a stranger and discuss the content of economic rights in massive depth and detail. In one instance, where a participant representing indigenous civil society spoke extensively about economic rights violations, how their property was being destroyed and how they felt helpless and defenceless in a system that didn't protect them, I found myself feeling so immobilised during the interview that I only learned the full extent of their thoughts when I listened back to the interview tapes.

Undeniably, at times I was faced with opinions expressed by participants that I personally felt to be tricky and hard to listen to - and indeed to listen to again when transcribing and analysing the interviews. As a researcher, it was one of my main objectives to ensure that the interviews fostered a non-judgemental environment for the participants. I didn't want to be both unethical and antithetical, I wanted to ensure a non-judgemental environment to allow the participants to be able to speak freely and unreservedly. Nevertheless, it was challenging to strike an equilibrium between my position as a researcher doing interviews and my personal perspectives, experiences, and identities.

Despite these difficulties, the experience of conducting in-depth study in this diverse and stimulating area enabled me to improve and refine my interview skills and nurtured my capability to confidently debate multifaceted and sensitive issues. It was also empowering and enlightening to listen to the perspectives of other people who had different backgrounds but were also critical of economic rights in Brazil and why they lack effectiveness. I was also able to visit a local indigenous house, which allowed me to see in practice why is so important that we try to understand, from their perspective, through their voice, what the economic rights system really means and why they think it does (or does not) work.

Throughout the field work I travelled for approximately 7.700 km (see figure 2.6), from Salvador to São Paulo (1.979 km), from São Paulo to Brasília (1.008 km), to Brasília to Salvador (1.444 km), and at last to Salvador to Rio de Janeiro (1.632 km) and back. It was not only a mentally demanding process but also a physical one.

Figure 2.6 Research Route



Source: Google Maps

CHAPTER 3: CONCEPTUAL DEVELOPMENT OF ECONOMIC RIGHTS FROM BEGINNINGS TO NEO-LIBERALISM

3.1 INTRODUCTION

To empirically analyse the understandings that people have on economic rights it is necessary first to study the social and historical context of which these individuals form part. To accomplish this, the current chapter comprises a theoretical review and content analysis of primary texts and interviews as they relate to the formation of the concept of economic rights within a social and legal system.

While this is a necessary first step in the research of this project, it is by no means sufficient. Rather, it will serve to provide the theoretical foundation that informs the subsequent case study of this thesis since it will look at the ideas and theories presented in this chapter which will be spoken by or are implied in the answers that the participants presented while discussing their understandings of economic rights.

The chapter proceeds as follows: there is a brief description of the sources that define economic rights in theoretical and legal discourse as well as the justification for their use and relevance. Economic rights are not dealt with from one perspective, rather, as will become clear, they conceptualise economic rights in terms of a historically specific form of social interdependence with an inherent human value and seemingly objective character.

The chapter will be divided into five subsections that will set up the historical development of the idea of economic rights. The nomenclature of 'economic rights' was forged in the international legal system with the creation of human rights law.[37] Thus this chapter will lay out different conceptions that have developed over time.

Although economic rights were not formalised until after the end of World War II within the United Nations framework and the Universal Declaration of Human Rights, it is important to highlight two periods that were crucial for developing the ideological foundation of ideas that eventually led to the concept. These eras were crucial for the

[37] This topic will be further discussed in chapter 5.

transformation of the idea of economic rights in its early years: the eighteenth century and the creation of liberalism and the development of the right to property as a natural right; and the nineteenth century's labour movements, uprisings, and social insurrections. The idea of economic rights depends on developments made through both these periods, and thus affects its conceptualisation and comprehension until today.

Throughout the analysis of the thesis and specially the data from the interviews, will show the clash between the ideas developed in these two periods (liberalism and socialism) and how this clash persists in contemporary society. It is important to clarify that a deep analysis of liberalism, socialism, and Marxist theory is beyond the scope of this thesis. The aim of this section is instead to illustrate the different views that will serve as foundations for the subsequent empirical study. The decision to employ a historical overview of the development of the idea of economic rights in this section was made for two primary reasons: to provide the theoretical context and background for the research and establish the hermeneutic foundation for the data analysis.

Thus, this section functions as a precursor to the empirical research findings in this thesis by framing and contextualising economic rights within their different theoretical frameworks. This section will start with the idea of economic rights in the liberal framework (3.2) focusing on the right to property value, followed by how the social revolution of the nineteenth and twentieth centuries shifted the discussion towards a more collective and social framework (3.2). Section 3.4 will introduce the birth of the term economic rights and what that entails. Finally, the rise of neoliberalism and the birth of key features that affect the contemporary safeguarding of economic rights will be discussed in section 3.4. In this way, this section demonstrates that it is not only the content of economic rights that ought to be considered, but also the context in which they were formed in the first place.

3.2 LIBERALISM AND THE RIGHT TO PROPERTY

The first and most protected economic right is the right to property, a degree of importance which persists to this day. It is impossible to understand economic rights without understanding property rights. The core of property rights throughout the evolution of Western society has always been a sovereign and exclusive legal power of a subject of law - the individual - over particular property.

The idea of a right to property in Greco-Roman civilisation was closely connected to religion (Fustel de Coulanges, 2006) and was part of the social Constitution of society. Fustel de Coulanges wrote that three things were founded and firmly established in ancient Greek and Roman societies: domestic religion, family, and property rights (2006). The house, the farm and the grave were part of individual assets of a family in the most private sense, that is, as something connected to blood heritage that united individuals in a group.

With the bourgeois revolution and the birth of capitalism and liberalism, the conception of property detached itself from its religious dimension and became a mere economic utility. Understanding the origins of liberalism necessarily implies understanding the important changes that took place in the seventeenth century in the modes of appropriation and exploitation of property. Society was changing from a feudal regime to a mercantile one, and the bourgeois class needed to establish a clear separation between the state and society, between private man as an individual[38], and the citizen, as subject of political society. In this dichotomous system, property was placed entirely within the realm of the private sphere[39].

But how was property justified in modern society? John Locke established the right to property as natural right, a right that came by simply being human[40]. This justification became the primary guarantee of the freedom of the citizen against the impositions of state power. For Macpherson (1990: 221), Locke justified the right to property "[...] as natural, a class differential in rights and in rationality, and by doing so provide[d] a positive moral basis for capitalist society". From that moment on, the right to property and the social contract became safeguarded against the interferences of others.

In the *Discourse on Political Economy*, Rousseau posits that "the right to property is the most sacred of all rights of citizenship, and even more important in some respects

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[38] The term 'individual rights' indicates first generation human rights.

[39] This dichotomy was the preferred target of socialist criticism. Marx considered the separation of the public and private spheres from social life to be merely ideological discourse since the state was also appropriated (in the technical sense) by the dominant class (Heller, 1986; Bobbio, 1996; Marx and Engels, 2008).

[40] "Though the earth, and all inferior creatures, be common to all men, yet every man has a **property** in his own **person**: this no body has any right to but himself. The **labour** of his body, and the **work** of his hands we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he has mixed his **labour** with, and joined to it something that is his own, and thereby makes it his **property**." Second Treatise of Government, § 27, John Locke (2004 [1690]).

than liberty itself" (1755:14). He emphasised that the basis of the social pact is property (or right to property) itself, stressing that each individual should remain with the tranquil enjoyment of what belongs to them. In his work, Rousseau claimed that "by basing all civil rights on property, once the latter is abolished, no other can survive. Justice would be mere chimera, government a tyranny, and leaving public authority to have a legitimate foundation, no one would be obliged to acknowledge it, unless constrained by force" (1964: 483).

This conceptualisation of the right to property was realised in two important documents of the eighteenth century:

a) The Virginia Declaration of Rights (12 of June 1776) Section 1: "That all men are by nature equally free and independent and **have certain inherent rights**, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, **with the means of acquiring and possessing property**, and pursuing and obtaining happiness and safety." (emphasis added)
b) The Declaration of the Rights of Man and of the Citizen (1789) article 2: "The aim of all political association is the **preservation of the natural and imprescriptible rights of man**. These rights are liberty, **property**, security, and resistance to oppression." (emphasis added)

Analysing these two fragments we can conclude that the right to property became constitutionally protected in two forms: as a subject of law and as a legal institution. What these two fragments recognise is that the right to property is not only a subject of protection against other individuals or the State, but also it is recognised by the legal protection that they have against legislator that could try to suppress the institution of property in its content. This is why, as we can see in the highlighted fragments above, property was founded to be a natural and inherent right of every human being[41].

It is within this legal-institutional perspective that the right of every individual to property was built on the idea that if private property was recognised as the ultimate guarantee of individual liberty, it became possible to argue that the legal order should

[41] In German theory this is called an institutional guarantee of the human person.

protect not only the present but also potential future owners. The access and protection of property became the most important and main characteristic of the fundamental right of the human person, and this distinct characteristic would later emerge throughout various legal documents around the world.

In other words, western society introduced a concept of property into legal systems based not on collective use, as happened in antiquity, but, above all, on individual appropriation and commodification. With the modern codification, property is incorporated in the legal orders as an exclusive individual right.

The French Revolution, whose most remarkable document, the Declaration of the Rights of Man and Citizen, based on Locke ideas, predicted that property would be an insurmountable barrier to the State: a natural right. In the 17th century, the word property had a broad meaning; it was an economic concept and a legal term. Property meant what was natural right to the individual, that is, what he had a right to claim.

According to Macpherson (1979), Locke's doctrine of property must be understood from his insistence that an individual's work is his property. However, such an idea would have the opposite meaning to many interpreters. Locke's emphasis would have provided the moral basis for bourgeois appropriation. Thus, "[...] Locke explicitly recognizes, [that] the property theory, on the whole, is a justification of the natural right, not only to unequal property, but to an unlimited individual appropriation" (MacPherson, 1979: 233).

Locke was successful in his endeavour. Starting from the traditional assumption that the land and its fruits were given to humanity for their everyday use, Locke came to conclusions contrary to those who asserted the limitation of capitalist appropriation based on this argument. Thus, he eliminated any impediment of legal framework for large-scale accumulation. For Macpherson, Locke went even further by justifying "[...] as natural, a differentiation of rights and reasoning and, in so doing, provided a positive moral basis for capitalist society" (MacPherson, 1979: 233)

Classical liberalism argues that a market order established on private property is an embodiment of freedom (Robbins, 1961). As Gaus and Schmidtz posit, classical liberals believed that people only have real freedom when they are free to make contracts and sell their labour, save and invest their earnings as they see fit, and free to

launch businesses as they raise the capital(Gaus, 1983; Schmidtz and Brennan, 2010). Understood thus, freedom existed essentially in the service of possession, while society was based on a relation between free and equal individuals, regarded as owners. In turn, political society became an institution built essentially for the protection of property and for the maintenance of society, which was characterised by the exchange of products[42].

MacPherson (1990: 3) says:

> "The individual, it was thought, is free inasmuch as he is proprietor of his person and capacities. The human essence is freedom from dependence on the will of others, and freedom is a function of possession. Society becomes a lot of free equal individuals related to each other as proprietors of their own capacities and of what they have acquired by their exercise. Society consist of relations of exchange between proprietors. Political society becomes a calculated device for the protection of this property and for the maintenance of an orderly relation of exchange."

To understand why the right to property became an essential part of the capitalist society being built in the eighteenth century it is vital to understand the socioeconomic context of that time. Society was transitioning from an *ancien régime* which protected the monarchy and the privileges of the nobility to a new regime created around the intellectual and scientific progress of the age, marked by the Industrial Revolution and the Enlightenment. It was a time of great social unrest led by the end of feudalism and the introduction of capitalism as the predominant mode of production (Pressburguer, 1998: 297-310)[43]. In England, for example, poor peasants were expelled from the countryside where they lived to work in the places and estates needed for extensive sheep farming for wool production (Marés, 2003: 26).

Gradually, European peasants were forced to leave the countryside and live in the cities that were being formed. Meanwhile, those who constituted themselves as the economically privileged class of the time, the bourgeoise, needed a device which allowed them ownership of the land while living in the city pursuing industrial and commercial activity. It was during this period that discussion of land conflicts in the

[42] As you will see in the last part of this chapter, although there was social development on the concepts of property and liberalism, some basic and vital characteristic remain present in today's society, and have great impact on whether economic rights can be protected and fulfilled.
[43] It began with mercantilism and later with the industrial revolution.

countryside was introduced. There arose a distinction between tenure (possession) and property, the first being a *de facto* relationship between man and land, while property was established as a legal relationship (Baldez, 2002: 97). It is possible to conclude that during this period there was a connection between property and wealth with the concentration of political power in the hands of the bourgeois class. An example of this is that in seventeenth-century England, property was mainly concentrated in the hands of large landowners, with lands worked by tenants, functioning within a tripartite social structure: landowner, capitalist tenant, and salaried worker.

The conception of property for classical liberals is an exclusionary and individualistic idea constructed by the narrative that the right to property is a fundamental right which protects individual liberties against other individuals and the state. There is an understanding that liberty rights are claims aimed at a sphere of non-interference in which the state should not penetrate. Carlos Frederico Marés (2003, 33-39), in his book *A função social da terra (The social function of the earth)*, suggests a narrow notion of property, reducing it to the right of exclusion. According to the author, the private individual becomes the rule and the public or collective the exception, there being no place for inclusion but only for the individual appropriation of things.[44]

With the evolution of society, the exodus of people from the countryside to the city which accompanied the escalation of industrial civilisation opened the door to discussions on labour relations, a right to subsistence, and social security.

3.3 THE SOCIAL REVOLUTION

The acceleration of the industrial revolution in western Europe and the United States had a giant influence on the birth of the welfare state and socialist theory. This shift took place alongside a transference of the labour force from the countryside to the cities to work in the burgeoning factories and exacerbated social problems such as the lack of labour rights, housing, and health, illuminating the conditions under which most lived and the necessity of their change.

[44] This conception will generate its effects in the application and protection of economic rights in Brazil, as it will be shown in chapter 4.

Legal treatment of the classical liberal state was based on the grounds that all individuals had the discernment to govern themselves. This principle of self-determination of individuals within society showed the self-regulation promoted by the indivisible hand proved to be flawed. The natural tendency of capitalism to concentrate capital together with the formation of oligopolies and monopolies caused a friction between the bourgeoise and the proletariat. Marx's corresponding critique of liberalism is profound. He asserts that the rights and freedoms of liberal democracies are illusions built on procedural equality and pure formalities. For Marx, the state is concerned only with the protection of bourgeoise interests and ignores those of workers. To explain this, he emphasises two important social relations: class domination and exploitation (Postone, 1993).

While classical liberals saw property as a way in which freedom is exercised, Marx, in contrast, saw private property as a source of separation and a mechanism of oppression within society (Engle, 2008). For Marxists, norms are not defined in terms of the justice they embody, but rather by the interests they serve. In contrast with the natural law position of Liberals such as Locke, Marxists view law as ideology[45]. This interpretation posits an important question that this research will try to answer throughout this thesis: do our moral values impact how we interpret and apply economic rights?

To understand Marxist and socialist criticism of liberal policies, it is important to understand the historical context and social transformation of that time. European peasants were forced to live in the cities that were being formed, with most of them surviving in inhumane conditions. As Commaille (1997: 13) detects, these social issues surfaced in France in the early nineteenth century. The process of industrialisation caused an impoverishment of a part of the population, leaving numerous individuals without protection. There was a feeling that permeated Europe at the time, entailing the belief that workers should be poor because they always were poor, but also because they belong to an inferior social class (Hobsbawm, 2007: 304). Indeed, even before the institutionalisation of capitalism, Montesquieu identified two groups of poor: 1) Those in which the rigidity of government impoverished them because they were naturally servants; 2) and the ones that were poor by mere chance of life but who had the chance

[45] In the upcoming sections of this chapter, you will see that some of the subjects of the interviews also believe in this view.

of growing by their work (Montesquieu, 2012). It is during this period and under these conditions and social values that the idea of economic rights moved from referring only to the right to property to encompassing labour rights and other social protections, offering policies and laws that protected not only individuals' freedoms but also society as a collective group.

Under capitalism, labour became a commodity whose price, the salary, corresponded to the minimum necessary for subsistence. This minimum varied according to competition laws and the success of trade. The worker is constrained by social risks, pressed by social insecurity, subject to the inclemency that arises from life in society. That this society was constituted in opposition to the State and outside its capacity for systematic intervention, meant it found itself with the agonising perplexity of not having the ability to dominate its future, as advocated by the heralds of rationalism. Thus came the social division of classes, giving rise to what socialism called the proletariat, characterised by Engels (Marx & Engels, 2008: 105) as "the class of those who have absolutely nothing, who are forced to sell their work to the bourgeoisie, to receive in return the means of subsistence necessary for its maintenance".

An example of this comes from Pope Leon XIII, in 1891 at the encyclical *Rerum Novarum*, who criticised the brutality of the selectiveness of property acquisition through the freedom to contract (Pope Leo XIII, 1891, para 3). As the Pope claims:

> "In any case we clearly see, and on this there is general agreement, that some opportune remedy must be found quickly for the misery and wretchedness pressing so **unjustly on the majority of the working class**: for the ancient workingmen's guilds were abolished in the last century , and in the other protective organization took their place(…). Hence, by degrees it has come to pass **that working men have been surrendered, isolated and helpless, to the hardheartedness of employers and the greed of unchecked competition.** The mischief has been increased by rapacious usury, which, although more than once condemned by the Church, is nevertheless, under a different guise, but with **like injustice**, still practiced by covetous and grasping men. **To this must be added that the hiring of labour and the conduct of trade are concentrated in the hands of comparatively few; so that a small number of very rich men have been able to lay upon the teeming masses of the labouring poor to yoke little better than that of slavery itself**." (emphasis added)

Therefore, while property is consolidated with its exclusivist character, a consequence of the liberal idea, in the second half of the 19th century, two contrasting positions on

the legitimacy and exclusivity of the aforementioned right were also consolidated. On the one hand, the socialists who reject the individual character of the ownership of essential goods, land being included in this category. From this perspective, the possession of such goods is illegitimate. On the other hand, we have the view led by the Catholic Church, arguing that legitimacy is not necessarily connected to the legality of the contract, seeking to add the idea of justice in property rights. Thus, both groups presented arguments challenging the idea of private property, albeit from different perspectives.

While such demands from society did not prompt deep paradigmatic ruptures, they led some industrialised European countries to introduce changes that enabled the implementation of a welfare state with a security net for the population. This afforded citizens better working and life conditions, higher salaries, paid vacations, stability, social security plans, health care, and free education.

Under this new arrangement, the legal structure of capitalist states underwent significant changes. To enable the effectiveness of the welfare state, the right to property lost the exclusivist character of the previous period. This new conjuncture began with Germany during the Bismarck government and was consolidated with the Weimar Constitution in August 1919. It is possible to note this transformation in the wording of Article 153 of the Weimar Constitution which established that "property imposes obligations. Its use by its owner shall at the same time **serve the public good***"* (German Empire, 1919). The introduction of 'to serve the public good' in a legal document produces the notion of collective interest *within* the conception of right to property. Thus, property rights start to have a social function, moving away from the natural and individual subjective right that was constructed during the birth of capitalism and liberalism. That means that even the right to property comes with social responsibility and to serve, not only the individual, but society as well.[46]

The problem of the concentration of power and wealth, especially the concentration of wealth generated by the Industrial Revolution, was to create another kind of right, not

[46] It is important to establish that these changes happened in the industrialised countries. In Brazil, the land structure inherited from the colonial period remained untouched and the social gains experienced were timid or almost non-existent. This topic will be further discussed in chapter 4.

the right to freedom from the state itself, but a right that has a strong connotation to what society accumulates as wealth over time.

The rise of the welfares state established the beginning of an implicit agreement between the bourgeois and the proletarian. Workers, who in the nineteenth century criticised the ownership of the means of production, abandoned this radical claim, accepted the legitimacy of profit, and in return, the bourgeoise accepted the legitimacy of trade unions. It is important to highlight that this context is applied to western society (Western Europe and USA) and chapter 4 will show how the Brazilian context was very different. This implicit agreement was broken by neoliberalist policies that were implemented in parts of the world in the 1980s onwards.

3.4 ECONOMIC RIGHTS IN THE HUMAN RIGHTS TRADITIONS

Economic rights are human rights, and are achievements constructed by social and political movements which have occurred since the eighteenth century (Piovesan, 2004). In theory, after the Second World War and the establishment of the United Nations Universal Declaration of Human Rights, human rights have been thought of as universal rights. These rights do not only lie within a given state, but as positive rights that must be respected everywhere. When human rights documents are ratified, states assume the obligation to integrate the rights contained in it into their respective legal systems. The framework of economic rights in the international doctrine will be discussed in detail in Chapter 5.

In 1941, US President Franklin Roosevelt gave an important speech called "Four Freedoms"[47]. During his State of the Union Address, he recognised that freedom from want was as essential as human freedom. In his address he stated that the third freedom was "freedom from want, which, means economic understandings which will secure every nation the healthy peacetime life for its inhabitants-everywhere in the world. (…) Freedom means the supremacy of human rights everywhere. Our support goes to those who struggle to gain those rights and keep them. Our strength is our unity of purpose." (Roosevelt, 1941). Roosevelt's idea of "freedom from want" comes from the classic American discourse where the emancipation of the individual from certain needs is a

[47] The 4 freedoms are: 1) freedom of speech; 2) freedom of worship; 3) freedom from want; 4) freedom from fear.

condition for the exercise of freedoms. This address was incorporated in the preamble of the Universal Declaration of Human Rights (White *et al.*, 1942) and was a well-known inspiration for the addition of the right to an adequate standard of living in the UDHR (Alfredsson and Eide, 1999).

The terminology 'economic rights' was introduced, not only in the human rights tradition, but in the legal and social discourse as well, first by the UDHR and later by the Covenant of Economic, Social and Cultural Rights[48]. As one can observe, the introduction of 'economic rights' first occurred in an international law document. Beforehand there was no mention of the term[49]. What the international human rights legal framework did was to compile rights and call them economic rights. Economic rights as a concept is an international project, a contrast from rights that are part of the economic rights catalogue and rights that were constructed within a national context, As was demonstrated in the previous sections, these rights have distinctive characteristics.

Thus, the term that incorporated all the rights that were discussed in this chapter was shaped at the international level by a small group of people while discussing the creation of the international bill of rights. This is an important contrast since all the above-mentioned rights were developed through social transformation and revolution, they were forged within societies and by their people, not in a room with lawyers and diplomats. Therefore, economic rights are a concept that comes from the top down and, as the following analysis will show, they are still unknown. This will be shown in chapter 4 when the participants answer the question of what economic rights are.

Still, the question of what economic rights are remains. They are universal human rights yet it is hard to find within international documents a precise description of what they are which does not simply describe the rights to which they pertain. One example of this in the fact sheet no.33 published by the Office of the High Commissioner for Human Rights (OHCHR) where they describe Economic, Social and Cultural rights as "those human rights relating to the workplace, social security, family life, participation

[48] I will speak more about these two documents in chapter 4.
[49] Earlier International Labour Organization documents contained what we would call economic rights, they just did not use the term.

in cultural life, and access to housing, food, water, health care and education" (OHCHR, 2008). The Universal Declaration of Human Rights (UDHR) establishes that all human rights are universal, indivisible, interdependent and interrelated, but the lack of a more specific conceptualisation of the meaning of what economic rights are generates a confusion that will be examined throughout this thesis.

The establishment of economic rights as human rights involves an understanding that economic rights are fundamental for the realisation of the dignity of the human person. This new conformation and relationship between international society and the state allowed, at least in theory, the birth of a framework that focuses on the idea that it is possible to think of rights in terms of socioeconomic obligations.

The early part of the twentieth century was based on the understanding of economic rights as a way of integrating society and it is not a coincidence that the international bill of rights reflected this in their documents. Yet, the limitations of the word are the limits of language and its interpretation and while economic rights have been established as a human right by the international framework, their understanding and application as such is still an ongoing fight. As one will see in the following section and across the answers of the participants, the spread of neoliberal values and narratives allowed economic rights to be devalued in contrast to other rights within the human rights tradition. This has had important consequences on the effectiveness of economic rights.

3.5 NEOLIBERALISM AND ECONOMIC RIGHTS

While the human rights framework was created in the second half of the 1940s, as discussed, the phenomenon is very new. The starting point of which human rights started to become a dominant discourse occurred in the mid-1970s as an agenda against totalitarianism and antidemocratic regimes. It was during this time that it became a movement and a justification that would be spread around the world (Moyn, 2010b). The mid-1970s also saw the doctrine of neoliberalism begin to take shape. Like human rights, the neoliberal doctrine was created in the first part of the 20th century, in the *Colloque Walter Lippmann*, but it was only with Milton Friedman's work in the 1970s that it became a widely discussed phenomenon. Friedman was an economist from the Chicago School of Economics who won the Nobel prize in 1976 by arguing that it was necessary to move to a 'liberal society' built on the premises of free market and non-

state intervention. His work influenced governments[50] and international organisations[51] to establish market-oriented reform policies focusing on austerity and reducing state influence in the economy. But neoliberalism is not only an economic theory, it is a political rationality which argues for an idea of what the role of government is, whether in the economy, in society, or in the state itself. It is the logic of capital until it becomes the form of subjectivity and the norm of existence (Dardot and Laval, 2013) .

Nowadays, it is common to see Marxist scholars arguing that human rights are a neoliberal phenomenon for two reasons: 1) the rise human rights and the victory of market fundamentalism occurred simultaneously (Moyn, 2015: 147); 2) the use of human rights narratives focused only on civil and political rights to overthrow regimes and implement austerity reforms. In contrast, "in the mainstream vision, international human rights can offer a toolbox of legal and other standards to guide, tame, and "civilise" an era of transitional market liberalisation that has generally improved the human conditions" (Moyn, 2015: 149). These two contrasting points were reflected by the participants in the empirical work, and they will be analysed through this thesis.

Nevertheless, and with this context in mind, economic rights take a secondary role to their civil and political counterparts within the human rights discourse because neoliberal principles are, if nothing else, strategies that fundamentally aim to reduce government expenditure on socioeconomic rights. Thus, neoliberalism brought a new feature which had great consequences on the protection and implementation of economic rights everywhere: the role of austerity and the severe inequality it both instantiates and requires.

These two consequences were also conveyed by the participants and will be highlighted in the empirical sections of the thesis.

3.6 CONCLUSION

The analysis presented in this chapter reveals a fundamental relationship between economic rights and the historical socioeconomic context of society. The sections presented in this chapter described the conceptual development of economic rights,

[50] Chile was the first country to implement neoliberalism policies created by Friedman during the Pinochet years. In the 1980s, Ronald Reagan and Margaret Thatcher implemented neoliberal policies in the USA and UK.

[51] Neoliberal policies became guidelines in the World Bank and the IMF.

stressing the importance of the right to property, the right to work, and the welfare state. It tracked how these ideas developed through across societies, until the creation of the term 'economic rights' at the international level. This chapter also summarised the birth of neoliberalism, and its austerity driven, non-state interventionist policies.

It is important to highlight the key role that the concept of property has in the development of economic rights. Property has always been a constant focus of social and economic tensions, destabilizing legal relations, causing fierce conflicts between people and between them and the State. Still today, it has substantial repercussions in all socioeconomic spheres[52].

Throughout this chapter, a literature review was carried out that considered two conceptual categories of property – liberal and social. As mentioned in Section 3.2 of this thesis, the conceptualisation of property came from the profound changes in the social relations that occurred with the end of feudalism and beginning of the modern state. Throughout the text, it is highlighted that liberalism connects the individual right to freedom to the right to property. Thus, only free men can be owners and can acquire property, because the possibility of acquiring and transferring it freely is part of the idea of property. The State starts to have as its main purpose the guarantee of freedom, equality, and property, with the latter assuming centrality.

In this context, property becomes a natural right of an absolute nature, introduced into the legal system in the French Revolution. It is in the French Revolution, therefore, that we find the legal framework of property, with the Constitution having the role of organizing the State and guaranteeing the law, in a conception marked by legal monism, that is, there is only one right, the state, a universal and general law, with the Modern State as its main purpose to guarantee equality, liberty and property, with the latter prevailing. Thus, property was first conceptualized as a natural right, with a universal characteristic that was inherited to every human being. It was also introduced as an individualistic concept.

[52] In Brazil, the legal regime of property is not restricted to civil law rules; it comprises a whole complex of administrative, environmental, urbanistic rules, business and, of course, civil, based on constitutional norms.

With the advent and dissemination of the commodity in society, social relations are profoundly modified. The world appears to men as if it were populated with commodities that are necessary for it and which they see themselves obliged to buy on the market. Another important aspect highlighted in this chapter is that work became a commodity like clothes and food. People started to sell their work to have house, buy food, medicine and so forth. It became clear that property was placed above anything else and that those who own it, were that had the power to control all spheres of life. By analysing the context of the 18th century, marked by intense social conflicts, it can be said that the 18th century legislators existed to preserve property and, incidentally, the lives and freedoms of the owners. The protection of property becomes a fundamental task of the Judiciary. In the paradigm of the Modern State, it is up to the Judiciary to guarantee the exercise of this right, even whilst excluding the vast majority of access to property.

As discussed in section 3.3, the debate around this individualistic liberal conception of property gives rise to the social revolution and the creation of other economic rights such as the right to work, social security, health, and so forth. The criticism came from the inhumanity of exclusivity in acquiring property through the freedom to contract. Only the owner had the freedom because he had in front of him a battalion of hungry people ready to be hired at any price that would alleviate their daily hunger. Thus, it is possible to see that, while modern property with its exclusivist character, because of the liberal vision, is being consolidated since the 18th century, the idea of social justice, collective rights and economic rights are also rising and fighting to be consolidated. In other words, the fight of social movements for better working conditions, better education systems, agrarian reform, social security, and other important socioeconomic rights led countries to implement changes that, even though they did not mean deep paradigm shifts, made possible the implementation of a Welfare State.

Such changes, however, would not be possible without a change in the concept of property that started after the First World War. In this new context of intervention in the economy (See section 3.3), the legal structure of the European capitalist states started to undergo significant changes. This was especially seen regarding the exclusive character of property, with constitutions not only allowing, but determining the intervention for the effectiveness of the Welfare State. The conceptualisation of

property gained a collective and social perspective with the addendum of the need to have a social function. The concept of the social function of property is born as a mechanism to impose a limit not only on the content, but also on the extent of property, and consequently a limit to capitalism and its individualism.

According to Eros Roberto Grau (1990: 244), there is no possibility of considering the principle of the social function of property as an isolated element of private property, since, after all, the "allusion to the social function of state property is qualitatively nothing innovative, since it is it becomes dynamic in the exercise of a public function". It is up to the principle of social function, in short, to provide the necessary stability to private property, protecting its legal integrity and seeking to make its existence sensitive to the social impact of the exercise of the powers granted to the owner of the territory/object. The social function of property informs, directs, instructs, and determines the mode of legal concretion of any legal principles and rules, constitutional or infra-constitutional, related to the legal institution of property.

It is noticed that, even considering the social function and the need of a minimum social floor as an agenda of capitalist countries, the patrimonial character of the political and legal culture of developing countries leads to the maintenance of the system that continue to be the exporter of commodities through large plantation. A Constitution, by guaranteeing the right to property, for example, does not exclude the appreciation of other rights such as respect for the environment and human conditions. We cannot separate individual rights from collective rights, just as we cannot separate property rights from social function, or civil and political rights from socioeconomic rights. This means, among other things, that one must interpret rights within a social, legal and cultural framework so one can truly guarantee the human rights all peoples. This description of the conceptual development of economic rights is essential because it provides the theoretical background used to analyse the responses given by the participants and how their interpretations connect with the theories introduced in this chapter.

At least, in theory, there is a predominance of the economic criterion in the content of the social function of property, which should mean the sanctions determined and accepted in the Constitution for distorted and degenerate use, which goes against the Brazilian national legal order. The principle of the social function of property has been

posited by an essential part of the doctrine as a programmatic[53] constitutional norm, perhaps the result of the great controversy that naturally revolves around the legal regulation of private property.

The institutional guarantee of property can give rise to the creation of rights and duties for the individual and society. Article 5, XXIII, expressly declares the existence of the fundamental principle of the social function of property, which is also present in article 170, III, listed among the principles of the economic order. The constitutional principles of the Brazilian order are in article 5th are fundamental constitutional principles, fully effective and binding on the conduct of the individual and the State.

There are no watertight and incommunicable compartments between fundamental rights and guarantees. The law is dynamic and is not linked only to what is expressly exposed in the Constitutional text. As it recognizes in its article 5, § 2, by determining that the "rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and principles adopted by it, or from international treaties to which the Federative Republic of Brazil is a party".

Nevertheless, it will be seen that the legislature, and especially, the judiciary in Brazil, still play an important role in protecting rights with an exclusivist and individualistic character as they were in the 19th century, as well as protecting the status quo of the members of the economic power, and how/why this affects the standing of economic rights.

The social development that occurred during the Industrial Revolution, the rise of Unions and workers revolution, permeated the societies with important collective rights and culminated in the creation and codification of economic rights in the international human rights system (Section 3.4). Yet, it will be seen in later chapters that there is an important difference between what is (what happens in practice) and what ought to be (what should be). This chapter also summarised the birth of neoliberalism, and its austerity driven**,** non-state interventionist policies, after the end of the cold war (Section 3.5).

[53] Programmatic norms will be explained in Section 6.1 of this thesis.

The consequences of the social issue are responsible for expropriating the human condition of the individual, who starts to govern himself pressed by the most atavistic needs, which he cannot satisfy well on his own, nor through the community. Belonging to the community comes to mean little if it does not live to ensure survival, not only the minimum but effective conditions to overcome the lack of assistance it finds itself. The individual is subject to the market, operating the commodification of their existential needs.

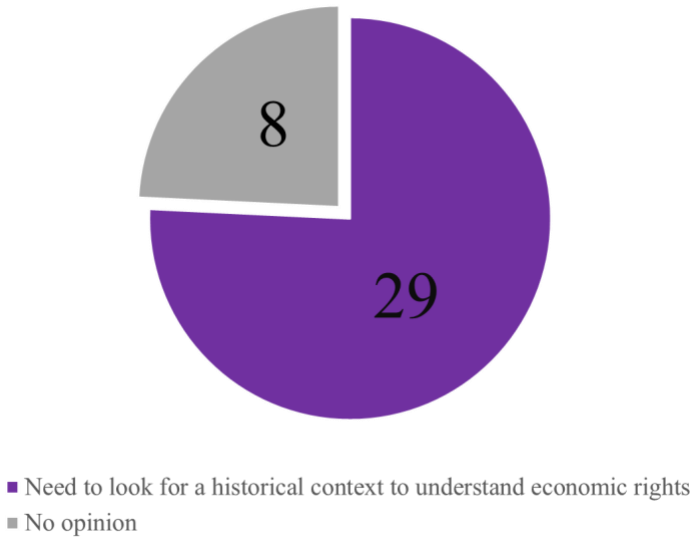
This description of the conceptual development of economic rights is essential because it provides the theoretical background used to analyse the responses given by the participants and how their interpretations connect with the theories introduced in this chapter.

CHAPTER 4: CONDITIONS AND CONTEXT OF ECONOMIC RIGHTS IN BRAZIL

Darcy Ribeiro portrays Brazil as "a melting pot of the Portuguese invader with plains- and forest-dwelling Indians and with African blacks, both groups coerced into slavery" (Ribeiro, 2000: 1). To understand how economic rights are perceived by the participants and, consequently, in the protection and application of these rights it is necessary to first briefly overview relevant Brazilian history. Thus, this chapter sets out the necessary cultural and historical background to understand economic rights in Brazil. These rights have deep historical roots and while understanding the evolution of economic rights may appear to be daunting task, such that it can be difficult to know where to begin, one must look at the entire history for a proper understanding of today's context. Some aspects were already touched upon in some respects in the previous section, but this part will include a variety of historical information in a descriptive way, in accordance with the guiding research questions, theoretical groundworks, and the methodological framework set out in chapter 2.

Accordingly, this chapter marks the first wherein interviews conducted during field research will be referenced and employed. The need to look for historical context to understand economic rights was highlighted in more than half of the interviews (See figure 4.1). This illustrates an interesting and very rare agreement between the three contrasting groups that I interviewed.

Figure 4.1 Participants' Opinion on the Necessity to look for a Historical Context to Understand Economic Rights



Whereas these examples that stress the importance of the historical context are unquestionably selected and narrow, their position is used here to support and validate the decision to begin, albeit short, historical account. How far back one goes is a subjective decision. It would be negligent to not include a brief description, incorporating the necessary historical account that produces the context for all of the analysis that will follow.

Thus, this chapter will be divided into 6 sections. The first part (4.1) will start with the arrival of the Portuguese settlers in Brazil, highlighting the formation of the country and the relationship between the colonisers and the indigenous people. This will be followed by the description of slavery in Brazil and how this affected the understanding of labour in the country (4.2). Section 4.3 explain how institutions and the legal framework were formed in the country, followed by how the military dictatorship affected economic rights in Brazil (4.4). Section 4.5 explains the present context of economic rights in Brazil, showing that there are characteristics from the 1500 that are still part of Brazilian society's cultural expectations. The last section is the empirical analysis of the response to the question of 'what is economic rights?' by the subjects interviewed.

4.1 THE WORLD THAT COLONIALISM CREATED

This section describes how the formation of Brazil was firstly based on the exploitation of the land, the original people, and their resources, followed by how the Portuguese Crown divided the territory into large chunks of lands, giving the ownership to fourteen nobles. Thereafter, this section will describe how the socioeconomic development of the country was based on large plantations and the exploitation of labour work. Throughout the issue of property will emerge as key to understanding economic rights in Brazil, and as we will see this began in 1500. Thus, this section establishes the economic structure of Brazil and shows how this structure was constructed to serve the upper class and foreign interests.

Since its beginnings, Brazil has consistently been described in terms of its beautiful nature and tropical weather. The country was 'discovered' on April 22, 1500. Pero Vas de Caminha, clerk of the Portuguese navy, described the land to the King João as "such a vastness of the enormous treeline, with abundant foliage, that is incalculable (…) Waters are many; endless. And in such a way it is gracious that, wanting to seize it, everything can be farm in it, for the wealth of the waters that it has"[54] and its people as "brown skinned, of a quite reddish complexion, with handsome faces and noses, in such "sculptured" features. They go about naked, without clothing. They do not bother about to cover or to uncover their bodies and show their private parts as readily as they show their faces. In this matter they are of great innocence (…) They only eat this "yam", which is very plentiful here, and those seeds and fruits that the earth and the trees gives[55]" (De Caminha, 1500).

It is impossible to understand Brazil without understanding its economic history, and Brazilian economic history is intimately connected with land and property (see for example Prado Junior, 1981). When the Portuguese arrived in 1500, they took

[54] Original Text in Portuguese: "Arvoredo tanto, e tamanho, e tão basto, e de tanta folhagem, que não se pode calculary(…) Águas são muitas; infindas. E em tal maneira é graciosa que, querendo-a aproveitar, dar-se-á nela tudo, por bem das águas que tem."

[55] Original text in Portuguese: " A feição deles é serem pardos, um tanto avermelhados, de bons rostos e bons narizes, bem feitos. Andam nus, sem cobertura alguma. Nem fazem mais caso de encobrir ou deixa de encobrir suas vergonhas do que de mostrar a cara. Acerca disso são de grande inocência(…) "E não comem senão deste inhame, de que aqui há muito, e dessas sementes e frutos que a terra e as árvores de si deitam. E com isto andam tais e tão rijos e tão nédios que o não somos nós tanto, com quanto trigo e legumes comemos.""

advantage of the abundant resources within the country, represented in the early years of colonisation by the *Pau-Brasil* (*Caesalpinia Echinata*)[56]tree. From the wood of the *Pau-Brasil* tree was extracted a resin of red colour that was used to dye fabrics. The extraction of the wood was the first economic activity of the country[57]. Subsequently, the colonial foundation was based on the tripod constituted by rural property, by the monoculture of a product of wide acceptance in Europe, and by slave labour[58] (Prado Junior, 2012). Jerry Mataluê, representative of the Pataxó tribe, describes this initial process as:

> (...) We are a country colonized by the Portuguese who came here to do a process of economic exploitation, were expanding their economy and came here to find raw materials. (...). Also, in the views of the native inhabitants, the tribes never wanted to teach (the Portuguese) a language, they didn't want to impose their culture, they didn't want to be the head of the non-indigenous group, they didn't want it. Thus, they initially had a condition of resistance, refusing to participate in it.[59]

It is important to highlight that a great part of indigenous population died of European diseases, while other native tribes were assimilated by the Portuguese[60]. The ones that did not accept were enslaved or died fighting for their freedom[61] (See table 4.1). The tribes that occupied Brazil were different from the Aztecs, Mayans, and Incas, as they

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[56] That's where the name Brasil came from. When the Portuguese first arrived, they named the land Ilha de Santa Cruz, then Terra de Vera Cruz and in 1505 Terra do Brasil. Terra de Santa Cruz was a homage to the first mass held in the land. The first name was associated to the church, the last to the market, as the pau brasil tree was a commodity. The indigenous name was Pindorama (Ribeiro, 2000).

[57] The exploration of the tree was an easy activity for colonisers, both because of the abundance of the tree throughout the coast and because of indigenous slave labour, recruited at the expense of violence and product exchanges, Pau-Brasil extraction was the best alternative for the exploration and later colonization of the newly discovered land. The exploration was so vast and uncontrolled that the tree was almost extinct and today it is a rarity (Prado Junior, 1981; Buarque de Holanda, 1995).

[58] This concept will be highlight during various interviews.

[59] Original reply in Portuguese: (...) a gente é um país colonizado pelos portugueses que vieram aqui fazer um processo de exploração econômica, estava expandindo a sua economia e vinha aqui buscar matéria prima. (...). Também nas origens dos indígenas, os indígenas nunca quiseram ensinar uma língua, não quiseram impor sua cultura, não quiseram ser o chefe do não índio, não quis isso, então ele teve uma condição inicialmente de resistência se recusando em participar disso né.

[60] The Portuguese tried to convert the indigenous population into Catholics. To read more about the theme see (Vieira, 1998)(CIMI, 2019b)

[61] According to data published by Funai (Fundação Nacional dos Índios), the indigenous population in 1500 was approximately 3,000,000 inhabitants divided among 1,000 different tribes. In 1650, that number fell to around 700,000 natives. The current Brazilian indigenous population is 817,963 For more information see Funai, "*Quem são*" [Who they are] (FUNAI, 2010).

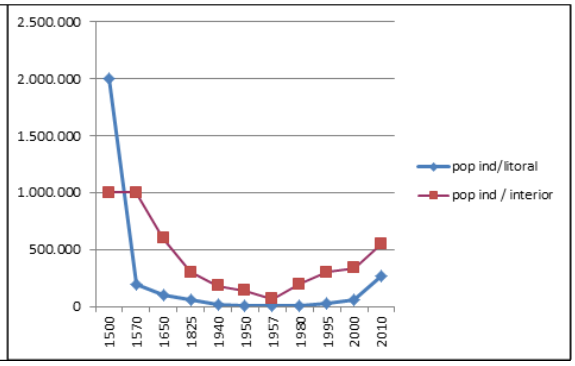
were not considered as "social" and "economically developed"[62]. While the former were seen as large and developed tribes with complex social systems, the latter were nomads and small tribes, that in the beginning exchanged their work for Portuguese artefacts such as mirrors and clothes. That does not mean that they were naïve or innocent, they were just curious beings that were confronted with this new reality.

Table 4.1 Demographic data of Indigenous Population in Brazil

Dados demográficos da população indígena no Brasil

ano	pop ind/litoral	pop ind / interior	total	% pop total
1500	2.000.000	1.000.000	3.000.000	100,00
1570	200.000	1.000.000	1.200.000	95,00
1650	100.000	600.000	700.000	73,00
1825	60.000	300.000	360.000	9,00
1940	20.000	180.000	200.000	0,40
1950	10.000	140.000	150.000	0,37
1957	5.000	65.000	70.000	0,10
1980	10.000	200.000	210.000	0,19
1995	30.000	300.000	330.000	0,20
2000	60.000	340.000	400.000	0,20
2010	272.654	545.308	817.962	0,26

Fonte: Azevedo, Marta Maria. 2013



Source: Azevedo, Marta Maria (2013)

As demonstrated by the table above, for the first seventy years after the date of colonisation, the number of indigenous people fell more than 50%. Today, the original inhabitants of the land only represent 0.26% of Brazilians population, and today they still are trying to defend their lands. As was already highlighted, the issue of land will be discussed through the thesis by the participants.

After the 'discovery' Brazil was divided in 14 hereditary captaincies[63](Salvador, 1918; Prado Junior, 1981; Bethell, 1987; Buarque de Holanda, 1995) (see figure 3.3). This was a system of territorial administration for Portuguese America. The captaincies were bestowed to grantees who enjoyed great privileges and sovereign powers. That meant that they were allowed to do whatever they wanted, from appointing the administrative authorities and judges in their respective territories, to the distribution of lands and the charge of taxes. In return, the Portuguese Crown would receive tariffs[64] from their exploitation. The possessor of the captaincies would also be responsible for the

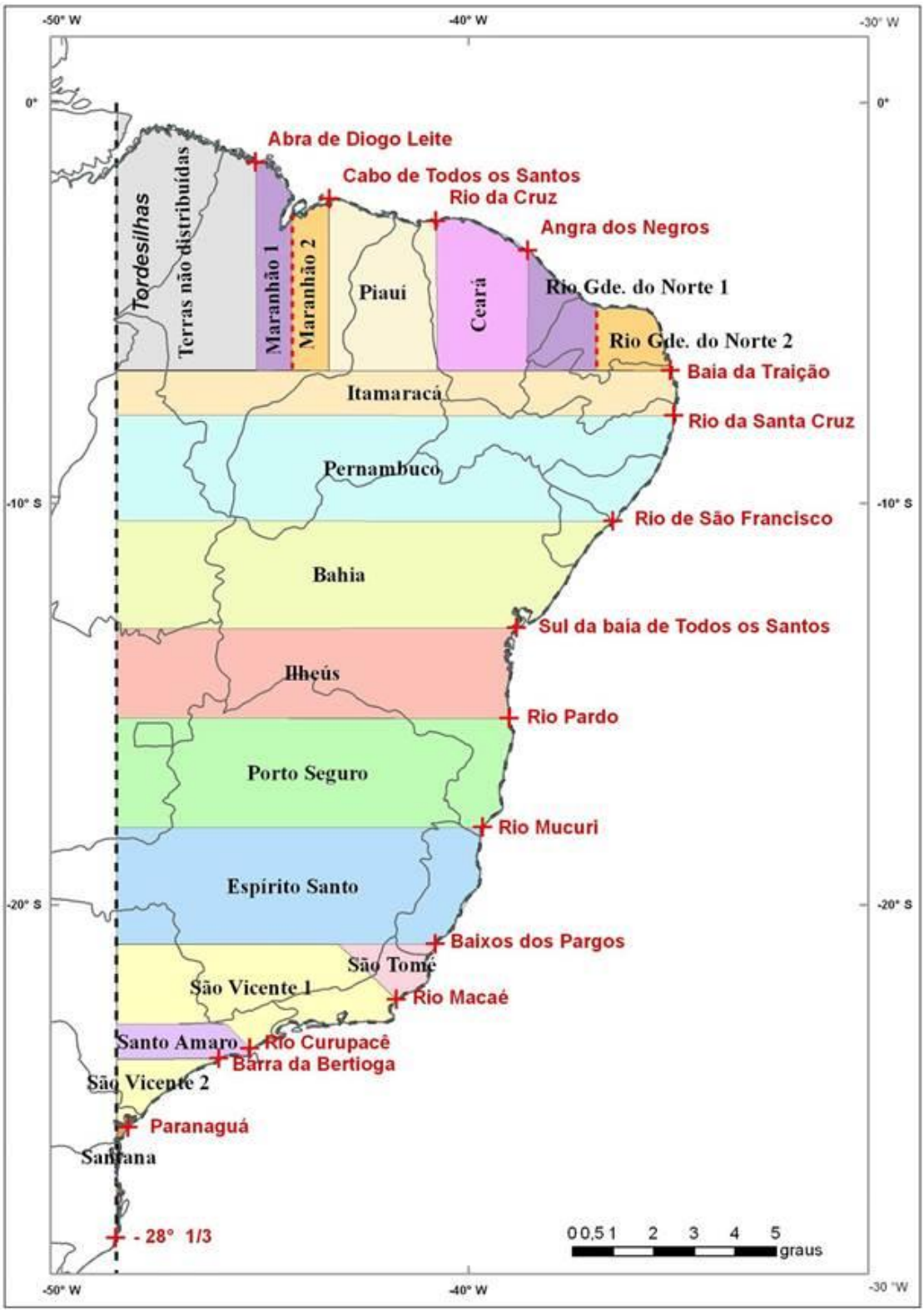
[62] By western standards. It is very hard to understand the structure of the tribes in the Brazilian region because most of its history is unknown and the quantity of different tribes with different culture and structures are huge(Ribeiro, 2000).
[63] The captaincies were created in 1534 and the beneficiaries were the lower nobility of Portugal, and the captaincy passed from father to son, that is why it was called hereditary.
[64] 10% of captaincy production.

expenses of transportation and establishment of settlers (Prado Junior, 1981, 2012; Bethell, 1987; Buarque de Holanda, 1995, 2000; Schwarcz and Starling, 2016) . The interviewees made a direct connection between the distribution of land in the country and this historical point[65].

It is on this basis, therefore, that the effective occupation and colonisation of Brazil began.

[65] This point of discussion will be highlighted in other parts of the thesis.

Figure 4.2 Hereditary Captaincies at the time of its creation (1534-1536)



Source: *Jorge Pimentel Cintra* (Cintra, 2013, 2015)

The objective of these captaincies was to preserve the land for Portugal[66] and lay the foundations of colonisation. The consequence of this process has had a great impact on the comprehension of economic rights, as will be shown in section 3.3. This colonial foundation was based on a tripod constituting rural property, the monoculture of a product of wide acceptance in Europe and slave labour (Prado Junior, 1981) . During his interview, Jerry Matalue states:

> "We have to understand that in Brazil there is a relativity and a subjectivity for a lot of things, not for property, not for this idea of who owns things and this idea of ownership. Look at the idea of the hereditary captaincies themselves: it had an owner. Then when it came to creating land distribution policies in Brazil, once again, the idea of giving ownership to someone knowingly that these lands were from indigenous people, that they had people there and did not consider it."[67]

As it was the 16th century, the idea of ownership in the captaincy was connected to the medieval era, where nobility were landholders of the land and everything in it. Thus, they were responsible for the economic exploitation in a monopoly regime. Yet, it is important to highlight that at that time, it was challenging to find individuals who wanted to move to the new colony. Even in the sixteenth century, Portugal was a small empire with only 1.2 million inhabitants (Oliveira, 2015). That means that even in Portugal there were unoccupied lands, and so it was almost impossible to find people who wanted to move out of the country to a colony, which at that time was underdeveloped compared to European and Asian cities.

This is one of the reasons why the type of colonisation in Brazil was different from other parts of the America continent: there were not individuals available and willing to emigrate at any price. Thus, the Portuguese settler would not bring with him the willingness of his physical work, he only would come as the possessor of the production of great commercial value, as the holder of a profitable business; others would work for

[66] During this period, the Portuguese and Spanish empire were fighting for the ownership of the lands in the 'south'.

[67] Original answer in Portuguese: 'A gente tem que entender que no Brasil existe uma relatividade e uma subjetividade para muita coisa né, não para a propriedade, não para essa ideia de quem é o dono das coisas e essa ideia do dono. Olha a ideia das própria capitanias hereditárias: tinha um dono, depois quando vem criar políticas no Brasil de distribuição de terras mais uma vez a ideia de dar dono para alguém sabendo que lá tinha indígenas, que lá tinham pessoas e não consideravam isso.'

him[68] (Leroy-Beaulieu, 1874; Prado Junior, 1981). In other words, for every landlord there would be many subordinate and landless workers. This characteristic is crucial with regard to the research since it is a feature that reinforces the tendency and values within society and would come to enforce the culture of exploitation within Brazil, which, as will be seen throughout the empirical analysis, is still present today.

With the disappearance of the *Pau-Brasil* tree and the arrival of the Portuguese colonisers, the history of Brazil's colonial origins continued with the economic monoculture of sugar cane. Sucrose was a very valuable commodity in the 16th century, and therefore became the primary product of Portuguese America for two hundred years. Whilst the extraction of *Pau-Brasil* had been nomadic in nature, with Portuguese merchants disembarking on the coast only to load all their cargo[69], sugar cane presented a different economic and territorial outcome. The stability and regularity of plantation was instead instituted, resulting in settlements and the establishment of plantations (Prado Junior, 1981, 2012; Schwartz, 1987; Buarque de Holanda, 1995, 2000; Schwarcz and Starling, 2016).

The organisation of the sugar cane plantation system was very simple (see figure 3.4); the landlord lived with their family in the *Casa Grande* (main house of the plantation), whilst found nearby was the *senzala* (house of slaves). The sugarcane mill was placed near the river, with storehouses built around the *Casa Grande.* A significant part of the land would be covered by the plantation and around these territories there would be small properties. These small properties were distributed among the settlers by the captaincy possessor and they would provide the main house with food from their farming[70] (Schwartz, 1987). This plantation system was built not only around a social factor - hereditary captaincies- but also had economic motivations as sugarcane cultivation could only function within a large property. At this time, it was only profitable when performed in large volumes. Thus, the subsistence of the small proprietor under these conditions was impossible. This way, Brazil became a territory

[68] There is a distinction between settlers heading to the temperate zone of America and those heading to the tropics. For more information about this topic see Turner (1921) and Leroy-Beaulieu (1874).
[69] The crown charged dues for its exploitation (Prado Junior, 1981).
[70] The type of farming produced in these small properties were established to provide consumer goods to the main house. It was not something made to export, they were produced only to satisfy the local market within each captaincy territory (Prado Junior, 1981).

where a minority group of individuals, with sovereignty and autonomous power, were the owners of a vast portion of lands, most of which were bigger than Portugal itself. It is these contexts that defined the type of agrarian exploitation adopted in Brazil: large property.

Figure 4.3 Plantation Structure

Source https://www.bahia.ws/engenho-de-acucar-no-brasil-colonial/

The hereditary captaincies came to an end thanks to their inability to generate profit[71], with only two such territories being financially viable[72]. In 1548, King João III created

[71] The reasons for this were many, from mismanagement of the territory, to the inability to find settlers, climate and the lack of nutrients in the soil to produce sugar cane. See Prado Junior (1981) and Schwarcz, and Starling (2016).
[72] The captaincy of Pernambuco and São Vicente(Linhares and Cardoso, 2000).

the General Government (*Governo Geral*), an administrative model based on the centralisation of colonial organisation in a governor who was responsible for the administration of the entire colony[73]. It is possible to notice a pattern that would be present throughout Brazilian socioeconomic history, the concentration of power in the hands of few.

With the competition from sugar cane plantations produced in the Dutch Antilles, export levels began to fall, and settlers started expeditions inside the country with the aim to find gold and silver[74]. Correspondingly, the locus of power moved from the northeast to the southeast of the country, with the change of economic configuration from production of a monoculture (sugar cane) to extraction of gold. The Crown quickly set up an administrative system that reconciled mine extraction and tax collection[75]. Although there was a change in the form of exploitation, the social and political power mainly stayed the same. The framework of the landowners of the mines was practically the same as the *Casa Grande-Senzala* configuration: there was an individual who possessed a large territory (mines), the slaves, and small group of individuals that worked to provide food and other things to these large properties. (Prado Junior, 1981, 2012; Fausto and Fausto, 1994; Buarque de Holanda, 2000; Schwarcz and Starling, 2016).

The gold rush happened between the end of the 17th century through to the end of the 18th century and was responsible for the of the growth of the metropolitan population of the country (Russel-Wood, 1987). During this period the first major Portuguese migration to colonial Brazil took place (Fausto and Fausto, 1994) as individuals flooded into the land looking for gold. It is important to highlight that while Colonial Brazil was going through this process, liberalism and Enlightenment ideas were starting and growing in Western societies. While the main liberal discourse of freedom and the social contract would only be instigated in the country in the 19th century as a motivation for liberation from colonial rule, it was during this period that for the first

[73] The new government was located at the Baía de Todos os Santos territory, where the first capital of Brazil was established: São Salvador da Bahia de Todos os Santos (*Ibidem*).
[74] Another aim of these explorative missions was to search for runaway slaves and indigenous people to use their slave labour in various daily activities (*Ibidem*).
[75] The Crown had imposed a heavy tax on mining: a fifth of all gold mined should be given to the Portuguese Monarchy (*Ibidem*).

time the elites (mining) began to design a strategy with the objective of creating a new republic in the region of Minas Gerais[76]. This discontent on the part of the elites happened due to the high taxes charged by the Portuguese Crown. Therefore, influenced by American independence and the French Revolution, the wealthier classes together with priests, poets, and paid workers, began an insurrection to eliminate the Portuguese domination of Minas Gerais and create a new and independent country. There was no intention to liberate the entire Brazilian colony because at that time a national identity had not yet been formed. (Prado Junior, 1981, 2012; Fausto and Fausto, 1994; Buarque de Holanda, 2000; Schwarcz and Starling, 2016)

Another important discussion started at that time was regarding the abolition of slavery by part of the insurrectionaries. Needless to say, the elite was not in favour of this development since most workers in the mines were slaves. The insurrection was dismantled due to the betrayal of one of its members and the defendants were charged with the crime of *Lèse-majesté*[77]. Only one of the insurrectionaries was sentenced to death[78]. Like the *Pau-brasil*, the extraction of gold in the Minas Gerais region was brutal. With an archaic model of mining and an uncontrolled and ruthless form of exploitation, the gold rush was over by the end of the 18th century and the colony was once more faced with recession.

The revival of agriculture occurred with the introduction of coffee[79] in the 18th century in the southeast region, around the Vale da Paraíba[80] territory. Again, coffee production was based on economic plantations and the social infrastructure was the same as the *Casa Grande-Senzala*. One key transformation to this dynamic occurred with the abolition of slavery[81] in 1888 and the arrival of immigrants to work in the coffee plantations. This topic will be further discussed in the next section. However, at the start of the 20th century, crises of the coffee cycle began. By then Brazil would already be an independent country, but its society was already impregnated with regressive

[76] This separatist insurrection was called *Inconfidência Mineira*.
[77]It is a violation against the dignity of a reigning sovereign.
[78] Joaquim José da Silva Xavier was dentist and a political actor. He was one of the members of the lower class in the Minas Gerais insurrection(Linhares and Cardoso, 2000).
[79] The American Independence stimulated Brazilian coffee production since the Northern Hemispheric country avoided at all costs buying products from his former metropolis(Prado Junior, 1981).
[80] This region covers part of the state of São Paulo and Rio de Janeiro.
[81] *Lei Áurea* - Officially Imperial Law No. 3,353, sanctioned May 13, 1888.

values constructed on exploitation, big properties, and slave/cheap labour. Industrialisation only arrived in Brazil in the beginning of the 20th century. By then, western countries were already going through the end of the second phase of Industrial Revolution and were discussing social and economic issues discussed in the previous sections.

Another consequence of this economic structure that is important to highlight is the hunger issue. Despite having a quantity of land that could be distributed and used in a more egalitarian form that could provide food for everybody, individuals not part of the wealthier class lived in a chronic state of malnutrition. During colonial times, for example, everything that they produced was furnished to the upper class as way to pay for the renting of the land. Caio Prado (1981: 41) explains as "on the one hand, wealth, prosperity and great economic activity; on the other, the lack of satisfaction of the most basic need of the majority of population: hunger"[82].

This dichotomy between the satisfaction of basic needs and the greed of the wealthy and thus the eternal presence of social and economic inequality underpins the construction of Brazilian socioeconomic society. Furthermore, this dichotomy has had a great impact on how economic rights were to be applied in Brazil, since the members of the institutions that are supposed to protect and apply those rights are part of the elite and do not have the will to use them to their fullest effect.

Caio Bandeira emphasises this aspect in his interview by stating:

> "Brazil was not designed to distribute anything; it was designed to concentrate. The idea of *sesmarias*, for example, was that you divide Brazil into huge hereditary captaincies. There is, the largest percentage of land and power concentrated in the hands of few. Thus, the idea of economic construction is the idea of denial of right. I need to deny rights to maintain the concentration of income."[83]

[82] Original text in Portuguese: "Se não, não se explicaria este quadro característico da vida colonial: de um lado abastança, prosperidade e grande atividade econômica; doutro, a falta de satisfação da mais elementar necessidade da grande massa da população: a fome."

[83] Original reply in Portuguese: "O Brasil não foi concebido para distribuir nada, ele foi concebido para concentrar. A ideia das sesmarias, por exemplo, as sesmarias era isso né, você divide o Brasil em enormes capitanias hereditárias. A maior porcentagem de terras e concentra o poder e concentra a parcela territorial, então ainda se permanece né, a ideia da construção econômica ainda é a ideia da negação né.Eu preciso negar direitos para manter a concentração de renda."

The Brazilian economy is constituted in the power of large property and the plantation system, on socioeconomic inequality and on the back of slave and cheap labour. The comprehension of economic rights and how axiologically the relationship is conceived it is intrinsic to this economic context construction. What effectively anchors and conditions the entire socioeconomic structure of the country is the basic economic structure of an export-producing colonial country that was organised not to meet its peoples' own needs but to serve upper class and foreign interests.

4.2 SLAVERY AND EXPLOITATION IS OUR CRADLE

This segment describes and analyses the role of slavery and labour in the construction of Brazilian society and how its peculiarities are vital to the comprehension of economic rights in Brazil and, therefore, the lack of protection and effectiveness they provide. The first part of this subsection will illustrate how slavery started in Brazil, first with the indigenous people followed by the arrival of Africans. Subsequently, it will show how the international context affected the abolition of slavery and arrival of immigration labour. This section underscores how labour was developed within Brazilian society.

With a vast and virgin territory to explore, a lack of sufficient labour and settlers, and the need to develop new forms of income, the Portuguese Crown eventually turned to its African colonies and its inhabitants as a solution. But first, they tried to enslave the native people of the land. Unlike other tribes in América, the native communities[84] in Brazil were mainly nomadic (Prado Junior, 1981). They would explore the environment around and move once they thought necessary. During the earliest phases of colonisation, they would trade their work for objects. But as time went by, the interest of indigenous people to exchange their work for insignificant objects decreased[85] which

[84] Gabriel Soares de Souza (1540-1591), Portuguese explorer and naturalist, described indigenous societies by what he thought they lacked: no faith, no law, no king. See Monteiro (2001).

[85] As Caio Prado Junior (1981: 32) explains "indigenous, with nomadic nature, had done more or less well with the sporadic work from the extraction of Pau-Brasil, the same was not true of the discipline, methodical and rigorous work of a methodical and sedentary activity such as agriculture. Gradually it became necessary to force them to work, to keep a close watch and to prevent the escape and abandonment of the task in which they were doing. Translated by me. Original text: *Se o índio, por natureza nômade, se dera mais ou menos bem com o trabalho esporádico e livre da extração do pau-brasil, já não acontecia o mesmo com a disciplina, o método e os rigores de uma atividade organizada e sedentária como a agricultura. Aos poucos foi-se tornando necessário forçá-lo ao trabalho, manter vigilância estreitasobre ele e impedir sua fuga e abandono da tarefa em que estava ocupado*.

caused the Portuguese to hunt them. Although the Jesuits[86] wanted to convert them, in 1570[87] the Portuguese Crown introduced the first law about indigenous people in Brazil, establishing the right to enslave them regulated by a 'just war'. 'Just war' meant that they could be enslaved in the cases of aggression of natives against the Portuguese, or tribes who refused to submit to the settlers or enter into agreements with them[88].

For the indigenous people who refused to live in the colonial villages, war or slavery was the only option. The natives defended themselves valiantly and tried to move inside the continent to escape being captured[89]. The indigenous dispute that started in 1500 and the resulting friction was never resolved in Brazil. The fight for recognition and the protection of indigenous property and the accompanying socioeconomic consequences and disputes shape Brazilian society until today. One example of this is how indigenous Amazonian residents are still today hunted and killed today for trying to protect the forest and their homes (APIB, 2019; Boadle and Benassatto, 2019; Goodman, 2019). According to the report "Violence against Indigenous Peoples in Brazil" the number of indigenous murders grew by 20% in Brazil in 2018, and from January to September 2019 CIMI pointed to a 40% increase in cases of invasion and illegal exploitation of indigenous lands (CIMI, 2019b, 2019a).

In the end of the 16th century the Portuguese started to smuggle (see table 3.2) Africans to replace indigenous labour[90] (Schwarcz and Starling, 2016). Much like the *Pau-Brasil* tree and the sugar cane, Africans were seen as commodities by Europeans, something that they could own and sell, exploit, abuse and replace. As with any product, they were documented at the ports' entry and exit points, and taxes were collected on them.

[86] The project was to bring "souls to Christendom". See Vieira (1998, 2016).
[87] Carta Régia de 1570.
[88] This law was only completely abolished in the mid of 18th century.
[89] This is one of the reasons why Brazil grew in size. Individuals would travel further and further inside the continent to capture indigenous people.
[90] Indigenous slavery faced strong opposition from the Jesuits. The Jesuits were a powerful religious order in charge of catechesis in the colony.

Table 4.2 Trans-Atlantic Slave Trade - Database

Trans-Atlantic Slave Trade - Database								
Year Range	**Europe**	**Mainland North America**	**Caribbean**	**Spanish Mainland Americas**	**Brazil**	**Africa**	**Other**	**Totals**
1501-1525	624	0	683	0	0	0	0	1,307
1526-1550	0	0	6,810	14,926	0	0	1,516	23,252
1551-1575	0	0	9,998	35,841	388	0	0	46,227
1576-1600	266	0	19,888	159,811	597	399	36,225	217,186
1601-1625	449	0	15,759	196,979	1,670	0	10,706	225,563
1626-1650	0	0	12,453	104,260	38,779	240	7,382	163,114
1651-1675	1,306	1,675	123,835	24,100	8,199	3,595	5,883	168,593
1676-1700	1,116	10,474	327,414	17,248	82,202	207	8,122	446,783
1701-1725	377	39,729	480,938	40,654	237,067	1,063	16,792	816,620
1726-1750	3,962	98,682	684,317	15,792	420,804	589	40,977	1,265,123
1751-1775	1,151	122,638	1,117,699	2,589	351,687	1,403	26,111	1,623,278
1776-1800	18	23,829	1,158,551	12,993	454,392	2,095	12,579	1,664,457
1801-1825	0	65,582	546,556	28,930	1,037,451	34,933	20,941	1,734,393
1826-1850	0	585	363,893	3,849	876,467	105,289	15,256	1,365,339
1851-1875	0	2,409	190,555	0	9,798	19,186	0	221,948
Total	9,269	365,603	5,059,349	657,972	3,519,501	168,999	202,490	9,983,183

Source: The Trans-Atlantic Slave Trade Database

According to the Trans-Atlantic Slave Trade Database [91], almost 3.6 million Africans were brought as slaves to Brazil. During 1501 to 1875, 35% of the slave trade in the Americas was destined for Brazil. In comparison, during the same period, approximately 365,603 slaves disembarked in the United States, or 3,6% of the slaves shipped to the Americas. The slave trade proved as lucrative as sugar cane. Like indigenous people, Africans slaves also tried to escape their owners. The difference was that the indigenous people knew the land and the territory and knew how to survive the environment, thus they were more successful in staying free. Yet, some African slaves managed to establish important communities in Brazil. These communities were called *quilombos*. *Quilombos*[92] were described by the Portuguese as a group of black runaways (more than five) that created autonomous and illegal communities. For the slave, the *quilombo* was a form of rebellion against the system where they could live freely.

Understanding the *quilombo* is essential as it is also connected to the development of the right to property. Throughout time, the black movement mobilised politically to obtain recognition of these lands. This only happened with Article 68 of the Transitional Constitutional Provisions Act (ADCT) of the Brazilian Constitution of 1988 that

[91] See Database, T.-A. S. T. (n.d.).

[92] The most famous quilombo in Brazil was Palmares. It emerged in the late 16th century and at one point had almost 20 thousand inhabitants. The Quilombo dos Palmares was located in the territory of the captaincy of Pernambuco. It was destroyed in 1694 and its leader, Zumbi, was killed in an ambush. See Albuquerque (1978) and Reis and Gomes (1996).

established that "The remnants of the *quilombo* communities occupying their lands are recognized as definitive proprietor, and the State shall issue them with their titles[93]" (Brasil, 1988). Thus, the objective was to provide this ethnic group with access to property rights since they were never incorporated into the legal formalisation process and division of the land[94]. Today there are more than three thousand *quilombola* communities in Brazil fighting for their right to property (Palmares, 2019).

As was established in previous sections, Brazilian society was built on the back of slave work. Although the country suffered from foreign pressures since the early 18th century, the government nonetheless tried to delay the abolition of slavery due to pressure from landowners and the majority of the elite class. Instead, they created a set of laws which were informally characterised as happening only for "Englishmen to see" (*para inglês ver*), or in other words, for the purposes of appearing as acquiescence to foreign demands without validity. Thus, Brazilian authorities pretended to give in to pressure from England, taking staged actions "for Englishmen to see" to combat the African slave trade. However, international scrutiny had great influence in the eventual abolition of Brazilian slavery.

The *Lei Áurea* (Golden law) was adopted on 13 of May 1988 establishing the extinction of slavery in the country[95]. Overnight millions of people found themselves lacking food, shelter, and work. The Brazilian government did not create any plan to help the transition of the slave population to citizenship. As such, some slaves asked to remain in the farms, exchanging their work for food and shelter. Remaining in the jobs meant, in part, that they were subjected to the same or worse conditions they had endured under

[93] Original text: Artigo 68 do o Ato das Disposições Constitucionais Transitórias: "Aos remanescentes das comunidades dos quilombos que estejam ocupando suas terras é reconhecida a propriedade definitiva, devendo o Estado emitir-lhes os respectivos títulos."

[94] The respect and protection of this right started a debate of what is a quilombo. According to the Brazilian Association of Anthropology (ABA), *quilombo*" … consist of groups that have developed resistance practices in maintaining and reproducing their characteristic ways of life in a given place." Thus, it comes from a common ancestry, forms of political and social organisation to linguistic and religious elements. What characterised the *quilombo*, therefore, was not isolation and escape, but resistance and autonomy. See Comissão (2019) e Boyer (2011).

[95] Before the adoption of the *Lei Aurea* abolishing slavery, Brazilian government promulgated two abolitionist law: 1) Lei do Ventre Livre (1871) – that considered free all the children of women slaves born from the date of the law; 2) *Lei dos Sexagenários* (1885) - which ensured freedom for slaves 60 years of age and older. The slave owners should be compensated, and compensation should be paid by the now free men. Therefore, he was required to service his former master for a further three years or until he is 65 years old.

slavery. Those who did not maintain the ties with their 'owners' were practically extinguished on the market. It was necessary for them to move to a situation at the margin of the society. Hence the distinctions drawn by Engels (Marx and Engels, 2008: 107) between the situation of the proletarian and the slave. As individual property, the slave has their existence, however miserable, ensured by their owner. That meant being considered an object. The proletarian, however, was the 'property' of the bourgeois class. They were a commodity in the form of their own labour, selling it for their subsistence, and as such subordinated to competition laws. The proletariat personality and membership in society were formally recognised. The slave would fight against his personal appropriation, while the proletarian revolted against private property.

After the abolition of slavery, landowners first tried to use immigrant labour in the plantation[96]. They needed 'hands' for labour on the farms, thus closely linking the issue of European immigration to that of slavery. Also, the racial issue was influential in immigration policy since the government wanted white European families to settle in the country and did not want an increase in the "Africanization" of Brazil (Luz, 2013). As has been shown, Brazil was formed in the language of slavery and colonial structure and thus the first wave of immigrants who arrived in the country also suffered from this arrangement. The landowners, accustomed to dealing exclusively with slaves, treated immigrants as servile, and had no regard for them as free workers. They were inspected and their time controlled, with bells marking the beginning and end of the workday. There was physical violence, including the use of a whip, resembling the violence committed against slaves.

Employment contracts signed by the immigrants were generally written for the sole benefit of the employer and in plain bad faith. They were signed in Europe before the workers embarked on their journey to Brazil, completely unaware of the environment and circumstances of the country into which they were moving[97]. Immigrants had no prospect of obtaining legal protection, as they were not citizens, and the landlord was

[96] Most of these immigrants were Italians who began to migrate significantly to Brazil from the 1870s. They were driven by the socioeconomic transformations underway in Italy. See Trento (1989).

[97] Upon arriving at the farm, the immigrants were faced with the terrible conditions that awaited them. Farms were far away from urban centres, isolated for hours, sometimes days, without medical access, far from churches, with rare to no access to school. A lot of them lived in the *Senzala*, having to sleep on straw without any conditions or hygiene.

rarely punished by the authorities for his abuses, encouraging the continuation of his behaviour. There were also economic abuses, established by the confiscation of products, the withholding of wages, and the application of exorbitant fines for futile reasons. Landowners used migrants' debt as strategy to keep them tied to the farm and prevent their departure (Trento, 1989). The labour conditions were so bad that the Italian government created a decree restricting immigration of Italian citizens to Brazil[98]. Over time, landlords who were already experiencing labour shortages relied more and more on the European immigrant[99]. Thereafter, they started to value immigrant labour more highly and treat them according to their condition as free individuals (Prado Junior, 1981).

These three different groups – indigenous, Africans and immigrants – were exploited throughout different periods of Brazil history, demonstrating the centrality of modes of exploitation to the establishment of the Brazilian economy. This characteristic is vital to understanding economic rights in Brazil and the lack of protection and effectiveness. Even today there remains slave labour within the country (See figure 3.5). The majority of the population are still being exploited and the labour protection floor created in the 1930s and further developed in the 1988 Constitution is being destroyed, violating article 2 of the International covenant of economic, social and cultural rights in the name of austerity, investment and better economic prospects.

[98] Prinetti Decree, March 1902.
[99] The immigration system had more success in the south, where there were no large plantations and settlers were given small land parcels to live on.

Figure 4.4 Number of Workers Released from Slave-Work per Year (1995-2014)

Source: Global Slavery Index Organization

4.3 THE ELITIST PACT AND ITS SYMBOLIC VIOLENCE

The previous two sections demonstrated how the organisation of property and labour were constructed in the country. In this section, the focus will be on law and institutions. Thus, the first part will describe how Brazilian institutions are organised, focusing on the legal framework. Hence, this subsection will emphasise the Brazilian Constitutions and how they have organised institutions and presented different economic rights over time. To understand economic rights in Brazil it is also important to highlight the Brazilian legal framework.

As was shown in the two previous subsections, Brazilian political and socioeconomic construction was dominated by the power of sectarian groups led by the merchants of *Pau-Brasil*, followed by landowners, Jesuits, gold miners and so forth. Karl Marx argues that the form of political economy that one given society adopts, and the way production, exchange, and distribution are organised have massive ramifications in almost everything we do (Marx, 1999). This is seen not only in what kind of jobs one can get, how much money one can make, what happens to those who are left behind, how these things are organised both locally and globally, but also what kinds of ideas one finds plausible. Thus, the kind of ideas and reform projects that we think are reasonable and choose to pursue are affected by the macro-arrangement of how we are politically organised (Marx, 1999).

Like the Brazilian economy, Brazilian society is organised along patriarchal and patrimonial values to privilege certain kinds of groups. Senator Regina Souza highlights what these values stand for in her view. She says:

> "But here when it comes to economic power is the power of the rich. (...) It is to maintain the power of the rich, it is to maintain the hegemony of the powerful, of those who always had and still want to have more than everyone else and for that it is worth anything (...) economic power is the judiciary, it is communication, is large properties. It is these people who were and are always hegemonic. In politics there is also hereditary captaincies. You can look, the (political) mandates are inheritance, they only come out when there is another (family member) in the system to take office."[100]

Almost half of the federal deputies elected in 2014 were political heirs. They were elected thanks to the political capital of direct relatives who already held an elected office. In the Senate, the proportion was even higher: six out of ten senators were part of family clans (Schoenste, 2014). Lauren Shoenste, representative of the NGO *Transparência Brasil* highlights that "the transfer of power from one generation to another within the same family is a way of keeping the worn-out traditional figures on the political scene as a way of perpetuating archaic political practices that ensure the defence of the interests of certain local groups and make changes difficult[101] (Schoenste, 2014)." According to a preliminary survey of the Inter-Union Department of Parliamentary Assistance (*Departamento Intersindical de Assessoria Parlamentar*), those numbers grew in the 2018 elections (DIAP, 2018). Thus, individuals holding offices can change but the surnames remain the same.

This has been the practice since Brazilian became an independent country. Brazilian independence occurred on September 7, 1822[102]. With independence, the whole

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[100] Original answer in Portuguese: 'Mas aqui quando se fala em poder econômico é o poder dos ricos. (...) É manter o poder dos ricos, é manter a hegemonia dos poderosos, dos que sempre tiveram e continuam querendo ter mais que todo mundo e pra isso vale qualquer coisa (...) o poder econômico é o judiciário, é comunicação, é latifúndio. É esse pessoal que sempre está hegemônico né. Na política também tem capitanias hereditarias. Pode olhar, os mandatos são herança, só sai quando tem outro na forma para assumir.'

[101] Original text in Portuguese: "A transferência de poder de uma geração a outra de uma mesma família tanto é uma forma de manter no cenário político figuras tradicionais já desgastadas – muitas das quais chegam a ser rejeitadas pelas urnas – como uma maneira de perpetuar práticas políticas arcaicas, que garantem a defesa dos interesses de determinados grupos locais e dificultam mudanças."

[102] Brazil has unique case of colonialism in the world because it was the only colony that became a kingdom since the Portuguese Court was transferred to Brazil in 1808. The arrival of the Portuguese Crown meant that for the first and only time in history a colony was hosting a European Court. In other

structure that came from three centuries of colonial formation was transformed: after years of colonial monopoly over foreign trade and other economic privileges there was a shift in political and social privileges, highlighted by the administrative and legal framework of the country. While in Euromerican society this change happened in the 17th century, in Brazil it occurred two centuries later. Yet, in this section one will note that the Brazilian transformation happened in a very peculiar form: while there was change regarding a new model of government, the socioeconomic structure continued the same. That is, even though the model of government was new the people in power were the same, the economic structure was the same, and consequently nothing significant changed.

Brazilian Constitutions are intertwined by the transformation and important historical events and doctrinal development that occurred in both the country and the world since the seventeenth century. Throughout its brief history, Brazil has had seven different Constitutions, the first one promulgated in 1824 by Brazilian Emperor Pedro I. Over the years the country has tried to build a constitutional framework that mirrors other western countries, especially the United States and France. As was mentioned in previous sections, enlightenment ideals were used as narrative for Brazilian independence and the creation of a new nation. Yet, it is possible to infer that even today, after two centuries of constitutional history, the ideal of the rule of law built on the premises of liberty, social justice and the separation of power is still an unfinished project. This has great impact on the effectiveness of economic rights since the cultural expectations of society are still embedded in an unjust structure. One of the reasons for this is that rights, in general, serve the interest and the narrative of those who hold socioeconomic power. Thus, analysing the legal framework of Brazil since its first Constitution is vital to understanding the relationship between economic rights and institutions.

As already mentioned above, the first Brazilian Constitution was promulgated on the 24th of March 1824. In contrast to the European model of constitutionalism, which came from the fight against absolutism, Brazilian constitutionalism was born from the wreckage of colonialism, and everything that came with it. In other words, with the

words, the colony exercised the sovereign power and the government of the Portuguese empire. See Wilcken (2005).

immorality of slavery[103], a colonial complex, and the power structure represented by the animosity between the Bragança Royal Family and the Lisbon Court. Despite this difference, the doctrine that was the core of the first Brazilian Constitution was French constitutionalism and its Declaration of the Rights of Man and of the Citizen, which established as the essence of the Constitution the inviolable idea of rule of law[104]. Other doctrines that were important for the development of the first Brazilian Constitution came from the American Constitution and the British common law (Bonavides, 2004).

Yet, different powers interfered in the creation and the implementation of the first Brazilian Constitution. One example of this is how the project for the first Constitution was blocked on two fronts: by an absolutist resistance who eschewed freeing the slaves, and by the on-going interference of the status-quo represented by the political and economic power. Elite dominance regarding policy making and application highlighted and aggravated the social inequalities within Brazilian society, causing 'civil wars' and leading the country to era of 'constitutional dictatorship' and the unbalanced and antidemocratic power structure we still see today.

The first Brazilian Constitution is called the Brazilian Imperial Constitution (*Constituição Imperial do Brasil*) and, differently than other Constitutions around the world, that established the triad - executive, legislative and judicial power,- the Imperial Constitution added one more branch to its ranks, the Moderator[105] (Brasil, 1824). The holder of the fourth power was the Emperor, and this move centralised all government organisation and decision making in his hands. It was the Emperor who controlled everything and had the last word, the Moderator power was above the other three and it was called the 'Power of powers' (*O poder dos poderes*)[106]. Article 3 of the

[103] As already stated in this thesis, the abolishment of slavery only occurred in Brazil in 1888, more than sixty years after the first Constitution.
[104] Article 267 of the Imperial Constitution established that it is 'only Constitutional what concerns the limits, and respective attributions of the Political Powers, and the Political Rights, and individuals of the Citizens.'
[105] Article 10. The Political Powers recognized by the Constitution of the Empire of Brazil are four: The Legislative Power, the Moderating Power, the Executive Power, and the Judicial Power.
[106] Art. 98. The Moderating Power is the key to the entire political organization, and is delegated privately to the Emperor, as Supreme Chief of the Nation, and First Representative, to incessantly watch over the maintenance of the Independence, balance, and harmony of the other powers.
Art. 99. The Emperor's Person is inviolable, and Holy: He is not subject to any responsibility.
Art. 100. His titles are "Constitutional Emperor, and Perpetual Defender of Brazil" and have the Treatment of Imperial Majesty.

Constitution stated that the government was constitutional and representative but also a hereditary monarchy.

This shows that the first Brazilian Constitution was developed by the upper class to continue to control everything. The only economic right present was the right to property[107], which was 'guaranteed to its fullest' as established by liberal theory in the 17th century. While slavery was still enforced[108], the imperial Constitution of 1824 established the inviolability of civil and political rights of Brazilian citizens, based on freedom, individual security, and property. It did so by guaranteeing the right of ownership in full, assuring owners the right to prior confiscation[109]. Nothing is more contradictory than a Constitution that is called the Imperial Constitution. This complex reality continued to be key in Constitutions, power relations, and the social comprehension (or lack thereof) which followed.

Additionally, as established in section 3.3, the world was already moving to a discussion of social and economic rights as workers were reacting to the effects of the Industrial Revolution. This gave rise to social developments and theories that proposed social reformulations and the construction of a fairer society using socioeconomic policies and laws, such as labour laws, as a protection floor for citizens. While international society was discussing these issues, Brazil still possessed slaves.

With the rise of the Republic, on 15 November 1889, the axis of values and principles of the formal organisation of power in Brazil changed from a European inspiration to an American one. It became clear that the influence for the second Constitution was the Philadelphia Constitutional Assembly and American presidentialism (Bonavides, 2004). As was shown in section 3.2.2, the free labour of the immigrant replaced the

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[107] Article 179. The inviolability of civil and political rights of Brazilian Citizens, which is based on freedom, individual security, and property, is guaranteed by the Constitution of the Empire, as follows: XXII. The right to property is guaranteed to its fullest. If the legally verified public good requires the use of the property the citizen, he will be previously compensated of its value. The law will establish the cases of this exception and will establish the rules for the compensation.

[108] Slavery in Brazil was extinguished on May 13, 1888, with the *Lei Áurea.* Brazil was the last country to abolish slavery in America.

[109] Brazilian Constitution of 1824, article 179, XX: *Article 179. The inviolability of the Civil and Political Rights of Brazilian Citizens, which is based on freedom, individual security, and* ***property****, is guaranteed by the Constitution of the Empire in the following manner. XX. No penalty shall go further than the person of the offender. Therefore,* ***in no case will there be any confiscation of property****, nor will the infamy of the Defendant be transmitted to the relatives in any degree whatsoever. (emphasis added) (Translated by me)*

slave labour of Africans. The republic was built in the political and doctrinal conception of the liberal state, dispensing with the Moderator power and installing a president elected by direct suffrage[110] (Brasil, 1891). However, the idea of property stayed the same[111] and the only mention of work was to institute the competence of the national congress to legislate on the subject.

The first real change to the content and values of the legal framework regarding economic rights occurred with the Constitution of 1934. This Constitution brought principles of economic rights that were ignored by previous documents. In its preamble the new Constitution established that 'the representatives of the Brazilian people(…)gathered in the Constituent National Assembly to organise a democratic regime that ensures unity, freedom, justice and social and economic welfare(…)' (Brasil, 1934). The influence of the Weimar model of the welfare state is clear in the substantial adaptation of direction and orientation for Brazilian constitutionalism (Bonavides, 2004). Like the Weimar Constitution, the Brazilian Constitution of 1934 established in its article 17[112] that property rights could not be exercised against the social or collective interest, making a direct connection with article 153 of its German counterpart.

Another important addition to this Constitution is the establishment of the idea that economic order should be organised in accordance with the principles of justice and the needs of national life, so as to give everyone a dignified existence[113]. Also, for the first

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[110] Article 70 - Voters are citizens(male) over 21 who enlist in accordance with the law.
Paragraph 1. Voters who can't vote for federal or state elections:
1st) the beggars;
2º) the illiterate;
3º) the pre squares, except the students of military schools of higher education;
4º) the religious of monastic orders, companies, congregations or communities of any denomination, subject to the vote of obedience, rule or statute that implies the renunciation of individual liberty(Brasil, 1891).

[111] Art. 72 - The Constitution guarantees to Brazilians and foreigners' resident in the country the inviolability of the rights concerning freedom, individual security and property. § 17. The right to property is fully maintained, except for expropriation out of necessity, or public utility, through prior compensation. § 27. The law shall ensure the ownership of trademarks (*ibidem*).

[112] 17) The right to property is guaranteed and cannot be exercised against the social or collective interest, as determined by law. Expropriation for necessity or public utility shall be made in accordance with the law, upon prior and just compensation. In the event of imminent danger, such as war or intestinal commotion, the competent authorities may use private property to the extent required by the public good, subject to the right to further compensation (Brasil, 1934).

[113] Article 115 - The economic order must be organized in accordance with the principles of justice and the necessities of national life, so as to enable everyone with a dignified life. Within these limits, economic freedom is guaranteed (*ibidem*).

time, trade unions and professional associations and the social protection of the worker were recognised in a national Constitution[114]. Finally, the socio-economic principles and values that were already being discussed and developed in other societies started to be part of the legal framework due the social transformations within the country. This was especially apparent after the 1929 stock market crash which saw Brazilian coffee trade plummet, social unrest skyrocket, and workers start to demand rights and better conditions of work[115][116].

Yet, the 1934 Constitution was short-lived. In 1937, Brazil suffered a *coup d'état* hampering these theoretical advances. In 1937, Getulio Vargas, Brazilian president established the *Estado Novo* regime, characterised by the centralisation of power, nationalism, anti-communism, and authoritarianism. The *Estado Novo* was influenced by the international context, specifically Europe, of authoritarian governments that rejected the idea of liberal democracy[117]. To scare people, Vargas used the narrative of social unrest and the apprehension of communist infiltration saying that notorious demagogic propaganda was looking to denature class struggle, and extreme, ideological

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[114] Article 120 - Trade unions and professional associations shall be recognized in accordance with the law.
Article 121 - The law shall promote the protection of production and shall establish working conditions, in the city and in the fields, in view of the social protection of the worker and the economic interests of the country.
§ 1 - The labor legislation shall observe the following precepts: among others that improve worker conditions:
(a) prohibition of pay difference for the same job, on grounds of age, sex, nationality or marital status;
b) minimum wage, capable of meeting, according to the conditions of each region, the normal needs of the worker;
c) daily work not exceeding eight hours, reducible, but only extendable in the cases provided for by law;
d) prohibition of work for children under 14 years old; night work for children under 16 and in unhealthy industries, under 18 and women;
e) weekly rest, preferably on Sundays;
f) paid annual leave;
g) compensation to the worker dismissed without just cause;
h) medical and sanitary assistance to the worker and the pregnant woman, ensuring this rest before and after childbirth, without prejudice to salary and employment, and social security institution, upon equal contribution from the Union, the employer and the employee, to the old age, disability, maternity and in the event of accidents at work or death;
i) regulation of the exercise of all professions;
j) recognition of collective labor agreements (*ibidem*).

[115] Until 1930 in Brazil the so-called coffee latte (café com leite) policy prevailed. This policy was called that because politicians supported by Sao Paulo (coffee producers) and Minas Gerais (milk producers) alternated in the presidency (Prado Junior, 2012).

[116] See Fausto (1972) and de Holanda (1995).

[117] Benito Mussolini rises to power in Italy in 1922 and then established fascism; Salazar became prime minister of Portugal in 1929 and inaugurated a dictatorial state; Hitler came to power in Germany in 1933.

conflicts[118]. In 1937 Vargas promulgated a new Constitution(Brasil, 1937) that was extremely authoritarian and gave the government virtually unlimited powers (Bonavides, 2000)[119]. Again, like the first Constitution, it established that the 'president' had the last word. Once more, nothing is more contradictory than a Constitution that establishes a dictatorship.

The objective of the *Estado Novo* regime was to cater to the interests of political groups eager for a strong government that would benefit the dominant class and consolidate the control of those who stood with Vargas (Henriques, 1964; Ferreira and Delgado, 2003; Neto, 2013). It is important to note that the idea that property ought to be exercised in the social or collective interest was no longer present, showing that the dominant class did not want the right to property to have a social function.

In the last years of the *Estado Novo*, Vargas created Brazil's first labour legislation. Again, Brazilian society emerges once more as peculiar and contradictory. At the same time that Vargas was persecuting political enemies, 'communists', and labour leaders, and removing from the worker the right to strike[120], he was also creating a labour Court. In 1943, the labour act (Brasil, 1943) established laws that still regulate labour relations to this day. His goal was to tie populist policy and labour legislation to the implementation of economic development in the country (Campana, 2008).

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[118] Constitution of 1937 preamble "-THE PRESIDENT OF THE REPUBLIC OF THE UNITED STATES OF BRAZIL, in response to the legitimate aspirations of the Brazilian people to political and social peace, deeply disturbed by known factors of disorder, resulting from the growing recording of partisan dissent, which, a notorious demagogic propaganda seeks to denature in class struggle, and the extreme, conflict ideological, tending, by their natural development, to be resolved in terms of violence, placing the nation under the dire imminence of civil war; In response to the state of apprehension created in the country by the Communist infiltration, which becomes more extensive and deeper, demanding remedies of a radical and permanent nature; WHEREAS, under the previous institutions, the State had no normal means of preserving and defending the peace, security and welfare of the people; Without the support of the military and yielding to the inspirations of national opinion, some are justifiably apprehensive about the dangers threatening our unity and the speed with which the decomposition of our civil and political institutions has been taking place; (Brasil, 1937)"

[119] The new Constitution was called Polaca ("Polish") for its inspiration from the Polish semi fascist model (Bonavides, 2000).

[120] Article 139 - In order to settle conflicts arising from the relations between employers and employees, regulated by social legislation, the Labour Court shall be established, which shall be regulated by law and to which the provisions of this Constitution relating to competence, recruitment and prerogatives of the common Court.
Strike and lockout are declared antisocial resources harmful to labour and capital and incompatible with the superior interests of national production.

This labour legislation was very progressive, guaranteeing a series of protective rights to the worker. It established collective labour contracts; the right to paid weekly rest; paid annual leave; compensation commensurate with years of service for unjustified dismissal; the right to remain in service in the event of change of employer; the right to a minimum wage that was able to meet the normal requirements of work, according to the conditions of each region; the right to work eight hours a day; the prohibition of work at night, except those that occur in shifts, and with remuneration above the daytime rate; the prohibition of work for children under fourteen, night work for children under sixteen and, in cases of insalubrious environment, for children under eighteen and women (Brasil, 1943).

The *Estado Novo* period (1937-45) was therefore one of great ambiguity, as it associated authoritarianism with economic and social development, mainly through the implementation of broad labour legislation and support for industrialisation through projects in the steel and petroleum area (Ribeiro, 2001). Yet, trade union movement was controlled, censored, and repressed. Fabio Ramiro makes a connection between the *Estado Novo* regime and the paradox that is contemporary Brazilian society regarding the protection of economic rights. He highlights that while Brazil was going through the *Estado Novo* dictatorship, incredible as it may seem, important economic rights were incorporated in society, such as the creation of the labour law code and rules.

The Estado Novo regime ended with a new *coup d'etat* and a new Constitution in 1946. The new Constitution restored democracy and was notably an advance for individual citizens' freedoms. It re-established the liberal order (Brasil, 1946) and brought back the use of property conditionate on social welfare, principles of social justice, and the right to strike and free union association[121] (Ferreira and Delgado, 2003). That happened because for the first time the communist party participated in the national assembly of the Constitution. The conditioning of the use of property to social welfare

[121] Article 145. The economic order must be organised in accordance with the principles of social justice, reconciling freedom of initiative with the valorisation of human labour.
Art 147 - The use of the property will be conditioned to the social welfare. The law may, subject to the provisions of art. 141, § 16, promote the fair distribution of property, with equal opportunity for all.
Article 158 - The right to strike, the exercise of which the law shall regulate, is recognised.
Article 159 - The professional or trade union association is free, being regulated by law the form of its Constitution, its legal representation in collective labour agreements and the exercise of functions delegated by the Government (Brasil, 1946).

enabled dispossession for social interest and had great impact on the whole society, and would eventually be one of the reasons for the next *coup d'etat*. This topic will be discussed in the next section. This Constitution was also doomed to a short lifespan. In 1964 the military coup occurred, ending the government of democratically elected president, João Goulart (Couto, 1999; Ferreira and Delgado, 2003; Napolitano, 2014).

4.4 THE ELITE'S ANTI-POPULAR PACT WITH THE MIDDLE CLASS

This section describes the Brazilian military dictatorship and how this period of Brazilian history was important to the development of the civil society organizations and social movements which protect economic rights. This section will start by explaining how the issue of agrarian reform was a key element for the military *coup d'état,* highlighting the role of the upper class and foreign countries. Furthermore, this subsection illustrates the role of the church in the creation of civil society organizations and social movements that enable vulnerable groups to fight for property rights, and the role of trade unions for the protection of the right to work. This subsection shows what the reality of economic rights was before the promulgation of the Brazilian Constitution of 1988. This reality would subsequently have a great impact on the Brazilian Constitution Assembly of 1987/88 as will be further discussed in Chapter 6.

The Brazilian military dictatorship started on the first of April 1964. Although called the military coup, the dictatorship should not be considered as exclusively military, but in fact civil military. Newly released documents indicate support for the coup by important segments of society: the landowners , the São Paulo industrial bourgeoisie, a large part of the urban middle classes, and foreign countries (Galé, Nassif and Aarão Reis Filho, 2014)[122]. The coup established an authoritarian and nationalist regime[123] and marked the beginning of a period of profound changes in the political organization of the country, as well as in economic and social life.

As mentioned in the last section, one of the reasons of the coup was that President João Goulart[124] wanted to promote important reforms such as agrarian reform, which consisted of: promoting the democratisation of the land; educational reform, using the

[122]See São Paulo, Estado de (2019).
[123] The military regime was politically aligned with the United States who financed the coup not only in Brazil but in other Latin America countries. For more, please read Schwarz (2001) and Ayerbe (2002).
[124] João Goulart was a leftist politician from the PTB (Brazilian Labour Party) party.

Paulo Freire method[125]; urban reform; and electoral reform, where he wanted to extend voting rights to the illiterate and the low-ranking military and legalise the Brazilian Communist Party. On 13 of March 1964, at the rally at *Central do Brasil*, in Rio de Janeiro, he determined the nationalisation of private oil refineries and the expropriation, for agrarian reform purposes, of properties alongside railways, highways, and public dam irrigation areas[126].

The narrative disseminated by the media in response to these reforms was that he wanted to start a left-oriented *coup d'état*. Indeed, João Goulart tried to pass these socioeconomic reforms, but conservative sectors of congress blocked them with the narrative that Brazil would become a communist country. Therefore, with the success of the Cuban Revolution, and the Cold War tensions getting stronger, significant sectors of Brazilian society supported the military coup[127]. It was during this time that the sixth Brazilian Constitution was promulgated in 1967. This, however, bordered on farcical, being amended by successive Institutional Acts, the most famous of which being Institutional Act No. 5 which gave the regime absolute powers and whose first consequence was the closure of the National Congress for almost a year. Institutional Act No. 5 also suspended any political meeting and censored the media- extending to music, theatre and cinema, everything had to be approved by the government first. Moreover, it suspended habeas corpus for so-called political crimes, among other things (Brasil, 1968).

This was the beginning of great human rights violations in the name of national security, aimed at combating "internal enemies" of the regime. Any social movement was illegal, and labour association and strikes were met with brutal repression. Amid the years of the so-called Brazilian economic miracle, where the GDP growth rate jumped from 9.8% in 1968 to 14% in 1973, another paradoxical period of Brazil's history took place. While the economy was blooming, people were suffering torture and dying in military basements. It was also during this time that then Finance minister, coined the famous

[125] See Freire (2017).
[126] Decree No. 53.700 of March 13, 1964 -Declares of social interest for the purpose of expropriation the rural areas flanking the federal road, the national railroads, and the lands benefited or recovered by exclusive Union investments in irrigation, drainage and reservoir works, currently unexplored or exploited contrary to social function of property, and other measures.
[127] It is important to highlight that few news outlets opposed the coup, the vast majority openly preached for the ousting of the president. See Molica (2005) and Magalhães (2014).

phrase: 'let's make the cake grow, then split it.' The ‘cake’, however, was never divided, and when the dictatorship ended in 1985, the percentage of Brazilians in extreme poverty was at 21.7% of the population (IPEA, 2018).

But it was also during the regime that civil society started to organise itself, initially in a clandestine way. With this is mind, it is important to highlight that the role of one sector of the Catholic church in Brazil, the *pastoral da juventude*[128], was very important during the dictatorship years. This progressive part of the church was crucial regarding the political conscientisation of society on topics such as property, agrarian reform, and resistance against the regime. The *Pastoral da Juventude* developed new forms of working with youth from lower backgrounds such as rural youth and youth from vulnerable environments. They were demanding a new way of articulating and organising themselves. Senator Regina Souza was part of this Catholic youth group and in her interview, she highlights the role of the church in her political activism. She says:

> “I remember that all my activism was pastoral, and we were trying to organize union association, but it's a big difficulty within associations, because for people work collectively is one thing, sharing later is another, is too difficult.(…) we were not educated for that.(…) Brazilians do not know how to live collectively, this is an important issue. We were not educated for the collectivity.(…) Having a military dictatorship made many people think and express these thoughts and write and debate. The buzz word was awareness, and there was a part of the church that played a very important role in that, I came from the Pastoral da Juventude. At least this wing of the church, we called it progressive. It had the conservative church and the progressive church. Many suffered and were arrested, so it was those people there that helped us, it was that church.”[129]

[128] The youth ministry used as its foundation the teachings of liberation theology, the pedagogy of the oppressed, and Specialized Catholic Action. In the late 1970s and early 1980s the Church was experiencing a period of great expectation as Medellin Conference of Latin American Bishops brought new air to pastoral action with a commitment to social justice. See Dussel (1996) and Pastoral de Juventude (2019).

[129] Answer in Portuguese: ‘ Me lembro que toda a minha militância foi pastoral e a gente tentava organizar associação do sindicato, mas é uma dificuldade muito grande nas cooperativas, as pessoas trabalharem coletivamente é uma coisa, dividir depois é difícil demais. (...) a gente não foi educado para isso. (...) porque o brasileiro não sabe conviver coletivamente, essa é uma questão importante. A gente não foi educado para a coletividade.(…) O fato de ter uma ditadura militar fez muita gente pensar e expressar esses pensamentos e escrever e debater. A palavra da moda era conscientização, e teve uma parte da igreja que teve um papel muito importante nisso, eu vim da pastoral da juventude. Pelo menos essa ala da igreja, a gente chamava ela de progressista. Tinha a igreja conservadora e a igreja progressista. Muitos sofrearam e foram presos, então era aquela gente ali que ajudava a gente, era aquela igreja.”

Analysing the interview of Senator Souza, the importance of the church on developing the idea of social justice is clear. However, equally evident is how hard it was to develop an idea of community since everything was connected to charity and individualism. Like the role of the church in the development of the social revolution that happened in the 19th century, and that was highlighted in section 3.1.2, here it had a key role in the development of civil society regarding the protection of property and labour work.

Another civil society group that was born during the dictatorship years and also had a great impact in the defence of workers' rights was *Central Única dos Trabalhadores* (CUT) – the national labour union. It was founded on August 28, 1983, in the culminating years of the dictatorship. It is important to highlight that at the time the regime was already weak and undergoing a phase of democratisation; the country was passing through an economic crisis and the years of growth were in the past. This period marked the reorganisation of many sectors of civil society, which were slowly expressing themselves and publicly manifesting themselves. The CUT was one of these groups.

The birth of the CUT as a Brazilian trade union organisation represents more than an instrument of struggle and real representation of the working class, it also embodies a transformation of the working class in their attempt to be part of, and have presence in, national politics[130]. While this transformation started centuries ago in other parts of the world, the idea of a strong working class and the creation of a national union to defend their interest only germinated in Brazil at the end of the 20th century. This scenario of profound political, economic, and cultural transformation led essentially by social movements also arises from the process of mobilisation of the working class. These struggles are the result of the decades-long struggle of rural and urban workers for the creation of a single entity that represents them.

4.5 THE NEVER-ENDING TRACES OF COLONIALISM AND PATRIMONIALISM

This subsection presents the current context of Brazil. First, this segment will describe the transformation that the country went through after the end of the military

[130] The most famous member of CUT was Luis Inácio 'Lula' da Silva, who started his political career in their ranks and was the leader of large strikes in the 80s before becoming president in 2002.

dictatorship, highlighting the role of neoliberalism and international politics. Then, it will briefly mention of the role of the Constitution in the construction of this new system. This topic will be further discussed in Chapter 6. Next, this subsection will show how Brazil continues to be an unequal country built on exploitation and culminate with an analysis of how socioeconomic values constructed throughout time affect the implementation and protection of economic rights.

Since the start of Brazil's industrial development in the latest 1930's, the republic was always called the "country of the future", with beautiful nature, tropical weather, and abundant natural resources. With every phase of great economic growth that phrase would rise in the mouths of the politicians and businessmen. In the end, it became a shadow and a joke for the Brazilian people, because although Brazil earned a lot of money, this was never distributed among the majority of its people.

As part of an international society witnessing the end of the cold war and the victory of neoliberalism against communism, the idea of a state built on interference in institutions and economy was seen as outdated. The "evil" of communism being spread in South America was in the past, and it was no longer framed as good for the United States to support Dictators in the region as it was against the values of neoliberalism and human rights. The new narrative consolidated by the Washington Consensus was instead that developing countries should adopt neoliberal policies and follow ten specific policy recommendations to recover from economic crisis[131]. Meanwhile, relating back to section 3.1.4, the narrative of human rights was gathering more and more force with the rise of globalisation, the proliferation of international non-governmental organisations[132], and the development of international law.

Thus, after enduring 21 years of dictatorship (1964-1985), it was this environment that the Brazilian new legal system tried to mirror. It is not a coincidence that the constituents of 1987-1988 built the new and last Brazilian Constitution based on the rule of law, democracy, and human rights. The "Citizen's Constitution" was sanctioned in 1988 and received this name because it included in the text social and economic

[131] 1) fiscal deficits; 2) public expenditure priorities;3) tax reform; 4) interest rates; 5) the exchange rate; 6) trade policy; 7) foreign direct investment;8) privatization 9) deregulation; 10) property rights. See Williamson (1990).
[132] Amnesty International and Human Rights Watch for example.

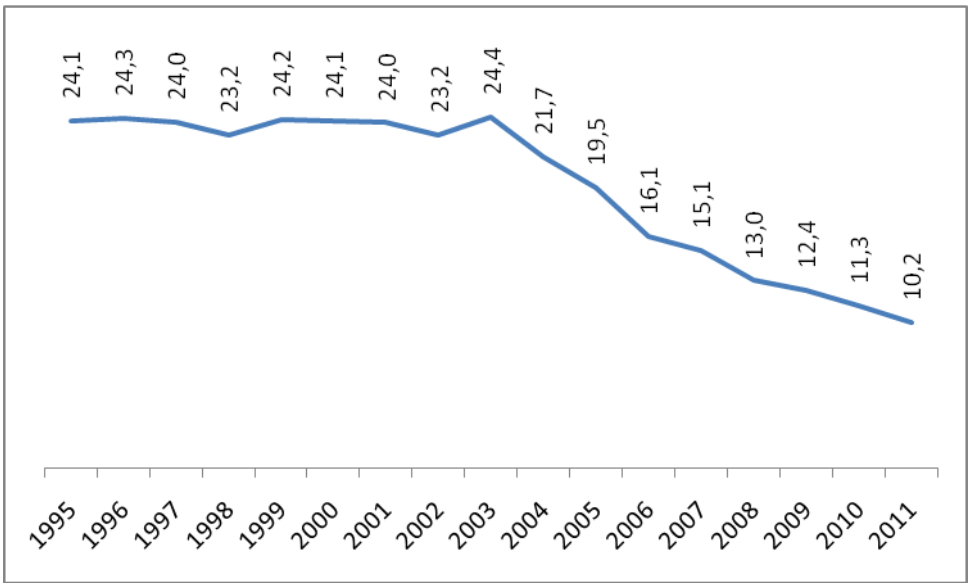
rights, framing them as fundamental rights of Brazilian society. Moreover, it is a Programmatic Constitution characterised by having provisions that define the tasks and action programs to be implemented by the government[133].

The Constitution innovated by establishing the principle that the eradication of poverty and reduction of social and regional inequalities are fundamental objectives of the Republic. The text was clear regarding social and economic rights receiving equal treatment in the charter to other fundamental rights. With this panorama in mind, and by reading the Constitutional provision, it can be inferred that the new Brazilian economic order was founded on the value of human labour and free enterprise aimed at ensuring everyone a dignified existence, per the dictates of social justice. It can be understood that the constituent idea was to humanise capitalism. Eros Roberto Grau (2004), a former Supreme Court judge, stated that "social justice initially is meant to overcome injustice in distribution, the personal level of economic output". The same lesson can be seen by José Afonso da Silva (2005) who emphasises that "social justice is only achieved through equitable distribution of wealth". As will be shown, there is a difference between what is established in the Constitution and what is applied in practice. This discrepancy occurs because while the Brazilian Constitution is a very forward document, Brazilian society is still very much a patriarchal and patrimonial one, suffering huge inequality.

Until June 2013, Brazil underwent important socioeconomic transformation. Some important policies were established to end poverty and combat inequality. In 2013 for the first time Brazil left the United Nations hunger map and poverty (see figure 3.6) and inequality fell (see figure 3.7).

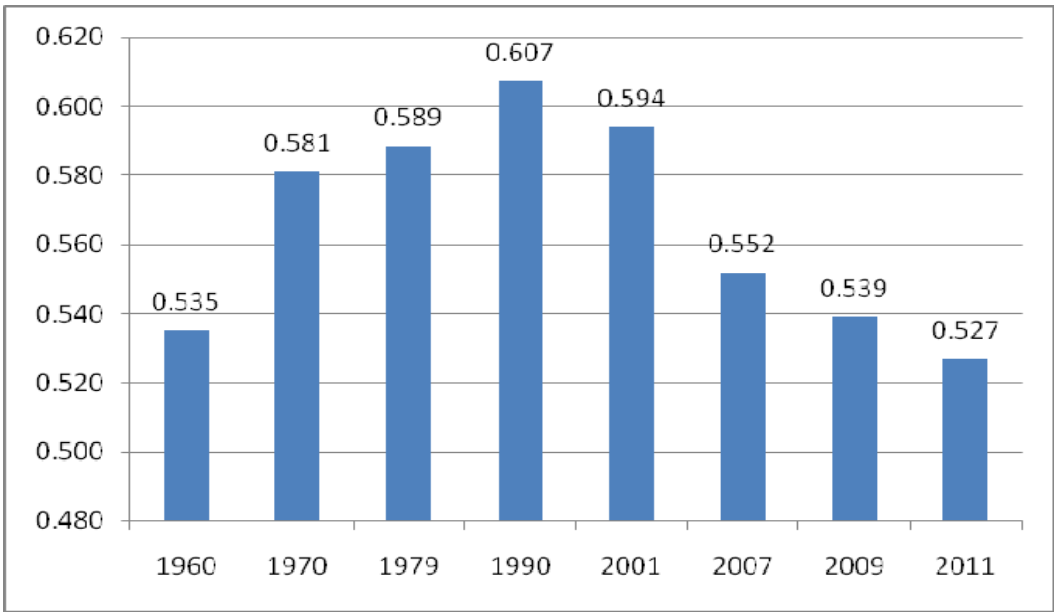
[133] This will be explained in chapter 6.

Figure 4.5 Population with per capital household income below poverty line (%)



Source: IPEA (2012)

Figure 4.6 Long-term Vision of Inequality (Gini)



Source: IPEA (2012)

This was possible because of policies that protected and applied economic rights, such as social security programs and especially the *Bolsa Familia*. This programme was established in 2003 and according to IPEA, was one of reasons why inequality was reduced since the majority of benefits (80%) were going to the 40% of the poorest population (Abrahão de Castro and Modesto, 2010). Analysing both charts above it is

possible to stress the fall of poverty and inequality since 2003. It is not a coincidence that when the government invested in policies that developed a socioeconomic protection floor, individual lives got better as they ensured a distribution sufficiency (Moyn, 2018) [134].

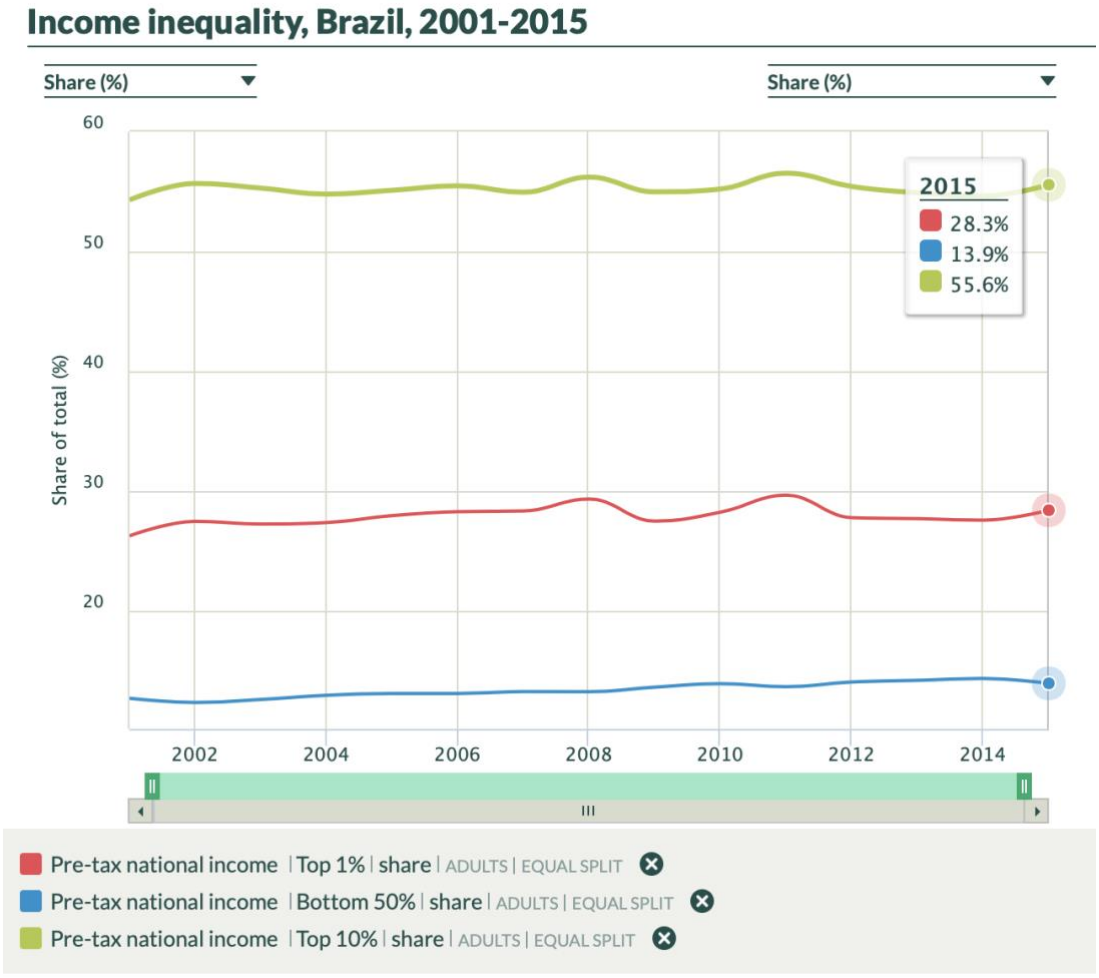
Using the concept of equality distribution[135], it can be argued that this was never the goal of politicians in Brazil. This had great impact amid the political turmoil which occurred when the 'bubble' burst in June 2013. This was because although the government did create important socioeconomic protection policies for distribution sufficiency, they also continued to build a narrative based on the values of consumerism and neoliberalism. This narrative was helped by global factors as international institutions, power wielded by U.S and Western Europe, enforced the dominance of neoliberalism everywhere.

It can be said that neoliberal rationality is characterised by making the market a model of all relationships by following the logic of competition and the ideal of 'freedom' by establishing a kind of "anything goes" for money and success. And this narrative in an unequal country rooted in values of patriarchism, individualism and patrimonialism produce great effects in the application and protection of economic rights as economic rights require distribution sufficiency and equality distribution to function.

[134] For Moyn (2018), distribution sufficiency is related to a situation where any individual is in relation to not having anything or enough. He or she is protected on the ground of a protection floor provided thanks to socioeconomic rights.

[135] Equality distribution is about how people relate to one another. It asks not just whether the poor are less poor but also how rich the rich are (Moyn, 2018).

Figure 4.2 Income Inequality in Brazil from 2001 to 2015



Source: Piketty (2019)

According to World Inequality database, almost 30% of Brazil's income is in the hands of only 1% of the country's inhabitants, the largest concentration of its kind in the world (Piketty, 2019). More than 55% of Brazil's income is in the hand of top 10%, while the bottom 50% amount for the 13.9% of the income. In a country of almost 2010 million inhabitants, half of the population only counts for almost a quarter of the income. As was mentioned in Section 2.3, economic inequality reaches extreme levels despite the country being one of the ten largest economies in the world. According to a Oxfam report, six people concentrate the wealth equivalent to 100 million poorest Brazilians and the richest 5% have the same income share as the other 95% (OXFAM, 2019). As

Senator Regina Sousa stated: “It is necessary for the rich to live more simply so that the poor can simply live”[136].

The socioeconomic context that was established when Brazil was ‘discovered’ in 1500 is still in place. The name or economic framework may change, but the system of exploitation and the concentration of power and wealth in the hand of few is still impregnated in society. Brazil was built on the back of exploitation and violence. While analysing data in relation to the historical context of the country, it is possible to affirm that the protection and application of economic rights in Brazil is strictly connected to values and socioeconomic structures constructed since its beginnings. This directly affects the interpretation and understanding of the participants regarding economic rights. While international movements and revolutions did indeed help with the development of important rights in Brazil, they mainly were used by the elites to control the narrative and maintain its privileges. This can be seen with the enlightenment and independence of Brazil, or labour rights and the dictatorship in the Vargas era.

It is important to reiterate that the purpose of this thesis is not to recount Brazilian socio-economic history in the greatest depth possible, but rather to understand how economic rights, especially the right to property and the right to work, have altered to, and have been understood, in the local Brazilian context. Of course, however, this cannot be achieved without a degree of description of the case at hand, coupled with original research in the form of document review, content and policy analysis, as well as interviews and other soft data gained in the form of observations. Yet, the current research relies heavily on the historical context of Brazil to understand how it affects the understanding of economic rights and, consequently, how this understanding affects the application and protection of these rights, even as they are present in national law.

Valuable observations can be made from interpretative analysis of the historical context of economic rights: 1) the process by which they were developed into the local sphere; 2.) developing a further understanding of the global-local nexus as it relates to economic rights; and 3.) for understanding a local perception of protection and/or

[136] Original answer in Portuguese: ‘é preciso que os ricos vivam mais simplesmente para que os pobres possam simplesmente viver.’

application of economic rights. These observations will permeate the following chapters of the thesis.

4.6 THE VALUE OF LANGUAGE: INTERPRETING ECONOMIC RIGHTS

As the last section of the conceptual framework of economic rights of this thesis, it is necessary to try and tie everything presented thus far together – in both these chapters as well as the entire case study section – into some coherent whole. Following from the observations made above regarding the development of the idea of economic rights, and the construction of Brazilian society, this section endeavours to consider further the value of conceptualisation more closely.

Accordingly, this section will proceed with an analysis of the peculiarities and designations that have been applied to economic rights, as they relate to the understanding of economic rights by the subjects interviewed. Thereafter, this section will include an in-depth analysis of the very term "economic rights" in light of the answers given by the interviews. The latter part of this section will bring the reader back to the fundamental issue that this thesis seeks to make, which is to analyse how the people selected understand what economic rights are and how their comprehension affects their protection and application. Indeed, two of the groups selected to part take in this study are the ones who are responsible to apply them in practice.

Additionally, this section will present the claim this thesis seeks to make: the understanding of participants in regard to economic rights are connected with three hypotheses:1) their individual moral-ethical background; 2) the socioeconomic environment into which they were born; 3) and the narrative created by the 'dominant class' through the years, wherein in policy or law is spread uninterrupted and almost becomes unquestionable.

4.6.1 The Discourses of Economic Rights

This Section presents the findings pertaining to how members of civil society, judiciary and the political class define economic rights. The purpose of this section is twofold. Firstly, this section functions as a foundation to the empirical research findings in this thesis by framing and contextualising how these individuals define economic rights, thus providing an evaluation reference point for the findings presented in the following chapters. Secondly, this section contributes to the existing knowledge base of how to

define economic rights from the specific perspective of these three groups – who, as discussed in section 2.4.1, are those responsible for the application and protection of economic rights within a national system.

This section and its findings are important because existing empirical research has not commonly investigated how economic rights are defined by these three groups of people participating in the research (as discussed in 2.4.1) – a lacuna identified as in need of being addressed. While, as discussed in Chapter 2, the nature of small-scale in-depth research does not necessarily lend itself to providing solid recommendations for policy formation, conducting exploratory research on the understanding of economic rights serves to draw out areas of particular significance, whilst foregrounding the substantive findings of the research discussed through the thesis.

Recollecting from section 3.4, the terminology of economic rights was first introduced by the United Nations in the Universal Declaration of Human Rights in article 22[137]. The document does not conceptualise the term 'economic rights', but only states that economic rights are indispensable for the dignity and free development of the individual personality. The same can be said for the International Covenant on Economic, Social and Cultural Rights (ICESCR). In the text there is no conceptualisation of what constitutes economic rights, instead the document preamble recognises only that these rights derive 'from the inherent dignity of the human person' (United Nations, 1966a).

Although the human rights tradition establishes that all human rights are indivisible, interdependent, and interrelated, it is important to highlight that the Brazilian Constitution recognises the right to work, right to health, the right to social security as social rights not as economic rights. This different description will concern the replies of the participants. Moreover, many participants stressed that this was the first time that they heard the term economic rights. The facial expression of various participant when I asked what economic rights are was of confusion at first, some would ask what I meant by economic rights and others would just say that it was a term they had not heard before. The juridical and civil society participants that had a background in international

[137] Article 22 UDHR. Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

law and human rights law were the only ones that when asked the question answered with confidence.

What are economic rights? That was the first question asked to the participants.

Caio Bandeira, civil servant and representant of the commission of human rights of the State of Bahia, was emphatic and emphasized what economic rights are to him: 'in my experience, after years working with civil society, indigenous tribes and social movements, economic rights reveal itself as the right to property.' Although Caio has a leftist background, in the interview he highlights that this opinion comes from his activist trajectory, stressing his understanding comes from the day-to-day practice and from the practical interaction with the people. He states that:

> "The understand we have with the conception of economic rights or is in its absence, or it is the need for security and part of it is the guarantee of property. Whatever kind of property, at least the economic rights that we are correlating, that we are dealing with. Part of the conflicts we have in this area mainly permeates in this relationship (the absence or presence of economic rights), with the idea of property, the guarantee of property"[138].

When Caio speaks about conflicts he is relating back to the exploitation and the violence between landowners against indigenous and *quilombola* groups, a conflict established since 1500, as was demonstrated in section 4.1. Caio's definition of economic rights relates to the idea of individualism and property shaped in the 18th century, where the idea of private property was recognized as the ultimate goal of the individual. At the same time, like Marx, he perceives private property as a source of separation and a mechanism of oppression within society. This is a little paradoxical, since he states that economic rights should be more than an individual right to property, indeed, they should be a path to social justice whereas in reality they are not.

In a country like Brazil, where the socioeconomic system was built on violence and exploitation, Caio expresses that trying to change cultural expectations and the values of society is hard. The means of production and income, and governmental institutions are in the hands of the elite. It is very hard to change a system when few, but powerful

[138] Original answer in Portuguese: 'O contato que a a gente têm com a concepção de direitos economicos ou é na ausência dele, que é a necessidade de garantia né e parte dele é na garantia de propriedade. Seja qual tipo de propriedade, pelo menos o direito econômico que a gente está se correlacionando, que a gente está lidando. Parte dos conflitos que a gente têm nessa área.' principalmente também perpassa por essa relação mesmo, com a ideia de propriedade, da garantia de propriedade.

people control the narrative. For him, the narrative helps to construct people's conception on certain principles and values. Who controls the narrative, controls the system. And history is always told by the victors.

One example of how the narrative affects society, is the case of the *Bolsa Família* programme. Bolsa, in this case, means grant if we translate in verbatim to English, but in the Brazilian dialect, it means aid[139]. This is how people see the programme, as an aid, not as a policy developed to end the intergenerational cycle of poverty. That wording was created by the federal government. Instead of giving a name where people could understand as a fulfilment of economic rights, they used the language of assistance. As such, if it is aid, this means it is not a right, and can be taken away at any moment. Fabio Ramiro emphasises this issue in his interview and highlighted how, in his experience, he believes individuals understand the programme. For him, the *Bolsa Família* is seen as charity and not as a right. In his understanding everything that has '*Bolsa*' in the name has become a derogatory thing. This is the narrative that is used when someone want to downplay a policy that is making a social difference and changing the socioeconomic structure. He says:

> "Then they start 'oh, these miserable from the family grant programme'. Following by 'the miserable of Bolsa Family has my money, they don't not even know how to vote'. There are people who express that these people should not even vote. What is charity? It is something that you give if you want too. Because, otherwise, if it was a right, it is someone's duty"[140].

Saulo Casali understands the *Bolsa Família* as an income distribution program, a very progressive distributive policy that has parameters involving schooling. It is a programme that fulfils the socioeconomic rights established in the Brazilian Constitution. This topic will be explained in chapter 6. Dirley da Cunha Jr also believes that this programme is important, but he highlights one key aspect that has a great impact on how we understand socioeconomic policies and programmes within

[139] The Merriam-Webster dictionary defines aid as: to give assistance.
[140] Original reply in Portuguese: Ai começam "ai, esses miseráveis do bolsa família". E assim, miseráveis do Bolsa família tem meu dinheiro, você não pode nem votar. Tem pessoas que definem que essas pessoas não pudessem nem votar, mas a palavra é exatamente essa, quando você vê uma coisa como algo, porque, o que é caridade? Você dá se você quiser dar. Porque se existe direito é porque existe o dever de alguém.

Brazilian society: the difference between an aid state[141] and a welfare state. He declares that there is a difference between an aid state and welfare state that is often misleading in the Brazilian society. Many say that Brazil, because of the propagation and dissemination of grants (*bolsas*), has become an aid state, which he believes not to be true. For him, this is part of the welfare state model established by the Constitution. He posits that the Brazilian welfare state model has created poverty eradication funds and programmes, and this poverty eradication fund has institutionalized social programs of granting cash transfers.

He says:

> "We talk about Bolsa Familia, Bolsa Escola (school grant), Bolsa Educação (education grant), Bolsa etc, etc, etc, as a way of identifying the program, but this is part of a welfare state model and it does not convert our welfare state to aid state. Besides, from the point of view of aid, our state gives very little, I believe. And they (the Bolsas) have nothing to do with aid, it is the contrary, it is a model of welfare state that we use based on a public policy to eradicate poverty, which, by the way, it is one of the fundamental objectives of our state. Is there in article 3, paragraph 3: to eradicate poverty. We have created a poverty eradication fund, we have provided this fund with public resources, and we are transferring these resources to low-income people through these programs. The belief that we have, of non-legal people, has no perception of law and much less of constitutional law is this, is the state giving a charity to people at a high price, because the state when it gives charity give charity with the money of all of us who pay the taxes. So, it's the state doing social justice, using a popular colloquialism, 'with others' people's hats', using other people's money. But that's what I attribute to a lack of awareness, a lack of knowledge, a true ignorance from the point of view of defining our own constitutional model of state. You obviously end up favouring the return of liberalism. There is more criticisms among the upper middle class, one criticizes more the conception of social programs of income transfers to the low-income population than the transfer of virtuous incomes to large companies, because the upper and upper middle class, the 'high clergy', have a different understanding"[142].

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[141] An aid state is a state that give a momentary, philanthropic and punctual assistance.

[142] Original answer in Portuguese: " A gente fala do Bolsa Família, Bolsa Escola, Bolsa Educação, Bolsa etc, etc, etc..É uma forma de identificar o programa, mas isso faz parte de um modelo de estado social e isso não converte o nosso estado de social para assistencialista. Até porque do ponto de vista assistencial, o nosso estado dá muito pouco, eu acho. E eles(as bolsas) não tem nada a ver com assistência social, está dentro do modelo de estado social que usamos a partir de uma política pública de erradicação da pobreza, que alias um dos objetivos fundamentais do nosso estado está lá no artigo terceiro, inciso 3, erradicar a pobreza, nós criamos um fundo de erradicação da pobreza, abastecemos esse fundo com recursos públicos e estamos transferindo essas recursos para pessoas de baixa renda por meio desses programas.

The idea of charity is an idea intrinsically linked to the idea of love and the idea of fraternity (Brunkhorst, 2005: 1-9). Alberto understands the idea of charity as a form of sharing wealth as absolutely fundamental for survival so that everyone can live with dignity. He believes that if charity has this context, related to fraternity, he does not see a problem in viewing economic rights, or indeed any rights, as charity. But he opposes the charitable framing when one thinks that conceiving economic rights as charity allows these rights to be withdrawn at any time. Thus, he states that "the idea of charity as an arrogant expression of giving something that can then be taken away, that can be withdrawn regardless of any consideration for the dignity and the moral value of the individual, is absolutely reprehensible[143]."

As it is possible to note, in this practical case, the understanding of economic rights in Brazilian society is strictly connected with the idea of charity not a right. The construction of this narrative was entrenched since the 'discovery' of the country, as was shown in the previous chapter, especially regarding vulnerable groups such as indigenous people, *quilombolas*, and the poor. Brazilian institutions were built to maintain privilege, not to create a just society. This analysis can also be expressed in how people view other kinds of expenses for the upper-class.

One example of this is the housing allowance (*auxílio-moradia*)[144]payment that Brazilian Federal judges receive in addition to their salary[145][146]. Relating back to the above quote by Dirsley da Cunha Jr, there is more bias and criticism about paying a

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A crença que nós temos, de pessoas que não são da área jurídica, não tem uma percepção do direito e muito menos do direito constitucional é essa, é o estado prestando uma caridade para as pessoas a um elevado preço, porque o estado quando presta caridade presta caridade com o dinheiro de todos nós que recolhemos os tributos necessários. Então é você fazer justiça social como se fala na gíria com o chapéu dos outros, usando o dinheiro dos outros, mas isso aí eu atribuo a uma falta de percepção, uma falta de conhecimento, uma verdadeira ignorância do ponto de vista da definição do nosso modelo constitucional de estado. Você acaba obviamente favorecendo o retorno do liberalismo. Se critica mais entre a classe média alta se critica mais a concepção de programas sociais de transferências de renda para a população de baixa renda do que transferência de virtuosas rendas para grandes empresas, porque a classe média alta e a altíssima, né o alto clero, tem uma compreensão diferente.

[143] Original answer in Portuguese: mas a ideia de caridade como uma expressão arrogante de dar algo que depois possa ser cobrado, possa ser retirado independentemente de qualquer consideração pela dignidade do outro e pelo valor moral do indivíduo, é absolutamente condenável.

[144] They can receive up to R$4.300,00 on housing allowance. See *RESOLUÇÃO No 512, DE 11 DE JANEIRO DE 2019.*

[145] The salary of a federal judge in Brazil today is R$ 33.689,11. See CONSELHO DA JUSTIÇA FEDERAL. 2019.

[146] By way of reference, a Supreme Court judge in the European bloc earns 4.5 times more than the average income of a worker. In Brazil, the judge's base salary of R $ 33.700,00 corresponds to 16 times the average income of a worker in the country. See Schreiber (2018) and Shalders (2018).

programme that is safeguarded by the Constitution than an allowance for an already privileged class. To stage a comparison, the amount of money that the Brazilian government pays for one year of the *Bolsa Família* programme, which creates a safety net for people and affects 13.9 million families (Caixa, 2019), is of about R$30 billion of the budget. In contrast, the housing allowance for around 16,400 judges and 12,200 prosecutors in the country is R$1 billion of the budget (Schreiber, 2018; Shalders, 2018; STJ, 2019a, 2019b).

Moving back to the understanding of economic rights by the participants, like Caio Bandeira, indigenous leader Jerry Matalue also understands economic rights as the right to property. Furthermore, he brings a collective idea of property correlating to his indigenous values. He states:

> "Look as an indigenous person, I only understand right to property as a collective right, because a right of an individual in an indigenous territory where you have the property, the forest is collective, the river is collective, where you plant is collective and so on, so it is impossible to understand a logic of ownership in the tribes that the goods that are distributed there for the enjoyment of the communities should not be placed as a collective right. But we are in a country that is capitalist and requires money to buy consumer goods, and this is the argument that increasingly puts the indigenous in a very vulnerable situation, because at the same time he has the right to collective property, it cannot have access for example to individual assets such as financing. I have a demarcated land, but I can't have access to rural credit, because the land is good of the union, the good of the union, we only have the right to enjoyment, so we can't make for example a consignment, a loan, so this is a hard issue to view"[147].

As you can see, he has a totally different view of right to property. In contrast with the liberal idea of property built on individualism and freedom, he understands property as a collective value that should be used to the development of everyone. Yet, he state that

[147] Original answer in Portuguese: 'Olha como indígena eu só entendo direito à propriedade como um direito coletivo, porque um direito de um indivíduo num território indígena aonde você tem os bens, a mata é coletiva, o rio é coletivo, aonde se planta é coletivo e assim por diante, então não dá para entender uma lógica de propriedade na aldeia que os bens que estão lá distribuídos para usufruto das comunidades ela não seja colocada como um direito coletivo. Porém nós estamos em um país que é capitalista e exige que se tenha dinheiro para comprar bens de consumo, no entanto essa é a discussão que cada vez mais coloca o indígena numa situação muito vulnerável, porque ao mesmo tempo em que ele tem o direito de propriedade coletiva, ele não pode ter acesso por exemplo a bens individuais a exemplo de um financiamento. Eu tenho uma terra demarcada, mas eu não posso ter acesso à crédito rural, porque a terra é bem da união, o bem da união, nós só temos direito de usufruto, então a gente não pode fazer por exemplo uma consignação, um empréstimo, então essa é uma questão dura de ver.'

he understands that we live in a capitalist world and thus, indigenous people have to learn to live in this setting. Nonetheless, he emphasises that it is hard for indigenous people to protect their rights because their land is not theirs, it is the government's. Even after more than 500 years, indigenous people are still fighting for their right to property.

Ana Tulia, political advisor of Senator Randolfe Rodrigues, understands that 'from a perspective of human rights, economic rights are rights linked especially to the measurement of the question of access to income, access to economic goods in general.'[148] Augustino, member of the Human Rights Commission of Congress, also understands economic rights as an access. However, while Ana Tulia relates economic rights to the access to income goods, he understands them as 'a material satisfaction of the human being, the need to eat, need to get dressed, the need to have health, so the rights that meet the material need.'[149] Augustino's understanding relates back to the idea of distribution sufficiency established by Moyn where economic rights are related to the position of what any individual stands in relation to not have anything or enough.

Gustavo Renner also brings this idea of minimum standards. However, he understands economic rights as one of the categories of human rights which reflect the collective dimension of a society, not an individual one. One, he claims, which enables a relationship between people and involves economic flows and resources to set some minimum standards so as not to allow extrapolation of a party involved.

Fabiola Veiga, Attorney General, admits that she never thought that economic rights could relate to human rights. The interview with Fabiola Veiga and Gustavo Renner were made together, thus when he replied that for him economic rights was one of the categories of human rights, Fabiola replied that this information was new to her and that she just had learned something new. When asked how she would define economic rights she answered that she believed that the definition of the term would depend on each individual view of what economics right means. She responded that her

[148] Original answer in Portuguese: Eu acho que os direitos econômicos na perspectiva dos direitos humanos, são direitos ligados especialmente à medição da questão do acesso à renda, do acesso aos bens econômicos de um modo geral, é basicamente isso.
[149]Original answer in Portuguese: ' os direitos econômicos que são aqueles que dizem, digamos assim mais a satisfação material do ser humano, o ser humano precisa comer, precisa se vestir, precisa enfim, ter uma saúde, acesso a saúde, então isso são direitos que atendem a necessidade material'

understanding of economic rights relates to the idea of the survival of a given population and a given group of people. Therefore, for her, the conception each given population gives to economic rights is subject to the normative framing of their conception of survival. However, Fabiola highlights she is thinking inside the framework of national law, economic rights in international law would be articulation between the different modes of survival. Thus, she understands the idea of economic rights as an idea of survival.

Caio de Souza Borges, member of the NGO *Conectas*, has a different understanding of economic rights He states that economic rights are a human right that must be safeguarded within their relation to the economy. He also states that before defining economic rights it is necessary also to define what the economy is. He believes that these two terms are correlated since if an individual understands the economy as commodity benefit exchange or the maximisation of the welfare society, he would understand economic rights as rights that are related to economic exchanges that take place between human beings. He also understands that the economy has to be embedded within a framework where the goal is to serve society but in reality, the opposite happens and society serves the economy. This is perhaps understandable since contemporary society is governed by markets and companies. When analysing the answers of members of civil society is possible to sense that the protection of economic rights becomes a secondary thing since the goal always was and still is to guard the interests of the holders of political and economic power. A number of participants from civil society characterised the notion of economic rights connected with the relationship between economic resources and exploitation of work.

Following the same line of thought, Alberto Amaral understands economic rights as credit rights that come from the development of society. He understands state intervention as a means of realising (or obstructing) economic rights due to the imbalances generated by liberal capitalism of the nineteenth and early twentieth centuries.

He says:

> "Thus, economic rights have to do with the idea of this credit that social groups, especially disadvantaged social groups, workers who organise themselves through unions that claim greater participation in socially produced wealth. Economic rights are essentially credit

> rights. And credit rights to what society has accumulated in terms of wealth over time. And this idea of the right to credit presupposes that the state does not abstain, but presupposes that the state intervenes through the tax system, which taxes the wealthiest sectors of the population as a means of transferring resources to realise the rights to education, the right to health, right to transport, right to housing, and so on"[150].

These viewpoints resonate with notions established in the 19th and 20th centuries, where the state is a vital actor for the protection of rights.

On the other hand, Eduardo Salles, who comes from a private background and worked for twenty years as director in agribusiness companies, believes that economic rights are inexistent in the national regime. He states:

> "But economic rights here, you don't have specifically, you have labour law, tax law, all issues related to the International Labour Organization. (…) But we don't have this term of economic rights here as you say, economic rights are a very broad thing, you have to specify what you want[151]".

As discussed in the introduction to this section, a significant proportion of participants replied that they did not understand the question since they never heard of the 'term' economic rights, they knew about the right to social security, the right to health and so forth but the idea of economic rights was unheard of. Eduardo answer shows how little common politicians now about economic rights since in his answer he identifies rights that are economic rights but at the same time he concludes that in Brazil the term economic rights does not exist.

The significance of knowing the term economic rights is that it shows that the individual understands that these rights are part of not only a national legal order but an international legal order as well, and that these rights are based on the principle of

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[150] Original answer in Portuguese: Então os direitos econômicos têm a ver com a ideia deste crédito que os grupos sociais, sobretudo os grupos sociais desfavorecidos, os trabalhadores que se organizam por intermédio de sindicatos que reivindicam uma maior participação na riqueza socialmente produzida. Direitos econômico são essencialmente direitos de crédito. E direitos de crédito em relação ao que a sociedade acumulou em termos de riqueza ao logo do tempo. E essa ideia de direito de crédito pressupõe que haja não uma abstenção do Estado, mas pressupõe que o Estado intervenha por intermédio do sistema tributário , que tributa os setores mais abastados da população como forma de transferir recursos para realização dos direitos à educação, direito à saúde, direito ao transporte, direito de habitação, e assim por diante.

[151] Original reply in Portuguese: 'mas direitos econômicos aqui, você não tem especificamente, você tem o direito trabalhista, o direito tributário, todas questões ligadas à Organização Internacional do Trabalho. (…) mas não temos esse termo de direitos conômicos aqui da forma que você está dizendo, direito econômico é uma coisa muito abrangente, você tem que especificar o que você quer.

human dignity. In other words, it means that their protection is essential to every human being regardless of race, nationality or gender. Thus, they have not one but two levels of protection and when a politician states that economic rights do not exist, he is weakening their scope of effectiveness.

Juridical participants who had a background in international law or constitutional law were the only ones that gave more elaborate answers, basing their responses on national and international framework. Fabio Ramiro claimed that economic rights are how the individual is viewed as a subject of law within an economic relationship. It is the right to work, right to be fairly paid, the right to be respected in what he produces, in what he accomplishes, in what he seeks to achieve. Like Eduardo, he thinks these terms are very broad, but he understands that when the term of economic rights is used within the human rights framework, there is a need for a broader protection since this protection is internationally based in the documents that Brazil and other countries have already ratified. Therefore, to have a more specific definition of economic rights could mean fewer international documents would be ratified since more specific parameters means that countries have fewer liberties on how these rights should be implemented and how they should be held accountable. For him, the broader definition of economic rights allows each state to implement them differently.

Nonetheless Ramiro understands economic rights as what men can produce and be paid, to have a respected return within certain set of rules, whether they come from legal or supra-legal frameworks, international treaties or not. As demonstrated in Chapter 3, Ramiro's comprehension of economic rights comes from the liberal idea of production and its worth.

A shared feature frequently found in participants' definitions of economic rights was the confusion in differentiating economic rights and social rights when discussing the topic. For instance, Ramiro highlighted in the interview that my first question (what is economic rights?) brought him some difficulty because he couldn't see much of a difference from economic rights to social rights. He says:

> "When we talk like that, we talk a lot about "the protection of economic and social rights", it throws everything there, as if it were just a category. What would be an economic right and what would be a social right? Would the right to work be an economic right or would be within social rights? Because if we open our Constitution, the right to work is a social

> right and there are aspects that are economic rights as well. My work (as judge), with a very objective view, is to answer what should I protect? Regardless of the nature, whether it would be a purely economic right or a purely social right. In other words, overcoming this question of the nature of each of these rights, we would put them in a situation, in a level of necessary protection, that a state commits to protect, and we are the agents for it. Or even the second, which would be this material equality that we do not yet have"[152].

For Ramiro, that the Constitution establishes economic and social rights - without making this distinction - gives it greater weight to protect both categories as it puts them in the same protection floor, respecting the indivisibility established by the international framework.

Saulo Casali has a different understanding and addresses the distinction of social rights and economic rights in the Brazilian context highlighting specific aspects of particular rights. For example, he shows that when you talk about workers' salaries, property, or about income, you talk about economic rights. When you deal with the workers' own social actions you deal with social rights. Because if you look closely at the value of work itself in terms of pay for a certain aspect, it is also a social right. Thus, for him there is a difference even within the right to work. For Casali, the problem is that economic rights in international doctrine receive a distinct conceptualisation of that in the Brazilian Constitution. He highlights that the Constitution itself seems to have made this difference between social rights and economic rights. He posits:

> "They established remuneration of the worker as a social right, minimum wage as social right. And you have the economic rights: property and etc there in article 170. It's the state interventionism of the economy. This is what makes provision for the limitation of man's exploitation by man and you must guarantee minimum conditions of social protection for workers, indigenous people, the elderly, children, so it is this catalogue of state

[152] Original answer in Portuguese: Quando a gente fala assim, a gente fala muito sobre "a proteção dos direitos econômicos e sociais", joga tudo lá, como se fosse apenas uma categoria. O que seria um direito econômico e o que seria direito social? O direito econômico seria um trabalho ou o trabalho estaria dentro deste direito social? Porque se abrirmos nossa constituição são direitos sociais e há direitos econômicos também. Acaba que, com uma visão muito objetiva: o que é que eu devo proteger? Independente da natureza se seria um direito puramente econômico ou um direito puramente social. Ou seja a....a....ultrapassando esse questionamento da natureza de cada um desses direitos, nós colocaríamos eles numa situação, num patamar de necessária proteção, que um estado se compromete a proteger e nós somos os agentes pra isso. Ou mesmo o da segunda, que seria essa igualdade material que a gente ainda não tem.

interventionism that creates this protective dimension of social rights and economic rights"[153].

Dirley da Cunha gives a detailed explanation of how the Brazilian Constitution establishes economic rights:

> "Economic rights, they are not exactly in title 2 of our text, which is our catalogue of fundamental rights, although it is not an exhaustive catalogue, but it is a catalogue that establishes the fundamental rights. Individual and collective rights are in chapter one, social rights are in chapter two, and here I do not find economic rights, although there may be a certain borderline between the category of economic rights and social rights. Although in chapter 2, that deals with social rights, the article seven makes reference to workers right, which is nonetheless an economic right, it is also a social right. Maybe here I have a kind of structural coupling between social rights and economic rights. Because right to work is one that will give the person the opportunity to have economic freedom. Professional freedom is obviously the assumption of economic freedom, but it is considered, at least in our Constitution, as a social right, as article six and article seven are all within chapter 2 dealing with social rights. So, there is the question of economic rights, economic rights are in Title 7 of our Constitution and disposes of the economic order, and article 170 disposes of the general principles of economic activity. The *caput* of article 170 establishes that the economic order in Brazil is founded and based on free enterprise, and, this is very important, the social values of work, and its purpose is to ensure all, a dignified existence within the dictates of social justice. And as principles we have the fundamentals of the economic order, the ends of the economic order and the general principles of the economic order, which are three things that interchange. And when we go to the analysis of the general principles of the economic order comes the right to competition, the right to seek full employment, the right to private property conditional on the fulfilment of its social function, the right to the defence of the sustainable environment, the right to favoured treatment of small businesses and microenterprises, all reflected from the idea of principles of economic activity. Accordingly, our economic rights here it involves these specificities that are included in title 7 of our Constitution. They dialogue a lot with social rights, although social they should not be confused"[154].

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[153] Original answer in Portuguese: 'E ali em direitos sociais ele fala da remuneração do trabalhador como direito social. Salario mínimo como direito social. Os direitos econômicos: propriedade e etc tá lá no artigo 170. É o intervencionismo estatal da economia. É nisso que faz com que se preveja a limitação da exploração do homem pelo homem e você deva garantir condições mínimas de proteção social a trabalhadores, a índios, a idosos, a crianças, então é esse índice do intervencionismo estatal que cria essa dimensão protetiva dos direitos sociais e dos direitos econômicos.'

[154] Original answer in portuguese: E no nosso caso, esses direitos econômicos, eles não estão propriamente no título 2 do nosso texto, que é o nosso catálogo de direitos, embora não seja um catálogo exauriente, mas ele é um catálogo que concentra como direitos fundamentais me refiro ao título 2, os

With this in mind, he expresses that economic rights have as their specific object the protection of material equality, substantial equality, and equality of opportunity. He defines economic rights as a bridge that allow everyone to have equal opportunity and to ensure exactly the very effectiveness of the clause of equal protection.

In the Brazilian Constitution, differently from the international bill of rights, there is a distinction between social and economic rights. During my interview I questioned whether this difference in terminology could cause legal uncertainties. Dirley believes that the distinction between social and economic rights can cause doubts and create uncertainties when an individual must define them. However, while the Brazilian system brings this distinction, it does not matter in practice since the doctrine sustains that economic rights are side by side with social rights. He highlights that when he answered my question, he mentioned that the right to work was an economic right since he stated that you work not only to produce, but also to have the payment for that production, which is your salary, from which you support yourself and your family. Yet, he believes that the Brazilian Constitution has a more limited concept of economic rights, as established in title 7, connected with general principles of economic activity, such as the right to competition, the right to seek full employment, and the right to consumer protection.

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direitos individuais e coletivos estão no capítulo primeiro, os direitos sociais estão no capítulo segundo e aqui eu não encontro os direitos econômicos, embora e aí talvez seja uma certa zona limítrofe entre a categoria de direitos econômicos e direitos sociais, embora nesse capítulo 2 que trata dos direitos sociais, lá no artigo sétimo faça referência ao direito do trabalho né, que não deixa de ser um direito econômico, não deixa de ser, é também um direito social e talvez aqui eu tenha um espécie de acoplamento estrutural entre direito social e direito econômico. porque direito ao trabalho é aquele que vai dar a oportunidade da pessoa ter a liberdade econômica, a liberdade profissional obviamente é o pressuposto da liberdade econômica, mas é considerado pelo menos na nossa constituição como direito social, como o artigo sexto e o artigo sétimo estão todos dentro do capítulo 2 que tratam dos direitos sociais. Então têm a questão dos direitos econômicos, os direitos econômicos estão lá no título 7 da nossa constituição e dispõe da ordem econômica, artigo 170 dispõe dos princípios gerais da atividade econômica. E logo no artigo 170 no cabo de um cabeça se dispõe que a ordem econômica no Brasil tem por fundamento a livre iniciativa, tem por fundamento a livre iniciativa, e isso é muito importante, livre iniciativa e os valores sociais do trabalho e como finalidade assegurar a todos a existência digna dentro dos ditames de uma justiça social. E como princípios, aí tem lá, aí nós temos os fundamentos da ordem econômica, os fins da ordem econômica e os princípios gerais da ordem econômica que são 3 coisas que se dialogam né. E quando a gente vai para a análise dos princípios gerais da ordem econômica aí vem o direito à concorrência, o direito à busca do pleno emprego, direito à propriedade privado condicionada ao cumprimento da sua função social, o direito à defesa do meio ambiente sustentável, o direito ao tratamento favorecido das pequenas empresas e das microempresas, todos considerados a partir da ideia de princípios da atividade econômica e como direitos também né. Então os nossos direitos econômicos aqui ele envolve essas especificidades, estão incluídos no título 7 da nossa constituição, mas eles dialogam muito com os direitos sociais, embora os direitos sociais entende eu eles não se confundem.

Dirley expresses that the axiological justification of economic rights in Brazil is the validation of the welfare state. This has as its main goal the reduction of social, economic, and regional inequalities, aiming at promoting social and economic inclusion. Hence, the theoretical justification reflects what was established in article 3 of the Brazilian Constitution of 1988: the validation of a political organisation model that aims precisely at promoting social welfare by reducing social and economic inequalities and eradicating poverty. He states that "the eradication of poverty, especially extreme poverty is the ultimate purpose of ensuring social inclusion within (…) an inclusive welfare state model"[155].

Like Dirley da Cunha Jr, Nina Ranieri also highlights that economic rights are second generation rights that express to some extent society's commitment to groups who require support to achieve a level of equity in relation to more favoured groups. Thus, they are aimed at ensuring greater equality between people. Nina Ranieri also finds it hard to tell which rights are economic rights and which rights are social rights, and thus, she believes that the difference between them does not affect the effectiveness of economic rights.

Rubens Beçak understands economic rights as rights that benefit the inclusion of certain people or populations into the welfare state. To explain his point of view, Beçak also expresses how the historical context of Brazil affects his point of view, stating that Brazil has a late and peripheral capitalism. He believes that Brazil had an empirical need to create a different framework that does not exist in other places in the world since economic rights in Brazil are more related to economic activity, such as the right to free enterprise, consumers right and so forth. Since things are self-regulating, they self-adjust, and it is in the sense that maximum equality has to be treated at the same level as maximum freedom.

Miguel Calmon also understands that economic rights are those rights which interfere with the exploitation of economic activity, either to enable or to direct economic activity in a certain way. Thus, he believes that all those rights that relate to freedom of enterprise, free competition, and private property itself are economic rights. He also

[155] Original answer in Portuguese: "(…)E erradicação da pobreza, principalmente da pobreza extrema com a finalidade última de garantir uma inclusão social dentro do que eu chamo de modelo de estado social inclusivo."

believes that some aspects of the right to work, for example the participation of workers in corporate profits, would be also an economic right. Likewise, some rights that have a relationship with the redistribution of wealth. He also thinks that some aspect of social security constitutes economic rights (a social right in the Brazilian Constitution) since it has a relationship with economic power.

Miguel Calmon also believes that whether you understand some of these rights as social or economic rights, these differences should not weaken their protection under the law. He declares that this is a concern that one must have since international human rights law clearly establishes that these rights are indivisible, interdependent, and interrelated. While there is a differentiation between social or economic rights in the national Constitution and international sphere, the majority of interviewees believed that, in practice, these discrepancies did not matter. What matters is how national institutions use international and national norms to protect and implement economic rights.

4.7 CONCLUSION

This chapter started by describing the conditions and context of economic rights in Brazil. The goal was to portray the development of Brazilian society regarding economic rights until today, to contextualise participants' sociohistorical backgrounds and see if this feature interfered in some way in their understandings of the nature of economic rights.

Thus, section 4.1 to 4.5 illustrated the Brazilian historical context, highlighting important themes that could have key consequences in how the subjects understand economic rights in Brazil.

The findings presented in Section 3.3 demonstrate that the definition of economic rights depends on three elements: 1) the individual's moral-ethical background; 2) the socioeconomic environment within which they were born and operate; 3) and the historic narrative created by the 'dominant class' through the years, wherein in policy or law that was/is spread was uninterrupted and almost unquestionable. While analysing the definitional accounts within the empirical research data it is possible to emphasise that there is a confusion in ascertaining what economic rights are vis-a-vis the nomenclature as used by the international order. When removed from this term and

presented as social rights as in the Brazilian Constitution[156], the answer given by the participants was followed by their understanding that these rights are connected to the right to property, power relations within society (dominant class and middle class or working class) and narratives of neoliberal values.

The tensions and conflict in their responses plays a key role in how the participants recognise the application and protection of economic rights. Relating back to the hermeneutical framework established in Chapter 2, the diverse interpretation of economic rights shows that each individual has a pre-comprehension of a subject based on their own history and the society they are in and because of this, they have different interpretations of why economic rights are difficult to apply in Brazilian society.

The thesis defended in this research is to interpret how people understand economic rights and the consequences of these understandings. It its firstly and fundamentally a "rationality" (understanding) of economic rights by the subjects interviewed who are primarily responsible for the implementation and protection of economic rights within a national framework.

[156] See chapter 6.

CHAPTER 5: ECONOMIC RIGHTS AS INTERNATIONAL LAW: IDEA OR REALITY

The presence of economic rights in the international system started with a paradigm shift which occurred in international law in the second part of the 20th century. For a long time, international law was the regime which regulated the relation between sovereign states. With the end of the second world war, the international law system introduced the human person as a subject of the law through the Universal Declaration of Human Rights (UDHR).

The UDHR, together with the international human rights covenants and declarations that came after, represented a significant transformation. They became a legal system built, whether intentional or not, upon the practice of placing human rights into the centre of international law and relations. This topic will be further discussed in Section 5.2. Yet, the issue of economic rights remains incompletely addressed by the international law system. While the idea of economic rights[157] as non-legal and non-enforceable is obsolete, they nonetheless remain nebulous in function. The reality is that, as Conor Gearty perfectly posits, "human rights have always needed action as well as ideas" (2014: 397).

The truth is, when it comes to the implementation of economic rights, there is little to no action. With no consensus or even discussion within the international law regime of how basic rules of economic rights should be understood and realised, the capacity to enact these rights is minimal. Hence, human rights but especially economic rights need to move from the discussion of international theory and ideas to become rights that can be justiciable, that can be protected and developed in practice.

Each State and its institutions separately discuss national social security, labour works, unions rights, but they rarely speak about setting forth rules that organize the international economic order to become more just and equal. The international human rights order does not conceive these rights this way. This is a barrier for the protection and effectiveness of economic rights. The IHRL framework still is mainly grounded in

[157] I would like to posit that although this thesis focus on economic rights is important to underline that economic and social rights are different sides of the same coin.

the political relationship of States actors and their interests and not on the development and application of an international human rights order that really protects human dignity[158].

In other words, the recognition of economic rights demands change to the international economic order, but part of the problem is that the IHRL framework doesn't conceive of rights, especially economic rights, as an instrument to change and develop this order. One example of this is the 2030 development goals. They are global guidelines created by the United Nations to guide countries towards a common goal, but they remain guidelines, and do not tackle the real issue of how international norms can be fulfilled or changed to create a just society. These guidelines are for state actors to act within the barriers of their borders, not to change the international economic order.

Another barrier to fulfilling economic rights is that of political decisions. Law can help in developing interpretation for the defence of human rights as a whole and their importance but until state institutions and representatives are willing to create a legal order wherein all rights are justiciable and enforceable, society can only keep trying to fulfil the economic rights through the weak mechanism created by the UN and Regional Organizations within their structure and the national legal order. Nevertheless, law and politics are not and cannot be separated. The reason the IHRL framework is limited is because of political decision-making factors and an outdated and slow-paced changing international system framework that limits its development and weakens its applicability.

As already stated in this thesis, local institutions are responsible for the implementation of human rights. Their representatives carry the task of putting into practice the norms established by the international order. Thus, their understanding of both human rights and, more specifically for the purpose of this thesis, economic rights, is key to their efficacy and applicability. The same can be said about the international human rights order. International institutions and States are responsible for the IHRL framework. Consequently, understanding how the international human rights order came to be is

[158] The international human rights order and how they are constructed will be discussed on section 5.2 and 5.3.

important since it highlights its limits and failures regarding the protection of the human person.

Hence, the lack of international institutions with protection of economic rights as their main target is very telling. Relating back to section 3.5, international institutions like the World Bank or the IMF have as their core goals neoliberal policies such as austerity, privatisation, and non-state intervention in the market. Thus, it can be said that their policies only protect the interest of powerful states and companies. First and foremost, they are banks, and they must protect the interest of the 'shareholders', in this case rich countries and their companies.

The fundamental purpose of this chapter is to think systematically about economic rights in the international law regime. Relating back to section 3.4, economic rights is a term created in international law. Therefore, how political, and juridical actors understand international human rights law and its institutions also has a significant bearing on economic rights. More precisely, individuals and groups understanding of international human rights law has a great effect on the role of economic rights (or lack thereof) in the international political and legal regime. This is not only a normative claim; it is also a political obligation. Legal construction must be grounded upon an existing enforceable system, institutions, and factual practices. Thus, it is necessary to understand the system through the eyes of the interviewees. This will help to understand how we can improve the existing international human rights law system, institutions, and policy frameworks with regard to economic rights.

The goal of this chapter is to analyse the interviews and explain how the participants view the international human rights order and thereby establish the conditions for a fairer economic rights regime. To understand how economic rights work in the international law regime it is necessary to comprehend how the doctrine of international human rights law was constructed, what its fundamental principles are, and why, in some way, these are the real obstacle to the implementation of economic rights.

Hence, this chapter will start with an historical overview of the construction of the international law system. After, the thesis will analyse two concepts that were put forward in almost all the interviews as limits or reasons for the distrust of the IHLR: the concept of international legal personality, and sovereignty. Subsequently, the research will provide the development of economic rights in international law,

beginning with the historical setting in which the protection of economic rights was developed following the adoption of the UDHR. The goal is to outline the nature of states' obligations under the ICESCR and role of its Optional Protocol.

Also, this thesis will highlight the importance of the concept of the minimum core within the IHRL framework. Moreover, fulfilling the minimum obligations is the *raison d'etre* for the existence of ESCR. This core concept will connect with the example that was brought by the participants and will be discussed together with austerity policies in section 5.6.1.

Next, this chapter will explore the Inter-American System (IACHR) in respect of the obligations and protection of economic rights it provides, and the lack of mechanism in the IACHR to address economic rights violations. After establishing the theoretical and documental discussion of economic rights in international law, this chapter will move to the empirical investigation, in other words, it will focus on how the participants view the international regime of economic rights. Thus, Section 5.6 will discuss what are the views of the participants regarding IHRL, followed by their views on the enforceability and applicability of economic rights.

This section takes as its points an acknowledgment of the pressing need to rethink, re-apply and reform the existing international human right law regime to genuinely include the protection of economic rights; to move from theory to a real practice.

5.1 INTERNATIONAL LAW: AN HISTORICAL OVERVIEW

This section describes how international law developed through the years to become a system that not only established set of rules between sovereign states, but a system to protect the human person and its human rights. This section is important because it shows how the international legal order places the protection of the individual in the international law agenda. In that way, we can understand how the international system became an important part of the defence of people's basic rights. Thus, it provides the foundation for the international institutions that were created to protect only human rights, such as the Inter-American Commission and Court[159].

[159] This topic will further be discussed in section 5.5.

For a long time, international law was constructed as a set of rules between sovereign states with the intention to regulate the relations between these actors in the international community. The international law system was first introduced with the Westphalia peace treaties in 1648. Famously called the 'Westphalian regime', these treaties enabled the emergence of a '*society*' of states. The Westphalian treaties were based on the teachings of Hugo Grotius and introduced the principle of legal equality between states, which is the fundamental principle of international law. The preamble of the treaty clearly describes the principle of legal equality between states and the idea that states should respect each other as equals as the fundamental core of the international system (Gross, 1948).

The subsequent period called the "peace of Westphalia" is considered the first phase of international law and lasted for 150 years, until the end of the Napoleonic wars[160]. The second phase began with the fall of Napoleon and the Congress of Vienna. The congress established new principles for international law - the principle of non-intervention and the self-determination of people[161].

It is important to highlight that at the beginning of the nineteenth century the philosophy of law was essentially positivist. This reflected directly in the international law system because in this period the process of establishing a positive international law began, to replace what was mainly customary rules[162]. With this paradigm shift, states started to ratify multilateral agreements with a view to a progressive "positivisation" of international norms[163].

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[160] For more explanation of the phases of international law see Thiago Carvalho Borges, *Curso de Direito Internacional Público e Direito Comunitário* (São Paulo: Atlas, 2011).

[161] The Vienna Congress also established rules on the freedom of navigation and the delimitation of the territorial sea, the classification of diplomatic agents to exercise the right to legal representation in foreign states and the ban on the slave trade.

[162] Customary rules are rights that arise from the customs of a given society. They do not pass through a formal process of creating laws, like constitutional amendments or interim measures. In customary law, the laws do not necessarily need to be sanctioned or enacted. The customs become the law.

[163] The important landmarks in this aspect are: 1) The conference of Paris of 1856 - a peace conference; 2) The Geneva convention of 1864, which created the Red Cross, an organisation dedicated to protecting humanitarian law. It is possible to argue that the Red Cross is a predecessor of international organisations, although has not constituted one; 3) The Brussels Conference Act of 1889, which established the prohibition of human trafficking and slavery[163]; 4) The Pan-American conference 1889, which was the embryo for the creation of the Organization of American States; 5) The Hague Convention of 1889 - this conference established several standards for international arbitration, which are still applied today (Lorca, 2014).

Throughout the years and with the progress of civilisation, the regime evolved to a complex international normative system and had as its features: 1) the respect for the principle of sovereignty; 2) non-intervention in the domestic affairs - all states are free to control their own fate without foreign interference; 3) Independence; formal equality of states and 4) state consent as the foundation of international legal obligation (Focarelli, 2012).

That these features became the guiding principles of the international legal system:

> "highlights the development of a world order in which states are nominally free and equal; enjoy supreme authority over all subjects and objects within a given territory; form separate and discrete political orders with their own interests (backed by their organization of coercive power); recognize no temporal authority superior to themselves; engage in diplomatic initiatives but otherwise in limited measures of cooperation; regard cross-border processes as a "private matter" concerning only those immediately affected; and accept the principle of effectiveness, that is, the principle that might eventually makes right in the international world—appropriation becomes legitimation" (Held, 2002: 4).

The twentieth century continued this process, but the consolidation period of international law was interrupted by the First World War. Once more, international law underwent a process of disruption. The events of the two world wars and their ramifications transformed the system of international law forever, bringing to its legal space obligations towards the protection of the human person. This broke the horizontal relationship between equal, legal sovereign states to introduce an important new actor: the international human rights order.

With the signature of the Treaty of Versailles, the First World War came to an end in 1919. This treaty created the League of Nations, which was an international organisation of a political nature aimed at ensuring the stability of international relations. Although the organisation did not last, it had an important role within international law history because it was the embryo for the future United Nations. The treaty of Versailles and its ramifications were a major trigger of World War II. The sanctions it imposed on the defeated countries, particularly Germany, as well as the

economic crisis in the world enabled the rise of Hitler, the Nazis, and authoritarian regimes throughout the world. During this period, the planet witnessed crimes and atrocities against human beings that changed forever the relation between individuals and states (Trindade, 2010; Focarelli, 2012; Lorca, 2014).

With the end of the second war in 1944, the fragility of the international law system was revealed, and with it the pressing need to establish new paradigms in international relations. It is in this context that the United Nations was created in 1945 with a huge challenge to face due to an immense geopolitical crisis (the Cold War) and the fact that several countries were left completely destroyed. The new phase of international law arrived after the Second World War with the signature of the Universal Declaration of Human Rights in 1948. These two events represent a milestone in the history of international law, because they established the protection of the individual in the international law agenda.

From the Universal Declaration of Human Rights, various treaties on the protection of the human person were signed and ratified. Of universal and regional character, the most prominent were the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights, both from 1966. These three documents are also called the International Bill of Rights; they are the legal base of the international human rights order (Eide, Krause and Rosas, 2001; Held, 2002; Trindade, 2008; Focarelli, 2012).

From 1945 onwards, International Law became more and more multidisciplinary, dealing with issues such as human rights, trade, environment and so forth. In addition, it also became multidimensional, because until the twentieth century it only dealt with land and sea. Now it organises oil extraction, mineral deposits, celestial space and so on. Another important factor in this phase is in relation to globalisation, scientific progress, and the emergence of regional blocs. Through engaging with these broader concerns, the International Criminal Court and international civil society enabled several international standards to impact directly upon the lives of people everywhere.

Hence, international law in the second part of the twentieth century is a much more complex system, especially regarding the execution process of its rules in relation to monitoring procedures and international jurisdiction. The existence of several international courts that should serve as enforcers of international standards and

guarantee greater effectiveness of international treatment still faces many challenges and much scepticism. Indeed, there are weaknesses that should be faced; international law moves slowly in its evolutionary process and does not always undergo great transformations.

5.2 SOURCES OF INTERNATIONAL LAW

This section presents the formal sources of public international law. It is important to emphasise that theoretical and doctrinal discussions are not the scope of this section or the thesis. The aim is to clarify how the relationship between international law, its sources, and domestic law works in theory. Another important point to highlight is that the relationship between international law and the Brazilian constitution will be discussed in more depth in chapter 6, especially in section 6.1.4.

In International Law, sources are the means of checking the very existence of the rule of law. International society does not have a constitution, nor is there a text of universal value that determines the sources of international law. However, it is customary to use, by doctrinal convention, article 38 of the *Statute of The International Court of Justice*, for its political importance and for the number of States that adhere to the document. The normative sources established were: "a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

Despite much criticism from legal doctrine, not only for the order used to enumerate the sources, but mainly for the definitions, it is agreed that the enumeration is merely illustrative, as the ICJ itself has used norms that do not fit the moulds of the aforementioned article. These norms are notably the unilateral acts of States and International Organizations, in addition to the widespread recognition of the so-called soft law as a source of modern international law.

As will be demonstrated by the results of data analysis and interviews, the minimum core is the unreflective admissibility of a prejudice regarding economic rights that does

not retain any legitimacy and pertinence with the unveiling of the historical horizon of the present and its projection for the future.

Precisely for this reason Gadamer (1999: 505) observes that all consciousness presents a reflexive structure insofar as, despite forming, in part, the effect, it has the aptitude to "raise itself above what it is consciousness. The structure of reflexivity is fundamentally given in every form of consciousness". But this suspension of prejudice can only be given to the stimulus of the hermeneutic horizon when merging with tradition through dialogue with the text and/or fact.

Therefore, the relevance of the formative moment of understanding, which occurs with the fusion of realities and horizons, must be recognized. There would then be several realities and two horizons, the one arising from the text, which brings with it the tradition and the temporal dimension in which it was produced, and the present, in which understanding is given, without losing sight of the future projection of meaning. Tradition operates, then, from the linguistic dimension of the text, which in the case of this research are international documents on human rights and the Brazilian constitution, which enable it to be subjectivized, allowing the subject-object dichotomy to be overcome. The main sources of public international law that are relevant to this research:

1. ***International Treaties:***

   The most accepted technical definition of the international treaty is that of article 2, I (a) of the 1969 Vienna Convention on the Law of Treaties[164]. Thus, a treaty is an international agreement concluded in writing between states and/or international organizations governed by International Law. In other words, it is a legal act through which the agreement of wills between two or more international persons is manifested, intended to produce legal effects.

   The treaty is a formal agreement, which is the main distinguishing element between treaty and custom[165]. It is common to use other nomenclatures to speak of treaties and conventions, such as the pact, charter, statute, constitution,

[164] Brazil is a signatory of the convention, having ratified it on September 25, 2009.

[165] Custom as a source of International Law will be discussed below.

agreement, act and so forth. International treaty is thus different from a mere agreement. In the first, there is the *animus contraitendi*[166]; in the second, there is only harmony between points of view. Even if there is a formal declaration to that effect, without a conventional spirit, one cannot speak of a treaty. The production of legal effects is essential to the treaty, which can only be seen in the dual quality of "legal act" and "norm." The mere agreement does not produce legal effects, having a purely political or moral scope.

Treaties also cannot be confused with declarations, as the latter do not generate a legal bond, but rather a political commitment. However, when a statement is substantive, like the UDHR, it can be considered a legal norm. The conclusive force of the 1948 declaration must not be based, however, on treaty law, but on the more recent sector of public international law, which deals with the decisions of international organizations and on the international legal personality (Section 5.3). International treaties, for didactic purposes, are classified according to formal criteria and matters. Formal criteria are the number of parties, or the procedure; The material criteria are the nature of the norms, execution in time, and execution in space.

Upon signing the treaty, the State undertakes to discuss it internally and to decide on its definitive adherence, or not, in accordance with the terms of the consolidated text. With the ratification, the State makes its binding to the document definitive, starting to be bound by society as soon as it enters into force. Like any legal norm, the consensus of will in international law should only aim at something or activity that is materially possible and permitted by law. Illicitness at the international level will be measured by the hierarchical position of norms, with principles at the top of the scale.

In Brazil, the executive branch is responsible for promoting diplomatic negotiations with a view to concluding an international treaty. The Constitution of 1988 determines that it is the exclusive competence of the President of the

[166] The *animus contrahendi* is the willingness of the parties to form a contract.

Republic to conclude international treaties, as established by article 84, VIII. It is the exclusive competence of the national congress to definitively resolve on international treaties, agreements or acts that entail burdens or commitments that are burdensome to the national patrimony. Human rights treaties have a specific regime within the Brazilian law. This matter will be dealt with in section 6.1.4, but it is important to note that the treaties that deal with human rights, and which passed the approval of the qualified forum of 3/5 of the two congressional houses in two rounds, will be incorporated as a constitutional amendment. In this way, they assume the condition of *entrenchment clause*.

The interpretation of a treaty assumes, in the 1969 Vienna Convention, the idea of determining the meaning of the legal norm expressed in an imprecise and/or ambiguous text as to the question of fact that it intends to discipline.[167] This is what happens in the case of economic rights. As already mentioned in section 2.1.2, interpretation is a naturally occurring feature of human communication. When he invented language, man made an irreversible breakthrough in cultural terms. But the complexity of understanding accompanies the complexity of social, economic, cultural, ethical and value relations, and thus, the very interpretation of norms becomes limited because their interpreter is limited by their realities. Obviously, if the interpretation of a norm is essential in the application of domestic law, interpretation is also central to the application of international law. However, in addition to facing the natural problem of language, here, interpretation also needs to overcome diversities not only of languages, but also of different realities. Thus, in the sense adopted by the 1969 convention, interpretation must follow a general rule, resorting, if necessary, to supplementary means of interpretation, such as doctrines and jurisprudence. The general rule is provided for in article 31, which assumes the interpretation using as grounds the objectives and purposes announced in the preambles of the treaties.

[167] The basic principle that governs the activity of the interpreter must be that he/she is not allowed to interpret what is not in need of interpretation.

Hermeneutics has therefore brought interesting contributions to the law insofar as it allows us to understand that the understanding given to the words used will determine the legal consequences of the norms. This means that the same text can adapt to the new conditions of realities according to the new needs that are presented to it, not forgetting the interpreter's condition, which can also change over time. Thus, the interpretive process starts to gain relevance for the application of rights, being not only a way to keep a legal device updated by thinking about a factual situation, but also one which must be able to remain useful in the face of the changes suffered by the different realities during its validity.

2. International Custom

International custom is composed of two elements: the material element and the psychological element. Material elements are the uses, repetitions, and repeated practices of customs during a period. The psychological element is the convention of the obligatory of the practice of conduct. It is the *iuris opinion*[168] that gives customs the character of a legal norm. Customs contain a level of enforceability because of their coercibility.

Spontaneity in the formation of custom makes it a very informal norm. This results in two important characteristics: the flexibility of content and a greater proximity to the phenomena and facts that regulate it.

3. General principles of law

General principles are norms imbued with a strong value charge, whose amplitude is verified in the content of the other norms of the system as a uniform whole. The principle of human dignity does not need to be declared in order for one to be aware of its existence, since no international human law norm would have any meaning if it were not based on the admission of the applicability of this principle. The value of the principle of human dignity spreads through all sources of international law, effective actions of various international

[168] It is the belief that an action was taken as a legal obligation. This contrasts with an action resulting from habitual cognitive reactions or behaviours to an individual/and or government.

organizations and civil society, as well as national ordinances throughout the world. It must be noted that a norm of domestic law requires the test of necessity, that is, the existence of an awareness that the principle represents a legal value to be preserved in international relations. Therefore, the occurrence of similar norms of domestic law in several States is not enough for them to be considered as a general principle of international law.

Article 53 of the Vienna Convention of 1969 provides that a treaty "that conflicts with a peremptory norm of general international law, also known as *jus cogens*, is void". Thus, *jus cogens* has the following characteristics: non-derogability or inalterability; universality; and inviolability. These are imperative principles of international law and are "norms from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law having the same character". The principles provide coherence and systematicity to the international order, as well as condition and limit international norms.

4. ***Judicial Decisions***

Judicial decisions are auxiliary sources, which can only produce norms when combined with the other three sources (treaty, custom and principles). They are not direct or exclusive, nor they can be a solitary normative force.

5. ***Doctrine***

Doctrine remains an auxiliary source of international law. Although it is the creator of all other sources, it nonetheless has less obligatory force. It also maintains its value in States' statements defending their rights before International Courts.

6. ***Soft Law***

The rules that make up the group called soft law have this name because they are flexible rules, as opposed to *jus cogens,* which are rigid principles. The option for flexible rules occurs due to the unstable international situation (political, social, and economic), which requires greater flexibility in decisions and the need to keep up with technological progress. These norms, therefore, do

not have elements that guarantee enforcement, but their relevance is already present in international practice.

5.3 INTERNATIONAL LEGAL PERSONALITY

This section reflects on one of the limits of IHRL: the international legal personality (ILP). The debates surrounding the international legal personality (ILP) is an important one since it focuses on who can access the international human rights mechanism and system, followed by answering the question on who possesses the duty and the authority to apply and enforce the rights presented in international law documents.

The human person was not always considered a subject of international law[169], rather, classical doctrine[170] always ignored the human person as a subject of international law. People were not considered the subject of international law because was not entitled to rights, nor did it have any duties in the international order. Instead, international law was constructed as a set of rules between sovereign states with the intention to regulate the relation between these actors in the international community, as was demonstrated in the section above.

After World War II and with the Universal Declaration on Human Rights, various international instruments have been adopted that are accessible directly by individuals as the right holders. Some of the treaties allow for individual complaints to treaty bodies but not all of them. Some requires states to agree to this additional implementation mechanism. Consequently, the human person at some point was submitted to the international order, constituting today a subject of international law, together with states and international organisations. The human person is a *sui generis* subject, because they cannot form treaties and cannot create international customs, therefore they are different from states and international organisations[171] (Trindade, 2011; Focarelli, 2012).

[169] See Focarelli (2012); Szazi, (2012), and *Nordic Journal of International Law* (1964).
[170] See Shaw (2003).
[171] It is important to highlight that international organisations do not have the same capacities as states either. To read more about these topics see Focarelli (2012) and Trinidade (2010).

The transformation of non-state actors (including the human person) to possession of a legal personality and constituting a subject of law shows a major breakthrough in the construction of the international law regime. This change started to shape state behaviour and international rules began, in some way, to govern how states should behave within their jurisdiction (Focarelli, 2012). What that means is that individuals began to have influence, albeit small, within the international order decision making process. Constitutions that were promulgated after the Second World War have in their text the protection of rights recognised by the UDHR and international covenants[172]. Yet, that does not mean that this addition to the national legal order denotes the realisation of these rights. This will be shown in chapter 6.

A legal person is defined as an entity that can exercise their rights and assume obligations within a certain legal system[173]. The notion of a legal person was constructed in domestic private law doctrine and later extended to the relations between states and other players acting in the international scene.

International legal personality (ILP) is believed to be a *conditio sine qua non* for the chance of acting inside a certain legal situation. Without it, international entities do not exist in law. Consequently, they cannot execute the type of legal acts that would be recognised by that legal regime nor be held accountable under international law.

The International Court of Justice defines the international legal person as a "subject of international law and capable of possessing international rights and duties"[174]. This definition is fundamental to comprehend the orthodox approach of international law because it outlines those entities that have rights and obligations in the international regime and by contrast, those who have not.[175] Thus, states are the only subject of international law who own a **full legal personality** (Piovesan, 2002; Trindade, 2010; Crawford, 2013). But this notion of international legal personality is not adequate because it leaves individuals as objects of the state and does not address important issues, such as who creates the rules and who decides who should create the rules

[172] South Africa and Brazil are some examples.
[173] Klabbers (2010).
[174] Advisory Opinion, *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ, 11 April 1949, at 179.

[175] See Brownlie (2003) and Pellet (2010).

(Lowe, 1989; Trindade, 2010; Focarelli, 2012). To answer these challenges, it is necessary to disaggregate the definition of the international legal person into six types of interpretation: 1) possession of rights and duties; 2) legal relevance; 3) law making capacity 4) exercise of authority 5) membership of the international community; 6) enforcement capability (Focarelli, 2012).

As already mentioned in the beginning of this section, and according with the ICJ opinion, if international subjects are those that are international rights holders and duty bearers, then individuals might be ILP only under one sense, that they are the addressees of these rights at the same time as having the obligation (duty) to respect them within its domain. But if the interpretation is that the ILP is defined in terms of law-making[176], then individuals are not international subjects since they cannot create international law; their rights and duties are those generated and recognised only by states.

ILP could likewise refer to "legal relevance", thus the characterisation of subjects could become bigger than only possessors of duties and rights, aggregating to its deontic mode capacities, competence, or approvals to act in a legally manner. Entering into contracts is an example of an action determined by the legal system. Yet, these two ILP approaches clearly show, yet again, that states or non-states actors derive from the explicit or implicit recognition of pre-existing states.

The third meaning is the law-making capacity or more specifically, the capacity to make international law. Hence, those who make the law are frequently defined as "subjects of law"[177] . If the ILP is understood in this way, the participation of the international legal person decreases since only states and few international organisations have the capacity to create international law.

The 'exercise of authority' interpretation of ILP refers to the entities that employ definitive authority in the international regime or, in other words, understanding ILP as participation in the decision-making process. This interpretation has great correlation with the question of legitimacy of international law and the lack of participation of individuals in the decision-making process. A lot of international law issues have a

[176] The orthodox view.

[177] See Parlett (2011).

direct impact in the lives of people; however, these people have little or no 'voice' when important topics are being decided. The big question is how to legitimate such a complex system if existing international organisations are nowadays going through a (rightful) process of self-questioning? And how can this important project move forward if change does not come from the people? These are questions with no easy answers, but it is imperative to discuss the role of global governance[178] and the emergence of the global constitutionalism debate as tools to develop a complex international legal system to protect universal principles and human rights.

The "membership of the international community" definition of ILP refers to the notion of belonging to a pre-established community, thus the members of the international community are the legal persons in this community. Yet is important to highlight that to be a part of a community does not mean to have its rights or duties, or to participate in it, or to make the law. An entity can be a member in one sense but not in the other. This view of ILP "can easily lead to the denial of the ILP of individuals on grounds that the internationally community is clearly not made up for individuals, regardless of possible (state-created) international rights and duties of individuals" (Focarelli, 2012: 236).

Another definition refers to the "enforcement capability" or more precisely the capability to enforce rights in case of transgression. In this regard, individuals could hardly be accepted as international subjects because they do not possess the power to enforce their rights. It is true that today there is a series of international bodies, such as courts and monitoring committees, but they lack the capacity to force states into compliance.

International rights are created by states, recognised by states and are dependent on states authority to be applied globally or domestically. States hold the power, not individuals. To have an international legal personality and be a subject of international law does not mean that individuals are a 'complete' actor in the global regime, they are the addresses of human rights instruments, but they are not part of the creation or the implementation process (Piovesan, 2002; Trindade, 2008; Focarelli, 2012).

[178] This topic will be elaborated upon in a future section.

Only two set of actors have the power to create and apply international human rights norms: i) the politicians, that in this case could be the representative of the states on the international level and national political actors (senators, deputies and so forth); ii) juridical actors. This position is why this thesis focuses on analysing the understanding that these set of actors have on economic rights. They represent the institutions thus their interpretations of the whole are important to understand the limitations of economic rights.

The role of international organisations is of monitoring and acting as the space of discussion. They do not have decision making power. The states are the ones that decide what the rules will be and how they will enter in effect. The International Court of Justice pointed out that, contrasting with other international subjects, 'a state possesses the totality of international rights and duties recognized by international law' and the other international law subjects only possess this standing because states so want[179]; thus, " the fact remains that the right has been created by the states, is recognized by the states' Court, and will possibly be enforced by state authorities" (Focarelli, 2012: 231).

Non-State actors have important role on developing IHRL. Civil Society Organizations (CSOs) and NGOs play a bigger role than they did with respect to the development of norms. They can have consultative status in the UN, they can participate in the UN meetings and they might request and perhaps be granted opportunities to speak[180], they can offer their experience and views, and seek to influence the inter-governmental decisions during conferences, forums, and committees, providing opportunity for lobbying in the margins. With the increased use of *soft law*[181], CSOs and NGOs can shed a light on topics that in other times would be forgotten. Also, Non-State actors are responsible for clarifying and developing the nature and scope of some important rights. One example of this, is the Limburg Principles, a set of principles created by experts in 1986 to provide the UN Committee on Economic, Social and Cultural Rights with ideas on the clarification of the nature of States Parties obligations resulting from the

[179] ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949.
[180] Non-state actors' statements are usually at the end of a session.

[181] Soft law is rules whose normative value is limited and which are not legally mandatory.

ICESCR. The Limburg Principles was an important step stone in the development of a common understanding of ESCR and served as source of inspiration for General Comments on the ICESCR that followed.

This discussion is important to the thesis since it highlights the fact that human rights international regime is different from the national one[182]. While the IHRL system is established and developed by State and non-state actors and individuals can only access in some specific cases[183], the application of international human rights law in a national system is about individuals who are tasked with implementing these international policy and laws and how they understand their role in this dynamic.

The limiting of the international legal personality enables the distrust that some people and institutions have in IHRL since they feel that the effectiveness and justifiability of economic rights in the international system is non-existent. They feel that those who have the decision-making power do not have the will to allow individuals to access the international system when these rights are violated, and when they do there is no significant change internationally or nationally. Additionally, even though CSOs and NGOs can be part of the development of certain norms, state actors still have the power to decide on economic issues that could see important changes in the neoliberal system. This will be shown in Section 5.6.

5.4 SOVEREIGNTY

State sovereignty is closely connected with human well-being in the sense that it is derived from people. The importance of sovereignty for the discussion of this chapter comes from the limitations that it brings to the IHRL order and consequently to human security. Thus, this section will introduce the concept of sovereignty and address how the current global trend of stronger sovereignty for national states and weaker international institutions affects international human rights law and consequently weakens the effectiveness and protection of the national human rights system.

Nowadays it is possible to perceive that the international legal system is going through a phase of great questioning. The economic and refugee crises are being used as pretext

[182] The application of international human rights law in the national system will be explained in chapter 6.

[183] See Section 5.5

by a lot of countries to reclaim a classic sovereignty discourse to excuse the violations of human rights.

States are increasingly articulating traditional Hobbesian conceptualisations of sovereignty and non-interference. This understanding is based upon a principle of equality of sovereign states (Morgenthau and Thompson, 1985). Following the Treaty of Westphalia in 1648, there has been an acceptance that a state has ultimate sovereign authority within its borders (Hobbes, 1968[1651]; Philpott, 2001). Thus, the classical regime of the principle of sovereignty refers to states that: are ostensibly equal and free; participate in diplomatic initiatives but otherwise in narrow procedures of collaboration; refer to cross-borders practises as a 'reserved matter' concerning only those instantly affected; possess absolute authority over every object and subject inside a particular territory; create an independent and isolated political orders with their own interests; and do not recognize an authority superior to themselves (Cassese, 1986).

But on the other side, with the evolution of society and globalisation, the international community has become more united in the promotion of common goals. In the last sixty years, the development of international society and the evolution of international law has shifted the balance between these two principles, showing the importance of the defence of human rights (especially regarding war crimes, genocide, and crimes against humanity) and in the *"relativisation"* of state sovereignty. Juliette Voinov Kohler argues:

> "State sovereignty is intimately associated with human security in the sense that sovereignty is ultimately morally derived from people (…) When States fail to provide human security this increasingly undermines the moral and legal legitimacy of the State itself" (2008: 3).

The defence of a traditional concept of sovereignty refers to the historical conception of sovereignty as a right, not as a responsibility. As mentioned above, this is a Westphalian vision of international relations where the principle of non-intervention challenges the legitimacy of international intervention (Held, 2002).

The contrast between this historical conception and contemporary views demonstrates the importance of the idea of sovereignty as responsibility. It constitutes a radical shift from the state's privileges of non-interference to a positive obligation to the protection of individual and collective rights in the international arena (Moyn, 2010a, 2014).

However, there is still an on-going battle to establish this idea in the modern world. The concept of sovereignty as responsibility underlines a re-characterisation of the concept, from control of sovereignty to responsibility in both interior purposes and exterior responsibilities. States which cannot protect the essential rights of their citizens or shamelessly abuse those rights fail with their responsibilities. Sovereign states have a responsibility to protect their own people from preventable tragedies – from mass murder to starvation – but when they are averse or incapable of doing so, that responsibility must be assumed by the international community. What is at stake is not building a world safe for big powers, or trampling over the sovereign rights of small ones, but providing sensible protection for common people (Bellamy, 2009; ICISS, 2001).

Yet, most of the interviewees think that the concept of sovereignty as responsibility is only a narrative used by rich countries to interfere with other countries' economies and politics. Whilst some participants see the protection of state sovereignty as a form of shield against international interference, the minority of them realise that by claiming sovereignty as responsibility they are at its core protecting human dignity. Another discussion that was brought by the participants in regard to sovereignty and international order was the issue of national politics and how it influenced the approach that a country would have in respect to sovereignty. According to some interviewees, if the government in power had a more radical view on human rights, they would defend stronger sovereignty, in contrast, if they had a more progressive or liberal view, they would defend the view that sovereignty should not interfere in the defence and protection of human rights. These topics will be fully discussed throughout Section 5.6.

Another important issue to highlight that is significant to the empirical discussion of this chapter is the subject of sovereignty within international organizations. International organisations are going through a time of questioning because of the concentration of power in the hands of the few powerful countries, and the corresponding lack of legitimacy. The UN is a perfect example of this situation. Criticism of the lack of legitimacy of the Security Council is one of the most critical points because it challenges the anachronistic composition of the Council and the veto power. To a large extent, this condemns the General Assembly to insignificance. It has

been marginalized by the Security Council, "dismissing its role not only as a decision-making body, but also as an important forum for an emerging strong global public" (Brunkhorst, 2005: 144).

This discussion about democratisation within the global sphere *per se*, and especially within the IHRL order, is crucial and necessary in this thesis because the participants perceive the UN system for example, as antidemocratic and representative of the developed world socioeconomic narrative. A significant number of participants used the example of the invasion of Iraq as a response to why they didn't believe in the UN and why they understood that was important to have a strong state sovereignty. Other International Organizations that were addressed were the World Bank and the IMF Section 5.6 will also expand on this topic.

As was already stated, the IHRL order needs changes. The system requires reform to create a more legitimate space for decisions, allowing the emergence, strengthening, and participation of state-actors and non-state actors equally. Power cannot be concentrated mainly in the hands of few states. Addressing this issue prompts the conclusion that the shift in the international legal order that started sixty years ago, with the classical concept of sovereignty making room for a more liberal concept of sovereignty anchored in responsibility, enabled the empowerment of individuals inside the international law system. Yet, this new paradigm is struggling to transform and impact the IHLR order, and as yet there has been no real discussion over the role of collective groups[184] within this order. The crises of values, morals, narratives, and socioeconomic inequalities within the world finds itself mired today serve only to highlight this struggle and illustrate that the IHRL requires significant changes.

Indeed, the project is burdened by grave and persistent trials which challenge its structured approach to the realisation of human rights, and their nature as dependent largely but not entirely upon economic issues and ideological changes inside of national states. As already shown in previous sections the main actors of international law are

[184] Collective groups are not Civil Society and/or INGOs. They are communities and/or groups that share at least one common issue and work together to achieve a common objective. For example, indigenous and quilombolas communities are collective groups. They share common issues, but they are not organized as a civil society institution. There are more collective groups than civil society, and if you don't give them a role, a voice in the international human rights order, a lot of groups within societies will be more vulnerable to violations.

states, so one of the major fragilities of this system is that the approach to international law of any given state could change drastically in accordance with the kind of ideology its government enacts. Such frailties cause dramatic problems within an already fragile system and weaken further the already suffering trust in its institutions. The empirical part of this chapter aims to display the concerns and doubts that the participants have about economic rights in the international human rights order.

5.5 THE INTERNATIONAL BILL OF RIGHTS

This section introduces and describes the International Bill of Rights focusing on the ICESCR. It is essential to have this outline because Section 5.7 discusses how the participants understand the IHRL system, focusing on economic rights and how this interpretation affects the effectiveness and protection of these rights in the international law system for the Brazilian people.

After the atrocities that occurred in the second world war, the leaders of the world were finally ready to discuss how the events of the last four decades could be avoided. To answer this problem, they decided to create an international bill of human rights that would protect every human person. In 1946 the UN Economic and Social Council established the Commission on Human Rights, which was the organ constituted to undertake the work of preparing this bill. The UDHR was adopted by the United Nations on December 10, 1948 and comprised of remarkably concise language which covers virtually the whole range of human rights in one consolidated instrument. Although the declaration is not a legally binding document, international doctrine believes that some elements are customary international law[185].

As such, after the publication of the UDHR, the members of the UN decided it was necessary to create a legally binding instrument that would encompass all these rights. Yet, when the working group moved to draft the bill, the ideological disparities between member states generated such a division they could not reconcile the application of those rights in a single biding treaty. By 1952 it became obvious that the growing ideological debate in the wake of the burgeoning cold war would prevent the creation

[185] See citation n.6.

of a unified treaty compromising all UDHR rights[186]. By this point the UN General Assembly[187] had decided that two distinct treaties should be created: one on civil and political rights, and another on economic, social, and cultural rights. At the heart of this decision was the assumption, largely shaped through Western influence[188], that these two sets of rights were distinct in nature, insofar as the ESCR[189] lacks judicial enforceability, and consequently there was need for two different instruments. After years of debate, said instruments were adopted in 1966 and entered into force in 1976, producing legally binding obligations to the signatories' states. Until today, the ICCPR has 168 states party to its obligations, while the ICESCR has 164[190].

It is important to highlight that the controversial way in which the working groups recognised these two sets of rights was transported into the Covenants' language. While civil and political rights were considered to be capable of "immediate realisation" and "directly applicable" as ICCPR refers to "all individuals", "any person" and "no one". ESC rights were implied in an indirect semantic, with nebulous phrasing inviting states to "undertake to take steps", "state parties recognising", "to the maximum of its available resources" and "with a view to achieving progressively".

This different terminology encourages the idea that ESC rights are purely programmatic assertions whose achievement rests solely in the hands of states parties. This interpretation was highlighted during the interviews by the political and juridical participants, as will be seen in section 5.7. Thus "the implication is that civil and political rights can and should be made justiciable in national law; economic, social and cultural rights, however, are treated less as individual claims than solemn statements of important public policy goals, for economic and social rights, states are obliged (only) to do what resources allow toward progressive realization (Donnelly, 2007: 42) and

[186] Separation resolution of 1952 by the Commission on Human rights. Resolution 543 (VI) of 4 February 1952
[187] Ibidem
[188] The eastern bloc supported equivalent treatment from both set of rights(Eide, Krause and Rosas, 2001).
[189] Economic, Social and Cultural rights.
[190] The International Bill of Rights consists of the Universal Declaration of Human Rights (UDHR), the Covenant of Civil and Political rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR). These documents are the foundation of the international human rights regime.

"only the ICCPR imposes direct legal obligations on states parties, while the ICESCR merely lays down indirect legal obligations, needing implementation steps at the national level, before becoming fully operative" (Riedel, Giacca and Golay, 2014: 13). The fundamental rift between these categories of rights took more than forty years to overcome, and only then through the development of the doctrine on ESR rights. The creation of the CESCR with its General Comments demonstrates that although there are some undeniable elements on the Covenant that genuine cannot be entirely fulfilled in a brief period of time, each single right contains elements that can be of immediate application and cannot be dishonoured, restricted or delayed by state parties, as will be illustrated bellow (Section 5.4.1). The fact is that doctrine on ESR was seriously underdeveloped when the treaty was adopted. The discussion of the welfare state and social Constitutions and doctrines was relatively new and suffered from the narratives from the Cold War, especially in the Global South countries[191]. If countries from the Global South tried to implement welfare policies, they suffered intervention from the USA.

In respect to implementation, it is possible to highlight the differences and reflect upon the ideological division caused by the two covenants solution. Whereas the CCPR provides for three monitoring devices at global level, i.e.: state reporting, individual communications, and state complaint procedure, the ICESCR merely foresaw a state reporting obligation. To stress the different treatment of these classes of rights, the ICESCR did not establish an independent supervisory committee in the text but entrusted the task to the economic and social council (ECOSOC). The Committee of Economic, Social and Cultural rights (CESCR) was only created years later by a resolution of the ECOSOC and started its independent work in 1987 (Mata, 2007; Eide, Krause and Rosas, 2001; Young, 2012).

Only in 2008 did the UN establish the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which allowed victims of violation of economic, social, and cultural rights established in the ICESCR to present complaints

[191] The influence in the countries of the global north, mainly western European countries, was different because they were near the Soviet Union. People could see the benefits of policies such as health care, education, and a social floor for everybody. Thus, the politicians had to developed welfare policies and a social democracy. Totally different from what happened with Latin American countries, for example.

in the CESCR. Thus, it was only in 2013 that individual complaints for violations of economic rights were accepted in the United Nations system. The Optional Protocol entered into force in 2013, with 45 signatories and 24 state parties (OHCHR, 2020). In comparison, the ICESCR has 71 signatories and 170 state parties (OHCHR, 2020). As individual complaints can only be made by the individuals of the 24 countries that are parties to the Optional Protocol, the system depends upon the willingness of a state to relativise sovereignty as part of an international human rights system which, in theory, has the protection human person as its foundation.

In principle, governments are no longer capable to treat their citizens as only they think appropriate. The international bill of rights marked the beginning of efforts to reframe the understanding of international law by enhancing the human person as a subject of international law and creating a IHRL order. But how people interpret and understand this system will be seeing in Section 5.6.

5.5.1 *Raison d'être* – the minimum core obligation

This subsection highlights the importance of article 2 of the ICESCR which describes the nature of the legal obligations undertaken by States parties to the Covenant, for the human rights order. This section is important for the empirical research because it explains the minimum core obligation and the progressive realization of ESCR established by article 2 and important documents such as General comment No. 3: The nature of States parties' obligations, the Limburg Principles[192] and the Maastricht Guidelines[193]. They are important for the empirical research because the discussion of the minimum core obligation and progressive realization are key for the discussion of the limits and effectiveness of economic rights highlighted by the participants.

The minimum core obligation and the progressive realization of ESCR create a set of legally binding rules protecting individuals against violations of such rights, such as government deciding for austerity measures without respecting procedures[194]

[192] Conceived by a group of experts assembled by the International Commission of Jurist in June 1986, the Limburg Principles is the best guide available stating the obligations under the ICESCR.

[193] The Maastricht Guidelines is a set of guidelines on violations of human rights and appropriate responses and remedies.

[194] This procedure will be explained in Section 5.6.

established by IHRL. These rules are key for the case-study that will be discussed and presented in Section 5.6.1.

Achieving the minimum core obligations is the *raison d'être* for the existence of the ICESCR. Their recognition comes from the people's struggle to realize their human dignity. The States Parties have, at the very least, to ensure the satisfaction of minimum essential levels of the rights contained in the Covenant. In other words, if individuals are deprived from food, housing, essential health care, education and so forth, from a country that is a party of the ICESCR, it means that this country is violating the minimum core obligation. Thus, some rights can and should be made justiciable immediately.

Nonetheless, it is important to denote that "any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned" (Committee on Economic and Social and Cultural Rights, 1990). Thus, it recognizes that the realisation of this core obligation is connected with budget limitations. But "in order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations" (Committee on Economic and Social and Cultural Rights, 1990).

Countries have different number of resources and this calculation does not depend only on the Gross National Product (GNP), for example. General comment N.3 claims that the socioeconomic situation of each country must be analysed separately, taking into account budget and the quantity of resources there are available to the state for the fulfilment of its obligation under international human rights law (Eide, Krause and Rosas, 2001: 34).

The concept of progressive realisation constitutes a recognition of the fact that full realisation of some ESCR will not be able to be achieved in a short period of time. In other words, there are some rights that can become justiciable over time. Yet, this is not a reason for states parties not to "move as expeditiously as possible towards the realization of these rights".

Clause 8 of the Limburg Principles states:

> 8. Although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time.

Declaring that ESCRs can be both immediately justiciable and justiciable over time oblige State Parties to take steps to achieve the full realization of the rights and to recognizes that some rights are justiciable instantly, at least in practice. Section 5.6 will introduce how the participants understand the legal obligations of ESCR and how their interpretation affects the fulfilment of the minimum core and progressive realization obligations[195].

5.6 THE INTER-AMERICAN SYSTEM

This section introduces how Economic rights is constructed in the Inter-American system. Brazil is a founding member and a state-party of this system. Thus, it is important to explain how economic rights is depicted within its structure.

Economic rights were first introduced into the Inter-American system in 1949 with the American Declaration on the Rights and Duties of Man. It was a non-binding declaration on the fundamental human rights to an individual and outlined economic, social, and cultural rights, as well as the principle of human equality under the law. But only 1969 with the introduction of the American Convention of Human rights, also known as the Pact of San José (OAS, 1969)[196], economic rights were effectively legally binding. This pact is an international treaty made by the members of the Organization of American States (OAS)[197] which established the protection of human rights in the Americas.

Economic rights are established in three passages in the Pact. It is Article 21 that establishes the right to property:

> "Article 21. Right to Property -1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2.

[195] Additionally, the obligations presented in article 2 of the ICESCR are obligations of conduct and obligations of result. The former is defined as an obligation that is determined, in this case, by the ICESCRS itself. The obligation of result requires that State-parties to ensure the achievement of a particular right, thus it depends on the conduct of State Party to achieve its result.

[196] The Pact of San José has 23 state parties and entered into force on July 18, 1978.

[197] The OAS has 35 members states and constitutes the main political, juridical, and social governmental forum in the Hemisphere.

> No one shall be deprived of his property **except** upon payment of just compensation, **for reasons of public utility or social** interest, and in the cases and according to the forms established by law. 3. **Usury and any other form of exploitation of man by man shall be prohibited by law**." (emphasis added)

As this passage illustrates, the Inter-American system establishes that the right to property can only be relativised when there is social interest, accepting, at least in theory, that the right to property must have a social function. Thus, within the state party's jurisdiction the individual can only lose their right to property if they are not using it according the principle of social function[198].

Additionally, the article establishes the idea that work is a form of property over which individuals have a right, thus its exploitation is prohibited by law. As such, Article 6 establishes freedom from slavery, stating that no individual should be subject to slavery or be forced to perform forced labour.

Chapter III of the Pact establishes economic rights. It states:

> "CHAPTER III - ECONOMIC, SOCIAL, AND CULTURAL RIGHTS
>
> Article 26. Progressive Development
>
> The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."

By analysing the article above, it is clear that the American system based the ESR in article 2 of the ICESCR but went no further. Economic rights did not receive the same degree of importance as the civil and political rights that are the core of the American Convention of Human Rights. The only economic right that received the same degree of importance was the right to property since it was the only economic right that was directly applicable and had immediate realization.

[198] As was stated in section 3.3, to have social function means that the right to property comes with social responsibility and must serve, not only the individual, but society as well. For example, a person cannot have a big property and not being used, it needs to be producing a collective good.

The San Salvador Protocol[199] is an additional protocol of the San José Pact. It was created to complement and fulfil the American Convention since the Pact was not forthcoming with to the protection of economic, social, and cultural rights. The San Salvador Protocol has in its text the protection of Just, Equitable, and Satisfactory Conditions of Work (article 7), Trade Union Rights (article 8), Right to Social Security (article 9), Right to Health (article 10).

Much like the ICESCR, the right to property is notably absent in a document which has as its *raison d'etre* the protection of economic rights. By analysing the development of the OAS together with the transformations happening in the world (see section 3.5) at the time that the San Salvador Protocol came to be it is possible to understand why they did not add the right to property to the document. The 1980s saw the triumph of neoliberalism (see section 3.5), developing a narrative which entrenched acceptance of the principle of non-intervention. Adding the right to property to the San Salvador protocol would mean that it had a collective characteristic, an approach which contrasted with the contemporary accepted orthodoxy [200].

The American system of protection against human rights violations does not allow direct individual petitions to the Court. The protection mechanisms are very state centred, as only the state can go directly to the Inter-American Court. The other actor that can refer cases to the Court is the Inter-American Commission of Human Rights (IACHR). The role of the Commission in the Inter-American Human rights system is the most important one since they receive, investigate and decide if the claims should be sent to the Inter-American Court (OAS, 1969; Trindade, 2007; Paz Gonzalez, 2018).

Hence, individuals and civil society do not have the mandate to claim human rights violations directly to the Court. Instead, they first must petition[201] the IACHR, asking them to investigate the violations of specific human rights protected by the American Convention on Human Rights. If, after analysing the claim, the IACHR believes it has

[199] Signed on November 17, 1988, it officially entered into force in 1999, after obtaining the minimum number of ratifications. OEA (1988).

[200] For the neoliberal doctrine, the right to property should be full and without the idea of social function. This was a return to the classic conception of liberalism discussed in Chapter 3.2.

[201] To be accepted, petitions must meet three requirements: 1) exhaustion of domestic remedies; 2) petitions must be filed within six months of the last action taken in a domestic system 3) petitions cannot be duplicated (before another Court).

merit, it will refer the case to the Court. Before sending the claim to the Court, the Commission will generally issue list of recommendations for the state to make amends.

However, this whole procedure made to protect individuals against violations of human rights in the Inter-America system are not applicable to economic rights. The exception to this rule is two rights in the San Salvador Protocol: the right to form trade unions (article 8) and right to education (article 13). Article 19.6 of the Protocol establishes:

> "Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights."

The lack of access to a protection mechanism for the American citizen over economic rights violations by the State-party regarding other rights in the Protocol is another demonstration that economic rights do not receive the same degree of importance as civil and political rights. Again, of the rights present in the Pact of San José, only the right to property receives an "equal" degree of importance. Regarding economic rights, individuals and civil society groups have no mechanism to report violations and the monitoring of compliance of the obligations is restricted to the reports prepared by States themselves.

A question therefore remains- that is, if even the international order and its institutions do not equally award importance to socioeconomic and civil/political rights, how can the national system? The answer lies in the analysis of the understanding that the actors responsible have regarding the protection of these rights. It will be shown in the following sections and chapter that the participants believe that society and especially members of the decision-making institutions place a higher significance on individual rights.

5.7 THE PARTICIPANTS' UNDERSTANDING OF THE INTERNATIONAL HUMAN RIGHTS LAW SYSTEM AND HOW IT AFFECTS ITS APPLICATION

After establishing the framework of international human rights law and consequently economic rights, this section will move to first answer the question of how the

participants understand the IHRL, more specifically, the economic rights system and its consequences. This section outlines the empirical research findings pertaining to the Research Question – "How, and to what extent, does the understanding of the participants regarding the international regime of economic rights affect state protection and policy efforts?"

Philip Alston states that "at the international level, the progress that has been made in theory also looks far less impressive in practice" (OHCHR, 2016). The gap between what is established in the international order and what happens in practices is gigantic. The states and institutions that apply these norms are populated by actors that interpret these texts in different forms. This interpretation is influenced by 1) an individual's moral-ethical background; 2) the socioeconomic environment into which they were born; and 3) the narrative created by the "dominant class". Together, these factors influence the ways in which economic rights are implemented in the legal system.

Thus, the first part of this section will focus on the empirical case of the Brazilian Constitution Amendment of 95(EC 95), looking at participants' interpretations of ideas surrounding the violation of economic rights. Subsequently, the question of international justiciability will be evaluated by the subjects, followed by their understanding of the access to the international system by individuals and civil society.

5.7.1 (Socio)Economic rights violation – a Brazilian austerity case

This practical case is important to this research because it highlights two important topics which affect the application of economic rights: 1) the issue of reception of human rights treaties by the Brazilian legal system (this topic will be discussed in chapter 6); 2) the realization of article 2 of the ICESCR. This section will focus on topic 2.

Starting in 2013, the low price of commodities caused Brazil to suffer a financial crisis. Consequently, the money that the country was spending was greater than that the government was collecting. It was during this time that the narrative of austerity reform began to take force in the political world. In December 2016, the Brazilian government promulgated Constitutional Amendment 95 (EC 95) establishing the freezing of socioeconomic expenditure for 20 years. It was stated that the objective of the EC95 was to reverse the "acute fiscal imbalance framework" of the Federal Government that

led to “the loss of confidence in economic agents and high interest rates, which in turn depresses investment and undermines the economy's capacity for growth and jobs” (Henrique de Campos Meirelles, 2016: 1). The government stated that the root of the Federal Government's fiscal problem was accelerated growth in primary public expenditure, mainly due to the increase in present and future expenditures on various socioeconomic policies.

The new fiscal regime is expected to last 20 years, a length of time considered “necessary to transform fiscal institutions through reforms that ensure that public debt remains stable" (Henrique de Campos Meirelles, 2016: 1). Tellingly, within government discourse there was not a single reference to assessments they made on the impact of its fiscal austerity on poverty, inequality, and human rights.

According to Philip Alston, UN Special Rapporteur on Extreme Poverty and Human Rights, EC 95 will most severely affect the poorest and most vulnerable citizens, widen social inequality, and endanger all a generation of Brazilians. It is as such totally incompatible with the international obligations assumed by the country in the area of human rights. He points out that the Brazilian National Education Plan would need an annual increase of R $37 billion to provide quality education to all students; instead, expenses will be reduced by $47 billion over the next eight years (Alston, 2016).

Civil society organisations (Conectas, Oxfam, Institute of Socioeconomic Studies (INESC), Global Justice, Oxfam Brazil, Platform Dhesca) presented a report to the Inter-American Commission criticising the lack of transparency of fiscal policies that indirectly and directly affect the economically vulnerable population in a cruel way. Jefersson Nascimento, representative of Conectas NGO declares that “state spending control cannot be done at the expense of access to basic rights of the population. A sustainable balance needs to be struck between the state's financial stability and the protection of human rights.” (Conectas, 2016)

The Economic and Social Rights Committee established the following criteria for assessing whether austerity or fiscal adjustment measures could be considered reasonable and justifiable and therefore compatible with the ICESCR:

i. the measure is temporary and limited to the crisis period;

ii. the measure is necessary and proportional, so that not adopting it would endanger even more the economic, social and cultural rights;
iii. the measure is non-discriminatory and takes into account all possible alternatives in order to guarantee the benefits needed to alleviate the inequalities that may arise in times of crisis, as well as to ensure that the rights of the most vulnerable groups are not disproportionately affected; and
iv. the measure identifies and protects the essential minimum content of rights, or a minimum level of social protection at all times. (OHCHR, 1993)

The same parameters are set out in the document produced by the UN High Commissioner for Human Rights:

i. The existence of a compelling State interest
ii. The necessity, reasonableness, temporariness, and proportionality of the austerity measures
iii. Exhaustion of alternative and less restrictive measures
iv. Non-discriminatory nature of the measures adopted
v. Protection of a minimum core content of the rights
vi. Genuine participation of affected groups and individuals (OHCHR, 2016b).

A question posed to participants was whether they believed that EC95 was a violation of economic rights within the international framework. Fabio Ramiro replied that he does not think is a straightforward violation, but it is by reflex. In his view, the government used a principle of reserve for contingencies (*reserva do possível*) to narrow the budget on policies that protect socio-economic rights. The principle of reserve for contingencies relates to the idea of minimum essential levels. This understanding aims to guarantee the minimum conditions necessary to sustain a decent individual life, as well as the idea that states must take steps to employ the maximum of available resources with a view to progressively achieve the full realisation of the rights established in the Covenant. The principle of reserve contingencies limits the realisation of economic rights because it employs the discourse that a scarcity of state resources necessarily accompanies a significant growth of socioeconomic expenditure.

In this case, the government was collecting less money because of the price of commodities but collective demands were increasing. For this reason, the Brazilian government was using the principle of reserve contingency as an excuse to do only what was within its budgetary limits.

In this regard, Ramiro sees the EC 95 as a form to limit the budget on policies on socioeconomic rights. He argues that the state does not have the money to pay for them. He states:

> "From the moment you say "look, I have 10 billion here", I have R$10 billion to spend on health, education, and now I only have R$5 billion with the discourse that I can't spent more than 5 because the scarcity of state resources, so it is strangled [the budget for welfare policies]. The government tends to strangle with the speech of I can't go beyond these expenses, I can't do it, but the demands won't go down. The socioeconomic demands of human rights, they only increase"[202].

It is a violation by reflex because you can lower the protection floor of socioeconomic rights, even if there is a principle like reserve contingencies. Within the national legal order, there is a principle that allows the government to lower this floor, yet meanwhile there is an international law that says that the state has the obligation to achieve progressively the fulfilment of these rights. Therefore, when you use the narrative of scarcity you are violating article 2 by reflex.

In contrast, Deborah Duprat believes that EC 95 is an absolute violation of article 2 of the ICESCR. She highlights that when the amendment project was in discussion in the congress, she sent a communication to the congress informing that if EC95 was approved it would assault the soul of the Constitution. After all, the Brazilian Constitution "fights" heavily against misery, poverty and inequalities of all kinds. In 2017, she wrote an official letter to the Attorney General Raquel Dogde, arguing for the unconstitutionality of EC 95. Not only does EC 95 violate constitutional law by violating Title I of the Constitution (Brasil, 1988)[203], but it also violates international human rights, especially those established in the ICESCR. When a policy asphyxiates

[202] Original answer in Portuguese: Porque a partir do momento que você diz "olha, tenho 10 aqui", tenho 10 pra gastar com saúde, educação, e agora eu tenho 5 e com o discurso de que eu não posso ter mais que 5 porque é a reserva do possível, então ele vai estrangulando. Ele tende a estrangular com o discurso do não posso ir além desses gastos, não posso fazer, mas as demandas não vão diminuir. As demandas sócias de direitos humanos, eles só fazem aumentar.

[203] This topic will be further discussed in chapter 6.

investments, which protect economic rights' attempts to lower inequalities, it is directly violating article 2 of the ICESCR. She states that a quick analysis of the EC 95 regarding its creation, processing, and results reveals that it does not stand up to a test with any of the international parameters (Duprat, 2017).

These international parameters are the following:

i. the proposal was not preceded by studies that ruled out other possible solutions. INESC, for example, talks about two measures that could be adopted: (a) combat tax evasion, which would represent an increase of 27% of the amount collected, which in 2015 corresponded to R $500 billion; (b) increase the contribution of the super-rich by revoking the non-taxation of profits and dividends in income tax, which in 2015 would have corresponded to R $43 billion.
ii. the issue of transparency, accountability and social participation- mechanisms that are still of limited use in the Brazilian scenario, in which the political elite considers that, by exercising the vote, popular sovereignty is exhausted (INESC, 2016).

By analysing the responses of the actors regarding the violation of article 2 by EC95, it is possible to conclude that depending on their political background, that is, if they were more right wing or left wing, their responses would differ. All participants from civil society and social movements said that it was a violation. Political actors from the right would have a contrasting view and use the neoliberal narrative of the need to reduce government expenditure on socioeconomic rights (Section 3.5). The same can be said about juridical actors. On the other hand, participants from these two groups with a more leftist view would agree that EC95 is a violation of the ICESCR.

As well be shown throughout this thesis, the application of economic rights depends on the cultural background and the socioeconomic environment of each individual. In some way, it does not matter that the case presented in this section is a blatant violation of article 2. What matters is what the people that have the decision-making power understand. And if, as is the case in Brazil, they are part of a dominant class within a society that is constructed on colonialism, patrimonialism and neoliberal values, their understandings will reflect these values. Thus, it is no surprise when the political class

decided in favour of EC95 without passing through the appropriate international legal procedure.

In this regard, Rubens Beçak focuses on the issue of genuine participation of affected groups and individuals. He emphasises that during the process of discussing the amendment there was no signal of deliberative processes that involved affected populations in the decision making. In other words, the government did not allow the participation of civil society when going through the rite of passing an amendment bill. This elision was a further violation of the rule established by the Committee of Economic and Social rights in that before passing austerity measures, the state in question has to discuss the policy with civil society and citizens (OHCHR, 2016b). This procedure is vital to the respect of democratic participation.

Another procedural violation occurred with the lack of a periodic evaluation of the effectiveness and impacts in the amendment. The EC95 has a lifeline of twenty years, with no expectation for review contained therein. Thus, the prediction of such drastic measures over the next twenty years contradicts of the temporal parameter of the crisis period. Philip Alston states that the human rights outcomes of this cap are devastating, and "will hit the poorest and most vulnerable Brazilians the hardest, and will increase inequality levels in an already very unequal society"(Alston, 2016). This devastation is due to the maintenance of a tax structure that historically favours the rich, coupled with the low investment in public policies aimed at reducing poverty. In the end, the EC 95 impacts the axiological axis of the ICESCR at its core because it violates the right to equality and non-discrimination since the poor are the ones who are going to pay the bill. The EC 95 weakens the Brazilian welfare state.

Dirley da Cunha states that by setting a ceiling on primary expenditure, EC95 violates the constitutional concept of the welfare state. In effect, limiting expenditures on primary expenses is a setback to progressively achieving the full realisation of socioeconomic rights. One of the characteristics of human rights is exactly the prohibition of regression present in the General Comment no. 3 that establishes The Nature of States Parties Obligations in the ICESCR. Dirley posits:

> "In this case, we are going through a setback that is aggravated because we know that this ceiling will be in force for the next 20 years. Why? Because this ceiling only exists on primary expenses. Non-primary financial expenses such as interest payments, debt loans

> have no spending limit, you are only limit spending health care investments, education, welfare, assistance. This is a very serious problem. Since we live in such a large country, that has a giant social demand. How will be able to maintain a pattern for the next 20 years? It is absurd"[204].

We cannot speak about state expenses without discussing what is implied by the "essential minimum". Da Cunha understands that both the valuation of the essential minimum and socioeconomic conditions differ within each community, thus the essential minimum in Brazil is very different from the essential minimum in Germany. But he recognises that what will define the level of the minimum is what is necessary to sustain the dignity of the human person. The essential minimum is the minimum that every human being has, and every human person must live with dignity. His view agrees with General Comment no. 3. A party state in which any significant number of individuals is deprived of an essential minimum is, *prima facie*, failing to respect its obligations under the ICESCR (Committee on Economic and Social and Cultural Rights, 1990).

Da Cunha was asked what a minimum essential would include. He replied that it would mean the right to food, a right to housing, a right to work, the right to social security, a right to pension, and a right to health, the last 3 rights being the pillars for the Brazilian welfare state. All of these features lay within this concept of an essential minimum, which has as its main theoretical support the protection of the dignity of the human person. The dignity of the human person is the source of all civil, political, social, economic, and cultural rights, whether individual, collective, or diffuse.

Gustavo Renner goes further in the discussion and emphasises an important point regarding EC 95. He says that if the goal were to simply cut the budget to reduce government deficits, a simple public policy establishing good governance and a responsible budget would work. It would not be necessary to amend the Constitution.

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[204] Original answer in Portuguese: "Nesse caso nos estamos passando por um retrocesso que é agravado porque nós sabemos que esse teto vai vigorar durante os próximos 20 anos, é um regime fiscal que em detrimento dos direitos sociais econômicos prestigia as despesas públicas não primárias. Por que? Porque esse teto só existe nas despesas públicas primárias, nas não primárias que são aquelas financeiras como pagamento de juros, de empréstimos da dívida não tem limite de gastos, você só limita os gastos para bancar serviços públicos, ampliar investimentos na área da saúde, educação, previdência, assistência, é aperfeiçoar serviços públicos já existentes em diversas áreas, nos estamos sofrendo um problema muito grave. Como é que um país de um crescimento tão grande, de uma demanda social tão gigante vai conseguir manter um padrão durante os próximos 20 anos, é um absurdo isso."

When you amend the Constitution, the purpose is to limit fundamental rights. If it were not to limit fundamental rights, you could simply implement a responsible budget policy.

Renner says that current focus takes a form more along the lines of: "I do not recognise the right to health because I can't afford it anymore", "I don't recognise the right to education because I can't afford it anymore", or - "Since I reached a budget limit, I don't recognise these rights." As a matter of fact, he is critical of the government's decision to waive taxes to industries like agribusiness despite the supposed budget constrictions that threaten economic rights. He states that all this logic of EC 95 it is only justifiable if you want to remove or reduce economic rights. On one hand, the government say that they must establish severe austerity policies with the argument that there is no money left. However, on the other hand, they waive payment of debts by big companies or makes easier for them to pay less taxes. Such contrast, in Renner's view, highlights the ideological component of the venture.

What the interview of Gustavo Renner shows is that the crisis is of rights not of budget. That is to say, the goal of the government is not to protect economic rights but to limit them. This whole narrative of limited budget comes from the third hypothesis presented in this thesis: the narrative created by the 'dominant class' influences the actors that create the policies regarding economic rights. The Brazilian elite is patrimonial, oppressive, and neoliberal, as was demonstrated in chapter 4. They want neoliberal policies applied in the government, but with the condition that these neoliberal policies should be only for the poor people. For their own concerns, they want the state to facilitate their lives by forgiving debts, for example (Souza, 2019; Casara, 2020). As Martin Luther King said, we have socialism for the rich and free market capitalism for the poor (King, 2003). By analysing the interviews together with the historical and socioeconomic background we can say that this is the case in Brazil. And this context affects the protection and implementation of economic rights in the country.

In this regard, Miguel Calmon says that this amendment shows that austerity is placed as a value in and of itself. This is a discourse that favours the prevalence of liberal and market ideas instead of economic rights and other values that are constitutionally safeguarded. The Socialist and Freedom Party (PSOL) placed this view at the heart of a challenge to EC 95, entered with a plaintiff arguing for its unconstitutionality as such

austerity reforms violate the social and economic rights established in the Constitution (Supremo Tribunal Federal, 2017). They claimed *periculum in mora,* arguing that the Supreme Court should decide quickly to avoid serious damage that would be difficult to repair.

The Federal Attorney, Raquel Dodge, opines for the rejection of the request arguing that there is no *periculum in mora*. The purpose of the constitutional amendment was to contain the Brazilian economic crisis and to rebalance the public accounts to avoid the deepening deterioration of public finances. In that way, any precautionary suspension of the effectiveness of EC 95 could cause reverse damage. It would cause economic instability, diminish the credibility of the Brazilian economy and damage the fiscal balance of public accounts (Supremo Tribunal Federal, 2017).

Until today the Supreme Court have not decided on the constitutionality of EC 95. Calmon doubts that the Supreme Court will declare the Amendment to be unconstitutional. On the contrary, he thinks that the Supreme Court will recognise the constitutionality using the narrative of necessity, of economic exception. And that is dangerous. He believes that the Court will find that the Constitution talks about the maximum available resources and that there are no available resources. He thinks this is a fallacy since the Amendment establishes a ceiling for social investments, but there is no ceiling for the payment of debt interest.

He claims:

> "Not that debt interest is not relevant, it is relevant, but it is no more relevant than social programs or investments in health and education. It cannot be more relevant because it does not have the constitutional priority that these rights have, that wealth redistribution has, so I have no doubt of the unconstitutionality. But at the same time, I have an inclination to think that the Supreme Court will not declare the unconstitutionality of that measure. They will yield to the appeals, to the terrorist discourse that the government has made regarding social security reform based on neoliberal policies. So, this narrative of no alternative, of extremism, of an exceptional situation is extremely dangerous and will compel people to accept these measures"[205].

[205] Original answer in Portuguese: "não que juros da dívida não seja relevante, é relevante, mas não é mais relevante do que os programas sociais, do que investimento em saúde e educação, não pode ser mais relevante, porque não tem a prioridade constitucional que esses direitos têm, que a redistribuição da riqueza tem, então não tenho dúvida da inconstitucionalidade, mas na mesma proporção eu tenho a

There are many myths and prejudices in Brazil regarding economic rights, such as their being minor rights, conditional rights. This issue will be further discussed in Section 6.1. Miguel Calmon believes that this is expressed in article 2 of the ICESCR, a common interpretation of which holds the idea of progressive realisation as that someday these rights are going to be realised. On the contrary, he understands that their realisation not as a singular event but as an ongoing process. These rights must be achieved constantly. That is the reason why he believes that economic rights are programmatic norms[206]. They must always enable a stage of satisfaction beyond the historical moment in which they are found. Progressive realisation is, to Calmon, never-ending by definition.

Brazilian Institute of Geography and Statistics (IBGE) projections show that, by 2036, the Brazilian population will grow by at least 20 million people. This growth includes a significant increase in the elderly population which will probably double that of today and results in a higher demand for health services. Given this scenario, *per capita* expenditure will not only be frozen but will suffer reduction. If the country currently lacks public services in this area, suffering as it does from chronic underfunding, imagine the chaotic situation that will set in with this population increase. Without the possibility of increasing the availability of services given the budgetary constraints imposed by EC 95, the violation of economic rights will rise as well.

Alberto Amaral Jr believes that the idea of the spending ceiling holds a certain uniqueness with the problem of pension reform, where it is a problem of misallocation of funds and an extreme inequality in the distribution of burdens. Thus, Amaral Jr believes that there it is a problem of establishing fair criteria so there is no unequal burden between groups within society. With this in mind, he argues that the government cannot allocate to the poor a heavy and excessive burden to the detriment of certain castes. He gives the example of the civil servants (judges, prosecutors, etc), stating that

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tendência a achar que o supremo não vai declarar inconstitucionalidade dessa medida cedendo aos apelos, ao discurso terrorista que o governo tem feito agora com relação a reforma previdenciária, que dizer isso inclusive viola o dever de publicidade que a constituição prevê ao governo, o governo não pode fazer publicidade para convencimento, publicidade terrorista, ahh vai acabar, ou aprova ou acaba, esse tipo de publicidade não pode ser feita, não é? Então esse discurso da ausência de alternativa, do extremismo, da situação excepcional que é extremamente perigoso e vai fazer com que as pessoas aceitem essas medidas."

[206] Programmatic norms will be discussed in Section 6.1.

they are a highly privileged group, and their privilege is something that he believes violates economic rights in a very clear way in regard to the issue of burden distribution. This is a problem that involves deep economic historical inequality, within which the burden is always placed on vulnerable groups. He argues that if it is true or necessary that the state cannot spend more than it collects, the burden of this decision cannot be distributed as unequally as the Brazilian government has done.

Resources are not being used for the purposes that they should be used. It is necessary to prioritise certain groups when deciding where expenses should be allocated, and economic rights policies should have essential primacy in these decisions. Yet that does not happen as the political actors responsible to protect and apply these international treaties are part of the upper class (Chapter 4), whose interests it is not in to properly apply and protect these rights. The case of EC95 demonstrates this.

5.7.2 Limits off International Justiciability

One of the consequences of the different interpretations of economic rights and understandings of international law can be seen in the case of international justiciability of economic rights. When asking about justiciability of economic rights norms in international treaties, most participants of civil society were not aware that they could use international mechanisms of protection. The only participants that understood how to use international mechanisms of protection were the representatives of international NGOs, such as Human Rights Watch and Conectas. Furthermore, participants would ask how the system worked and how they could use them to protect their rights. After the explanation, they replied that they did not believe in international justiciability of economic rights, as emphasising their incredulity that there even existed an international mechanism for the protection of economic rights. The fact that so many people are unaware of the mechanisms is, for these participants, an indication that international justiciability doesn't exist and/or is not meaningful. Another topic which frequently arose was the disbelief that the international community would get involved in local problems with nothing to gain.

Most politicians replied that international justiciability is non-existent. It only works to "name and shame" and provide beautiful rhetoric in congress, but that decisions of the Inter-American or the United Nations system are not seen as something serious by parliamentarians. Ana Tulia highlighted that Senator Randolfe had a bill in the House

determining that all the decisions or rulings by the Commission and the Inter-American Court on international responsibility based on a treaty ratified by Brazil hold immediate legal effects in the sphere of domestic law (Rodrigues, 2016). The problem is that the Brazilian Constitution already establishes that it should not be necessary to promulgate a new bill to reaffirm something that is already in the Constitution. This topic will be further discussed in the next chapter. Although Senator Randolfe's proposed bill comes from a place of good will, aiming to tie Brazil to its international responsibilities, the willingness to create a new bill shows how little Brazilian politicians know about international law. Such ignorance has an impact on the protection of important rights.

The answers of the judicial participants were more diverse about the justification of their interpretation. Prosecutor Duprat also does not believe that there is international justiciability of economic rights. In her opinion, not one economic right is fulfilled, and it does not even cause embarrassment anymore. She believes that an international system should use not only moral censorship but more serious reprobation. She believes that as we are inserted in a capitalist system, the only sanction that the international system has is of economic nature, and only between countries, in other words, sanctions that one country can impose on another. She believes this state of affairs is very dangerous because it does not involve a Court and is not based in clear international law framework but on politics and political interest. Political interest and agendas, she highlights, change very quickly. Rubens Beçak believes that international justiciability has an impact but like Deborah Duprat, he believes that the issue of the sanction is fundamental for the same reasons: that international bodies that do not have sanction mechanisms also often fade away and there is no disposition to respect their decisions if there is no sanction. Thus, the international human rights system is born with a fatal flaw: a lack of disposition from the countries to respect them. But Deborah Duprat believes that nowadays there is a growing perception that if you have your human rights violated you can use the Inter-American system, more so than the UN system.

Dirley da Cunha also believes that there is not international justiciability of economic rights. He states:

> We subject ourselves to the Inter-American Court of Human Rights, it is not a commission, it is the Court itself. But unfortunately, the Court has no legal power over national courts, so what is the point of a decision? To have a merely pedagogical, symbolic effect that cannot change the state of affairs in the country. For me the structures of these international

> "courts should be refined and improved so as to create recursive means of promoting dialogue between international courts and national courts"[207].

Thus, Dirley believes that there is not a relationship between the international and national system regarding economic rights and that weakens even more an already fragile system of protection.

Gustavo Renner highlights his experiences with the Supreme Court of applying the decision of the Inter-American Commission of Human Rights and Inter-American Court of Human Rights. He maintains that the letters or the decisions by these institutions does no matter for them and what his office did was to use this decision to name and shame the Court and create a conflict of moral coercion. Therefore, he says that they used these decisions to embarrass the Court and make them admit they did not take it seriously. Fabiola Veiga clearly states that she never read a Court decision based on an international treaty.

Nina Ranieri clearly recognises in her deliberations the importance of the individual having international legal personality and capacity to directly participate in the international framework. She understands that Europe has developed a more effective system because citizens have direct access to the European Court of Human Rights, in contrast with the Inter-American system where individuals must first petition to the Commission. But in her view, this kind of system is an exception since the international human rights system, whether the International Criminal Court, the Human Rights Council, or Human Rights Committee, are ineffective since they are essentially political bodies. Within them, the individual still cannot directly participate in the process and decisions are being made in small backrooms. Thus, she believes that for international justiciability to work, it is first necessary to strengthen local institutions regarding

[207] Original reply in Portuguese: "Nós nos sujeitamos a corte interamericana dos direitos humanos, não é comissão é a corte mesmo, porque é um tribunal judicial internacional que existe no âmbito da OAE, mas que infelizmente não tem nenhuma ascendência jurídica sobre os tribunais nacionais, então o que adianta uma decisão para ter efeito meramente digamos pedagógico, simbólico, sem efetividade né, que não tem condição de alterar o estado de coisas no país. Para mim as estruturas desses tribunais internacionais deveriam ser aperfeiçoadas e melhoradas para se criar meios recursais de se promover o diálogo entre os tribunais internacionais e os tribunais nacionais, mas isso na Europa também não existe, é a mesma coisa que a gente padece aqui e lá, a corte europeia também não tem ascendência sobre os tribunais nacionais."

economic rights. Nevertheless, she believes that it is important to have a place of international denunciation since it creates the feeling of international shame.

Alberto Amaral Jr thinks Brazil looks very little at the international human rights protection system and the Inter-American system in particular. Human rights in general are not thought of cross-cutting internationally delegated frameworks, neither from the Protocol of San Salvador, nor from the ICESCR, nor from the ILO's own letters when they are approved by Congress and incorporated into Brazilian law. He emphasises that Brazil has a very ingrained conception of its sovereignty and the Supreme Court has repeatedly reiterated this position in its decisions. Thus, although Brazil incorporates international human rights law in the national system, the people who should implement this are the ones who use the strong sovereignty narrative to argue these laws do not apply to them. The second point he makes is about how the international power is structured. He states that while international organisations have the role of publicising the violation of human rights, they have limited power in the implementation of these rights and consequently, they necessarily presuppose state participation. So, there is a gap here between the ability of an international organisation to force a country to respect the international human rights law and its application.

Fabiola Veiga believes that the international human rights system should be the last place of appeal in the case of economic rights violations. She considers it the last place that an individual can get help or at least cause some kind of international embarrassment for the state. Nevertheless, she also recognises that these kinds of cases take so long to reverberate, and do not have immediate impact for the people who are suffering the violation. She also asserts that the state is a multifaceted body and that the state that goes and ratifies the treaty is not the same state that will apply it. States have many internal power disputes, which is also reflected in the application of international human rights law. The states ratify a treaty that must be applied in all three branches, and the contradictions presented in each institution is also present in the power struggle between them. The law itself is not applied when there is a specific framework, and even less with international treaties. She highlights that this does not only happen with international treaties, but also with the Constitution. Furthermore, she pronounces that from moment of signature and the moment of ratification time always passes, and the political context changes.

Most of the participants, from all three spectra analysed in this research, understand that there is no international justiciability of economic rights. It was one of the few topics that they agreed on.

5.7.3 The local reality Vs international reality – the assimilation issue

One of the defining factors of the lack of enforceability of economic rights in Brazil highlighted by the participants was the issue of assimilation. Relating back to section 4.6, there is a clash between how international law portrays economic rights and how Brazilian citizens understand them. This clash is between what is written in the international documents and whether that is translated to the implementation and protection of rights in practice.

Eduardo Salles gives a practical example of how international human rights treaties ratified by Brazil are not on par with the reality and the socioeconomic context of most of the people. He uses the case of child labour in northeast Brazil, where kids help their families in the farm to help increase the family income. He highlights that for these families, this is a is a normal thing. However, the international treaty does not allow minors to work. Thus, you have an international law that does not allow child labour, but the stark reality wherein if the child does not help the family, they will not have enough income. He asks, "How can you go to that family and say that your kid cannot work anymore because an international organisation says so?" He highlights that until you can change that person's mind, it is hard to apply these policies. He states:

> "The people who are making these laws, who are ratifying these treaties does not know the (socioeconomic) reality. Then they make a treaty that will not be fulfilled, because we cannot have an inspection that can go on each door of each farm. Unfortunately, these laws will be laws that will not be fulfilled if they are not suitable to the extent that the population can understand and absorb and be educated for that and to be able to move forward"[208].

[208] Original reply in Portuguese: 'Então por exemplo, o trabalho infantil, o nordeste brasileiro, em diversos lugares, um jovem de 15 anos de idade colhia café com a família na fazenda deles, e o tratado hoje, não permite que o menor trabalhe. Na verdade, na visão daquela família do interior, aquele jovem que estava colhendo o café com a família pra aumentar a renda da família, é uma coisa normal. Até você conseguir mudar a cabeça daquela pessoa pra isso, é difícil. Por isso que eu digo, o escalonamento numa coisa dessa, é o que eu digo. Aqui não, aqui o trabalho infantil de uma hora pra outra, não existe. Então que tá fazendo essas leis, quem tá assinando esses tratados não conhece a base. Então ele faz um tratado que não vai ser cumprido, porque nós não temos um fiscal em cada porta de cada fazenda. Infelizmente essas leis, vão ser leis que não serão cumpridas se não forem adequadas ao escalonamento que a população possa entender e absorver, ser educada pra aquilo e pra poder tocar pra frente.'

Saulo Casali also highlights this aspect of assimilation. He states:

> "What good is it to bring (these international rules) from the outside if that doesn't get in your head, right? That's where that transplantation comes because if it is understandable, you can apply them, if that example is understood as something positive. But if you try to apply them without people from Brazil being open or prepared, it is not going to work. You have to implement what can be assimilated"[209].

Alberto Amaral Jr has a view more connected with article 2 of the ICESCR and its General Comment No. 3, since he believes that regarding the issue of economic rights nation states today are not sufficiently capable of solving the problems caused by an increasingly globalised society, within development regimes that generate poverty and inequality everywhere. He believes that although they contain particular aspects that should be treated separately, the realisation of economic rights cannot only be seen as a separate problem of each nation state. Article 2 of ICESCR states that "each State Party should undertakes to take steps, individually and **through international assistance and co-operation"** (United Nations, 1966b) to achieve the full realization of economic rights. He posits:

> "A state needs to have institutions that are inclusive. They should not have institutions that burden a large group of society for the benefit of a part of the population. Nevertheless, these issues also need to be considered at the global level, within the relations between rich and poor countries, within trade relations, for example, in the form of subsidies that are granted by developed countries to farmers causing poverty in many developing countries, causing extremely unfair international trade. I believe that despite the national particularities linked to a specific problem solving, the realization of economic rights is linked with understanding this complex global society and they need to be thought within this context."

Caio highlights an important distinction on rights - acquired rights and conquered rights - to understand the question of assimilation. He posits:

> "The idea of acquired rights in my head and what I understand, is what I observed on a daily basis, is as if something that came from the legislature's need. Times have changed

[209] Que que adianta você trazer de fora pra dentro se aquilo não entra na cabeça né? É... aí que fica aquela transplantação né... nesse sentido né... porque se você divide... se você é entendível...você pode trazer um exemplo de fora se esse exemplo for entendido como algo positivo se fosse aplicável... ok, mas se trazer por trazer sem que as pessoas daqui do Brasil estejam abertas ou estejam preparadas..tem que trazer o que puder ser é... assimilado né.

> and with that in the mind of the good legislator the law and laws will be changed. Conquered rights its different, it comes from a historical process, it comes from a historical formation, it comes from a historical organization that culminates in this achievement. It is a historically constructed process. Acquired rights contrarily, can acquired by x factors and it ends up being constituted"[210].

Thus, it is possible to understand that for Caio, economic rights stated in international treaties of human rights are acquired rights[211] which came from an international process, from a legislator that wanted to constitute a new form of society. However, the way in which national institutions and people construct them is through conquered rights; a historical process that moves in a totally different way since the historical construction of economic rights in the country was built on exploitation and violence. This relationship is in constant conflict, it is a clash between a national reality and constructed international norms which dictates the development of economic rights within a country. Sometimes the international norm can transform national reality and minds but normally this change occurs upwards.

In this context, it is the almost ritualistic specific set of values and practices that comprises how the assimilation of economic rights will occur. Changing people's understandings of what is legitimate is necessary. Changing the political and judicial actors' minds, however, is harder since they have the strong ties of patrimonialism, neoliberalism, colonialism, and exploitation that produce Brazil's contemporary sociolegal context; This is trait that permeates the whole political and legal system; this theme will be developed in section 6.2.

5.7.4 Participants' perspectives of the role of international actors

This section focuses on how the participants understand the role of international organisations in supporting economic rights and the mechanism of dissemination of international documents.

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[210]Original answer in Portuguee: O direito adquirida na minha cabeça e no que a gente vê, no que a gente observa no dia a dia, é como se algo que viesse por necessidade do legislador. Os tempos mudaram e com isso na cabeça do bom legislador o direito e as leis vão ser alteradas. O direito conquistado não, ele vem de um processo histórico, ele vem de uma formação histórica, ele vem de uma organização histórica que culmina nessa conquista. É um processo construído historicamente. Esse adquirido não, esse adquirido por n fatores ele acaba sendo constituído.

[211] This terminology was presented by Caio Bandeira during the interview.

Deborah Duprat believes that the UN's system is a problem for the institution due to its heavy dependence on the United States and big markets. These structural features render a system that is all the time accommodating human rights and big business as they try to implement their vision of the world. She gave an example of this issue by saying that she clashes a lot with UN Habitat because they have different perspectives of how to guarantee sustainability for displaced families. She argues a lot about why development process must occur in a uniform way if every place has different socioeconomic context? She understands that the UN is trying to accommodate and push the agenda of western countries and big capital. Nina Ranieri has a similar understanding of the international human rights system as Deborah Duprat, which for her is a very elitist system. She believes that the rapporteurs write such generic reports since they must be careful not to say certain things because of politics and the power structures within the system.

These viewpoints were also highlighted by most participants and resonate with the fear of a new form of colonialism through the "international norms" that follow the agenda of western society. For example, Eduardo Salles states:

> "It is not possible for the (Global North) class to want to legislate over the Amazon rainforest while they have destroyed their forests.... We cannot curtail the development of one country over what is the wish of the other. They should take care of their borders. Why the Europeans didn't take care of their forests and now wants to take care of the Amazon rainforest, which is the sovereignty of another country"[212].

A significant number of the politicians interviewed believed that it is important to respect the system but at the same time expressed that it was also important to delimit and defend national sovereignty and the accompanying principle of non-interference. For these participants, what happens inside the boundaries of state is not the business of other states or the concern of their people.

Politicians from both side of the aisle, right wingers, or left wingers, spoke about the topic of relativisation of sovereignty and interference of international actors. When the

[212] Original answer in Portuguese: "Não é possível que a turma queira legislar em cima da floresta amazônica enquanto eles acabaram com as florestas deles todas.(…) Nós não podemos cercear o desenvolvimento de um país em cima do que é o desejo do outro. Eles que cuidem do desejo deles. Por que a Europa não cuidou das matas dela e agora quer cuidar da floresta amazônica que é a soberania de um outro país."

topic would advance to a more political left/right argument the answer would depend on who was in power. If their political group was not part of the government, they would address the violation of human rights and international law by the administration. Yet, if they were part of the government, they would defend sovereignty and the principle of non-interference as a reason for the international institutions and countries to not interfere in their business[213].

Many participants discussed the disconnect between international and national institutional actors. Miguel Calmon believes that the UN regional offices should act more intensely to make these deliberations and decisions more visible for academics, universities, non-governmental, and governmental organisations. For him it is essential that the UN give more visibility to these parties because there is no interest of the judiciary or doctrine in seeking these documents. It is important to have more visibility because international human rights frameworks could be acknowledged and consequently used as references for judicial decision, research, and so forth. This viewpoint connects with the interpretations of Nina and Deborah that the UN system is elitist, and it is developed inside a bubble.

Rubens Beçak thinks that because of the Brazilian historical background, the country still understands international entities as alien bodies. For him, Brazilian institutions do not consider that the international framework can be permeated within the legal framework because of national sovereignty. It is something unfamiliar, distant and this goes for everything, goes for the ILO, goes for the OAS and so forth. Alberto do Amaral Jr understands that there is total insensitivity to the issues of international human rights law in Brazil. But, more than insensitivity, he believes that there is ignorance. Like most of the participants, he believes that judges and legal operators in general are unaware of international human rights law.

Brazilian culture is very thin in terms of knowledge of international law and that translates to how the participants behave towards the international system. It can be

[213] Two examples of this setting are the case of Belo Monte during the Dilma Roussef government (Left wing government) and the fire in the Amazon forest in the Bolsonaro government (far-right government). When international actors tried to interfere in these cases, both governments used the argument of interfering with Brazilian sovereignty.

said that it is a relationship build on distrust since Brazil has seen years of international interference of its governments with catastrophic results.

5.8 CONCLUSION

This chapter has presented research and findings that illustrate the empirical understanding of international law regarding economic rights by the participants. Accordingly, the analysis presented above provides an account of the most relevant aspects highlighted in the interviews.

To accomplish this, this chapter began with a brief account and analysis of international law. The chapter then introduced two important principles: International legal personality and sovereignty. To finish the legal-theoretical evaluation it was necessary to assess relevant international documents that address economic rights, that is, the International Bill of Rights, the San José Pact, and the San Salvador Protocol.

The last part of the chapter focused on the empirical question of "How, and to what extent, does the understanding of the participants in regard to international regime of economic rights affect state protection and policy efforts?"

The analysis presented in this chapter points to the marginal value that juridical and political actors put on economic rights. The fact that the legally binding international norms were not respected when the government passed the EC 95, ushering in austerity reforms which explicitly violate article 2 of the ICESCR emphasises this assessment. Furthermore, the fact that most of the participants agreed that there is not international justiciability of economic rights underlines the insignificant role and marginal value of international norms. This illustrates the limitations of the international human rights system.

This reveal both the value of language made available through the production of international human rights law but also its limitations when these values depend on local cultural considerations. They obstruct the application of a legally binding international norm because of the interpretation process by the actors responsible.

CHAPTER 6: ECONOMIC RIGHTS AND THE BRAZILIAN SYSTEM

The Brazilian Constitution of 1988 was celebrated as a document of hope. After 31 years of bloody dictatorship the people saw in this new document a social contract based on human dignity and a reminder that the mistakes of the past would not be repeated. This sentiment of hope and ideal of a better future connects the Brazilian Constitution of 1988 and the Universal Declaration of Human rights. Both came after the world and Brazil faced atrocities, violations of basis rights and bloody repression. Both have the principle of human dignity as their foundation. Equally, they describe in their preambles the aim and purpose for a common standard of achievement for all peoples. These two documents bring in their texts progressive and hopeful views of a society built on human rights.

However, and especially in Brazil, this sentiment of hope and optimism surrounding the future has been transformed over time into disappointment and suspicion. The human rights and especially socioeconomic rights that are present in the Brazilian Constitution were never fully established within Brazilian society and legal order. The idea of an equal and developed society for all never left the page of legal text to become reality. Like the IHRL order, there is an important and key gap between the rights protected in the Brazilian Constitution and how they are applied and protected in reality.

Accordingly, in this thesis it was important to establish the conceptual development of economic rights, Brazilian socioeconomic history and the IHRL system because together they form the socioeconomic culture and background of the individuals that are key for this research. As stated in the introduction and in chapter 1, the originality of this research is based on the analysis of the semi-structured interviews which reveal the complex understandings of those responsible for applying and protecting economic rights. Thus, this chapter explains how economic rights are recognised in the Constitution (Section 6.1). Next, it explores how international human rights treaties are received by the national legal system. Finally, it finishes with Section 5.2 and the answer to the empirical question of how the actors interviewed understand the implementation (or lack of implementation) of economic rights in the political-legal system. What are the limits for the protection and application of economic rights?

Economic rights are established as fundamental rights in Brazilian Constitution. To understand their effectiveness, it is necessary to analyse the actors' understandings of the Brazilian Constitution in regard to economic rights norms and how these understandings affect the protection and applicability of these rights.

6.1 BRAZILIAN CONSTITUTION OF 1988

As is the case in any complex legal-political system, the provision of economic rights and protections is an intricate and multifaceted process. Introducing the Brazilian Constitution allowed for a framework of how economic rights were to be presented in the national legal order. The Constitution was the means through which economic rights norms gained entry into a system that is authoritative and patrimonial (Chapter 4). Furthermore, this framework enables explanation of how international treaties of economic rights were assimilated by the national system (Section 6.1.4). As a result of this clarification, it is possible to say that the Constitution established a very strong protection system for socioeconomic rights. Indeed, these rights are protected by the Constitution. Moreover, this overview reveals that this legal protection is much more robust than what is practiced and applied. As shown in the legal and theoretical part of this chapter (Section 6.1.1), economic rights in the Brazilian Constitution receive an important position, they are not unlimited, but they are extremely protected.

6.1.1 National Constituent Assembly Of 1987-1988

This section analyses the National Constituent Assembly due to its demonstration of the will of parliamentarians and Brazilian society to forge a new order/society based on human dignity, social justice, and democracy. Such optimism and hopefulness contrast with the reality and values of Brazilian society constructed since 1500. Even though Brazilians citizens were asking for this change, the patrimonial and patriarchal society that they were part of and, as shown in chapter 4, has proven to be an obstacle; a limit to the fulfilment of economic rights in Brazil[214].

[214] This limitation will be discussed in section 6.2.

The goal of the National Constituent Assembly of 1987-1988[215][216] was to create a Constitution that transcended its dimension as a fundamental norm in the juridical sense of the word and became a fundamental condition to create a new and better society. The objective of parliamentarians was to have a Constitution which would act as a stepping-stone to a democratic order built on a fair and just society. As Ulysses Guimarães, President of the Constituent, underscores:

> "It is not the perfect Constitution, but it will be useful, pioneering, ground-breaking. It will be a light, even a lamp, on the night of the wretches. It is walking that opens the ways. She will walk and open them. It will be redemptive the way that penetrate the dirty, dark pockets and ignored misery" [217].

As examined in chapter 4, the Constitution of the 1824 (empire) and 1891 (1st republic) established Brazil as a liberal state displaying a singular iteration of economic rights: the right to property. Indeed, only civil and political rights had provisions in the old Constitutions. The Constitutions of 1934, 1937 and 1946, however, advanced somewhat the status of economic rights (see chapter 4). Before 1988, Brazilian legal doctrine understood socioeconomic rights as simple expectations, wishes and promises with no guarantee of their fulfilment (Canotilho, 1994; Bonavides, 2000, 2004; da Silva, 2000, 2014). That is why many authors said that these social and economic rights were devoid of any legal effectiveness and normative force (Canotilho, 1994; Bonavides, 2000, 2004;da Silva, 2000, 2014). This status changed in Brazil with the promulgation of the Constitution of 1988. (See section 6.1.2)

Furthermore, analysis of documents of the constituent debate[218] show that international human rights norms influenced the addition of some economic rights as fundamental rights of the Brazilian Republic (Brasil, 2013). During his interview, Miguel Calmon

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[215] Constituent Assembly is a collegiate body whose function is to draft or reform the Constitution. The Assembly endowed with full powers or constituent power, to which all public institutions must submit.(Bonavides, 2004)

[216] The National Constituent Assembly was convened by the Constitutional Amendment 26/85 and was introduced in 1987. It worked for 20 months and had the participation of 559 parliamentarians (72 senators and 487 federal deputies). It also had intense participation of civil society and citizens.(Bonavides, 2000, 2004; Da Silva, 2005)

[217] Original text in Portuguese: Não é a Constituição perfeita, mas será útil, pioneira, desbravadora. Será luz, ainda que de lamparina, na noite dos desgraçados. É caminhando que se abrem os caminhos. Ela vai caminhar e abri-los. Será redentor o caminho que penetrar nos bolsões sujos, escuros e ignorados da miséria.

[218] These documents are the minutes of meetings held with the constitutional representatives. These documents can be found in the Brazilian congress library and at Câmara dos Deputados (2020).

states that IHRL have a direct relationship with Constitutions. He explains that human rights feed the Constitutions and the Constitutions feed human rights, hence there is both a constitutionalisation of human rights and an internationalisation of fundamental rights. It is a bilateral and ongoing process. In the same view, Saulo Casali declares that the Constitution of 1988 incorporated economic rights present in international treaties and other Constitutions. He acknowledges that the positivation of human rights in Brazil has always being present, the problem always was and is the implementation of these rights. Therefore, Brazilian law has always embraced the idea of positive rights and positive obligations but when dealing with human rights, but more specifically with economic rights, effectiveness becomes a problem. The issue of implementation will be analysed in the empirical section of this chapter (Section 6.2).

The National Constituent Assembly was a repository of all the positive and negative lobbying that was advocated and sponsored throughout the process. Due to a distrust and fear of the constituted powers of the dictatorship, the National Constituent Assembly attempted to constitutionalise everything. Thus, several themes and matters were included in the Constitution to prevent them from being subject to constant changes as parliamentary majorities and governments changed. This move represented a way of entrenching guarantees in the face of the failings of democracy, such as the risk of becoming a tyranny of the majority. Thus, socioeconomic rights and collective rights gained legal a force never before seen in Brazilian history.

Rubens Beçak was involved in the National Constituent Assembly and highlights that the optimism of the constituency and the will to build a society in contrast to that which existed during the dictatorship made it possible to push for economic rights to be elevated to the same level as civil and political rights. These rights were established as fundamental rights of the Brazilian Republic. He states:

> "That's why Brazil made such an extensive charter of rights. I followed some discussions of the fundamental rights commission, and can I tell you that it was a concern to have economic rights and to make sure that they were eventually respected and enforced. Justiciable right? There was a great exchange of ideas (within international human rights law), they knew what was being discussed in other parts of the world and this went into

> the constitutional text, but they lacked a little knowledge on how to detail these rights to have an effective application, that element was missing"[219].

As was stated in the opening section of this chapter, this was a propitious moment because the country was leaving a brutal dictatorship. This is one of the clearest reasons surrounding why the Brazilian Constitution tried to constitutionalise everything, an illusion that the country could finally move forward to better days.

6.1.2 The Citizen Constitution

On October 5, 1988 the Constitution of the Federative Republic of Brazil came to force. In the beginning the Carta Magna was a beacon of hope for a new present which represented the possibility to forget the terrifying memory of the military dictatorship. Since the Constitution established socio-economic rights as fundamental rights of the Brazilian society it received the nickname of the "Citizen Constitution".

As was described in Section 4.5 the democratic state was eagerly awaited and desired in a society defined by exclusion, misery, and poverty. The Brazilian Constitution of 1988 established a new system built on the protection of the human person and with the aim to build a free, just, and solidary society. Brazilian society longed for a new system that respected human dignity. The first article of the Constitution emphasised that this new legal document transcended its dimension as a fundamental norm in the juridical sense of the word and became a fundamental condition to create a new and better society.

One of the most important achievements that the 1988 Constitution established to ESCR in Brazil was in terms of legal position regarding the legal nature of these social, economic and cultural rights. As previously stated, Brazilian legal doctrine had an

[219] Original answer in Portuguese: "Então eu acho que os direitos econômicos entraram no mesmo patamar que os direitos como um todo, por isso que o Brasil fez uma carta tão extensiva de direitos, não foi o da subcomissões dos direitos, não foi a que eu mais acompanhei, porque não dá para você estar em todas, acompanhei bastante, acompanhei mais a dos poderes, processo legislativo, mas a dos direitos eu te digo que era uma preocupação assim até em desdobrar direitos para ter a certeza de que eles seriam eventualmente respeitados e executados, exequíveis né, então alguns direitos que tradicionalmente viriam reunidos eram bem detalhados e separados numa explicitação. a discussão dos pactos, havia uma troca de ideia muito grande, sabiam o que estava se discutindo em outros lugares do mundo e isto entrou para o texto constitucional, mas faltou um pouco de conhecimento em como detalhar para ter uma aplicação diuturna disso depois, isso faltou.'

understanding that socioeconomic rights were merely simple expectations, wishes and promises without the guarantee of their fulfilment. Canotilho (1993: 68):

> By focusing on the material dimension, the criteria under analysis places us before one of the most controversial issues of constitutional law: what is the content or material of the Constitution? The content of the Constitution varies from time to time and from country to country, and it is therefore fairly correct to state that there is no reservation of Constitution in the sense that certain matters necessarily have to be incorporated into the Constitution by the Constituent Power. It should be noted, however, that the organization of political power (informed by the principle of division of powers) and the catalogue of rights of freedoms and guarantees were considered, *par excellence,* historically (constitutional experience) constitutional content. **Subsequently, the 'enrichment' of the constitutional material was verified through new content, that was once considered of irrelevant legal-constitutional value, of administrative value or of a subconstitutional nature (economic, social and cultural rights, rights of participation and workers and Constitution economic) (emphasis added)"**[220]**.**

It is important to note that this change regarding the legal nature of economic rights in Brazilian doctrine occurred almost at the same time that the IHRL order was instituting the minimum core obligation and the progressive realization of ESCR with the Limburg Principles (1986) and Maastricht Guidelines (1987) (See Chapter 5.4.1)[221]. Yet, the fact that they happened at the same time doesn't mean that the same understanding applied to both.

Nevertheless, Article 1 of the Brazilian Constitution reflected this feeling:

> Art. 1 The Federative Republic of Brazil, formed by the indissoluble union of States, Municipalities and the Federal District, is constituted as a Democratic State and has as its foundation:
> I - sovereignty;

[220] Original text in portuguese: "Ao apostar para a dimensão material, o critério em análise coloca-nos perante um dos temas mais polêmicos do direito constitucional: qual o conteúdo ou matéria da constituição? O conteúdo da constituição varia de época para época e de país para país e , por isso, é tendencialmente correcto afirmar que não há reserva de constituição no sentindo de que certas matérias têm necessariamente de ser incorporadas na constituição pelo poder Constituinte. Registre-se ,porém, que, historicamente (na experiência constitucional), foram consideradas matérias constitucionais, par excellence, a organização do poder político (informada pelo princípio da divisão dos poderes) e o catálogo dos direitos, liberdades e garantias. Posteriormente, verificou-se o 'enriquecimento' da matéria constitucional através de novos conteúdos, até então considerados de valor jurídico-constitucional irrelevante, de valor administrativo ou de natureza subconstitucional(direitos econômicos, sociais e culturais, direitos de participação e dos trabalhadores e constituição econômica)."

[221] The Brazilian Constituent Assembly occurred from 1987 to 1988.

II - citizenship;

III - the dignity of the human person;

IV - the social values of work and free enterprise;

V - political pluralism. (emphasis added)[222]

Subsection III and IV show that two economic rights – human dignity and work – are among the foundation that the state of Brazil should be built upon. The value of work and human dignity was elevated as fundamental principle of the national order. It became the basic core of the Brazilian juridical order. As a result, it became the guide to the interpretation and understanding of the established Constitution. In the first article, the Constitution establishes that economic and social rights should receive significant attention in the Brazilian legal order. Basing its foundation on the principle of human dignity, the Constitution brings to the forefront the protection of ESR.

In this regard, Deborah Duprat states that the Brazilian Constitution has a uniqueness surrounding social protection because during the National Constituent process there was a curious alliance between different groups that aimed at establishing strong institutions for democracy. Therefore, it was possible to create a singular constitutional document that put an end to all remnants of the inhumane practices of the dictatorship period. She also stated that the Constitution had an emancipatory character because it contained all the social emancipatory struggles, such as the *quilombola* and indigenous disputes, the combat of social inequalities, hunger, and misery. For her, the National Constituent created a document that encompassed all the human rights struggles and tried to establish programmatic rules to consolidate the protection of human dignity in all kinds of forms.

Adding to Debora Duprat's explanation of this uniqueness, Rubens Beçak denotes that Brazilian constitutionalism has one significant particularity: it gave socioeconomic rights a remarkable capacity to universalisation. He posits:

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[222] Original text in Portuguese: Art. 1º A República Federativa do Brasil, formada pela união indissolúvel dos Estados e Municípios e do Distrito Federal, constitui-se em Estado Democrático de Direito e tem como fundamentos:
I - a soberania;
II - a cidadania;
III - a dignidade da pessoa humana;
IV - os valores sociais do trabalho e da livre iniciativa;
V - o pluralismo político.

> "I will give you a very good example. If a foreigner is on a cruise disembarks in the port of Santos and goes to do one of those silly, nefarious rides and breaks the foot. By Brazilian law, she can be attended by the single health care system. Of course, she may choose to go on the ship or go to a private hospital and pay but in theory, if she chooses to go to a public hospital and get the care there, she can go. No one will ask if she is a foreign or not. The Constitution enables a much broader reading of rights, much broader than in other times. This way the Constitution not only embraces the Brazilian citizen but also all those who are in the protection of Brazil are visitors, whether they are residing here or not. This, in my view, shows how constitutional guard the rights in Brazil"[223].

With the *Constituição Cidadã* came a process of cultivation of and search for the realization of the fundamental objectives of the Republic established in article 3:

> I- To build a free, **just and solidary society**;
>
> II- To guarantee national development;
>
> III- **To eradicate poverty and marginalization and reduce social and regional inequalities**;
>
> IV- To promote the good of all, without prejudice as to origin, sex, color, age and any other forms of discrimination.[224] (emphasis added)

After analysing the first articles it becomes clear that the legislators of the Constituent Assembly wanted to give the protection and promotion of social and economic rights equal treatment with other fundamental rights in the charter (Guimarães, 1988; Brasil, 2013; Câmara dos Deputados, 2020). Thus, Title number II of the Constitution refers to fundamental rights and guarantees (*Dos Direitos e Garantias Fundamentais*) and chapter II (article 6 to 11) focuses on social rights.

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[223] Vou te dar um exemplo muito prático, se você está num cruzeiro, um exemplo bobo que me veio a cabeça, uma estrangeira desembarca no porto de Santos, vai fazer um daqueles passeios bobos, nefastos as vezes, a pessoa torce o pé, quebra o pé, pisou num buraco lá, ela pode ser atendida claramente pelo sistema único de saúde, é claro que pode ser que ela opte por ir no navio, uma pessoa que tenha dinheiro e queira pagar, mas em tese se ela optar pelo atendimento ela pode ir, ninguém vai perguntar no atendimento do SUS se a pessoa é estrangeira ou não, aquele mandamento de que está na própria constituição de que a constituição é dirigida aos brasileiros tem uma leitura na prática muito mais ampla do que em outras épocas. Essa maneira da constituição tratar o seu destinatário que ela abarca o cidadão brasileiro, mas todos aqueles que se encontram na guarita do Brasil sejam visitantes, sejam estrangeiros que aqui residem é que mostram na minha maneira de ver o assento constitucional do Brasil nesse aspecto.

[224] Original text in Portuguese: Art. 3o Constituem objetivos fundamentais da República Federativa do Brasil: I - construir uma sociedade livre, justa e solidária;
II - garantir o desenvolvimento nacional;
III - erradicar a pobreza e a marginalização e reduzir as desigualdades sociais e regionais;
IV - promover o bem de todos, sem preconceitos de origem, raça, sexo, cor, idade e quaisquer outras formas de discriminação.

It is in chapter II of the Constitution that the confusion between the international and national systems on what economic rights are starts to blossom. Article 6 presents a general definition of social rights:

> "**Are social rights** education, **health**, **work**, leisure, security, **social security**, protection to childhood and maternity and assistance to the destitute[225]" (emphasis added).

As was mentioned in the previous chapter, the right to health, social security and workers rights can be recognised as economic rights in international doctrine. The Brazilian Constitution defines economic rights in title VII, Chapter 1, article 170:

> Art. 170. The economic order, based on the valorisation of human labour and free initiative, is intended to guarantee everyone a dignified existence, **according to the dictates of social justice**, observing the following principles:
> I - national sovereignty;
> **II - private property;**
> **III - social function of property;**
> IV - free competition;
> V - consumer protection;
> VI - defence of the environment;
> VI - defence of the environment, including through differential treatment according to the environmental impact of the products and services and their elaboration and provision processes;
> **VII - reduction of regional and social inequalities;**
> **VIII - search for full employment;**
> IX - favoured treatment for Brazilian companies with small national capital.
> IX - favoured treatment for small companies established under Brazilian laws and having their headquarters and administration in the country.
> Single paragraph. Everyone is guaranteed the free exercise of any economic activity, regardless of the authorization of public agencies, except in cases provided by law. (emphasis added).[226]

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[225] Original text in portuguese: Art. 6o São direitos sociais a educação, a saúde, a alimentação, o trabalho, a moradia, o lazer, a segurança, a previdência social, a proteção à maternidade e à infância, a assistência aos desamparados, na forma desta Constituição.

[226] Original text in Portuguese: Art. 170. A ordem econômica, fundada na valorização do trabalho humano e na livre iniciativa, tem por fim assegurar a todos existência digna, conforme os ditames da justiça social, observados os seguintes princípios:
I - soberania nacional;
II - propriedade privada;
III - função social da propriedade;
IV - livre concorrência;
V - defesa do consumidor;

As you can see, there are some rights that appears as both social and economic rights.

In the interviews participants were asked whether they thought the difference between social and economic rights in the international and national doctrine had any impact on the protection and implementation of these rights. Miguel Calmon Dantas believes this differentiation of concept does indeed have an effect. In his words:

> "Brazilian doctrine does not study human rights enough, even constitutional academics when developing their research and their studies, the great majority, not all, but a majority does not understand fundamental rights[227] in the interaction, in the interdependence, and if you think of a multilevel system of protection or the notion of *interconstitutionality* or the *transconstitutionalism*, any notion is essential to make this linking between the covenants and the constitutional norms that protect the fundamental rights, both social and economic[228]".

Along the same line of thought Alberto do Amaral Jr agrees that differentiation between the international doctrine and the national one causes a problem in the protection of these rights in Brazil. He says:

> "I think that matters (the differentiation), yes, it matters in the imagination of the lawyer, in the way the lawyer works, in the matter of property. Property is traditionally conceived, by the legal thought, as something extremely individual, and that it should benefit its holder: the owner. The property of a house, of a land, of a corporation it is conceived in the same way. We do not make distinctions, because it is always seen as a right that must benefit of the owner. But think, for example, in a corporation, the control of a corporation. This can be extremely damaging if the manager of a particular corporation executes a

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VI - defesa do meio ambiente;
VI - defesa do meio ambiente, inclusive mediante tratamento diferenciado conforme o impacto ambiental dos produtos e serviços e de seus processos de elaboração e prestação;
VII - redução das desigualdades regionais e sociais;
VIII - busca do pleno emprego;
IX - tratamento favorecido para as empresas brasileiras de capital nacional de pequeno porte.
IX - tratamento favorecido para as empresas de pequeno porte constituídas sob as leis brasileiras e que tenham sua sede e administração no País.
Parágrafo único. É assegurado a todos o livre exercício de qualquer atividade econômica, independentemente de autorização de órgãos públicos, salvo nos casos previstos em lei.

[227] I should highlight that fundamental rights and human rights are the same thing for Brazilian doctrine. Human rights are fundamental rights positivized in the national legal system.

[228] Original reply in Portuguese: "(…) em geral eu acho que a doutrina brasileira estuda pouco os direitos humanos, mesmo pessoal de constitucional ao desenvolver suas pesquisas e seus estudos, a grande maioria, não todos, mas uma maioria não compreende os direitos fundamentais na interação, na interdependência com os direitos humanos e se você pensar num sistema multinível de proteção ou na noção de interconstitucionalidade ou no transconstitucionalismo, qualquer noção é imprescindível fazer esse entrelaçamento entre os pactos e as normas constitucionais que tutelam os direitos fundamentais, quer sociais, quer econômicos."

> policy that is harmful to the community, which does not lead to a dignified life for workers, a policy that damages the environment. That would be a problem because we consider this an individual right, a right that belongs to each individual, therefore a right that gives every person the possibility to enjoy, to have the things that he wishes, any way he wants. I think the question of nomenclature ultimately influences the way the judge works and ends up influencing how judges, in a country like Brazil, interpret the law. In Brazil, jurists do not give equal importance to social and economic rights as they give the rights of freedom. Thus, because social rights have specific characteristics, they will always be viewed with some difficulty by jurists as less important or are seen as subordinate to the rights of freedom ."[229]

On the other hand, most interviewees disagree with this point of view. The majority of participants affirm that this distinction between the international and national system does not create barriers to implementation of economic rights. In this regard, Saulo Casali posits that "in Brazil, there isn't any clear distinction of only economic rights or only social rights. I would not say that there is any kind of dogmatic, doctrinal conflict over it, and that this distinction doesn't create difficulty in implementing these rights"[230]. Thus, given there is no clear conclusion on whether it is the conflict between national and international doctrine which causes the issues outlined surrounding the implementation of economic rights, what should be understood as the source of this difficulty?

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[229] Original reply in Portuguese: "Eu acho que isso importa sim, importa no imaginário do jurista, na forma como o jurista trabalha, na questão da propriedade. Então a propriedade é tradicionalmente concebida, sobretudo pelo pensamento jurídico, como algo extremamente individual, devendo beneficiar ao seu detentor, ao proprietário. A propriedade seja de uma casa, de um terreno, de uma corporação ela é concebida primeiro da mesma maneira. Nós não fazemos distinções, porque ela é sempre vista como um direito que deve produzir frutos em benefício do proprietário. Mas pense, por exemplo isso no âmbito da corporação, o controle de uma corporação. Isto pode ser extremamente danoso se o controlador de uma determinada corporação executa uma política que seja prejudicial à comunidade, que não propicie uma vida digna aos trabalhadores, uma política que causa danos ao meio ambiente. Isso seria um problema porque consideramos isso um direito individual, um direito que pertence a cada um, portanto um direito que atribui a cada um a possibilidade de usufruir, de ter a benesses que desejar, da forma como quiser. Eu acho que a questão da nomenclatura acaba influenciando a maneira como o juiz trabalha e acaba influenciando como os juízes dos tribunais no país como o Brasil interpretam a lei e os juristas não costumam no Brasil, dar a mesma importância aos direitos econômicos sociais, aos direitos sociais sobretudo, como dão aos direitos de liberdade. Então os direitos sociais por terem características específicas, eles sempre serão vistos com alguma dificuldade pelos juristas ou são vistos como menos importantes, ou são vistos como subordinados aos direitos de liberdade."

[230] Original reply in Portuguese: "Eu não diria que exista é... nenhuma distinção no Brasil muito clara de direitos só econômicos e sociais, eu não diria que exista qualquer tipo de conflito é... digamos assim, dogmático, doutrinário em relação a uma distinção que cria dificuldade por conta disso na implementação, não."

As will be shown in the empirical section of this chapter, what gets in the way of the protection and applicability of economic rights is the differing understandings that the actors have about them. The reasons for this are: 1) the individuals' moral-ethical backgrounds; 2) the socioeconomic environment in which they were born; 3) and the narrative created by the 'dominant class'. Brazilian society is patrimonial, neoliberal, and individualist, shot through with traces of colonialism and exploitation. Although ESR are protected in strong terms in the Constitution, these factors have meant they are not effectively implemented. Instead, members of the institutions that are responsible for the implementation of these rights are part of the dominant class and do not have interest in changing this system.

Individuals involved in the drafting of the Constitution created a system that protects these rights in strong terms. These individuals were also part of the Brazilian society described above and suffered the same limitations, but it is important to analyse the circumstances of the time that they were writing the new Constitution: as already mentioned throughout this thesis, Brazil was transitioning from a bloody dictatorship and this new Constitution was the hope that Brazilian society could move in a different direction. This feeling permeated the National Constituent Assembly. It is also important to highlight that civil society and minority groups were able to participate in the draft of the Constitution as well. All these circumstances allowed the promulgation of a progressive Constitution. Yet, when it was time to put forth and apply these rights, the patriarchal, patrimonial, and colonial background of the institutions soon arose and the contrast between text and practice created a societal distrust in the applicability of ESCR.

Additionally, article 170 of the Brazilian Constitution determines the need for the state to intervene in the economic order to promote a dignified existence according to social justice. The protection of social justice presents the idea that it is not possible to split the economic order from the social order. The market cannot ensure a fair distribution of wealth. Indeed, the market does not distribute based on merit, does not distribute based on necessity, does not distribute based on any other criteria of justice. Instead, the traditional division of the market is according to economic power, according to what is most profitable, which concentrates more capital and increases wealth.

This natural tendency of the market is neither compatible with the model of the Constitution that Brazil adopts nor with the socioeconomic dimension of human rights. This validates the recognition that economic rights involve or enable intervention from governmental and non-governmental institutions at the national and supranational levels so that wealth produced has a more equitable destination that help to reduce poverty and inequality.

6.1.3 "*Dirigente* Constitution"

This section explains that the Brazilian Constitution is a *"dirigente* Constitution*"*[231] and describes both what this means and the importance of understanding this concept for economic rights in Brazil. It is important to highlight that this section will not compare the Brazilian Constitution to other Constitutions. The objective is rather to explain how the *dirigente* constitutional system works in theory to compare to the understanding that the participants have, in the empirical section of this chapter, and how this affects the applicability of economic rights.

Dirigente Constitutions are characterized by establishing rules and programs of action to be implemented by public authorities[232]. The development of the theory of the *dirigente* Constitution was carried out by José Joaquim Gomes Canotilho (1994) in the face of the emergence of socioeconomic Constitutions[233]. The *dirigente* conception starts by recognising the normative character of the Constitution as a whole; that is, all constitutional norms have a legal character and normative force.

Canotilho argues that a *dirigente* Constitution "has the function of proposing a coherent program and a plan for the achievement of society; the fundamental law (Constitution) [...] has the purpose of guaranteeing the legal principles or rules of the founded society.

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[231] *Dirigente* Constitution have a closer notion of transformative Constitutions. To read about Transformative Constitutions see (Hailbronner, 2017)(Vilhena, Baxi and Viljoen, 2013)and (Klare, 1998).

[232] The American constitutional for example is not a programmatic Constitution (Canotilho, 1994b; Calmon Dantas, 2011).

[233] Social Constitutions emerged in the interwar period and were consolidated in the post-war period. In countries where autocratic regimes were instituted, it was not possible to establish social constitutionalism.

(1994: 11)"[234]. In this sense, the constitutional positivity of the programmatic norms creates three important characteristics (Canotilho, 1993: 184):

1. Bind the legislator to the programmatic norm realisation (imposition);
2. All institutions must take the programmatic norm into account as permanent material directive during their activity (legislative, executive, judiciary);
3. Bind, as a negative material limit (censorship, unconstitutionality), the branches of the government in relation to the acts that oppose or violate programmatic norm.

Having a *dirigente* Constitution can mean a great deal or almost nothing, since such characteristics do not necessarily imply that the directions and programs constitutionally foreseen translate to reality since it depends on political or juridical actors to apply them. It is important to say that programmatic norms do have a lower degree of effectiveness due to their openness regarding the policies by which programs can be carried out. But it is also important to highlight that this openness causes confusion regarding their effectiveness since individuals believe that programmatic norms cannot be applied immediately and thus, that they do not cause a constitutional violation. This, however, is not the case. Deliberate inertia to apply programmatic norms or contrary institutional behaviour can indeed lead to unconstitutionality. The Brazilian Constitution has two legal mechanisms called Direct Action of Unconstitutionality by Omission - Ado (*Ação Direta De Inconstitucionalidade Por Omissão – Ado*)[235] and Direct Action of Unconstitutionality - ADI (*Ação Direta de Inconstitucionalidade – ADI*)[236] when there is inertia or contrary institutional behaviour[237].

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[234] Original text in Portuguese: [...] a constituição [...] tem a função de propor um programa racional e um plano de realização da sociedade; a lei fundamental [...] tem a função de garantir os princípios jurídicos ou regras de jogo da sociedade estabelecida.

[235] Direct Action of Unconstitutionality by Omission - ADO is the pertinent action to make effective constitutional rule due to the omission of any of the Powers or administrative body.(Brasil, 1988)

[236] Direct Action of Unconstitutionality (ADI) is the remedy that aims to declare that a law or part of it is unconstitutional, that is, it is contrary to the Federal Constitution. (Brasil, 1988)

[237] The actors that can claim ADO and ADI are:
I - the President of the Republic;
II - the Bureau of the Federal Senate;
III - the Bureau of the Chamber of Deputies;
IV the Legislative Assembly or Legislative Chamber of the Federal District;
V the State or Federal District Governor;
VI - the Attorney General of the Republic;

Dirigente constitutionalism thus focuses specifically on the transformation of reality through the imposition of binding tasks – to differing degrees - to the legislator. Furthermore, it is not possible to conceive of the inversion of its tasks in favour of policies that establish social retraction, or of neoliberal type. As mentioned in the previous section, starting from article 1, which establishes the fundamental principles of the Republic, through to the institution of objectives on article 3 and moving to the aims and stipulations of the economic order in art. 170, the Brazilian Constitution is assumed as norm (guarantee) and a programme (direction) of the socio-political process (Canotilho, 1993, p.169-170).

A *dirigente* Constitution, or any Constitution, is not the panacea for all socioeconomic troubles, nor is it the solution to the arbitrary exercise of political power. Constitutions cannot be constituted alone because they do not exist in an isolated system. It is society which gives the Constitution power and value and deposits in their texts the constructive synthesis of a community. What kind of community that will be depends on the cultural and historical construction of each society.

The transition from *law in the book* to *law in action* predicates, as an existential requirement for programmatic norm, a community composed of constituents and participants, as interpreters of the Constitution, in the realisation of fundamental rights and the constitutional objectives provided. As Ulisses Guimarães explains (1988: 2-3):

> "Participation (in the Constitution assembly) was also due to the presence, as around 10,000 postulants (…) freely crossed Parliament daily. (…) therefore, there is a representative and oxygenated breath of people, of the street, of the park, of the favela, of the factory, of workers, of cooks, of needy minors, of Indians, squatters, businessmen, students, retirees, civil and military, attesting the contemporaneity and social authenticity of the text that now comes into force. Like the snail, it will keep forever the roar of the waves of hope and claims from where it came. The Constitution is characteristically the status of man. (…) Man's mortal enemy is misery. The rule of law cannot live in a state of misery. More miserable than miserable people are society that does not end misery"[238].

VII - the Federal Council of the Brazilian Bar Association;
VIII - political party with representation in the National Congress;
IX - union confederation or national class entity. (Brasil, 1988)

[238] Original text in Portuguese: "A participação foi também pela presença, pois diariamente cerca de 10 mil postulantes franquearam livremente o Parlamento. Há, portanto, representativo e oxigenado sopro de gente, de rua, de praça, de favela, de fábrica, de trabalhadores, de cozinheiros, de menores carentes, de

Therefore, the community must be seen as represented in the Constitution, just as the Constitution must be experienced and comprehended in the community (Lassalle, 1998; Alexy, 2001; Grau, 2004; Calmon Dantas, 2011). Society is responsible for the realisation of the Constitution, society referring to all the institutions and the individuals who are part of it. They are responsible for the fulfilment of the Constitution. As Perter Häberle (2000: 34) beautifully states:

> "The Constitution is not limited to being a set of legal texts or a mere compendium of normative rules, but the expression of a certain degree of cultural development, a means of self-representation of an entire people, a mirror of its cultural legacy and foundation of your hopes and wishes"[239].

In that way, the realisation of the Constitution and the fulfilment of normative rules lies precisely in the community of interpreters embodied in the people (Häberle, 1997: 37-40). Häberle is accurate when he expresses that the Constitution should be a mirror of reality, and even goes further, claiming that it is "[...] the very source of light. It therefore has an eminent directive function"[240] (p.34).

Yet, this circumstance does not legitimise the obstacles placed by institutions in order to subject the Constitution to political-partisan wills, or even to the *lex mercatoria*. *Dirigente Constitutions* constitute a victory since they represent the capacity of programming the political process towards legal objectives that were constructed within a certain society. Häberle (2004: 183) claims:

> "On the contrary, a look at South America and Central America is very productive, even to the excessive efforts in this area (regarding welfare State) in the Brazilian Constitution (1988), partly also in the former Constitution of the United States of Peru (1985). Much of the welfare state can only be created through the political process and through ordinary legislation. But constitutional enactments are needed. Such an optimum (or minimum) of

índios, de posseiros, de empresários, de estudantes, de aposentados, de servidores civis e militares, atestando a contemporaneidade e autenticidade social do texto que ora passa a vigorar. Como o caramujo, guardará para sempre o bramido das ondas de sofrimento, esperança e reivindicações de onde proveio. A Constituição é caracteristicamente o estatuto do homem. É sua marca de fábrica. O inimigo mortal do homem é a miséria. O estado de direito, resultado da igualdade, não pode conviver com estado de miséria. Mais miserável do que os miseráveis é a sociedade que não acaba com a miséria."

[239] Original text in Spanish: "La Constitución no se limita solo a ser un conjunto de textos jurídicos o un mero compendio de reglas normativas, sino la expresión de un cierto grado de desarrollo cultural, um medio de autorrepresentación propia de todo un pueblo, espejo de su legado cultural y fundamento de sus esperanzas y deseos."

[240] Original text in portuguese: "[...] a própria fonte de luz. Ela tem, portanto, uma função diretiva eminente."

> regulation of social justice is today part of the standard of the constitutional state type, in particular in the form of rights justiciable to a vital economic minimum, to the protection of health, the protection of the family and the guarantee of working conditions in human dignity[241]".

Yet, there is a question surrounding whether the Brazilian Constitution of 88 embodies the values and cultural expectation of its people and the consequence of this ambiguity on economic rights. This topic will be further discussed in the empirical section of this chapter.

One of the questions that arises from Constitutions in general refers to the problem of the lack of effectiveness caused by the erosion of the constitutional conscience. Karl Loewenstein (1976) describes the erosion of constitutional conscience as a devaluation of the written Constitution: in other words when the omission of the public powers devaluates the role of the Constitution. In practice this occurs due to the consequences arising from the abyss between what Constitutions determine and the surrounding reality, between what the Constitution establishes and how its applied in practice (See section 6.2 and 6.3).

A key number of economic rights in the Brazilian Constitution are programmatic norms. They establish programmes of social transformation and depend on institutions' actions to be effective. One example of this is the norms established in Article 3[242] of the Constitution, presented in previous sections of this Chapter, which constituted the fundamental objectives of the Federative Republic of Brazil. Another is in the *caput* of article 7 that establishes that the improvement of social status is a right of urban and rural workers, and the IV of article 7 that institutes that the minimum wage must be

[241] Original text in French: " Un regard vers l'Amerique du Sud et l'Amerique Centrale est au contraire très productif, jusq'aux efforts excessifs en la matière (relativa ao Estado Social) dans la Constitution brésilienne (1988), en partie aussi dans l'ancienne Constitution du Pérou (1985). Une bonne partie de l'État social ne peut etrê créée que par le processus politique et pa la voie de la législation ordinaire. Mais des textes constitutionnels incitatifs sont nécessaires. Un tel optimum (ou minumum) de régulation de la justice sociale fait aujourd'hui partie du standard du type de l'Etat constitutionnel, en particulier sous la forme de droits justiciables à un minimum vital économique, à la protection de la santé, a la protection de la famille et à la garantie de conditions de travail dans la dignité humaine."

[242] Article 3- Constitute fundamental objectives of the Federative Republic of Brazil:
I- To build a free, just and solidary society;
II- To guarantee national development;
III- To eradicate poverty and marginalization and reduce social and regional inequalities;
IV- To promote the good of all, without prejudice as to origin, sex, colour, age and any other forms of discrimination.

able to meet not only individual basic vital needs, but those of the family in regard to housing, food, education, health, leisure, clothing, hygiene, transportation and social security, with periodic readjustments that preserve purchasing power.

As can be seen from the above, Article 3 has programmatic norms that are very abstract. It is not possible to identify specific state conduct for its fulfilment. But in article 7, IV it is possible to require specific conduct from the state because the programmatic norm gives parameters to calculate the minimum wage that is, the minimum wage must be able to meet individual and their family basic vital needs, and the minimum wage should have periodic readjustments that preserve the purchasing power. Thus, it is possible to calculate how much a minimum wage should be by using these parameters and making an economic evaluation using the data from research institutions such as IBGE. Nonetheless, the Supreme Court decided that the minimum wage increase may be merely nominal, it does not have to be a real increase[243].

As the examples show above, programmatic norms can be more or less abstract. Thus, they lack precision because they are indeterminate, in so much as one cannot determine how and in what way legislators should legislate 'the improvement of workers social statuses' for example. Nonetheless, all constitutional provisions have a legal character and normative force. Thus, just like the minimum core notion explained in Chapter 5.4.1, the Brazilian state must ensure the satisfaction of minimum essential levels of the constitutional provisions. The *Dirigente Constitution* is therefore justified as a theoretical stance capable of affirming the conditions for the effectiveness of fundamental rights[244] and constitutional objectives. Only the binding force of the constitutional provision and the inherent programmatic character of all fundamental rights supports the protection of the minimum core and the progressive realisation of socioeconomic rights.

The objective of this section was too present *Dirigente Constitutions* and how they connect with economic rights norms, and thus highlight some strengths and limitations of this kind of system. This presentation is important to contrast with the understanding

[243] RE 565714 and Súmula Vinculante 4,6,15 and 16.
[244] In Brazilian doctrine, fundamental rights are human rights that are in the Constitution.

that the participants have regarding the implementation and effectiveness of economic rights within this system.

6.1.4 Reception of International Human Rights Treaties

International human rights law expects that everyone should enjoy the rights contained in the international law treaties. International law treaties are agreed upon the respect of the principle of *pacta sunt servanda*. The phrase comes from Latin and means "Agreements must be maintained". This principle embodies the good faith element that is fundamental to all treaties. Thus, "every treaty in force is binding upon the parties to it and must be performed in good faith" (United Nations, 1969, article 26).

Brazilian legal doctrine and jurisprudence sustains that international treaties have supra-legal hierarchy (Supremo Tribunal Federal, 2008; Ramos, 2009, 2020; Piovesan, 2017). They built this argument by recognising *pacta sunt servanda* and the principle of good faith, and by emphasising article 27 of the Vienna convention of the Law on treaties which states that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (United Nations, 1969).

However, international human rights treaties are treated differently in the Brazilian legal system. They have a special standing because of the rights that the system wants to safeguard. The 1988 Constitution introduced the institute of predominance of human rights as the guiding principles of the Republic of Brazil in its international relations. Article 5, § 2 of the Constitution uncovers the interaction between Brazilian law and international human rights treaties, expressing that "the rights and guarantees expressed in this Constitution do not exclude others arising from the regime and principles adopted by international treaties to which the Federative Republic of Brazil is a party[245]" (Brasil, 1988). It is important to highlight that prior to the Constitution of 1988; the Supreme Court had established the understanding that international treaties were incorporated into domestic law with the same status as ordinary legislation. Thus, it could be revoked by a succeeding law or be overridden. This position was established by Extraordinary Appeal No. 80,004 (Supremo Tribunal Federal, 1977).

[245] Original text in portuguese: "§ 2º Os direitos e garantias expressos nesta Constituição não excluem outros decorrentes do regime e dos princípios por ela adotados, ou dos tratados internacionais em que a República Federativa do Brasil seja parte."

According to Flávia Piovesan, fundamental rights can be organized in three groups: 1) fundamental rights that are expressed in the Constitution; 2) implicit rights, arising from the principles adopted by the Constitution; 3) and rights that are stated in the international treaties ratified by Brazil. Article 5, § 2 of the Constitution innovates by including among the protected constitutional rights those enunciated in international treaties (Piovesan, 2017: 71). Piovesan (Piovesan, 2002, 2017)[246] believes that this innovation assigns international human rights law a special hierarchy within the national order in that it receives these norms as constitutional norms. She argues that this conclusion come from the systematic interpretation of the text regarding the expansive weight of the value of human dignity. To this reasoning is added the principle of maximum effectiveness[247] of the constitutional norms regarding fundamental rights. Hence, international human rights treaties should be received as constitutional norms in the Brazilian legal system because of the materially constitutional nature of fundamental rights. In the emancipatory hermeneutics of rights a material logic, guided by moral values and human dignity must prevail (Ramos, 2009, 2020; Piovesan, 2017).

In regard to the applicability of human rights treaties, article 5 § 1 of the Constitution establishes that it "(…) has immediate application."[248] Thus, **from the act of ratification**, the effect on national legal order is instant. It is not necessary to create a new policy or law that reproduces the content of the treaty. The treaty becomes part of the legal system effective immediately, allowing those treaties to be used by politicians, civil society and so forth.

Eduardo Salles, state deputy, does not agree with this, he states:

> "If someone is ratifying a treaty that, in my view, for such a treaty to have legitimacy, it's not just the president ratifying it, the legislators would also have to endorse it. So through a bill, the government to ratify any such treaty, before ratifying, in my view, would have to submit a bill to the National Congress so that Congress, which is the legitimate representatives of the people, could authorize that bill to become a law and then he could

[246] Other human rights theorists that support this theory include Antônio A. C. Trindade, André de Carvalho Ramos and Valerio Mazzuoli.
[247] The principle of maximum effectiveness was introduced by Konrad Hesse and established that constitutional norms should be interpreted in such a way that the effectiveness of the Law is full, maximum.
[248] Original text in portuguese: "§ 2º As normas definidoras dos direitos e garantias fundamentais têm aplicação imediata."

> ratify the treaty on the legitimacy of the legislators. He should not just ratify the treaty and come from the top down and that is it. (…) I think (the process of passing thru congress) it's important, because it's no use bringing a law that isn't enforced. So, there are a lot of these treaties that are ratified, but that don't work in practice. What's the point of having a country that ratifying a treaty but that doesn't really work in practice?"[249]

The opinion of Salles is very common in the political sphere and was brought up by other participants. It is possible to determine that, in regard to national reception of international treaties, the Brazilian legal system is mixed, combining two different juridical systems: one applicable to human rights treaties and other applicable to traditional treaties (Herrera, 2009; Piovesan, 2017; Ramos, 2020).

With the introduction of the constitutional amendment 45 (EC 45) in 2004, there was an addition in the Constitution's text, instituting in § 3º that 'International treaties and conventions on human rights that are approved in each House of Congress in two rounds by three-fifths of the votes of the respective members shall be equivalent to constitutional amendments' (Brasil, 1988).

The issue that arose from this provision was what happens with the human rights treaties that do not pass this procedure? In other words, § 3º of article 5 omits what happens with the treaties that were ratified before this amendment and what happens with the treaties that are ratified but do not pass this process. Flavia Piovesan still understands that it is enough for Brazil to ratify international treaties that it would produce internal effects since human rights treaties have an emancipatory characteristic based on the protection of human dignity (Piovesan, 2002). Yet, the majority of the Brazilian Constitutional law doctrine understands that for these international treaties to have applicability it is necessary to transform them into domestic law; thus, it is

[249] Original answer in Portuguese: 'Se alguém está assinando um tratado que, na minha visão, pra um tratado desses ter a legitimidade, não é só o presidente assinar, teria que também os legisladores abalizassem isso aí. Então através de um projeto de lei, o governo para assinar qualquer tratado desses, antes de assinar, na minha visão, ele teria que submeter um projeto de lei ao Congresso Nacional pra que o Congresso, que são os legítimos representantes do povo, pudessem autorizar, aquele projeto de lei se tornar uma lei e aí sim ele pudesse assinar o tratado em cima da legitimidade dos legisladores, e não pudesse assinar só o tratado, e vir de cima pra baixo e que vai ter que se fazer. (…) Eu acho que é importante, porque não adianta você trazer uma lei que não seja cumprida. Então tem muitos desses tratados que são tratados, mas que não funcionam na prática. Então o que adianta você ter um país que se diz cumpridor de um tratado e que na prática ele não funciona.'

necessary to follow the procedure that was established by the Constitution (de Oliveira Mazzuoli, 2018).

In Extraordinary Appeal RE n. 466,343[250] the Supreme Court decided that treaties that were ratified prior to constitutional amendment 45 had the legal status of supra national law, not a constitutional status (Supremo Tribunal Federal, 2008). This lawsuit was about the case of the arrest of the unfaithful trustee[251]. The Constitution of 88, in its art. 5, LXVII[252], allows the arrest of the unfaithful trustee. However, the arrest could only occur with the creation of new law that establish how this arrest would be made. It is needless to say that this law was never created. The issue is that this constitutional provision was a violation of article 7.7 of the San José da Costa Rica Pact[253] (Section 5.5) since it prohibits civil imprisonment for debt. As was demonstrated in this Section, before the Supreme Court Decision on this Extraordinary Appeal, there was no rule or provision that established the legal position that treaties that were ratified before the constitutional 45 and, in this case, the San José da Costa Rica Pact was ratified in 1992.

Because the EC45 was silent in regard to human rights treaties that that were ratified before EC45 and treaties that were ratified but didn't pass the procedure established in art.5, § 3º, the Supreme Court had to decide in this case what legal status it would give to these human rights treaties. The Supreme Court Judges instead of arguing that the San José Pact does not violate the Constitution because it extends freedom by enlarging the protection of the human dignity, which is the foundation of the Brazilian Constitution, decided to create a new framework called paralyzing effectiveness (*eficácia paralisante*). Paralysing effectiveness is a concept that means that there will be norms established by the Constitution that will never have effect. This is because

[250] The RE 466,343 involved cases of civil imprisonment of unfaithful trustees, which is established in article 5, LXVII of the Constitution of 1988 and which is a violation of article 7.7 of the American Convention on Human Rights (ACHR), according to which imprisonment for indebtedness is only permissible for non-payment of alimony(Supremo Tribunal Federal, 2008).

[251] Unfaithful Trustee is one who refuses to return the object entrusted to him as a deposit. The possibility to arrest the unfaithful trustee was a topic greatly discussed in Brazilian legal order in relation to the possibility of civil imprisonment. This occurred because the Constitution of 88, in its art. 5, LXVII, provides that "there will be no civil imprisonment for debt, except that of the person responsible for the voluntary and inexcusable breach of maintenance obligation and that of the unfaithful depositary". Hence, the Constitution accepts the arrest of anyone who is considered an unfaithful trustee.

[252] Art.5, LXVII - there will be no civil imprisonment for debt, except that of the person responsible for the voluntary and inexcusable default of maintenance obligation and that of the unfaithful depositary.

[253] Article 7, 7 establishes that "7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support."

legislation will never be able to institute them, as instituting the norms will contradict the treaty that has supra-legal status.

Thus, in this case, the Court decided that the human rights treaties that do not go through the procedure established in paragraph 3 of article 5, enter the Brazilian legal system above the ordinary law and below the Constitution. In other words, with the ratification of a Human Rights Treaty, the treaty rights become supranational norm, above the national laws and below constitutional law (Supremo Tribunal Federal, 2008). However, if they go through the constitutional amendment procedure, they will be given constitutional norms status. For this research, it is important to highlight that the ICESCR, the San José Pact and the Protocol of San Salvador have the supranational norm status in Brazilian legal order because they were ratified before the Constitution of 88 and did not pass through the procedure to receive constitutional amendment status. The decision of the Supreme Court in the unfaithful trustee lawsuit had general effects (*erga omnes*) in the whole legal order and created a new legal status: the supranational norm.

Miguel Calmon understands that the position taken by the Supreme Court in the case of unfaithful trustee leads the legal system to a strange situation since it created a legal aberration. He states:

> "You will have a constitutional norm that will never have effect because the legislation that came to discipline it cannot discipline because it violates the Pacto de San José da Costa (international human rights treaty). And the Pact in its turn does not allow something that the Constitution allows, this is absurd"[254].

In the same sense, Dirley da Cunha believes that this decision and position by the Supreme Court is very unfortunately because it has come to the understanding that as long as the human rights treaties is not approved by Congress it will not have a constitutional status but a supra-legal status. He questions 'what is a supranational norm?" He follows his thought by saying that within the legal relationship between the law and the Constitution, a supra-legal norm is in the middle, thus the supra-legal norms repeal previous incompatible legal norms and inhibits the production of later

[254] Original answer in Portuguese: Isso aí é uma Aberração. Você vai ter uma norma constitucional que nunca vai produzir efeitos porque a legislação que vinha discipliná-la não pode disciplinar porque viola o pacto. E o pacto por sua vez não permite algo que a constituição permite.

incompatible legal norms, but in relation to the Constitution it is below and as a consequence will not have the same legal protection as the law established in the Constitution. He concludes:

> "If the Supreme Court had adopted the position that regardless of whether the treaty was approved by that procedure or not, but if the object is a human right it already enters our legal system with a normative status equivalent to the status of a constitutional norm, then it would broaden the legal scope and better protect these rights. No doubt about that, but it is an unfortunate position that ends up compromising our national system of international protection of rights"[255].

Relating back to the Constitutional Amendment 95(EC 95) discussed in section 5.6.1 regarding austerity measures being a violation of article 2 of the ICESCR it is possible to see how the reception of human rights treaties affects economic rights in practice. The EC 95 has a constitutional status which has a higher status than a supranational norm. This means that Constitutional Amendment 95 does not violate article 2 of the ICESCR in regard to national law because the ICESCR is a supranational norm and consequently EC95 has a higher legal hierarchy inside the Brazilian legal system because it is a constitutional provision.

This causes a great conflict between international law and national law since to the outside Brazil ratified a treaty and became legally responsible to respect it but nationally the Constitution takes precedence over supranational norms. Thus, for the international legal framework, the norms in EC 95 are a violation of legally binding instruments ratified by Brazil, but in the national framework it is not. This means Brazil is in violation of its international obligation while regarding the Constitution, Brazil is not violating any right. If human rights treaties had received constitutional status from the moment that these treaties were ratified, it would be realising the rights established not only in article one of the Citizen Constitution but the IHRL order.

As was demonstrated in section 4.6.1 there is a petition requesting the Brazilian Supreme Court to declare the EC 95 unconstitutional based on violation of Brazilian

[255] Original answer in Portuguese: "Agora se o supremo tivesse adotado que independentemente do tratado ser aprovado por aquele procedimento ou não, mas se o objeto é um direito humano ele já entra no nosso sistema jurídico com estado normativo equivalente ao status de uma norma constitucional, ai sim ampliaria uma forma de melhor proteger esses direitos. Não tenha dúvida disso, mas é uma posição infeliz que acaba comprometendo nosso sistema nacional de proteção internacional à direitos."

principles and international human rights law documents. Only two international human rights treaties[256] have passed the procedure established by article 5 § 3º and thus only two have constitutional status. Therefore, all other international treaties that Brazil ratified to realise and protect economic rights cannot be use as argument for the unconstitutionality of EC 95. It is important to highlight that the rights in the treaties can be used as sources of law in courts. Thus, when Brazil ratifies these treaties all the rights contained in them, can and should be used by the courts, attorneys, prosecutors, civil society and so forth. More than that, they should be used as foundations and objectives of Brazilian society since this is the status given by article 1 of the Constitution.

The case of the unfaithful trustee is an example of how the understanding of economic rights by politicians and juridical actors impacts directly on their application. When the legislative power passed the Constitutional Amendment 45 and was silent in regard to the status of important human rights treaties, the Supreme Court had to decide in a practical case with a general repercussion (*erga omnes*) what the status would be. They created a new status and decided that treaties of human rights were/should be received as supranational law, in other words, below the Constitution but above general norms. Thus, when congress decided in favour of EC 95 it violated international law but not constitutional law. This shows why is important to analyse the understanding that the participants have on economic rights since their interpretation can change the legal order in significant ways and affects the protection and application of these rights.

6.2 THE PARTICIPANTS UNDERSTANDING OF ECONOMIC RIGHTS IN THE CONSTITUTION AND ITS EFFECTIVENESS AND CONSTRAINTS

Politicians, administrative, and juridical actors are responsible for the implementation of economic rights. As argued throughout this thesis 1) individuals' moral-ethical backgrounds; 2) the socioeconomic environment into which they were born; 3) and the narrative created by the 'dominant class' influence the ways in which economic rights

[256] The two international human rights treaty that has constitutional amendment status in the Brazilian legal framework is Convention on the Rights of Persons with Disabilities and the Inter-American Convention against Racism.

are implemented in the legal system. The responses given by the actors in this section show how.

As shown in this chapter, economic rights are part of the Brazilian legal framework as constitutional and supra-legal norms. Yet, their realistic implementation was limited due to the hermeneutic constraints of interpreting a text. The position that any individual has inside a society is restricted by their environment. Living in Europe is not the same as living in Brazil. The same thing can be said about living in an apartment in Copacabana and living in a favela in *Cidade de Deus*. They are two different realities, with different perspectives. These differences result in divergent views between individuals, as some are part of, or feel they belong to, the ruling (dominant) class, whilst others are part of minorities or the working class.

6.2.1 Limits of economic rights: values and cultural expectation

This section will analyse one important issue that was frequently conveyed by the participants: the value that Brazilians give to economic rights and their cultural expectations. This topic was brought up in all interviews to discuss the ineffectiveness of the legal system in regard to economic rights. Thus, this section will start by reintroducing the hermeneutic concept since it is the method used in this thesis for analysing the interviews. This theoretical exploration will be added to and illuminated by the discussion and analysis of the interviews regarding why values and cultural expectation are limits to the effectiveness of economic rights in Brazil.

For hermeneutics, legal science is interpretive. Norms exist only through the process of interpretation of the text and the context to which they refer (Müller, 2007: 141). According to hermeneutics, in this interpretive activity a critical-reflexive dimension is inserted because it enables the assessment of the relevance of the preconceptions that are part of the pre-comprehension when in contact with the text and with the respective historical perspective. With this, the social sciences have overcome the subject-object dichotomic relationship through the hermeneutic-dialogic. There is a mutual interaction between the subject and the object to the point of becoming an intersubjective relation, as emphasized by Boaventura de Sousa Santos (1989: 16), which brings the natural sciences closer to the humanities, recognizing the historical and cultural dimension of natural phenomena.

As Peter Häberle (2000) posits, a Constitution is not reduced to its text, instead it has an own life constructed by the cultural and moral past within the community to which it refers. Consequently, the Constitution is constructed daily by the people and the institutions so that "the texts of the Constitution themselves must be literally 'cultivated' so that they become an authentic Constitution"[257] (Häberle, 2000: 35).

With this discussion in mind, one of the issues frequently conveyed by the participants regarding the ineffectiveness of economic rights was the value that Brazilians give to these rights and their cultural expectations. The majority of the interviewees often said that the Brazilian Constitution is very forward thinking; it is a complete document that protects the human person in all of its spheres but that does not reflect the values and the cultural expectations of the population, especially the ones that have the decision-making power.

Casali believes that the Brazilian Constitution is advanced and modern because it builds a very good socioeconomic framework. The same text could be applied in Sweden or Norway, for instance. For him, the problem is while in Sweden they would make a text like this applicable because of their willingness to practice and live the values present in it, in Brazil, it is the opposite. The applicability of economic rights is a matter of values. Thus, the key issue of implementation is how you interpret economic rights instruments. This relationship relates to the values Brazilian society constructed throughout years. Thus, Casali understands that first and foremost, Brazilian society needs a reformulation of its values based on a more solidary society. He states:

> "The judge is a reflection of society. Every society has the judiciary it deserves. Every society has the politicians they deserve. So, the judiciary reflects that society, right? What is a judge? You are a law enforcer, and what is the law? It is that set of norms that he extracts, interprets, and apply" [258].

[257] Original text in Spanish: "[...] los propios textos de la Constitución deban ser literalmente 'cultivados' para que devengan auténtica Constitución".
[258] Porque o juiz né...ele é um reflexo. Toda sociedade tem o judiciário que merece. Toda sociedade tem os políticos que merecem. Então o judiciário reflete né. Que que é o juiz? É um aplicador do direito, e o que é o direito? É aquele conjunto que ele extrai e averigua ali. Se ele decide contra aquilo ali ele perde a dignidade.

With this context in mind, the interpretation given by Casali connects with the view of Alexis (section 2.1.2) that the interpretation of one legal instrument can lead to different answers depending on the individual's cultural background.

This was the concern of other participants as well: how to effectively apply economic rights since they already are part of the national, regional, and international normative system and Brazil is already legally bound to all of them. Saulo Casali attributes the difficulty in the implementation of economic rights in any society as the result of greater or lesser belief and importance and therefore value that a specific society awards to the implementation of these rights. He adds that although there are countries where the feeling of altruism and solidarity creates an argumentative reinforcement that is present in the judiciary, the legislative, and the executive, there also exist countries where this altruism and solidarity is much smaller and where the awareness and appreciation of this dimension is placed at a lower level. He believes that there is a difficulty in implementing economic rights in every society, and that it is not only a Brazilian problem, but the importance that distinctive societies give to these values has an important role regarding the effectiveness of the protection they enable. He highlights that there are societies with much less resource availability and where the allocation for efficacy is much larger. He states that Brazil has very advanced legislation regarding economic rights and after analysing the law, this thesis supports his statement. As was showed in section 6.1, the protection of economic rights in the Constitution is robust. The obstacle to implement these provisions is the correct valuation and recognition of what these rights means.

Duprat thinks that Brazil is strongly affected by its colonial history, by how the country was formed. She highlights how the elites have always been the same since 1500. Like Casali, Duprat says that there is no impartial person. As a person is part of a socioeconomic background, he/she will interpret and understand society inside this scope. Deborah Duprat believes that the problem of economic rights in Brazil is the lack of their applicability in the judiciary. She adds that nowadays it is getting worse since she believes that there is a younger generation ascending that is much more human rights-refractory. Dirley da Cunha states that the liberal state is completely averse to the protection of economic rights.

Gustavo Renner[259] highlights an understanding of human rights in Brazil that consequently affects economic rights, expressing that human rights are deeply associated (in Brazil) with left-wing ideas and the consequence of this is that people react against everything that is associated with them. They thus they 'react' against the system. Economic rights are treated in Brazil as a matter of policy and not principle. Even if the Constitution establishes them as foundation for the Brazilian society, people do not value them as such. Fabiola Veiga for example, highlights that if you interpret the Constitution using economic rights as principles, all properties should have a social function. But, she says, the right to property is untouchable in Brazil. Gustavo Renner followed her remark by saying that it is remarkable how the idea of social function is easily forgotten even if this concept is present in a lot of sections in the Brazilian Constitution, even in the economic order title. The value that people give to the right to property is therefore more than life itself.

Like Gustavo Renner, Rubens Beçak highlights the degree of importance that property has been given in Brazil and understand that this degree of importance was influenced by Locke's doctrine establishing that property was more important than life itself. When a government allows people to kill because of the right to property there is confirmation that this doctrine has been deeply embedded within society.

Alberto Amaral Jr. states that "the conception of property that the Brazilian jurist works with is the conceptualisation of liberalism of the 20th century". Property is completely understood through an individualist prism: there is no idea of collectivity despite the Constitution explicitly stating that property should have a social function. Thus, property is traditionally formed, especially through juridical thought, as something extremely individualistic that should benefit the proprietor. In this way, the property of a house, of land, of a corporation, of merchandise, are all conceived of in the same way. No distinction is made as the primary objective is to produce benefits and profits for the proprietor. Even if the Constitution and legal (national and international) system establish clauses that determine the protection of certain rights and how they 'should' be applied, there is a big difference in practice between legal clauses and socioeconomic values constructed throughout time.

[259] The interviews of Gustavo Renner and Fabiola Veiga were conducted together.

Rubens Beçak believes that judges, when working with economic rights, adopt different measures depending on their political background. He states that judges that are more progressive are more sensitive to economic rights, and that if they understand that economic rights are fundamental rights they will probably decide in a more favourable way. However, he also understands that Brazilians are not only living in conservative society, but there is a conservative wave of thought everywhere in which the arguments of orthodoxy, which he also understands as important, prevail as the most important. It is important to highlight that Gustavo Renner's background is in human rights work. Today he is one of the members of the Federal Prosecutor's Office that works with the defence of human rights for vulnerable populations.

He understands that the application of economic rights depends on two things: the judge socio-economic background and how they interpret the law. He states:

> "The judge is a human being and each one has a different background, some will be more in tune with broader constitutional interpretations and others will be more semantic, have a more orthodox interpretation. Thus, you will have different interpretations. Being a Professor of Law and an Attorney, I know hundreds of judges, and the application of economic rights depends a lot on how one understands the law, how one understands equality... Some will not see economic rights as a right. When you go to higher courts you have a greater uniformity of recognizing economic rights in a more acceptable form of application. The TST (Labour Supreme Court) has an extremely comprehensive and progressive view, because he works with one of the most important rights, which is labour and everything that is connected with it. Thus, the Court will have a very large inclusiveness view. This no longer happens in the STJ (Superior Justice Tribunal) and STF, I think these powers still tend to make a gradation between rights. Thus, they still are a little stuck in this kind of outdated view that some rights are more important than other. Thus, rights that are immediate justiciable, rights that we act at any moment, such as expression, belief, property… it is funny how property it is always present. Property is the most protected right not only in Brazil, but worldwide. Not that property is not important, they will think I'm crazy, of course property is important because capitalism won, we need to rethink what happened. So, I think it's a vision permeated by a somewhat conservative spirit, we still need to transcend that[260]"

[260] Original answer in Portuguese: "Depende muito do juiz, o juiz é um ser humano e cada qual vai ter uma formação, uns vão estar mais afinados com interpretações constitucionais mais abrangentes e outros com outro tipo, outros serão mais semânticos, sabe o juiz boca da lei, quer dizer você ter que ver só o que está na lei, uma interpretação muito ortodoxa, literária, então você vai ter de tudo, eu conheço pelas circunstâncias dezenas, centenas de juízes, alguns amigos, companheiros de turma e tudo, depende muito

Saulo Casali states that interpretation of the Constitution is an indicator of the evolution of values since the judge reflects society. Casali only speaks about his experience as a federal judge. Thus, the judiciary is also a reflection of that society. Judges are enforcers of the law and the law is that set of values that they extract in the historical and socio-economic background. If they decide against that he loses dignity[261]. By analysing the interviews by all participants from different branches and institutions, one can conclude that the valuation of economic rights depends on who the judges, the politicians and government administrative personal are, what their cultural expectations are, and what their upbringing and training are like. Understanding this setting allows one to recognise the complex factors involved in rendering the interpretation and effectiveness of the Constitution and laws as favourable for economic rights or not. As was demonstrated in the case of austerity in Section 5.6.1, politicians did not work to violate international law.

Nina Ranieri highlights that Portuguese colonial institutions were mainly extractivist, and that this history shaped Brazilians institutions. They were not created to protect the majority, but to ensure the continued protection of elites. This emphasis is present in policy, in the judiciary, and in congress. It is a mindset that endures. Brazilian institutions, save for some small gaps through time, have always had a conservative mindset and thus always adopted a model of capitalism that privileged capital and

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de como a pessoa pensa o direito, como pensa o sistema democrático, como pensa igualdade e alguns não verão como um direito realmente como outros verão e isso vai sendo talvez depurado quando você vai indo para as instâncias superiores você já tem uma uniformidade maior de reconhecer os direitos econômicos direitos sociais de uma forma mais plausível de aplicação. O TST, tribunal superior do trabalho, ele tem uma visão extremamente abrangente e progressista, porque ele trabalha com um dos direitos mais importantes, que é o direito do trabalho e tudo o que está ligado com ele, a questão acidentária, a questão, sabe então, ele vai ter uma visão de inclusividade muito grande. Isso já não se passa no STJ e no STF, eu acho que esses poderes ainda vão tender por uma séria de circunstâncias a fazer uma gradação nos direitos, estão um pouco presos nessa questão meio superável né, que alguns direitos são os mais importantes, eles sim são direitos que a gente age a qualquer momento, a expressão, a crença, a propriedade, a propriedade sempre entra nesse. A propriedade é o direito mais protegido não só no Brasil, mas no mundo todo. não que a propriedade não seja importante, vão achar que eu sou louco, é claro que a propriedade é importante porque o capitalismo venceu a gente precisaria repensar o que aconteceu. Então eu acho é uma visao permeadas por um espírito um tanto conservador, ainda precisaamos transcender isso."

[261] Original reply in Portuguese: 'É um índice da evolução de valores. Porque o juiz ele é um reflexo. Toda sociedade tem o judiciário que merece. Toda sociedade tem os políticos que merecem. Então o judiciário reflete né. O que é o juiz? É um aplicador do direito, e o que é o direito? É aquele conjunto que ele extrai e averigua ali. Se ele decide contra aquilo ali ele perde a dignidade.'

absolute freedom. This mindset reflects how Brazilians value economic rights today, and consequently impacts the protection and implementation of these rights.

Miguel Calmon highlights that the Constitution forbids the arbitrary increase of profits to the detriment of those who are most in need. In a capitalist state, profit is legitimate but even then, it should not be detriment to the rest of society. Profit it is not a right, it is not a principle, and thus, it should not be the ultimate goal of a state or government. Relating back to section 5.1, the primary objectives of the Republic of Brazil are to build a free, just, and solidary society, as well as eradicate poverty and marginalisation, and reduce social and regional inequalities, having at its core the principle of the dignity of the human person.

Alberto do Amaral Jr agrees with the fact that neoliberal discourse of austerity and non-state intervention has permeated and continues to permeate many state policies, but he believes that that human rights are not solely represented by civil and political rights for a very simple reason. This is that the exercise of freedom often presupposes the emancipation of necessity and it is only through socio and economic rights that this can be achieved. That is, in a country with extreme social inequalities such as Brazil, the consecration of certain freedoms is an empty consecration, for the reason that if individuals do not have access to education, health, housing and so forth, they can no longer exercise these freedoms. Alberto do Amaral Jr thinks that axiological justification of economic rights in Brazil *is* Brazil's extreme inequality. As was demonstrated in section 3.2.1.5 Brazil is one of the most unequal countries in the world. He understands that the role of the jurist is to think of the law as an instrument that safeguards human beings in all their dimensions. This requires seeing rights not only as a technique on the part of realising any value but as an instrument to help the human person to flourish.

6.2.2 The limits for effectiveness of economic rights in Brazil

The question of effectiveness comes from the question of justice itself. Can we have justice if we do not have the efficacy to implement basic rights? The answer to this question comes from the hermeneutic interpretation of the interviews.

Because law is interpretative, having a new norm every day causes uncertainty in governability. Deborah Duprat believes that the consequence of the excessive

production of laws creates an absence of law, because it results in so many rules, regulations, and norms that people disregard them. She frames this as 'legislative hypertrophy'[262] and claims that this is why the implementation of economic rights in Brazil is deficient. This answer relates to the response of Senator Regina Sousa where she says that in Brazil there is always a new law created to apply a previous law. For comparison purposes, since the promulgation of the Constitution in '88 until 2013 there were 4,785,194 legal norms issued, that means 524 norms per day (Amaral, Olenike and Amaral, 2013: 2). This idea relates back to the practical example raised in the previous chapter where Senator Randolf created a bill that determined that all the decisions or rulings by the Commission and the Inter-American Court on international responsibility based on a treaty ratified by Brazil have immediate legal effects in the sphere of domestic law. If the Constitution and the international law norms were properly applied, there would be no need to create a new law to apply something that would be expected if responsible actors just did their jobs.

Deborah Duprat also believes that the problem of the effectiveness of economic rights in Brazil does not have to do with the reception of international human rights treaties but accepting the decisions of the international courts, especially the recommendations of the Inter-American Court and Inter-American Commission. But she cannot attribute this difficulty only to the Supreme Court either, she believes that we live in a foreign binary system where there is always a tension between internal vs. external, international vs. national. Nonetheless, she understands that international law cannot be the last word, that these systems should have a permanent dialogue between them, and that the last word should come from this dialogue. Thus, everything is currently done in a very atomised way.

We can gather from these responses that the constant creation of new legal norms is a form of behaviour which causes political actors to create mistrust among juridical actors

[262] Legislative hypertrophy is a concept that perceives that in some societies there is a mass production of laws which causes systemic ungovernability since it causes widespread insecurity in socio-political life and the business world (Carnelutti, 2003; Eduardo, 2004; Amaral, Olenike and Amaral, 2013).

and the population alike. This is because it creates legal insecurity due to the need to promulgate ever-multiplying new legal norms to validate the old ones.

Conversely, Fabiola Veiga believes that the issue of implementation of economic rights arises from outdated institutions that do not recognise internal instances of protection for economic rights. She understands that it is necessary to validate these forums as the first circle of protection. They should come first, then the external ones. Yet, she believes that the international forums sometimes inspire and help to influence internal forums. Gustavo Renner agrees with Fabiola saying that Brazilian institutions are very outdated in regard to the implementation and protection of economic rights, and this is a reflection of the whole system, not only in the courts, but in schools, the formation of magistrates, legal professionals and so forth. For Gustavo, the majority workers of the workers of his institution (MPF[263]) believe that international law, human rights, and as a consequence, economic rights are seen as a luxury argument. Luxury in the sense that legal representatives believe that they are so unlikely to succeed that it would be a waste to try them and the people arguing the cases most of the time don't have the luxury to do that. Thus, they are added in some lawsuits as luxury argument, one that they know judges won't care but they make the petition more robust. There is no impetus to implement them due to the perception that they result in an overly complicated framework.

One of the issues frequently conveyed by the participants was that that international norms of economic rights are mainly use as rhetorical arguments. Fabiola Veiga states that international human rights instruments are merely rhetorical arguments and the legality of these documents in practice is almost zero. Gustavo Renner agrees with this statement. He illustrates this through the example that he asked an interlocutor that the Federal Prosecutor Office has at the national congress to what extent he thought it was worth investing in the argument of international treaties and the Inter-American decisions when going to speak with them. The response was that for congress an argument based on rights would be of no value.

[263] Ministério Público Federal - Federal Prosecution Agency

He also states that the MPF uses international human rights documents as a luxury argument. He highlights that although he finds it relevant, there is uncertainty in whether they will be taken seriously. Fabiola Veiga also believes that is the case with the Attorneys Office, that rights are a more rhetorical argument than legal one, which she believes will not be legally considered.

Therefore, the institutions that apply economic rights are ineffective because they are comprised of individuals that come from the ruling class, as demonstrated by the amount of family heirs inside the congress in section 4.3. They only use legal norms and rules of human rights when they want to show off in their legal request. This shows that they do not take these rights seriously. Therefore, they show a patriarchal and colonialist mentality that impedes important structural changes.

All this information shows that these limitations threaten the effectiveness of economic rights. As Saulo Casali states, the real challenge of economic rights is applying the policies that are already in place. This challenge arises differently in each society, depending on the extent that each one places in the prominence of applying these rights. He states:

> "There are countries where the feeling of altruism and solidarity creates an argumentative reinforcement that is present in the judiciary, the legislative, the executive, and there are countries where this altruism, where this solidarity is much smaller and where the awareness and appreciation of this dimension is placed at a lower level. I think this struggle it is present in every society. It represents the values of each society. There are societies with much less resource availability and where this protection is much larger. I don't think it's because of the different denomination of rights. Rights are rights that are formed by development of society. The problem is how to apply that, at least in the western societies, because we can't say that this kind of legislative standard is built in countries like Muslim countries. Brazil has very advanced legislation in regard to economic rights. There is only this difficulty to implement because of the lack of appreciation and recognition of what economic rights means[264]."

[264] Original answer in Portuguese: A dificuldade hoje em dia não é tanto a previsão criação legislativa de direito mas a implementação completivação do direito, né!? Essa... esse é o grande desafio da sociedade, de você realmente viver a implementação desses direitos. A dificuldade de implementação dos direitos econômicos e sociais em qualquer sociedade ela é resultado de é... de maior ou menor crença daquela sociedade né na importância de implementar esses direitos. Na maior ou menor valorização da implementação desses direitos. Há países onde o sentimento de altruísmo e de solidariedade cria um reforço argumentativo que é corrente no meio judiciário, no meio legislativo, no meio executivo... e há

Casali understands that the welfare state can only work with generational solidarity, and thus new foundations of solidarity have to be reached in Brazil. But he does not see this occurring because people do not want to give up their privileges. His argument relates back to the historical context of Brazilian society since it was possible to perceive that structural change in Brazil was and is always difficult. Casali understands that before applying economic rights it is necessary to understand what is the interest that is being sought. Only after answering this question can one judge decide on the issue.

The interpretation of the law given by the juridical actors is essential to the effectiveness of economic rights. Institutions are made of people and people are the ones responsible for applying the rules established by the legal system. Society has little say in the application of theses norms; they can show their disagreement, but they do not possess decision-making power. In the end, they can only show their resistance through social movements and civil society groups.

6.2.2.1 The neoliberal narrative and the limits that individualism creates with respect to economic rights

Within the empirical research of data emphasising cultural expectations and values, a theme of individualism emerged. With the triumph of neoliberalism in the 80s, the values of meritocracy, individualism and the free market gained force and their narratives were spread around the world with much success. This created a worldwide culture based on the values mentioned above. Brazil is part of this culture which influences the understanding of economic rights.

países onde esse altruísmo, onde essa solidariedade é muito menor e... onde a consciência e a valorização dessa dimensão é colocada em um patamar inferior. Eu acho que essa, essa... essa dificuldade passa pela cabeça de cada sociedade né. Pelos valores de cada sociedade. Há sociedades com muito menos disponibilidade de recursos e onde essa repartição é muito maior. eu não acho que seja por conta de... de denominação de direitos. Os direitos são... são... são direitos que se tem formação por questão implementadas em outras sociedades, outros países, os documentos internacionais sempre os mencionam, nós temos a todo tempo é. O problema é como efetivar aquela.... pelo menos no mundo ocidental né, porque a gente não pode dizer que esse tipo de padrão de legislativo seja construído em países como muitos países muçulmanos. Nem sempre o padrão legislativo é alcançado em todos países, que as vezes nem participam e assinam. Mas no Brasil assina todas. O Brasil tem uma legislação avançadíssima. Só existe essa dificuldade de implementar que eu vejo desta forma: por conta da falta de valorização e de reconhecimento do que esse direito significa.

Fabio Ramiro recognises that Brazilian society has a very individualist formation that comes from its cultural and historical background. This characteristic can be seen in the adjudication culture which causes the system to be clogged up by individual claims. In this regard, Nina Ranieri says that it is very curious that the adjudication of economic rights in Brazil is done through individual claims and not by collective action. It is important to highlight that Brazil does not have the Class actions lawsuit[265] in its legal framework, the device that could be used for a 'collective claim' would be *Ação Civil Pública (*Public civil action). Yet this device is very restrictive since only the Federal Prosecution Office, the Public Defender's Office, the Union, states, municipalities, public companies, foundations, mixed capital companies and interested associations can initiate a claim/case (Brasil, 1985). This shows that the legal system is also built within an individualised structure and not a collective one. The consequence of this structure within economic rights adjudication is that the judiciary will receive thousands and thousands of individualised cases, with similar claims, that will swell up the courts causing delays and monetary costs.

One practical example of this is of legal claims regarding the Brazilian health system. According to the Constitution everyone has the right to be attended in the Brazilian health system and this right enables all kinds of claims. One practical example of this was the diffusion of the use of synthetic phosphoethanolamine known as the cancer pill. The case was that a chemist from the Universidade de São Paulo (USP) started selling a *phosphoethanolamine* product saying it cured cancer. Individuals than started to request access to these pills before the Court on the basis of the right to health. The judiciary was overwhelmed by injunctions and individual security mandates for USP to provide the pill, and most decisions were in favour of giving individuals access to it. In the end, the Cancer Institute in São Paulo concluded that the pill did not cure cancer and also caused a lot of side effects (Zebulum, 2017; UNICAMP, 2018). However, between announcing the existence of the drug and proving it has no effect: thousands

[265] According to Wex Legal Dictionary "A class action is a procedural device that permits one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group, or "class". Put simply, the device allows courts to manage lawsuits that would otherwise be unmanageable if each class member (individuals who have suffered the same wrong at the hands of the defendant) were required to be joined in the lawsuit as a named plaintiff." See "Class Action | Wex | US Law | LII / Legal Information Institute." https://www.law.cornell.edu/wex/class_action (October 15, 2019).

and thousands of injunctions, all individuals' requests, were issued, clogging up the judiciary[266]. The sense of the collective action does not exist.

According to the juridical actors the possibility of only individual claims over socioeconomic rights causes a lot of disruption in the judiciary. One such issue is the problem of budget. Saulo Casali believes that there is a concrete problem in Brazil brought by the individual adjudication of socioeconomic rights policies that consume budgetary resources. He criticises this kind of adjudication because for him this creates an unjustified differentiation in direct distribution. He thinks that the judiciary cannot serve individual interest by hurting the distributive budget rules. He also uses the example of individual adjudication of the right to health, highlighting that today the courts are clogged up with legal requests and judges are hurting the budget by deciding in favour of these individual claims.

For him, this is a legislative issue, and he articulates that the issue of public policy of economic rights cannot be thought from an individual perspective. He states that the individual adjudication of economic rights produces micro justice not macro justice. This is because the impact of the decision is to one person and this decision causes an effect on the budget. He also emphasizes that this displays the privilege of who can access justice. Studies and surveys have shown that lawsuits are filed by the richest on the richest federations in Brazil (Casali Bahia, 2014).

According to UNDP data, states such as Santa Catarina, São Paulo, Rio de Janeiro, Paraná and Rio Grande do Sul, the states with the highest Human Development Index scores in Brazil concentrate 74% of claims against the Ministry of Health in the judiciary. Casali believes that public policy cannot be devised from an individual perspective. The interference of the judiciary causes selective distribution of already scarce resources and this is not correct. Resources that would be dispensed for a collective priority are being allocated by the judiciary to pay for drug tests, for example. He states:

> "This is micro justice, is that story that the law is mine, is the lack of solidarity, is the individualistic mind of the Brazilian, of the Brazilian judge. This individuality, the idea of

[266] It is important to highlight that even the federal government issued a Law(no. 13,269 / 2016), authorizing the supply of the pill by the SUS(Unified Health System).

> the individual x the state, the state with the obligation which is a political construction. In truth, this kind of obligation has to be relatively understood. This type of construction only thrives in the legal cultural environment that we have in Brazil. There is no essential minimum right where any person requests and wins the demands. These benefits perspective is individual. We need to evolve beyond these perspectives. It is an important role because the judiciary has the capacity to safeguard the Constitution. This is really important since Brazil is a country that guarantees partiality to the individual. It is necessary to address economic rights policies on a collective level and to not stay on an individualistic dimension"[267].

The issues brought by Casali show how the juridical structure is based on individual claims and that sometimes can harm collective rights. Access to justice in Brazil is mainly made by those who can pay for the lawyer and the process. Even in this way, justice is only accessible to few, which shows that Brazilian institutions are still archaic and patrimonial due to the lack of capacity for the poor to access the judiciary and due to the legal institutions being filled by people of the dominant class.

Fabio Ramiro states that the Brazilian judiciary is in much demand. And although he believes that today it is easy to access justice in Brazil, he also declares that this access transpires throughout considerable misery since it comes from terrible injustices. He believes that because the courts have millions of processes to solve, judges sometimes try to solve them quickly, but he states that this is not adequate.

On the other hand, Fabiola Veiga does not agree that access to justice in Brazil is easy. She believes this is one of the problems for economic rights. She asks: 'who are the people who get favourable Court decisions?' She follows that statement by speaking about how the judiciary is very patrimonial and that has to do with the issue of access

[267] Original answer in Portuguese: isso é uma micro justiça é aquela história de que o direito é meu, o direito é da pessoa e você... é a falta de solidariedade mesmo, é a cabeça individualista do brasileiro, do juiz brasileiro. Essa individualidade né... é... o individuo x o estado, o estado com a obrigação que é uma construção politica. Não, na verdade esse tipo de obrigação tem que ser entendida relativamente né. Esse tipo de construção só prospera nesse ambiente cultural jurídico que nós temos no Brasil, não existe o mínimo essencial com direitos da pessoa que qualquer um chega lá reclama e obtem. Essas perspectiva as prestações são individuais. A gente precisa evoluir muito mais ainda pra abandonar essas perspectiva que hoje a segregação constrói. é um papel importante porque afinal de contas o judiciário tem capacidade de agir protejatoriamente resguardando a constituicao. Ele tem uma utilidade relevante num país como o Brasil, que garante parcialidade ao individuo. Deve haver cuidado de tratar politicas publicas e intervenções sociais e coletivas numa dimensão também coletivas e de nível sociais, se não fica numa dimensão individualista.

to justice. Gustavo Renner agrees with her and expresses that normally you cannot access justice to claim economic rights, and if you can, you will not be able to demand it, since for him, these kinds of rights are not recognized as rights that can be required. For him, these rights are seen as fleeting political favours, thus they are considered only when there is a transitory political concern and not as a right that should be protected by the law.

All the legal participants use the example of healthcare to show how economic rights in Brazil are very individualistic. They also argue that only the people who have the money to pay a lawyer can access them, thus, like everything else, even the access to justice for economic rights is unequal and unjust. The right to health is the economic right that is the most legally accessible because it is a right that those with resources can claim to protect their health without paying gigantic bills.

Deborah Duprat believes that the human rights regime still has a strongly individualistic character. She states that within the regime rights, even economic ones, are seen much more as an attribute of the individual than of the collective. This has a lot to do with the socioeconomic background and academic background as well. The topic of education will be discussed in the next section. She states that universities in Brazil are controlled by the Brazilian Bar Association, and as such emphasise the role of lawyer over that of a defender for example. And the lawyer generally works for the market.

Thus, she believes that that mentality of all legal professionals is very focused on individual rights. Also, she highlights that Brazilian legal text, past and present, has focused on the individual and for the individual. Before the 1988 Constitution, collective rights were only present the perspective of rights of association, trade associations, professional associations. For her, there is nothing that distorts an economic rights policy more than a judicial system that only meets individual demands.

We can see that she believes that the juridical system is tied to neoliberal values, especially individualism. Another value that was constantly brought up was patrimonialism and the affect that it has on the Brazilian legal framework.

Fabiola Veiga understands that the Brazilian legal framework is built on the subject of property rights, and moreover, that Brazilian judicial practices are absolute patrimonialism. For example, the Supreme Court decisions on civil rights are far more

advanced than decisions involving land issues, property issues, and the right to property. The Court does not think this is a central issue in the constitutional framework. And that is a consequence of the difficulty of understanding what is social/collective property in Brazil. Normally, people understand collective as a junction of individuals, but it is much more complex than that. This presentation simplifies something that is much more multifaceted, that has a historical background, maybe a geographical, a religious one. There was never an agrarian reform in Brazil, there is not one agrarian reform project and yet there are several provisions in the Constitution that talk about the social function of property. You have something written in the Constitution that in practice has not been regulated and cannot be implemented. This is not a mistake but a decision.

As the members of civil society highlight, the owners of the land are judges, politicians, lawyers and so forth, how will they decide against their own interest? Jerry Matalue states that "the natives feel fragile to see their demands presented and without solution, they feel deceived, they feel how people see them because they are painted, with bow and arrow in the hand, but in fact he does not feel respected in its moral integrity, as a subject of law, as a subject who is there to cooperate[268]."

Property is traditionally conceived in Brazil, above all in legal thinking, as something extremely individual. This has an inescapable effect on the political and juridical system. Alberto do Amaral Jr states:

> "I think Brazilian society is a very authoritarian society. It is an authoritarian society in which democracy is not yet firmly rooted as a fundamental value that everyone defends because of inequalities and other facts, such as our heritage tradition, our authoritarian tradition, our slave tradition. Thus, we do not have a properly liberal society in the American(tradition) sense of the word. What I think we have is a great advance of individualism in some sectors of Brazilian society, especially in the more affluent sectors. So here there is an important point: Brazilian legal culture, especially in the ambit of public law, works on the basis of liberal values, in general it seeks to apply these values to law. For example: the Brazilian legal doctrine, which is actually the creation of a set of criteria for the application of positive rights, is formulated from liberal values that guide the judge

[268] Orignal answer in Portuguese: "os indígenas se sentem fragilizados por ver a sua demanda apresentada e sem solução, eles se sentem enganado, se sentem como as pessoas atendem ele por conta que ele está pintado, está com arco e flecha na mão, mas na verdade ele não se sente respeitado na sua integridade moral, como sujeito de direito, como sujeito que está ali para colaborar"

> and the lawyer to deal with the law. And I think that liberal values have a major influence on legal doctrine. Liberal values and individualistic values greatly influence the doctrine and the way conflicts are to be resolved. Property is strongly viewed from the individualistic prism"[269].

Similarly, Rubens Beçak highlights that when he studied law it was it was unimaginable to speak about collective rights, rights that you do not know to whom they belong. It was always the idea that you had to allocate the right to an individual. He brings an interesting reflection about the topic. He believes that individual value is extremely associated with consumption. While social issues requires reflection, they also sometimes imply consumption. However, this is a reflection between a battle of interests (individual x collective), between the most immediate individual interest and the collective community interest which is the socioeconomic one. For him, the problem is that the collective interest is not immediate, but a long term and ongoing process and thus it is harder for people to see immediate benefits. He also believes that the media play a perverse role in this discussion since whenever they must make a choice, they opt for the immediate. He believes the media does not do this on purpose, but it is easier to defend something that has an immediate impact, than something that will have a future impact, that does not generate views. He states:

> "The first dimension right, those most associated with the issue of freedom, with a more individual facet, it is associated with an opposition of the individual to the state, are rights of opposition. The individual raises a barrier where the state cannot enter, the state cannot interfere on how you will educate your children, your religion, your religious practice, your freedom of speech and so forth. These are barriers that you put in opposition of the state. With the development of society, it is possible to see a need to equalize these rights and to make those who are more vulnerable to be treated equally. I think that's where the

[269] Original answer in Portuguese: Eu acho que a sociedade brasileira é uma sociedade ainda muito autoritária. É uma sociedade autoritária em que a democracia ainda não está definitivamente enraizada como um valor fundamental que todos defendem, devido justamente ás desigualdades e devido a outros fatos, por exemplo, a nossa tradição patrimonialista, a nossa tradição autoritária, a nossa tradição escravagista. Então nós não temos uma sociedade propriamente liberal, no sentido norte-americano do termo. O que eu acho que nós temos, é um grande avanço do individualismo em alguns setores da sociedade brasileira, sobretudo nos setores mais abastados. Então aqui existe ponto importante: a cultura juridica brasileira , sobretudo no ambito do direito publico, ela trabalha com bases em valores liberais, em geral ela procura aplicar ao direito esses valores, por exemplo: a dogmática jurídica que na verdade é a criação de um conjunto de critérios para a aplicação dos direitos positivos, formulada a partir de critérios liberais que orientam o juiz, o advogado a lidar com o direito. E eu acho que os valores liberais influenciam de maneira muito importante a dogmática jurídica. Os valores liberais e os valores individualistas influenciam de maneira muito importante a dogmática e a maneira como devem ser resolvidos os conflitos. A propriedade é fortemente vista sobre o prisma individualista.

> role of economic rights comes in, not necessarily in a generational and successive way, but when you realize that you need them. Why don't social causes mobilize so much? Because the individual does not observe an immediacy in the result"[270].

Funnily enough, these are the arguments used as well regarding the justiciability of economic rights, and this topic will be further discussed in chapter 6.3. The presence of individualism, patrimonialism and neoliberalism are central to the understanding, interpretation, and practice of economic rights in Brazilian legal institutions. It is a culture of values that reinforce the mindset of 'me' first, second and third. In this legal culture, economic rights are only perceived when they gain an individualist setting, like the case of the right to health. If not, they do not matter.

6.2.2.2 Education struggles

Education was another theme highlighted by the participants on why economic rights struggle to be implemented in Brazil. In contrast with what was presented by the constitutional norms and principles (Sections 6.1.1 and 6.1.2), legal institutions in Brazil do not have in their infrastructures a human rights perspective. This reality is due to the lack of human rights education within the institutions and consequently for the juridical and political actors. This, in turn, is because the political, social, and economic structure in Brazil is not interested in having this concept taught. If it were, the Brazilian Constitution would be implemented with the principal of human dignity and the protection of human rights as *raison d'être* of the document.

For Fabiola Veiga, lawyers in Brazil are trained to focus on domestic law, thus there is very little information about international human rights law, conventions, international

[270] Original answer in Portuguese: Os primeiros direitos, aqueles mais associados com a questão da liberdade, com essa faceta mais individual, essa faceta mais que tem sido os direitos garantidos nas primeiras constituições ela está associada com uma oposição do indivíduo ao estado, são direitos de oposição, o indivíduo ergue uma barreira onde o estado não entra, o estado pode tudo menos trabalhar a forma como você vai educar seus filhos, a sua liberdade, se você vai associar ou não vai associar, a sua religião, a sua prática religiosa, sua liberdade de expressão e tal, tal, tal, que é uma barreira, é uma capsula que você se coloca como oposição, como bloqueio ao estado. Na evolução você tem necessidades em equalizar essas capsulas todas entre si e fazer com que aqueles que perdessem determinados agrupamentos sejam tratados de forma isonômica, eu acho que aí que entra o papel dos direitos sociais, não necessariamente de forma geracional e sucessiva, mas é quando você percebe que você precisa. Por que que as causas sociais não mobilizam tanto? Porque o indivíduo não percebe uma imediatidade no resultado.

law, and so forth. She highlights that she did not have one class, one seminar, or one course of international law or human rights law in law school.

Gustavo Renner agrees with this statement and state that big problem of implementing economic rights is the lack of effective education. He says that if you look at law schools, even those with a slightly more progressive outlook, they don't even have a human rights module, and that shows what principles theses university value and what their students will learn. He conveys his experience:

> "I have spent ten periods studying civil law and I have not spent one period studying human rights. While always had this interest to study this topic and I always tried to study on my own, what my educational institution said is that human rights are not a right. What they have always said is that the international system has no importance, and this is reflected in all universities, and in consequence, it makes the legal professionals to also reverberate these ideals"[271].

Fabiola Veiga complements his answer with:

> "I think that besides teaching human rights it is necessary to have the democratization of these rights. Education is still for the elite, and even if you teach them, you will teach human rights for the elite. The majority of people that go to law school are the upper class too. Thus, it is also necessary to ask the question of who has the access and who attends these courses?"[272]

As was already discussed through section 6.2, the juridical actors are part of the upper class. The responses from the interviewees states as such. In fact, the individual values brought up by both classic liberal and liberal doctrine are ever so present in the Brazilian society. To point out this feature, Nina Ranieri states the lack of implementation and effectiveness of economic rights is because legal education in Brazil is focused on this

[271] Original answer in Portuguese: Eu já passei dez períodos estudando direito civil e não passei nenhum estudando direitos humanos, apesar de eu sempre ter tidos esse interesse desde sempre ter tentado estudar por contra própria, o que minha instituição de ensino dizia, é direitos humanos não é direito,) o que eles disseram desde sempre é que o sistema internacional não tem importância e isso é refletido em todas as universidades e faz com que os profissionais do direito já sejam, além de uma posição que eles tem natural por conta da classe social que eles vivem da forma que é constituída esse grupo.

[272] Original answer in Portuguese: "Eu acho que além do Ensino, é a democratização mesmo desses direitos que é necessário. Porque, assim, o ensino continua sendo para elite, por mais que você continua, vai ensinar direitos humanos para elite, continua sendo a elite que frequenta, você não tem esse acesso, quem é que frequenta esses cursos?

individualist view. That reflects Brazilian cultural values and does not change with the level of education. Brazilian society, from top to bottom, has an individualistic nature.

Some institutions do however try to develop a human rights culture. This process occurs when actors that hold important positions have a more pro-human rights view. When this happens, we can see a small gradual change in their juridical actions. This was the case with the Brazilian Federal Prosecutor Office (MPF)[273]. Deborah Duprat believes that the MPF is the Brazilian institution that focuses the most on human rights and economic rights. But even there, this content is very small. To explain this assessment, she spoke about her experience in the sixth chamber when she was the coordinator, stating that her biggest difficulty was to find the line between indigenous rights, *quilombola* rights and property rights. She declares that these groups are very organised regarding armed disputes and violence. Therefore, they were far away from a legal dispute.

With this context in mind, she went to speak with the director of the National School of Magistracy to start a partnership to prepare the judges like the federal prosecutors. Thus, they could study and understand economic rights. She claims that she did that because she knew that after the judges were assigned to places that had land conflicts, they stumble with the conception of the right to property within a human rights framework as they have no education on economic rights. Fittingly, they normally decided in favour of large enterprises and plantations and against indigenous people and *quilombolas*. She states:

> "It is incredibly absurd the formation where a judge does not dialogue with anything. It does not dialogue with human rights, and in this example, with the indigenous issue. But the same can be said about the peripheries of the big cities, the countryside, the peasants… the judge is a being who does not know the system and the system does not know him"[274].

[273] This is not happening anymore because President Bolsanaro changed the person in charge and put somebody with a anti human rights views. Thus, important improvements that were being made are now being rolled back. One example of this is the lack of action in regards to the violations by the state against vulnerable groups and the destruction of the natural environment.

[274] Original answer in Portuguese: (…)assim é tão absurda a formação onde um juiz né, ela é tão absurda porque ela não dialoga com nada, ela não dialoga com direitos humanos com nada, estou falando de questão indígena, mas se a gente colocar periferias das grandes cidades, o campo mesmo o campesino tal, ele entra ali, ele é um ser que não conhece o sistema e o sistema não o conhece.

Duprat also highlights another issue derived from education: the dispute of socioeconomic rights with the development project. She expresses that there is a large university investment in this area (property law) because it is the largest niche within Brazilian law. She inquires: 'How do you leave a university without thinking that property is inheritance'; 'that property is an absolute right, an individual contract?' She follows these questions with another: 'who are the owners of private universities?' She replies by saying that they are the same group of families that represent the rural lobby or the elites.

This structure has a great impact when applying economic rights. We cannot separate how the education system is organised and thought from the practice of law. If the system teaches patrimonial, individual and market friendly values, there is a greater chance of having judges, lawyers and politicians that do not understand and value the idea of human rights, especially socioeconomic rights. If these people come from an upper-class group, the chance of a favourable interpretation is even smaller.

Jerry Matalue gives a practical example:

> "We have to recognise that the indigenous population have a very serious complaint against the institutions because the allegations are made, and the majority of times are not investigated. For example, the crimes against indigenous people in Brazil, there is no investigation, there is no trial… There is no one being charge for killing indigenous people, for stealing indigenous land, for discriminating against us, and so on. So the first issue is this (…) the idea that indigenous people have this rights and when he seeks them, he realises that he is criminalised (…) so you realise that the indigenous issue in Brazil all the time is posed as a criminality problem (…) There is a judge in the region who said 'I decided everything against indigenous people', 'if your process get to my table I do not even analyse them'. So, it is this judiciary that we are talking about, this is the Brazilian justice we are talking about. (…) And we are also talking about dispute, because it has to do with land, with power"[275]

[275] Original answer in Portuguese: temos que reconhecer que os índios inclusive nesse momento têm uma queixa muito grave porque as denuncias são feitas e elas não são as vezes nem investigadas, por exemplo os crimes contra indígena no Brasil, não existe inquérito, não existe investigação, não existe julgamento, não existe condenação e não tem ninguém pagando pega por matar índio, por grilar terra de índio, por discriminar indígena e assim por diante, então a primeira questão é essa(…) a ideia de que os índios tem essa queixa e quando busca ele percebe que ele é criminalizado né(…) ntão você está percebendo que a questão indígena no Brasil todo o tempo é colocada como uma questão de crime(…)Tem um juiz lá na região que falou eu dou tudo contra índio, se chegar na minha mesa aqui eu nem analiso, eu dou tudo contra índio, então é desse judiciário que nós estamos falando, é dessa justiça

His statement connects with the ideas presented in this chapter that since all institutional actors, from the policy department to judicial institutions, do not receive an education that teaches human rights, the consequence is that when they are faced with vulnerable groups, their first instinct is to marginalise these groups. This is what has happened since 1500 (chapter 4) and in the majority of the cases, land or territory is involved and as was demonstrated in previous parts of this thesis, when land is involved, blood and conflict is the norm. When education does not transform reality or change perceptions, you are left with the rules of the powerful.

Matalue state that those who live side-by-side with the indigenous communities are foes and have an interest in their property. The mayor of the city is sometimes the landowner, but if he is not, his secretary is. They understand that they own the indigenous land. The whole process (of protecting and defending their economic rights) is very hard.

Deborah Duprat declares that if you count together the indigenous, *quilombolas*, and traditional population land and conservation unit, you have 42 percent of the off-market land stocks. She remembers that when the congressional group who represent the rural lobby found this data she was called in the congress and was told the following: "this year we ended up with the forest code, next year is the indigenous people". As was showed in previously section, almost half of the federal deputies elected in 2014 were political heirs and six out of ten senators were part of family clans. Their interest is not to protect economic rights but to take the protected lands and use them[276].

The question that remains therefore is how can we change this reality? How can we demand the change that is necessary? As stressed in section 6.3, the role of civil society is crucial for this.

In this regard, Fabiola Veiga expresses that nowadays some institutions are compelled to study this subject through the demands of civil society and social movements. But she believes that this is not a matter that is routinely understood or studied. In the General Attorney's Office, they only study international human rights law when there is a case that is very emblematic that they need to go look for other sources

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brasileira que nós estamos falando. (…) E. nós estamos falando também de disputa, porque tem a ver com terra, com poder"

[276] In 2019-20 we saw environment laws being erased at the same time that illegal miners invaded indigenous land.

(international treaties, international Court decisions, etc). But in her everyday work she hardly uses international documents and from her experience, it is the same in the whole institution.

Most representatives of the judicial system are part of a sector of society that came from the upper class; their understanding depends on what their cultural expectations are and what their upbringing and training are like. The whole process of how an individual can become a judge in Brazil should be seen as democratic but because the whole structure is unequal, the people who generally have the chance to become a judge comes from a privileged background.

Brazilian legal guidelines institute that individuals graduated in law must pass an exam to become a judge. These exams are very difficult and most people who pass them come from the middle and upper class. They are individuals who went to private school and public university[277]. According to some studies, it takes a minimum of 3 years of study to pass in this kind of exam. Being that you must fully commit, in other words, you must only study and not work. Under those circumstances only individuals who have money can fully commit since others need to work to pay the bills.

Moreover, Amaral Jr. states that Brazil is a caste society, just like India, but pretends that it is not the case. He believes that it is fundamental to develop cultural roots based on solidarity and collectivity if we want to see the realisation of economic rights in the country. Economic rights should have equal importance as civil and political rights, not be something minor. Judges are high in this caste society. They are the primary protector of the legal order. They have the protection and the decision-making power in their hands. Yet their knowledge on certain issues is insufficient. This is a choice.

Fabio Ramiro believes that the lack of knowledge by the judiciary, and especially federal judges in regard to international human rights law is inexcusable since the purpose of judges are to judge cases that are established in the Constitution and the protection of international human rights laws are part of the Brazilian legal framework. Consequently, the judiciary should use the international legal framework to form their

[277] Public Universities in Brazil are the best ones. For an individual to get in he/she also must pass an exam. Most people who go to the public university are students from private schools. `The government of Luiz Inacio 'Lula' da Silva implemented a quotas system to allow people from a poorer background to have the chance to go to public university.

decisions. But he does not believe that is the case in reality, he believes instead that there is a lack of knowledge regarding into which and what extent the international human rights framework can be used in a Court's decisions. He thinks that if international documents were used properly, the decisions made could have an even greater substance and range of protection since it would not mean only a local right, but a right that it is protected everywhere. Brazil committed to protect them when ratifying the document. He understands that international human rights law is a tool to deal with the shortcomings of the local law and institutions.

However, if you do not know what this legal framework entails you will not ask in a legal complaint and nor will a judge base their decision on it. For this reason, Fabio Ramiro also understands that the legal education system is extremely deficient. He states that judges in general are not introduced to international legislation and that is a shame because it is important to internalise this framework, to discuss its demands. This dialogue enables the creation of a stronger system based on the protection of the human person nationally and internationally.

This section demonstrated how the institutions lacked an education focused on the human rights doctrine and the consequence of this absence. As was demonstrated the educational structure of Brazil is based on neoliberal, patrimonial and individual values. In law school you have ten modules on civil rights and property but not one about human rights. The consequence is that when these individuals becomes judges or lawyers, they interpret the law with a market eye, with the idea that the land of the indigenous people should be used to produce agrobusiness. They don't understand that these lands and properties need to have a social function. They don't understand that the norms should be interpreted according to the principles set by the Constitution.

Thus, there is a very progressive Constitution but the individuals responsible to apply it do not understand its programmatic rules. They were not taught to do so, and the social and cultural environment that they are in does not let them to go beyond this pre-conceived interpretation. As a result, we have a forward-looking constitutional system, that protects economic rights, but we have (purposefully) archaic institutions that teach individuals neoliberal values.

6.2.2.3 The meddling of the Economic Power and its emblematic violation

Economic power is the ability to interfere with the mechanisms of production, circulation, and pricing of products and services, thus those with economic power have these abilities. There is a debate who have more power in Brazilian society. The political, economic, or ideological power? Economic power deals with necessity, politics with violence and ideological power with ignorance and knowledge, and it is only natural that economic power and ideological power also try to seize political power. Especially in a fragile state with fragile institutions like Brazil.

Economic power has its agents in the representative bodies which greatly hinders the ability of economic regulation to effectively serve its purpose. Lobbying is one of the ways in which economic power is used to capture and direct regulation (or lack thereof) to its interests, and they use various mechanisms, such as terrible and agonising discourses that there is no alternative but austerity policies, tax breaks and so on. Economic power uses various elements, various resources to defend its interests.

Deborah Duprat states that the judiciary is part of the economic power. But she understands that this is what capitalism is. She articulates that what she is trying to do is to think how it is possible, in these interstices of power, to manage to accomplish something. For her, this alliance of power with capital is inevitable, thus we must learn how to manage it to create a social protection floor to protect the most vulnerable. She understands that capital has this ability to reinvent itself all time. But she does not see this as a problem, what is most important for her is that social movements, the activist understands this framework and understands how they can use this to protect their rights.

Fabiola Veiga thinks that this economic argument permeates all the arguments, it permeates everything. She says that sometimes inside the AGU office there are decisions to cut off some claims in the list of priorities in the name of this economic power. It is an entity that hovers amid every institution such that she utters “we don't even know who it is”. Economic power is not a homogeneous thing, but it is used to control certain selectively interests. And what is this idea of economic power? They

are just rentiers[278], when you see the indigenous lands like that it has an economic power, so the standing forest is not an economic power? What it is the economic power? It is the financial market that commands. Gustavo Renner states that when you talk about economic power you involve various internal forces in society. Yet, he states that the consumer who pays for the product, the worker who generates wealth are not considered economic power, these economic agents are disregarded when someone is speaking about economic powers and this kind of discourse it is very worrying since there is an important part of agents that are not being contemplated by the institutions.

Augustino , member of the Human Rights Commission on the congress, declares that "predominantly the judiciary today is at the service of economic power, the 'mind' of the Judge works in another way when they judge a black, a poor person"[279]. Indeed, such a view supports the views of Marx, wherein law is a construction of the dominant class to protect their interest (Engle, 2008; Fraser, 2013; Hamacher and Jesus, 2014).

Caio Bandeira also believes that "law is a power clash; it was built as a power dispute. If part is conceived by the state, the state is also a power struggle, the state is a class conflict. Thus, who has the appropriation of the state continuously have economic power"[280]. For him, the financial market and the elite have the economic power in Brazil.

Fabio Ramiro believes that the judiciary eventually ends up acting in favour of the economic power, which is not one of the powers constituted in the tripartite of power by Montesquieu. He reflects that the Brazilian judiciary is not ashamed to hide this fact, and that economic power is a component implicit in discussions when cases move to higher courts. The relationship between judiciary and private companies is so absurd that there are countless examples of banks paying for judges' trips to discuss topics that may be tried or eventually come to Court (Cordeiro, 2009; CUT, 2015).[281] Fabio inquired if judges would agree to spend the long weekend under the tents of some MST

[278] A person living on income from property or investments.
[279] Original answer in Portuguese: 'predominantemente o poder judiciário hoje está a serviço do poder econômico, cabeça de juiz se você julga um negro, um pobre, a cabeça funciona de uma outra forma.'
[280] Original answer in Portuguese: 'o direito é disputa de poder, ele foi construído como uma disputa de poder. Se parte foi concebido pelo estado, o estado é uma disputa de poder, o estado é uma disputa de classes. Então quem sempre se apropriou desse estado é quem sempre teve poder econômico.'
[281] One example occurred when the Brazilian Federation of Banks paid an invoice of R$ 182.000,00 for the lodging and transportation of the 47 judges to speak about interest rate on bank loans.

(Landless movements organization) camp to discuss land reform. The social outrage if that happened would be unprecedented.

Dirley da Cunha states that economic power is the opposite of economic rights. He believes that economic power nowadays is the new moderator power (See section 4.3). He says that the economic power holds the key to the political organization of the state. He posits that the Brazilian president may be with 1% of popular approval, but if he is 51% approved within the financial institutions and the market, no one will take him away from the presidency. Gustavo Renner also declared that the economic power is the new moderating power right. While in the Brazilian empire the moderate power was in the emperor's hand, today it is in the hands of the companies, the banks, and the financial institutions.

Alberto Amaral Jr believes that the economic power influences the lack of justiciability of economic rights in Brazil because economic rights mean a fairer distribution of advantages and disadvantages that exist within society. But he also believes that the political interests also affect economic rights in Brazil. He states:

> "I think we cannot disregard the system of Brazilian politics. The Brazilian state is organized in an extremely patrimonialistic way. I would say more, not only the Brazilian state, Brazilian society too. The institutions are constructed as extremely patrimonial, and the university also follows this model unfortunately. That is, even public universities are often run as extensions of private property. It is a conception of property that the Brazilian jurist works, it is the conception of individualistic liberalism of the nineteenth century. We could not evolve from this this idea"[282].

Deborah Duprat states that the Supreme Court in its decisions considers the impact that their sentences will have on the national economy. This is very telling because nowhere in the Constitution is there a clause that establishes that the Courts should take into

[282] Original answer in Portuguese: Eu acho que nós não podemos desprezar a forma da política brasileira.Então o estado brasileiro organizado de uma forma extremamente patrimonialista, eu diria mais, não só o estado brasileiro, a sociedade brasileira também, as instituições são pensadas de forma extremamente patrimonial, a universidade também segue esse modelo infelizmente. Quer dizer, mesmos as universidades públicas muitas vezes são administradas como se fossem extensões da propriedade privada. é uma concepção de propriedade que o jurista brasileiro trabalha, é a concepção do liberalismo individualista do século XIX. A gente não conseguiu evoluir dessa ideia.

account the impact that its decision will have on the economy. This is not a principle, or a value established by the Brazilian Constitution.

The Brazilian Supreme Court is very progressive when they treat issues of civil and political rights. They decided in favour of recognition of same-sex marriage in 2001. Deborah Duprat tells a story that one of her advisors expressed to her that he wanted to see whether the Supreme Court would continue with a progressive view when the demands were about land reform, property rights of indigenous people, or of *quilombolas*. She recognises that there is huge problem in the matter of right to property. And in the difficulty, there is the issue that the judiciary must establish who has the competence to judge cases of economic rights.

6.2.3 The role of Civil Society in the protection of economic rights

The following section of this chapter aims to focus specifically on the role of civil society and social movements in the protection of economic rights. One of the first observations possible when evaluating the interviews was that civil society constitutes the first line of defence against violations of economic rights because they are the resistance, and their members are the ones who are suffering these abuses every day. They have the power to influence the political order, as was showed in section 6.1, with the role of civil society in the creation of the Brazilian Constitution of 1988.

Fabiola Veiga believes that the conversation about economic rights within institutions starts with pressure from social movements. Social movements are the ones that push for the institutionalisation of economic rights in Brazil. It is not the citizens, it is not the institutions, it is civil society and social movements, and she believes that even then, the institution does not have the requisite institutional instruments to make this issue internalised. For example, she states that in the AGU there is no institutional culture that favours the protection of economic rights. She understands that the first problem is that the legal bodies in Brazil do not have any permeability with the social sphere.

In Brazil there is an historical lack of responsibility of institutions since the institutions are built to protect the interest of the elite (section 4.3 and 4.4), even if the Constitution says otherwise. In practice, there is a transfer of responsibility from governmental institutions to civil society and the social movements. They should not be, and are not, the bodies responsible for the protection of economic rights according to international

human rights law. Their role is as monitoring bodies. Civil society must push for the efficiency and the implementation of economic rights, this is their job. Veiga also states that there are no mechanisms within the institutions for social participation and dialogue. She believes that the MPF are more open to such discussions and experiences; in the AGU there is no social participation mechanism. Thus, she thinks that civil society must press first to have mechanisms of participation within these institutions and second to establish what the content of the discussion will be.

Gustavo Renner gave an example of the struggle between institution and civil society to create a dialogue:

> "A prosecutor decided to set up a commission whose idea was to stimulate the dialogue between the MPF and social movements. At the beginning the prosecutor said: 'we have to teach social movements talk to the MPF'. We don't have to teach social movements talk to anyone, they know how to talk, if the MPF doesn't know how to listen, we can't change the social movement. Thus, there is an institutional and social understanding that the mistake is with the social movements and not with the institutions. If you are going to deal with indigenous people for example, some prosecutors say, 'write and send me the document', you are speaking with an indigenous person that not speak Portuguese and requires him to write. What kind of citizenship is that? But you say 'but there is an association that represents him, there is an anthropologist who deals with him who can write', but it's not him, you denied his right, and an interlocutor will be able to represent you, but the indigenous person has no right to speak for themselves. Hence, the issue about the judiciary is that the judiciary does not allows an indigenous person to speak in his own language if he can't speak Portuguese. I just think that shows the difficulty that we have to understand, to open our institutions to deal and dialogue with different social movements"[283].

[283] Original answer in Portuguese: 'em tempo ele decidiu montar uma comissão que a ideia era estimular o dialogo do ministério público com os movimentos sociais. no inicio o conselheiro que estava tratando falou, a gente tem que ensinar os movimentos sociais conversar com o ministério publico, a gente não tem que ensinar os movimentos sociais conversar com ninguém, eles sabem conversar, se o ministério publico não sabe ouvir a gente não pode mudar o movimento social, então essa visão social de algum erro está lá e que na verdade de alguma forma as instituições não dificultam isso, se você vai tratar com índio por exemplo, a própria gente lida muitas vezes, alguns procuradores dizem por exemplo, escreva e me passe, você falou índio que não falar português ele vai ser obrigado a escrever, que cidadania que é essa? A não, mas tem uma associação que representa ele, tem um antropólogo que lida com ele que pode escrever, então não é ele, você negou o direito dele, e um interlocutor vai poder representa-lo, mas ele não tem o direito, então assim discussão sobre o judiciário, o judiciário permite ou não um índio se manifestar na própria língua se ele souber falar como uma segunda língua o português, então eu só acho que isso mostra a dificuldade que a gente tem de entender, de abrir realmente para lidar.'

The above response shows the disconnect between the institutions and civil society. This interpretation relates back to the cultural context of Brazilian society since 1500; institutions in Brazil were and are not constructed to liaise with civil society and social movements. On the contrary, institutions were always built to make this dialogue difficult, for it to be a struggle for 'normal' citizens to obtain access to governmental institutions. This research found that over sixty percent of the participants believe social movements to be the battle ground of economic rights since they are the locus that has dialogue with the majority of the population. The issue, however, is that these people do not have the economic power to interfere in politics.

Another issue that was highlighted in the interviews was that a lot of social movement participants do not see themselves as subjects of law. Deborah Duprat first understands that it is difficult to conceptualise social movements since they can represent movements of different times and different values. There are some social movements within which the fight is much older and therefore they are much better equipped to battle. That is the case of the indigenous people, who have been fighting for their land and their rights since the discovery of the country. In contrast, there are some social movements, as for example the case of *Fundo do Pasto*[284] communities in Bahia, who have only understood themselves as subjects of law very recently which causes knowledge mismatch - whoever works with these groups usually has less information about how to fulfil and protect their rights. Thus, the role of civil society is dependent of how social movements are constructed, what are their struggles and how they see themselves as subject of law.

Deborah Duprat thinks that things are changing little by little. She sees that now, in places like the Amazon, there is a lot of work taking place in the communities with the aim to develop a more collective conscience. People are starting to see themselves as communities that have rights and understand that they can get more if they fight as a group. This is an extremely important political act by these communities, since they are

[284] Fundo do Pasto are traditional communities (*quilombolas*, indigenous..) characterized by the common use of the land and its resources. Most of these inhabitants do not have title deeds, which is used as an argument for land grab attempts by ranchers and agribusiness. See http://www.cerratinga.org.br/populacoes/comunidades-de-fundos-de-pasto/

finally seeing themselves as subjects of law, which allows them to be better equipped when they have to protect their economic rights and their ways of life. She discloses:

> "When I started working on this issue (traditional communities), forced displacements they were done individually, you gave a sum of money and the person left and would never discuss it. Nowadays it is very difficult for you to see a force displacement from a traditional community you know, they are aware that their struggle is collective that they will not sell their lives for any amount of money. It's not any money, it's not cute little houses that will replace the various houses, there's a lot involved. Now this circumstance is obviously where you have a better equipped community, so it will depend a lot. But there was an empowerment. We are in a moment of construction when everything is new. The adaptations are progressive, we have to have this notion that for the groups all this is quite new, so for indigenous people too, for *quilombolas* people, for *quilombolas* I got the beginning of this fight"[285].

Relating back to chapter 4 and the role of the catholic church in the construction of social movements in Brazil, Deborah Duprat recounts that when she started her work in the prosecutor's office working with the indigenous issues, the Catholic church was present in almost all indigenous areas. She believes that the Catholic church, with the *Pastoral da Juventude*, was responsible for a series of achievements in terms of economic rights. Nowadays, she says, this is changing because of the arrival of evangelical churches, mainly from the USA, that are occupying mainly the Amazon region. This arrival produces an important transformation because both groups have different views of the world and values since the *Pastoral da Juventude*, as was showed in previous sections, has great influence from liberation theology and thus, developed a view from the perspective of the fight for rights, fight for the land, fight for economic rights while these evangelical churches focus on liberal liberties and individualism. The

[285] Original answer in Portuguese: 'Quando eu comecei a trabalhar nessa questão, os deslocamento forçados eles eram feitos individualmente, você dava uma quantia em dinheiro e a pessoa saia e nunca ia discutir isso. As comunidades, hoje em dia é muito difícil você conseguir um deslocamento de um povo sabe, eles tem consciência que a luta deles é coletiva que eles não vão vender a vida deles por uma quantidade de dinheiro. Não é um dinheiro qualquer, não são casinhas bonitinhas que vão substituir as varias casas, tem muita coisa envolvida. Agora isso ocorre obviamente onde tem uma organização melhor equipada, então vai depender muito. Mas houve um empoderamento. Nós estamos num momento de construção em que tudo é novo. As adaptações elas são progressivas, a gente tem que ter essa noção de que para os grupos também tudo isso é bastante novo, então para indígenas também, para quilombolas gente, para quilombolas eu peguei o inicio dessa luta.'

spread of these churches is thus expanding these ideas around the Amazon. On this context, she states:

> "I'm not Catholic, I want to make that clear, I'm not here defending one religion against another and I don't want to get into this religious war. But it's very funny (the different views) because while I was working with these churches, the Catholic group was prepared to fight for rights, fight in every meaning of the word, to fight the narratives, to fight the political and physical battle, even if that means taking up weapons. The evangelical church, I don't want to speak evangelical, because it seems like it's just Pentecostal, they have a very different perspective, which is that of accommodation and conformity. That's very funny because if you read Weber's it is a little different from this Protestant ethic. But it the Protestant ethic has a lot of the 'you have to own plenty' speech, plenty material things, accumulation of money … it is the 'I have to have', but you have to try to access it with as little dispute as possible. And that gives rise to this notion of absence and conflict and the perception of conflict is essential in life in society. I'm not saying of armed conflict, but to create different positions, it is necessary a conflict all the time"[286].

Duprat highlights the economic struggles of the *quilombola* and indigenous people making a connection with the Brazilian historical background stating that since 1500 they were born fighting, fighting for their land, for their freedom, for their rights and nothing has changed since them. The indigenous people, for example, do not even own their land, the state own their lands, they just have the right to usufruct.

Comparing the indigenous angle to business interests, we see a difference of influence that a traditional population has in comparison to the power of capital. The collective interest of traditional communities such as the indigenous people is something that has to be fought for, whereas the interest of the companies is easily gained. As Jessé de

[286] Original answer in Portuguese: Eu não sou católica, quero deixar isso claro, não estou aqui defendendo uma religião contra a outra e nem quero entrar nesse guerra religiosa, mas é muito engraçado porque enquanto eu tava com a igreja trabalhando, o grupo tinha a igreja católica ele estava preparado para a luta por direitos, para a luta mesmo, para luta em todos os sentidos, luta o campo do discurso e luta no campo da luta política e da física, da luta pegando em armas e enfim, não havia nenhum coisa. A igreja evangélica protestante, eu não quero falar evangélica, porque parece que são só as pentecostais, neopentecostais, elas já têm uma perspectiva muito diferente né, que é a da acomodação e do conformismo. É muito engraçado isso, porque não parece, porque se você for ler Weber é um pouco diferente a ética protestante, mas ela tem muito assim, você tem que ter a abundância, as coisas materiais, acumulação, isso tudo tem que ter, mas você tem que procurar ter acesso a isso com o mínimo de disputa possível, então já é uma visão diferente, é uma visão de conseguir coisa, mas sem a luta, sabe? E aí isso dai assim gera muito essa noção de falta e conflito e a percepção do conflito ela é essencial na vida em sociedade, eu não digo do conflito armado, mas de criar posições diferentes, há disputa o tempo todo.

Souza argues, Brazilian society was constructed in a ‘guise of savage capitalism’ (Souza, 2019: 217) in favour of the elite and to the impact of the rest of the population. This was described by the Jerry Matalue, an indigenous from the Pataxó tribe.

Moving further in this discussion, some participants suggested that international corporations could be key to the protection of economic rights because they have influence over states and their representatives. Today many international corporations have powers that sometimes are equal or superior to state power. In this regard, Alberto do Amaral Jr raises the role of international corporations as important actors in the effectiveness of economic rights. For him it is clear that the protection of economic rights also passes throughout the participation of international corporations in guaranteeing these basic rights.

This shows the difference between a collective perspective of economic rights by indigenous people in contrast with the liberal perspective of Amaral. The neoliberal narrative is present in academia and, as we will see, in education (6.2.5). The presence of this narrative undermines the capacity of legal education institutions to teach economic rights because they do not give importance to these rights. This perspective is not the one present in some of the indigenous communities since their understanding of society comes from an everlasting fight for survival.

Yes, there is a need to create a link between national and international mechanism of protection of economic rights. The protection of economic rights also presupposes some kind of transnational articulation since the world is increasingly connected. By analysing the responses from the civil society actors, it was possible to conclude that social movements need to articulate not only nationally but transnationally as well because the problems faced are global. One example is the issue of the fires in the Brazilians biomass and the fires in California. These acts affect individuals everywhere, in Brazil we are seeing more and more vulnerable groups experiencing difficulty over access to basic needs because of the consequences of these fires. They are having to move to the city without access to housing, health, or work. The loss of the natural environment is causing violations of economic rights. And at least in Brazil, the fires start because of land grabbers or landowners. Therefore, it is necessary to exert transnational pressure on corporations so that corporations can stop financing the structure that enables violations of economic rights.

The issue of slave labour for example deals with a flagrant violation of human rights, where companies that have taken advantage of slave labour are compelled by the reaction of consumers and social groups to modify corporate practices around the globe. This has happened with Nike and with Zara (Parente, Lucas and Cordeiro, pp.39-64, 2017). In Brazil today still there are people treated as slaves whether in plantations or in factories (Repórter Brasil, 2020). The role of civil society in Brazil contrasts the role and the hierarchy of two groups: those represented by social movements and organisations and those represented by business. The first group is always reacting to the violations, whether is from landowners against indigenous group, or the politicians lowering the social floor protections and so on. The second group are the ones controlling the narrative and the institutions through lobby and corruption.

In a country where democracy is only thirty-two years old, and the upper class control all three spheres of the government, how is possible for social movements and organisations to push forward an economic rights narrative if some of them do not consider themselves as subjects of law? How, if they do not have an opening to dialogue with the institutions that should be there to protect them, or they are fighting every day for their life? Companies hold the economic power and the economic power is the new moderator power (Section 4.3). These findings also raise pertinent questions about cultural expectations that go further than civil society and focus on the identity of society. The next sections tackle this issue.

Despite not having the decision-making power civil society and social movements are the ones that monitor violations and start discussion of these rights inside the institutions. This role has been central to the evolution of Brazilian society as showed through history with the protected status given to the *Quilombolas* and with the Landless Workers' Movement (MST)[287]. These actors are the frontline defenders of economic rights since they are the ones that are fighting every day, sometimes with their lives in jeopardy, to defend these rights. To analyse how they understand this concept is vital to help create mechanisms to move the institutions and its actors to look at economic rights in an important way.

[287] See section 4.4 and 4.5.

6.3 NATIONAL JUSTICIABILITY

Throughout the process of interview analysis, and attention to the case study it became clear that justiciability emerged as an important theme for the implementation and protection of economic rights. This subsection will introduce the discussion of justiciability of economic rights in Brazil by showing how the participants understand the issue of justiciability and how it affects the application, highlighting the discussion of budget and capital resources control.

Economic rights (together with social rights) have been described as rights of "second generation", or the so called "positive" rights"[288]. According to Karel Vasak (Vasak, Alston and Unesco, 1982), in the evolution of human rights, it is possible to distinguish three temporal dimensions: the first dimension is to think of human rights as freedom. Human rights were not yet positivised, but they were presented as demands formulated by society, more particularly by certain social groups, concerning the limitation of power. The first dimension has as its main element the classic idea of individual freedom, focused on civil and political rights. These rights could only be achieved by abstaining from state control, as their action interferes with the freedom of the individual. Thus, the history of human rights begins with the limitation of political power. It is the first phase, so it is a phase wherein human rights are thought of as a set of ideas, an ideology for the limitation of political power, and it is thus associated with contractualism of the 17th century.

The second dimensions are linked to the concept of equality and more concerned with the power to demand socio and economic rights, such as right to health, the right to education, the right to social security and so forth. These rights impose on the state a set of obligations that materialise in constitutional norms, execution of public policies, social programs, and affirmative actions. It is the state's obligation to fulfil them. Thus, the second dimension is characterised by the phase wherein human rights are no longer an abstract issue but become positive rights envisaged by regulations, especially Constitutions, and claimed within the state.

[288] Put the reference

The third dimension is guided by the ideal of solidarity or *fraternité*. The main concern becomes diffuse rights - rights whose holders cannot be determined - and collective rights, which have a determinable number of holders and share a particular circumstance.

Economic rights are second dimension rights based in the principles of social justice and the public obligation to fulfil the rights of those who are marginalised. They are called "positive" rights because they demand a positive obligation from the public institution, in other words, they demand the creation of policy and laws that protect or help the neediest individuals. The human rights doctrine divides state obligations in three parts: 1) the obligations to respect; 2) obligation to protect and 3) obligation to fulfil, which incorporate the obligation to provide and facilitate (Committee on Economic and Social and Cultural Rights, 1990). It is inaccurate to say that economic and social rights are obligations to fulfil, and civil and political rights are obligations to protect. All human rights have the three obligations (Eide, Krause and Rosas, 2001).

What constitutes economic rights? This relates back to the discussion in chapter three, the confusion of defining what economic rights are, and the consequence thereof which produces a weakened framework for protection since this obstructs the role of judges to justify decisions on whether violations have occurred. This lack of specification undermines guardianship and thus the correct remedy that should reinforce protection is not invoked in favour of that right. Secondly, this comes from the argument that economic rights require the use of resources by the state and thus, are rights that do not have an immediate impact and cannot be claimed because they depend on state budgets. That brings the discussion of separation of power and of whether the judiciary can assess the realisation of economic rights. This topic will be further discussed in section 6.3.1.

Judicial enforcement of economic rights is fundamental. Miguel Calmon believes that because of the lack of understanding of economic rights, both in an international and regional context, they naturally lose the safeguarding potential that these frameworks should provide in defending these rights. He understands that there is a great deal of resistance or lack of knowledge regarding the immediate application of provisions of the ICESCR and the Pacto of San Jose da Costa Rica. He states that most of the time judges go to the Constitution and do not seek further instruments to protect economic

rights, even if they already are part of the Brazilian legal framework. He believes if judges and lawyers read article 2 of the ICESCR it would help them understand and safeguard economic rights better, but most of the time they do not do that and thus, justiciability ends up being limited.

Alberto do Amaral Jr does not believe that there is justiciability of economic rights in Brazil. He expresses that the only right that you can see having justiciability is the right to health, and even then, it is very controversial since there is the issue of disproportionate access to justice.

6.3.1 Justiciability limit: the budget debate

According to the separation of power principle (Montesquieu, 1996; Stewart, 2004), the Executive branch has the primacy of determining how the budget should be allocated. At the same time the Constitution says that the government must be built to end social inequalities. For Amaral Jr the issue of justiciability arises when you note that the government actually have the budget but the way it is being allocated is not the way to protect the dignity of the human person, nor to end the inequalities, as established by the Brazilian Constitution. Thus, for him, the question of respecting the separation of power is limited by the Constitution in article 1 which establishes that the goal of Brazilian society is to respect human dignity and end inequalities. Thus, the judiciary has the power to decide when these guarantees are not being met. Yet, because of the way Brazilian law is operated, there is no justiciability of economic rights since there is an unequal distribution of advantages and disadvantages.

Deborah Duprat understands that it is challenging for most constitutional courts to incorporate economic rights since it is hard to determine how far the Court can go without affecting the principle of separation of power or starting to commit judicial activism because sometimes, they involve budget analysis and resource allocation. Resource can be used for bad or good purposes; it has no colour or smell.

For Casali, the correct use of resources goes through understanding the perspective that resources are scarce whilst need is endless. Rubens Beçak declares that it is obvious that good budgeting practices are necessary for good governance. He understands that you ‘shouldn’t spend if you don't have it’, and thus nobody will say that tax accountability is not important. But he states that what scares him is when society put

these values as a maxim that dominates the whole debate. He believes that socioeconomic rights issues end up always in the background, whilst first and foremost it is seen as necessary to protect budgetary rigidity. This position relates back to the neoliberal narrative of austerity and fiscal budget as a cultural transformation that made people think of themselves as economic agents and engaged in an economic rationality built on the individualisation of society.

Miguel Calmon articulates that there is excessive criticism of the judiciary when it acts to enable the protection of economic rights, arguing that they are performing an adjudication of politics, which is partaking an activist role. He states that some authors will invoke countries like United Kingdom and Germany to argue that this is not the role of the judiciary, that they should not decide on whether a government should pay for a medicine or create more schools. Miguel believes that these claims are not present in the judiciary of these countries because their systems work, thus there is no need for a person to demand this of the judiciary because, compared to Brazil, the social protection system and state intervention measures in the economic order work relatively well.

Miguel also understands that the judiciary sometimes exceeds their power and do not realise that resources are scarce, so to while the judge guarantees a person the satisfaction of a health demand, he also must balance the resources. He says:

> "For example, when an individual legally request a medicine that is very expensive. The resource that could be contributing in buying maternity beds, child vaccination, haemodialysis machine and etc, will only generate an individual benefit over a collective one. So, I think this balance is missing. I believe that the citizen cannot have their right denied because of a deficiency in public policy and because the judiciary could not universalize that measure. But this is a really sensitive issue, and I think the judiciary, when facing these individual claims, should have mechanisms that would allow them to be extended to beyond one case. I suggest that the Brazilian legal system should have a mechanism that allows the judge to turn an individual claim into collective one. Thus, the decision that would benefit one person can extend and benefit others"[289].

[289] Original answer in Portuguese: Por exemplo o fornecimento de medicamento de alto custo, aquele recurso que poderia ser participar de compra de leitos em maternidade, vacinação infantil, compra de máquina de hemodiálise, isso vai gerar um benefício individual entre aspas em detrimento do coletivo, então eu acho que falta, agora em contrapartida o cidadão não pode ter o seu direito negado por uma deficiência de política pública e porque o judiciário não poderia universalizar aquela medida, então essa

Dirley da Cunha states that there is a myth that the judiciary cannot be a positive legislator. He says that the Brazilian Supreme Court has always resisted the idea of directly realising economic rights. But why it this important? He stresses that the law cannot be unassisted, that is, the omission by the legislator cannot be stronger than the constitutional provision. Thus, the omission of applying the law cannot have more normative force, or in this case, normative omission, than the constitutional provision itself. The normative force of the law has prevailed. One example of the positive legislator regarding economic rights is the decision of the Supreme Court on article 9 of the Constitution. The Brazilian Constitution defines the right to strike (article 9) as an instrument of defence for the interests of the worker and that the exercise of strikes in activities that are essential to the needs of society must have limitations defined by law. Thus, in 1989[290] a law was created which defined the limitations of strike activities fulfilling the norm. In contrast, the right to strike for civil servants is still a very controversial issue. Article 37 determines that for public servants "[...] the right to strike will be exercised under the terms and limits defined in a specific law[291]".

Yet, until today this specific law has not been created, causing an ongoing debate about this theme. In 2017, the Supreme Court decided a case on the right to strike for public servants and decided that public servants that are striking must have their wages discounted for the unworked days. The exception to this rule was in the event of a strike due to late payment of wages or breach of labour agreement[292]. In 2018, the same Court decided, in the Extraordinary appeal n. RE 1104823 /CE, that the "inexistence of the right to strike" of the public servants, diverged with the jurisprudence of this Court that ensures all civil servants the existence of the aforementioned right. Such guidance allows only any restrictions or limitations as to its exercise, depending on the essentiality of the activity considered, so that it does not prevent the enjoyment of the

é uma questão realmente delicada, mas acho que o judiciário quando enfrenta essas questões individuais ele deveria ter mecanismos que possibilitassem a extensão dessas medidas para além daquele caso. Eu sugiro na minha tese de doutorado, algo que foi até revogado, que foi vetado do CPC novo, porque isso em tese estaria num código de processo coletivo que até hoje não existe que é a possibilidade do juiz de transformar uma demanda individual em coletiva e aí aquilo que ia beneficiar uma pessoa pode se estender e beneficiar outros, certo.

[290] Lei 7.783/1989

[291] Original text in Portuguese: "[…] o direito a greve será exercido nos termos e limites definidos em lei específica"

[292] Agravo regimental em recurso extraordinário - AG .REG. no RE 1.236.737/DF

constitutional right of strike that has immediate effectiveness, to be exercised through the application of the Federal Law. 7,783 / 89, until a specific law comes to regulate it". As one can see, the lack of a specific law that regulate the economic right established in article 37 caused the Supreme Court to decide the rules when there is a public servant strike until there is an end to legislative omission. The Supreme Court decision had general repercussions (*erga omnes*) in the legal system.

As Dirley states above, the Brazilian Supreme Court has always resisted the idea of directly realising economic rights, this case was an exception because it did not involve Judges deciding on the allocation of budgets, in other words, it did not involve making a decision that would interfere on how other branches should allocate their resources. Deborah Duprat explains that occasionally decisions on economic rights also involve tragic choices, and for a judge it is very hard to separate all that. Ramiro agrees with her and gives a practical example:

> "We are not, as I would say, irresponsible judges. We cannot be! We have tremendous power to make a decision. But neither can I ignore the commandment in the Constitution. Health is everyone's right and state duty. And often, Marina, there is a claim for a judge that what is behind that claim there is not even that drug, is that the judge is the obstacle for a person to continue to envision a possibility of cure. For example, in this matter of health if I say "No, this is very expensive," you're condemning this person to die. Is very difficult to make this decision"[293].

In case of the right to health specially, judges end up accepting these demands because it is very difficult to be the obstacle for an individual to live. The right to health brings urgency that other economic rights do not have, it brings an immediate moral dilemma and that is why judges feel more at ease in deciding that the state has the obligation to use their resources to remedy the violation.

[293] Original answer in Portuguese: Nós não somos, como diria, juízes irresponsáveis. Não podemos ser! A gente tem um poder enorme de dar uma decisão. Mas também não posso ignorar o mandamento que está na constituição. Saúde é direito de todos e é dever do estado. E muitas vezes, Marina, chega um pleito pra um juiz que o que tá por traz daquele pleito ali não é nem aquele medicamento, é não ser aquele juiz o obstáculo a que alguém possa continuar vislumbrando uma possibilidade de cura. Por exemplo nessa questão de dinheiro da saúde. "Não, isso aqui é muito caro", e ai você tá condenando essa pessoa morrer? É muito difícil.

6.4 CONCLUSION

This chapter discussed the findings relating the question of how economic rights have (or have not) been implemented in the legal system, presenting the findings pertaining to participants' perspectives on the topic. The presence of the ties of patrimonialism, neoliberalism, colonialism, and exploitation that produce Brazil's contemporary sociolegal context are found within the institutions and structures in which the legal order operate. Exploring the ways in which this structure provides the basis for the implementation of economic rights within the legal system shows us the way in which they are limited. They are limited because the Brazilian Constitution provides a progressive framework to enable the protection and application of economic rights fully, yet the individuals responsible for applying these norms interpret them with a view connected with the values mentioned above. In this way, economic rights are weakened, making them harder to be fulfilled.

As demonstrated in this thesis, this context is not a coincidence. Since its 'discovery' Brazil has been constructed to realise the desires of the elite. The cradle of the country is exploitation and violence. As Oscar Viena Vieira (2008: 42) states:

> "Economic and social exclusion, arising from extreme and lasting levels of inequality, destroys the impartiality of law, causing the invisibility of the extremely poor, the demonization of those who challenge the system and the immunity of the privileged in the eyes of individuals and institutions. In short, socioeconomic inequality erodes reciprocity, both in its moral sense and as a mutual interest, which undermines the integrity of the rule of law"[294].

Beginning with Section 6.1, this Chapter established the legal framework of economic rights inside the Brazilian Constitution of 1988 followed by the different interpretations for the reception of international human rights treaties by the national system, and how the Congress and the Supreme Court resolved this issue.

[294] Original text in portuguese: "a exclusão econômica e social, decorrentes de níveis extremos e duradouros de desigualdade, destrói a imparcialidade do direito, causando a invisibilidade dos extremamente pobres, a demonização daqueles que desafiam o sistema e a imunidade dos privilegiados, aos olhos dos indivíduos e das instituições. Em suma, a desigualdade socioeconômica corrói a reciprocidade, tanto em seu sentido moral quanto como interesse mútuo, o que enfraquece a integridade do Estado de Direito. "

This chapter concluded that the Brazilian Constitution has a strong, robust framework that protects economic rights in all its spheres. Yet the effectiveness gap between text and reality arises from the limits imposed by actors' socioeconomic backgrounds and education, and the meddling of economic power.

Education places an important role for the limitations of economic rights since Brazilian institutions understand that these rights should not receive attention. Furthermore, it was showed that economic rights are only requested in in cases of individual claims. The idea of a collective claim does not even exist in the legal framework. This shows that Brazilian society placed a high value in individualism, a neoliberal value. In this regard, we also see that the free-market value is also present when speaking about the justiciability of economic rights. The focus that juridical institutions place in the budget and in the will of economic power supersedes the progressive constitutional framework.

CHAPTER 7: CONCLUSION

This thesis set out to study how economic rights are understood by the primary individuals responsible to protect and implement them, and how this understanding affects their application in local frameworks. The objective of the work is also to study what economic rights are.

The affirmation of the economic rights demands the verification of public policies' insufficiency and state actions regarding human rights' effectiveness. The insufficiency is also perceived by the misunderstanding of doctrinal and jurisprudential instances about the conditions and possibilities for the effectiveness of economic rights, especially by the exaltation, defence, and circumscription of justiciability to what would be the minimum core.

The problem of the social question concerns the individual's dependence on their existential needs, which, not achieving adequate satisfaction, subject them to exploitation through the market economy, constraining their freedom. The effects of poverty and social exclusion that it entails, leading to the expropriation of the human condition, are even manifested in the risks of breaking the social bond formed around solidarity, founded on the sharing of demands and values, such as common yearnings and utopias.

The risk is related to the community's subsistence, which can lead to the perishing in favour of individualism that relegates each one to himself. Politics would be doomed to disappear in such a situation, losing its primitive and meaningful sense of freedom. Freedom in the community is being suppressed by the economic power appropriating political institutions.

There is the reductionism of the human being to *homo oeconomicus*, which obscures the possibilities and capacities of international organizations, non-state actors, and the States themselves to face situations of inequalities, social exclusion, and extreme poverty and, with them, their effects. “[...] The world has never been so rich, never have human beings been so unequally endowed, never has the biosphere been so threatened”. Despite this, the economic discourse asserts that there is no alternative but the adoption of neoliberal policies (Felice, 2010: 15).

Therefore, it is necessary to support a review of the theory of economic rights. Established under the ideological mantle of liberalism, they have difficulty to be fully implemented and protected. It is necessary that the theory of human rights confers economic rights the same stature and importance as civil and political rights and that it dialogues more intensely with regional and international systems to protect human, economic, social, and cultural rights. It is also necessary to recognize the fundamental indivisibility between all fundamental rights and, above all, between freedoms and socioeconomic rights, breaking with myths that have become internalized in the Brazilian doctrinal and jurisprudential sphere thanks to both the ideological discourse and social reality that went from liberal to neoliberal and reflexive immobility.

Only with the development of a strong and adequate parameters of what economic rights is would there be a proper and sufficient horizon of understanding them by exploring their full potential as a regulatory idea and as an element that should guide the constitutional reflection and practice subject to open and plural understanding by the community of interpreters and regional and international normative instruments that address the protection of the human person.

Accordingly, this chapter presents the findings pertaining to participants perspectives on the research question and draws them together to argue that economic rights within Brazil cannot be understood outwith the context of those who apply them. This concluding chapter proceeds in section 7.1 from the findings of the empirical research. This summary will be followed by the consequences that these interpretations have in the issue of implementation and application of the rights. Section 7.3 draws on Chapter 2's discussion of lacunas in existing research to highlight some recommendations to address these limitations which emerged from the analysis of the interviews. It also considers the limitations of this study. Finally, section 7.4 provides some final considerations on the empirical research, drawing on an analogy between a relevant Brazilian song and participants' understandings of economic rights.

The song in question, *A Novidade* was written by Gilberto Gil, a Brazilian musician from the Northeast of the country, its poorest region. Gil was exiled to London during the dictatorship because of the socio-political content of his music. After his return and the cessation of the dictatorship, he was also the Cultural Minister of Brazil during the Lula da Silva government. In this role he was responsible for developing popular

cultural policies while in power. The song was chosen because it perfectly represents the notion that when two persons look to a text, they have different interpretations because of their backgrounds (social, economic, cultural, historical, moral).

7.1 SUMMARY OF FINDINGS

The decision to research this topic came through my personal experience as a human rights lawyer regarding the protection (or lack thereof) of economic rights, both within Brazil and the international order. When I started doing the research project to present to Professor David Held, I noted that the primary individuals responsible to apply these rights were political and juridical actors. I realised this meant that it was therefore essential to analyse said actors' understandings of economic rights to be able to consider the influence of these understandings, and therefore how this process affects issues of protection and applicability.

The first step then was to decide which group of actors would be interviewed. Political and juridical actors were obvious since they were the representatives of the institutions that had the decision-making and protection power. After, it was decided that it was also essential to listen to civil society and social movements because they were the (un)official monitoring bodies and simultaneously the frequent receiver of violations. These actors also have responsibility, although small, on the application and protection of economic rights. Among these three groups the whole process of economic rights in the legal and in the political order is developed and applied.

By analysing the interviews, it became clear that three hypotheses interfered in the understanding of the actors regarding economic rights: 1) the individual moral-ethical background; 2) the historical and socioeconomic environment that they were born; 3) and the influence of narrative created by the "dominant class" and/or economic power.

Therefore, it was necessary to create a thesis structure that demonstrated how the idea of economic rights was developed until the triumph of neoliberalism, and how this context continues today. Additionally, it was essential to describe the socio-historical background of the country that the actors were from to understand how this background affects both the actors themselves and its institutions. Furthermore, it was established that as economic rights are a concept formed within the international order, and thus with international institutions that also have mechanisms of protection and

dissemination, it was necessary to understand the role of economic rights within the international system, and how these actors understand this.

As illustrated through this thesis, the persistent ties of patrimonialism, neoliberalism, colonialism, and exploitation which produce Brazil's contemporary sociolegal and cultural context are present within the actors that drive the interpretation of economic rights. Institutions and structures within the country are therefore and necessarily a mirror of these contexts. As such, exploring the ways in which this structure provides the basis for the protection and applicability of economic rights within the Brazilian system (socio-political and legal) shows us the ways in which they are limited.

The result of the analysis of the data demonstrates that the understanding of the actors in regard to the implementation of economic rights depends on their preconceived ideas, and that the relevant historical, socioeconomic and cultural contexts affect their interpretation. Thus, it was imperative to analyse all these things together. Individuals' understandings of certain things are always connected with their moral, socio-historical, and political background.

Law, customs, and norms are part of this context and thus cannot be analysed in a void. Based on the detailed analysis of the results of this research, it is possible to identify four aspects that influence the understanding of economic rights by the actors interviewed:

i) the *micro reality* in which each actor is inserted, that is, their ideological constructions within the personal sphere, which is constructed through their ethical reflections, readings, experiences, moral values, and personal beliefs.

ii) the *common reality*, which is the perception and influence of immediate collective and socioeconomic relationships, that is, the actor's ethnicity, education, social class, job, income, religion that are identified. All this understanding of average reality affects the understanding of economic rights (see section 4.6 and section 6.2).

iii) the *macro reality* inserts the individual in the historical, socioeconomic, and cultural context of the country. In this reality, it is possible to identify how patrimonialism, patriarchy, neoliberalism impacts the understanding of actors about economic rights (see chapter 3, 4 and 6).

iv) the *international/global reality* brings to the world of these actors' contexts, facts, relationships that are outside their immediate circle of relationships, but which are no less important. In chapter 5 of this thesis, it is possible to see the influence that international treaties have on the discussion of economic rights. It is evident that international economic rights laws could have a greater impact on actors, but already opening a door to dialogue allows that in the future these issues can be developed in a stronger way[295].

This therefore demonstrates that a) the individual first understands economic rights within a *'micro' reality* - what he believes, what he thinks, his theoretical, ideological affiliation, ethical and moral issues; b) is influenced by the *common reality*, that is, their social class, income, education, ethnicity, universe of beliefs; c) is influenced by the country's *macro-realities* - the country's history, socioeconomic transformations, constitution, legislation, context and political changes, patrimonialism, neoliberalism, patriarchy; d) that are embedded within and thus influenced by a *global / international reality* - internationalization of the context.

It is important to highlight that this path is not linear, and nor does it happen step by step. It is a circle where the individual is in a constant dialogue with their surroundings. As was introduced in section 2.1.2, this constant dialogue can be described as the hermeneutic circle (Gadamer, 2001), which defines this circle of life. We comprehend the part that can be a text, a fact, or a subject in relation to an expectation of the whole, which we conceive with the language and traditions from where we come from.

The importance of an adequate understanding of the interpretation of economic rights, and, of course, of the interpretation as a whole, is fundamental in the construction of a solidary social state that protects human rights. The hermeneutic analysis of the data allowed us to find an adequate answer about the degree of effectiveness of the existential conditions related to economic rights. No matter how indeterminate and imprecise they may be, economic rights have a relevance that cannot be eliminated, conditioning the actual exercise of human rights and freedoms, in addition to enabling a more just and collective coexistence.

[295] For example, it is important to emphasize the importance that the global reality is currently having in relation to climate rights.

Indeed, it cannot be admitted that the correct answer to any difficult case involving economic rights is left to a discretionary decision taken by the judge or is constantly subject to the constraints of the legislature or economic power. Thus, in paradigmatic terms of understanding and developing economic rights, it is not possible to develop theoretical constructions that do not presuppose or admit the constructive dimension of meaning inherent to understanding, interpretation and application of these rights.

As mentioned in previous chapters, to this date there is no qualitative, empirically based research with semi-structured interviews on economic rights that uses hermeneutics as a methodology. Evidently, it is relevant to be able to perceive the prejudices that, inhabiting the pre-understanding, guide the understanding from the different units that the same individual can come to inhabit. It is important to emphasise that realising all these different units of pre-understanding is an impossible task, since reflections, contexts, prejudices, and pre-understandings are very complex and subjective as they depend not only on a contextual analysis but also on a very personal one, which is not within the scope of this thesis. Therefore, interpretation represents nothing more than understanding itself, only that it manifests itself from the language itself, which allows the text to come to speech and challenge the interpreter, in the manner of a productive dialogue that leads to reflection. It was through this method that the data analysis was carried out and from which conclusions were drawn about the actors' understanding of economic rights and how this affects its applicability both nationally and internationally.

While limited, the relationship between understanding, interpreting, and applying economic rights denotes integration within a plural reality and concrete situations. Through the analysis of the interviews, it is clear the difference between what is and what ought to be. For example, how economic rights are protected in international and national law and how they are applied. This can be seen by the understanding that is given by the actors to the right to property. As mentioned in early chapters, the right to property was conceptualised in liberal theory as a universal and absolute right, but with the transformation of society, it was limited with the introduction of the idea of social function within the concept. Yet, in Brazil, because of the social, historical, and economic context, it still carries an understanding deeply connected with the concept developed in the 18/19 century.

In fact, the law is actually created in the practical sphere by interpretation. There is no law, legislation, costume or norms without interpretation and application. In this way, there are no economic rights without a reflexive dimension of understanding.

For this reason, the thesis was divided in 7 chapters. Apart from chapters 2 and 3, each chapter begins with a theoretical base followed by an empirical investigation of the interviews and how they relate to the research question. Chapter 3 was constructed to comprise the conceptual development of economic rights since the eighteenth century to the present day. The ideas and theories presented in this chapter were part of the participants understanding of economic rights, as was emphasised throughout the thesis.

Chapter 4 started by describing the Brazilian historical background regarding economic rights. It showed that the country still embraces an exploitative, patriarchal, and patrimonial cultural perspective (Section 4.1- 4.5), and that any changes which did happened were achieved only through the fight of civil society and social movements (section 4.4, 4.5 and 6.1). These achievements were placed in the Constitution and gave the Brazilian Constitution the name of the citizen's Constitution (*Constituição Cidadã*) (Section 6.1).

Be that as it may, real structural and institutions change did not occur and the actors responsible for application of the Constitution never changed. As such, this group is dominated by the same class that have held power since 1500. Even when actors did not originate from this group, they were nonetheless raised within an education system that has at its core neoliberal, patrimonial, and individualist values (section 6.2.5). What happened, therefore, was an elitist pact with only symbolic change as the power structure remained the same (Section 4.1- 4.5) (Souza, 2019).

True though this may be, it is nonetheless important to note that during the Fernando Henrique Cardoso, Lula da Silva, and Dilma Roussef governments there were public policies in place that developed socioeconomic protections, such as *Bolsa Família* (Section 4.5). Yet, these advancements are already being rolled back. This development began with the government of Michel Temer, with its general precariousness and attack on labour rights with the passing of EC95 (Section 5.6.1), and continues with the election of Bolsanaro and his fascist policies and rhetoric (Souza, 2019). The development of these events shows that it is not only juridical and political actors who

have the patrimonial, exploitation, patriarchal and neoliberal mentality of Brazil, but a significant part of the population as well (Casara, 2017)[296].

Following the description of the Brazilian historical background it was necessary to respond the question of how the actors understood economic rights. Thus, section 4.6 focused on this empirical question. The result of the analysis shows that while some participants had never heard of this concept before, others understood them as property rights, or rights connected to income resources or economy.

It became clear that their understandings depended on their historic, cultural, and socioeconomic backgrounds. Caio Bandeira, for example, is a Marxist that believes that property should have a social function. Yet, from his practical experience with social movements he understands that economic rights in Brazil means the right to property and that the applicability of these rights is insufficient because the institutions were built not to give importance to them. He gives an example of the agrarian reform that was established in the Constitution but never happened. His response ties into the issues raised in section 6.2 which showed that institutions are populated with individuals of the dominant class and/or from economic power. They are the majority and as such put forward their understanding of economic rights.

In contrast to Caio, Eduardo Salles, also a director in some agribusiness companies, believes that economic rights are inexistent. The two views represented above clearly show how the same right can be seen from two different perspectives. One is member of social movements the other is an elected politician.

As can be seen, the three hypotheses presented in this thesis interfere in the understanding of economic rights. As can be seen from the outset, a thesis of this kind makes an original contribution to this field by focusing on the empirical understanding of economic rights and the consequences thereof. That is to say, even though the case study here is Brazilian actors, the conclusion remains that for economic rights to become more justiciable and protected in any context, it is necessary to study the understanding of the actors responsible and their institutions. When you understand what the issue is you can create a mechanism to change this reality. It is obvious that

[296] To read more about the topic see Casara, R. (2017, 2020) and Souza (2019).

changing people's cultural and socioeconomic expectations is not an easy task. Then again it is prejudicial to society to have progressive documents that are not put in practice. It causes a lack of trust by the citizens in the system. That was the response that the indigenous actors gave me. Why try to go through the legal process if the judges are part of the problem?[297] Thus distrust of the system from part of the population is significant.

Economic rights are a concept created in international law, and it was therefore necessary to write about the international order. Chapter 4 started by focusing on explaining the international legal framework of economic rights. It included a document review and content analysis of the primary documents produced by the international community setting out the recently developed normative framework of economic rights. This chapter was essential for this study because it allowed me to analyse how the interviewees understand this system and how this affected the national economic rights order (Section 5.6). The findings of this chapter show that that the participants believe that the international framework is not taken seriously by national institutions and society because of three themes: a) a lack of knowledge of the international system; 2) political will; 3) lack of assimilation by society. The consequence of this is a weakened framework for protection of economic rights, both nationally and internationally.

Chapter 6 began with an explanation of the Brazilian legal framework of economic rights focusing on the Constitution of 1988. After that, it explained how the legal framework receives international human rights treaties. The chapter followed with the empirical study of the economic rights order (norms and institutions) by analysing how the actors interpreted the protection and application process within the national system.

As a result of this analysis, it was possible to contrast the progressive framework established in the Brazilian Constitution of 1988 with the with the real practice applied in daily life. The findings confirm that even though the Constitution institutes the protection of economic rights as a fundamental aim of the republic (Section 6.1), the implementation and protection of these rights depends on the application by political

[297] It is important to highlight here that he was speaking about the local judges that live in the communities that the tribes are from.

and juridical actors. In essence, the applicability and protection of economic rights depends on the three hypotheses presented above. In other words, it depends on the individual's moral-ethical background, the historical and socioeconomic environment in which they were born, and the influence of the narrative created by the "dominant class" and/or economic power.

One current and international example is happening in the United States with the discussion about when the new Supreme Court Judge should be appointed. This is a power struggle between republicans and democrats, but the real dispute is who is going to appoint the Judge that will interpret the law according with the values that the respective parties want (Moyn, 2020). Regardless of who will win the power clash above, one thing we can certainly conclude is that the Supreme Court Judge who will be taking charge will represent the values of the group that selected that person. Hence, this practical example demonstrates the importance of empirical research into the understanding of juridical actors on certain issues. This analysis will give us the possibility to create mechanisms and/or instruments to learn how we can make important changes to protect economic rights.

Every system is different; thus, this research opens the door to widen the scope of such empirical investigation, and its conclusions can be interrogated and strengthened with more participants, looking to different countries, or considering the international system. Consequently, this framework influences the protection and applicability of economic rights. By understanding this process, it is possible to state that the standing of economic rights depends on the interpretation of the actors that are the primary individuals responsible to fulfil them. I highlighted the role of the individual actors because they are the ones that represent, work for, and guide the institutions.

All things considered, it is important to once more say that Brazil was built on exploitation, colonialism, patrimonialism, and neoliberal values. As a result, an important part of society still carries these values, especially the dominant class (Souza, 2019).

7.2 ORIGINALITY

This study has demonstrated that discussing definitions with research participants when conducting empirical research on economic rights is a meaningful and vital element of

both the thematic focus of the research and the research design for empirical investigations in this area. Most of the previous research on economic rights has not sought to establish the impact of understandings of economic rights by different actors, nor how these understandings have on the protection and their application. To the contrary, most work on economic rights focuses on theoretical work only – a significant lacuna identified by the researcher demonstrating a major fault in existing knowledge. This is an important discovery for those who are researching economic rights and should encourage them to see how the different understanding of economic rights affects the whole framework in qualitative contexts.

By discussing the effectiveness of the application of an economic rights framework with participants, contextual unity between the research objective and the research findings is accomplished through careful analysis of the data. This research therefore adds to existing knowledge by demonstrating that discussing and investigating empirically the understanding of economic rights with research participants ensures that participants are aware of and vocalise discrepancies between how economic rights should be applied – nationally and internationally – and how they are really applied in practice. To empirically study their views shows that cultural expectations and socioeconomic historical contexts of a given society coalesce with its moral values. Through hermeneutic empirical research, a relationship emerges between what ought to be and what is and, therefore, provides differentiated and nuanced findings. Additionally, few in-depth studies have been conducted with these particular groups and in this particular area – indeed, no such similar study in Brazil can be identified.

This research has therefore further contributed to existing knowledge by generating empirical findings on the understanding of economic rights and the practical impact that the different views have on the effectiveness of these rights within the national and international framework. By demonstrating the complexity and contradictions contained within the views of the actors identified, this thesis has also developed a significant theoretical addition by illustrating the importance of such empirical work. It therefore significantly differs from the legal-theoretical framing of much previous research in this area, which generally involve document-based investigations within human rights discourses. Moreover, much previous empirical research in economic rights is detached from the everyday reality of the people that are bound to protect and

apply them and, as a result, has generated findings pertaining to an oversimplified comprehension of economic rights provisions and subsequently lacks the nuanced findings on specific forms of economic rights content provided by this research.

Undeniably, potential empirical research in this area could benefit from a mixed-methods methodology, made possible with more time and resources and separating the three groups (juridical, political, and civil society) to get a better understanding on their comprehension on the topic. Also, this area could benefit from a broader objective, doing empirical research in other countries and thus contributing to the understanding of economic rights by these groups in different contexts.

Predictably, however, the small sample size of the empirical research hinders the ability to draw wide-ranging conclusions from the findings. Whereas generalisation was not the aim of this thesis, it is possible to highlight that in the light of the findings, noteworthy future consideration can be given to conducting larger-scale studies in this area.

7.3 LIMITATIONS AND OPPORTUNITIES

As stressed in chapter 2, small-scale, in-depth empirical research does not offer an opportunity to provide concrete recommendations for policy formation and legislative improvement. However, the exploratory nature of the research functions to draw out significant areas of legal and policy meaning for further research and consideration. To expand upon the findings and increase the possibility of generalisation, future research could consequently exploit a mixed methods approach to investigate unified research questions based upon the findings of this thesis.

This would serve to further investigate and expand upon the findings of this thesis – particularly those pertaining to understanding economic rights by these groups and how they affect the application and protection of these rights– and provide overviews on how perspectives on economic rights are at the centre of a disputed interpretation of the scope of human rights in general. Conducting future research of this nature could therefore serve to build a picture of juridical, political, and civil society individuals' perspectives on economic rights in Brazil that is simultaneously tight in its scope and yet still nuanced in its findings. As was presented in chapter 2, these three groups have primary responsibility for the protection and implementation of economic rights

locally, thus, analysis of their understandings of the topic is of vital importance since they are members of the institutions that apply economic rights.

It is also important to ask context-structured questions on the individual's life setting to make an enhanced connection between the individual and its political, economic, and historical background. An example would be asking their political views in a structured framework. Whilst this could be seen as a limitation of this thesis, such claims open a door to enacting a research strategy embedded more deeply in such rich personal data.

This research adds significant new knowledge to existing empirical research findings and methods, theoretical discussion, and legal debates on the understanding of economic rights. It does this by enhancing both our capacity to analyse the political will as the legal capacity of local institutions to protect these rights, and how (and whether) international protection of economic rights affects local/state protection and political efforts. This new knowledge relates to: a) the constructive impact of discussing definitions of economic rights with empirical research participants to ensure contextual unity between the aims of the research and the research findings, or the impact of the process by which they were developed within the local sphere; b) individual perspectives in regards to their understanding on the local perception of protection and/or application of economic rights and resulting issues requiring further consideration, such as justiciability; and c) both developing a further understanding of the global-local nexus as it relates to economic rights and increasing methodological knowledge on conducting in-depth qualitative research in this area.

7.4 FINAL CONSIDERATION

Art (in this case, music) can sometimes translate into poetry what the academy has long sought to unravel. As such, perhaps it puts what I have demonstrated into another framing. In essence this song was chosen to close this research because it illustrates perfectly how diverse backgrounds take us to see the same text in different ways, and therefore that this affects not only the individual doing the interpretation but also the whole system. Depending on the decision that would be made by the individuals in the music, the mermaid (representing the economic rights, for example) could have a different end. In our reality, the dominant and economic class has the power to make this decision.

Given this, I sought a dialogue with the music of Gilberto Gil (*A Novidade*). In its poetic approach, this music for me alludes to the perfect representation of economic rights.

A novidade veio dar à praia	The news came to the beach
Na qualidade rara de sereia	In the rare quality of mermaid
Metade o busto de uma deusa Maia	Half the bust of a Mayan goddess
Metade um grande rabo de baleia	Half a big whale tail

In the first verse highlighted above, the novelty that reached the beach, like economic rights, has a rare quality, built on the dignity of the human person as an ideal to be sought. It has two halves: the utopian, represented by the Mayan goddess; and the whale tail, which represents reality.

A novidade era o máximo	The news was the maximum
Do paradoxo estendido na areia	Of the paradox lying in the sand
Alguns a desejar seus beijos de deusa	Some to wish her kisses of the goddess
Alguns a desejar seu rabo pra ceia	Others to eat her tail

Novelty is the eternal pursuit of the ideal, so it refers "to the fullest." At the same time, it represents the paradox of society, highlighted in this second passage by the perception held by each. That is, depending on our perspective, it's a paradox. The mermaid is a metaphor for inequality. And depending on how we understand it, it is a war between interpretations, socioeconomic and cultural expectations. For this reason, the composer points out that some desire the kisses of the goddess (the ideal) and others, the desire to eat the tail (the reality).

Ó mundo tão Desigual	Oh, such an unequal world
Tudo é tão desigual	Everything is so unequal
De um lado este carnaval	On one side there is carnival
De outro a fome total	On the other, total hunger

The above excerpt highlights the inequality and paradox that exists in society. On the one hand, the representation of happiness and on the other, the representation of hunger, of pain.

E a novidade que seria um sonho	And the news that would be a dream,
O milagre risonho da sereia	The mermaid's laughing miracle

Virava um pesadelo tão medonho	It was such a terrible nightmare
Ali naquela praia, ali na areia	There on that beach, there on the sand

And economic rights, which should be the dream, the evolution of a society based on the values of human dignity, actually becomes a nightmare, a clash, a dispute brought about by the reality of the world.

A novidade era a guerra	The news was the war
Entre o feliz poeta e o esfomeado	Between the happy poet and the hungry
Estraçalhando uma sereia bonita	Ripping a beautiful mermaid
Despedaçando o sonho pra cada lado	Shattering the dream to either side

To sum up, this song was selected for the final consideration of this research because brings metaphors that dialogue with relevant interpretations of economic rights.

In summary, the thesis shows that it is important to analyse how juridical, political, and civil society actors understand economic rights since they are those with primary responsibility to protect and apply them. The analogy between the song and the findings of the thesis comes through in a lyric about two interpretations originating from different backgrounds and realities, and how this influences the life of the mermaid and the start of the war.

The aim of this research was to understand the standing of economic rights by empirically researching the individuals responsible for their implementation. The findings summarised and considered in this conclusion have been intended to bring this thesis to a close. We now have more to think about when considering economic rights and their systems; there are also new ways to think about this issue as a whole.

APPENDIX I – LIST OF INTERVIEWS CONDUCTED FOR THIS STUDY

1. Alberto do Amaral Jr. 2017. [Interview]. São Paulo, Brazil. Professor of Law at Universidade de São Paulo. Interview conducted at his house in São Paulo, 21st September 2016.
2. Ana Tulia de Macedo. 2017. [Interview]. Brasília, Brazil. Parliamentary Assistant at Brazilian Senate. Interview conducted at the Federal Senate of the National Congress, 21st September 2016.
3. Augustino Pedro. 2017. [Interview]. Brasília, Brazil: Civil Servant at the Commission of Human Rights in the Brazilian Congress. Interview conducted at the Federal Senate of the National Congress, 21st September 2016.
4. Bete Wagner. 2017. [Interview]. Salvador, Brazil: Politician and Head of the Environment Department at the Bahia Assembly. Interview conducted at the Bahia Congressional Building, 21st September 2016.
5. Caio Bandeira. 2017. [Interview]. Salvador, Brazil: Civil Servant at the Commission of Human Rights in the Bahia Assembly. Interview conducted at the Federal University of Bahia, 21st September 2016.
6. Caio de Souza Borges. 2017.[Interview]. São Paulo, Brazil: Lawyer at Conectas Direitos Humanos (NGO). Interview conducted at Avenica Paulista, 21st September 2016.
7. Deborah Duprat. 2017. [Interview]. Brasília, Brazil: Federal Public Prosecutor. Interview conducted at the Attorney General's Office, 21st September 2016.
8. Dirley da Cunha Jr. 2017. [Interview]. Salvador, Brazil. Federal Judge and Professor at Bahia Federal University. Interview conducted at the Federal University of Bahia, 21st September 2016.
9. Eduardo Sales. 2017. [Interview]. Salvador, Brazil. Politician and State Representative. Interview conducted at the Bahia Congressional Building, 21st September 2016.
10. Eduardo Suplicy. 2017. [Interview]. São Paulo, Brazil. Former Senator. Interview conducted at his house in São Paulo, 21st September 2016.

11. Fábio Moreira Ramiro. 2017. [Interview]. Salvador, Brazil: Federal Judge. Interview conducted at Federal Court of Bahia, 21st September 2016.
12. Fabiola Veiga. 2017. [Interview]. Brasília, Brazil. Attorney General. Interview conducted at the Brasilia University, 21st September 2016.
13. Guilherme Bellintani. 2017. [Interview]. Salvador, Brazil. Former Development Secretary of the City of Salvador de Bahia. Interview conducted at the Secretary of Development Office , 21st September 2016.
14. Gustavo Renner. 2017. [Interview]. Brasília, Brazil. Federal Public Prosecutor. Interview conducted at the Brasilia University, 21st September 2016.
15. Iain Levine. 2018. [Interview]. New York, United States. Director at Human Rights Watch. Interview conducted by Skype on the 5th July 2016.
16. Jefferson Nascimento. 2017. [Interview]. São Paulo, Brazil. Lawyer at Conectas Direitos Humanos (NGO). Interview conducted at Avenica Paulista, 21st September 2016.
17. Jerry Mataluê. 2017. [Interview]. Salvador, Brazil. Representative of the Pataxó tribe in the State of Bahia. Interview conducted at the Bahia Congressional Building, 21st September 2016.
18. Juca Ferreira. 2017. [Interview]. Brasília, Brazil. Politician and Former Minister of Culture in Brazil. Interview conducted at his house in Brasília, 21st September 2016.
19. Leandro Ferreira. 2017 [Interview]. São Paulo, Brazil. Parliamentary Assistant. Interview conducted at Avenica Paulista, 21st September 2016.
20. Marcelino Galo. 2017. [Interview]. Salvador, Brazil. Politician and State Representative. Interview conducted at the Bahia Congressional Building, 21st September 2016.
21. Maria Laura Canineu. 2017. [Interview]. São Paulo, Brazil. Brazilian lawyer and Brazil Director in the Americas Division at Human Rights Watch. Interview conducted at Avenica Paulista, 21st September 2016.
22. Maria Paula Dallari Bucci. 2017. [Interview]. São Paulo, Brazil. Professor at Universidade de São Paulo. Interview conducted at the University of São Paulo, 21st September 2016.

23. Mario Sanchez. 2017. [Interview]. Brasília, Brazil. Civil Servant and Parliamentary Assistant at Brazilian Senate. Interview conducted at the Federal Senate of the National Congress, 21st September 2016.
24. Miguel Calmon Dantas. 2017. [Interview]. Salvador, Brazil. State Attorney and Professor at Universidade Federal da Bahia. Interview conducted at the University of Salvador, 21st September 2016.
25. Nei Campelo. 2017. [Interview]. Salvador, Brazil. Civil Servant for the State of Bahia. Interview conducted at the Bahia Congressional Building, 21st September 2016.
26. Nina Ranieri. 2017. [Interview]. São Paulo, Brazil. Attorney and Professor at the Law Department at Universidade de São Paulo. Interview conducted at Avenida Faria Lima, 21st September 2016.
27. Phillip Alston. 2018. [Interview]. New York, United States. Professor and UN Special Rapporteur on Extreme Poverty and Human Rights. Interview conducted by Skype on the 5th July 2016.
28. Randolfe Rodrigues. 2017. [Interview]. Brasília, Brazil. Brazilian Senator. Interview conducted at the Federal Senate of the National Congress, 21st September 2016.
29. Regina Souza. 2017. [Interview]. Brasília, Brazil. Brazilian Senator. Interview conducted at the Federal Senate of the National Congress, 21st September 2016.
30. Rubens Beçak. 2017.[Interview]. São Paulo, Brazil. Attorney and Professor at Universidade de São Paulo. Interview conducted at his house in São Paulo, 21st September 2016.
31. Samuel Moyn. 2018. [Interview]. New Haven, United States. Professor at Yale University. Interview conducted by Skype on the 5th July 2016.
32. Saulo Casali. 2017. [Interview]. Salvador, Brazil. Federal Judge. Interview conducted at Federal Court of Bahia, 21st September 2016.
33. Yulo Oiticica. 2017. [Interview]. Salvador, Brazil. Former Secretary of Human Rights at the State of Bahia. Interview conducted at the Bahia Congressional Building, 21st September 2016.

APPENDIX II

TERMO DE CONSENTIMENTO LIVRE E ESCLARECIDO

Declaro, por meio deste termo, que concordei em ser entrevistado(a) e/ou participar na pesquisa de campo referente a pesquisa intitulada The Standing of Economic Rights, desenvolvida por Marina Costa Esteves Coutinho. Fui informado(a), ainda, de que a pesquisa é orientada pelo Professor David Held, cientista político britânico.

Afirmo que aceitei participar por minha própria vontade, sem receber qualquer incentivo financeiro ou ter qualquer ônus e com a finalidade exclusiva de colaborar para o sucesso da pesquisa. Fui informado(a) dos objetivos estritamente acadêmicos do estudo, que, em linhas gerais é fazer um estudo de caso sobre direitos econômicos no Brasil.

Fui também esclarecido(a) de que os usos das informações por mim oferecidas estão submetidos às normas éticas destinadas à pesquisa envolvendo seres humanos, da Durham University, no Reino Unido.

Minha colaboração se fará por meio de entrevista semiestruturada a ser gravada a partir da assinatura desta autorização. O acesso e a análise dos dados coletados se farão apenas pela pesquisadora e seu orientador.

Fui ainda informado(a) de que posso me retirar dessa pesquisa a qualquer momento, sem prejuízo para meu acompanhamento ou sofrer quaisquer sanções ou constrangimentos.

Atesto recebimento de uma cópia assinada deste Termo de Consentimento Livre e Esclarecido, conforme recomendações da Universidade de Durham.

Cidade, de_____de 201__.

Assinatura do (a) participante: _____

Assinatura do(a) pesquisador(a): _____

Assinatura do(a) testemunha(a): _____

APPENDIX III

SCRIPT 1

Specific objective: How, and to what extent, the diverse interpretation of economic rights affects the implementation and protection within the Brazilian framework?

Data of the participant

Name:

Age:

Profession:

QUESTIONS:

1.What do you understand by economic rights?

2.What is the justification of economic rights in Brazil? And what is your view?

3.Do you think that the international protection system of economic rights was discussed during the Brazilian constituent of 1987/88? How thoroughly?

4.What is your view about justiciability of economic rights?

5.Do you believe in the justiciability of economic rights in Brazil? Why?

6.Data shows that few cases of economic rights are brought to the judiciary. Why do you think this is?

7.What is your assessment on the comprehension of the judiciary of economic rights? And international economic right norms in treaties ratified by the Brazilian government?

8.Some researchers believe that Brazilian Constitution is a very forward-looking document but that it does not work in practice. Do you think that's a fair assessment?

9.What do you think about the constitutional amendment 95? Do you believe it is an attack on socio-economic rights?

10.The United Nations released a statement saying that Brazil is now implementing the most regressive package in the world and it is a clear attack on poor people. Do you think that's fair?

11.What do you think about the Committee of Economic and Social Rights? Does its rules and decisions have any affect in judiciaries rulings?

12.What do you think about the labour reform in discussion in the Congress? And the social security reform (or pension reform)?

13.Do you think these reforms are in tune with the rights established by the economic rights treaties ratified by Brazil?

SCRIPT 2

Specific objective: How, and to what extent, did the international regime of economic rights affect State protection and policy efforts?

Data of the participant

Name:

Age:

Profession:

QUESTIONS:

1.What do you understand by economic rights?

2.What is the justification of economic rights in Brazil? And what is your view?

3.Does the international regime of economic rights affect state protections? How?

4.Does the international regime of economic rights affect policy efforts? how?

5.What do you think about the constitutional amendment 55? Do you believe it is an attack on socio-economic rights?

6.The United Nations released a statement saying that Brazil is no implementing the most regressive package in the world and it is a clear attack on poor people. Do you think that's fair?

7.What is the role of civil society in regard to the protection of economic rights?

8.Civil society, such as MST, complains about the demonization of civil society movements, who fight for socio-economic rights, by the government. Do you believe that's a fair evaluation?

9.What is the role of NGOs in Brazil in regard to the protection of economic rights?

10.A lot of people complain that NGOs only care about civil and political rights. Do you think

that's correct?

11.What do you think about Bolsa Familia? Do you believe it was a state effort to protect socio- economic rights?

12.What do you think about the Committee of Economic and Social Rights? Does its rules and decisions have any affect in states policies?

13.What do you think about the labour reform in discussion in the Congress? And the social security reform (or pension reform)?

14.Do you think these reforms are in tune with the rights established by the economic rights treaties ratified by Brazil?

BIBLIOGRAPHY

Abrahão de Castro, J. and Modesto, L. (2010) 'Bolsa Família 2003-2010: avanços e desafios.' Brasília: IPEA.

Alexy, R. (2001) *Teoria de los Derechos Fundamentales*. Madrid: Centro de Estudios Políticos y Constitucionales.

Alexy, R. (2010a) *Direito, Razão, Discurso: Estudos para a filosofia do direito.* Porto Alegre: Livraria do Advogado.

Alexy, R. (2010b) *La Construcción de los Derechos Fundamentales*. Buenos Aires: AD-HOC.

Alfredsson, G. and Eide, A. (1999) *The Universal Declaration of Human Rights : a common standard of achievement*. Boston: Martinus Nijhoff Publishers.

Alston, P. (2016) 'Brazil 20-year public expenditure cap will breach human rights'. Geneva: United Nations. Available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21006. (Accessed: 11 November 2018)

Amaral, G. L. do, Olenike, J. E. and Amaral, L. M. F. do (2013) 'Quantidade de normas editadas no brasil - 25 anos da constituição federal'. São Paulo: Instituto Brasileiro de Planejamento Tributário.

APIB (2019) *APIB note about indigenous leadership murders in Maranhão | APIB*, *APIB*. Available at: http://apib.info/2019/12/09/apib-note-about-indigenous-leadership-matters-in-maranhao/?lang=en (Accessed: 9 December 2019).

Baldez, M. L. (2002) 'A terra no campo: a questão agrária', in Molina, M. C., Sousa Júnios, J. G., and Tourinho Neto, F. da C. (eds) *Introdução crítica ao direito agrário. Série o direito achado na rua*. Brasília: Editora UNB, pp. 95–106.

Barton, A. H. (1979) 'Paul Lazarsfeld and Applied Social Research: Invention of the University Applied Social Research Institute', *Social Science History*. Cambridge University Press, 3(3/4), pp. 4–44. doi: 10.2307/1170954.

Bethell, L. (1987) *Colonial Brasil*. Cambridge: Cambridge University Press.

Boadle, A. and Benassatto, L. (2019) *Illegal loggers kill Amazon indigenous warrior*

who guarded forest, wound another - Reuters, *Reuters*. Available at: https://www.reuters.com/article/us-brazil-indigenous/illegal-loggers-kill-amazon-indigenous-warrior-who-guarded-forest-wound-another-idUSKBN1XC0GR (Accessed: 9 December 2019).

Bobbio, N. (1996) *Left and Right: The Significance of a Political Distinction*. Cambridge: Polity Press.

BOGDAN, R. C. and BIKLEN, S. K. (1994) *Investigação qualitativa em educação*. Porto: Porto Editora.

Bonavides, P. (2000) 'A evolução constitucional do Brasil', *Estudos Avançados*, 14(40), pp. 155–176.

Bonavides, P. (2004) *Curso de Direito Constitucional*. 15th edn. São Paulo: Malheiros.

Brasil (1824) 'CONSTITUIÇÃO POLITICA DO IMPERIO DO BRAZIL'. Rio de Janeiro. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao24.htm.

Brasil (1891) 'CONSTITUIÇÃO DA REPÚBLICA DOS ESTADOS UNIDOS DO BRASIL'. Rio de Janeiro. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao91.htm.

Brasil (1934) 'CONSTITUIÇÃO DA REPÚBLICA DOS ESTADOS UNIDOS DO BRASIL'. Rio de Janeiro. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao34.htm.

Brasil (1946) 'Constituição dos Estados Unidos do Brasil'. Rio de Janeiro: Casa Civil. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao46.htm.

Brasil (1968) 'Ato Institucional Nº 5'. Brasília: Casa Civil. Available at: http://www.planalto.gov.br/ccivil_03/AIT/ait-05-68.htm.

Brasil, C. C. (1937) 'Constituição Brasileira 1937'. Rio de Janeiro: Casa Civil.

Brasil, C. dos D. (2013) *A construção do artigo 5º da Constituição de 1988*. Brasília: Centro de Documentação e Informação – Cedi.

Brasil, P. da R. (1943) 'Consolidação das Leis do Trabalho(CLT)'. Rio de Janeiro: Casa Civil. Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452.htm.

Brasil, P. da R. (1985) *Lei 7.347*. Available at: http://www.planalto.gov.br/ccivil_03/leis/L7347orig.htm (Accessed: 15 October 2019).

Brasil, P. da R. (1988) *Constituição Brasileira*. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm (Accessed: 16 October 2019).

Brunkhorst, H. (2005) *Solidarity: From Civic Friendship to a Global Legal Community*. Cambridge: MIT Press.

Buarque de Holanda, S. (1995) *Raízes do Brasil*. 26th edn. São Paulo: Companhia das Letras.

Buarque de Holanda, S. (2000) *Visão do Paraíso. Os motivos edénicos no descobrimento e colonização do Brasil*. São Paulo: Brasiliense.

Caixa, C. E. F. (2019) *Bolsa Família*, *Caixa Econômica Federal*. Available at: http://www.caixa.gov.br/programas-sociais/bolsa-familia/Paginas/default.aspx (Accessed: 6 July 2019).

Calmon Dantas, M. (2009) *Constitucionalismo dirigente e pós-modernidade*. São Paulo: Editora Saraiva.

Calmon Dantas, M. (2011) *Direito Fundamental ao Máximo Existencial*. Universidade Federal da Bahia.

Calmon Dantas, M. (2019) *Máximo existencial como direito fundamental*. Curitiba: Juruá.

Câmara dos Deputados (2020) *Portal da Constituição Federal de 1988 — Portal da Câmara dos Deputados*. Available at: https://www2.camara.leg.br/atividade-legislativa/legislacao/Constituicoes_Brasileiras/constituicao-cidada (Accessed: 11 October 2020).

De Caminha, P. V. (1500) 'Carta de Pero Vaz De Caminha'.

Campana, P. (2008) 'O mito da consolidação das leis trabaljistas como reprodução da carta del lavoro', *FURB Revista Jurídica*, 12(23), pp. 44–62.

Canotilho, J. J. G. (1993) *Direito Constitucional*. Coimbra: Livraria Almedina.

Canotilho, J. J. G. (1994a) *Constituição dirigente e vinculação do legislador: contributo para a compreensão das normas constitucionais programáticas*. Coimbra: Editora Coimbra.

Canotilho, J. J. G. (1994b) *Constituição Dirigente e Vinculação do Legislador*. Coimbra: Coimbra.

Carnelutti, F. (2003) *A Morte do direito.* Belo Horizonte: Líder.

Carvalho, L. (2018) *Valsa Brasileira - Do boom ao caos econômico*. 1st edn. São Paulo: Todavia.

Casali Bahia, S. J. (2014) 'Judicialização da Política', in *II Jornada de Direito Constitucional*. Brasília: Escola de Magistratura Federal, pp. 387–402.

Casara, R. (2017) *Estado pós-democrático: Neo-obscurantismo e gestão dos indesejáveis*. 3rd edn. São Paulo: Civilização Brasileira.

Casara, R. (2020) *Bolsonaro - O Mito e o Sintoma*. São Paulo: Editora Contracorrente.

CIMI (2019a) *Conselho Indigenista Missionário | Cimi, CIMI*. Available at: https://cimi.org.br/ (Accessed: 9 December 2019).

CIMI (2019b) *Violência contra os povos indígenas no Brasil -dados de 2018*. Brasília.

Cintra, J. P. (2013) 'Reconstruindo o mapa das capitanias hereditárias'. *Anais do Museu Paulista: História e Cultura Material*, 21(2), pp. 11–45.

Cintra, J. P. (2015) 'As capitanias hereditárias no mapa de Luís Teixeira ', *Anais do Museu Paulista: História e Cultura Material* , 23(2), pp. 11–42.

Commaille, J. (1997) *Les Noveaux Enjeux de la Question Sociale*. Paris: Hachette.

Committee on Economic and Social and Cultural Rights (1990) 'CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)', p. 5. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11 (Accessed: 7 October 2019).

Conectas (2016) *Políticas FiscalesGarantía de los Derechos Económicos, Sociales y Culturales en América Latina:Argentina, Brasil, Colombia y Perú https://www.conectas.org/wp/wp-*

content/uploads/2018/05/Informe_Poli%CC%81ticasFiscalesDESC_CIDH_11mayo2018.pdf (Accessed: 21 June 2018)

Cordeiro, E. (2009) *OAB critica viagem de magistrados paga pela Febraban*, *CUT*. Available at: http://www.fetecpr.org.br/oab-critica-viagem-de-magistrados-paga-pela-febraban/ (Accessed: 6 August 2019).

Couto, R. C. (1999) *Memória Viva do Regime Milita*. São Paulo: Record.

Crawford, J. (2013) *Brownlie's Principles of Public International Law*, Oxford: OUP.

Creswell, J. W. (2003) *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches*. 2nd Editio. Thousand Oaks: Sage.

Creswell, J. W. (2010) *Projeto de pesquisa: métodos qualitativo, quantitativo e misto*. 3rd edn. Porto Alegre: ARTMED.

Dardot, P. and Laval, C. (2013) *The New Way of the World: On Neoliberal Society*. London: Verso.

Denzin, N. K. and Lincoln, Y. S. (2005) *THE SAGE HANDBOOK OF QUALITATIVE RESEARCH*. London: SAGE Publications Inc.

DIAP, D. I. de A. P. (2018) *Eleições 2018: bancada de parentes cresce no Congresso Nacional*. Available at: https://www.diap.org.br/index.php/noticias/noticias/28527-eleicoes-2018-bancada-de-parentes-cresce-na-camara-dos-deputados (Accessed: 26 June 2019).

Donnelly, J. (2007) 'The west and economic rights', in Hertel, S. and Minkler, L. (eds) *Economic Rights: Conceptual, Measurement, and Policy Issues*. Cambridge: Cambridge University Press, pp. 37–55.

Duprat, D. (2017) 'Procuradoria Federal Dos Direitos Do Cidadão- Argumentos que procuram demonstrar a inconstitucionalidade da Emenda Constitucional 95'. Brasília: PROCURADORIA FEDERAL DOS DIREITOS DO CIDADÃO, pp. 1–30.

Eduardo, F. J. (2004) 'O Direito na economia globalizada'. São Paulo: Malheiros.

Eide, A., Krause, C. and Rosas, A. (2001) *Economic, Social and Cultural Rights*. Second Rev. Edited by A. Eide, C. Krause, and A. Rosas. The Hague: Kluwer Law International.

Engle, E. (2008) ‘Human Rights According to Marxism ’, *Guild Practitioner* , p. [iii]-256. Available at: https://heinonline.org/HOL/P?h=hein.journals/guild65&i=257.

Esterberg, K. G. (2002) *No Qualitative Methods in Social Research*. Internatio. Boston: McGraw Hill.

Fausto, B. and Fausto, S. (1994) ‘História do Brasil’. São Paulo: Edusp.

Ferreira, J. and Delgado, L. (2003) *O Brasil Republicano: o tempo da experiência democrática – da democratização de 1945 ao golpe civil-militar de 1964*. Rio de Janeiro: Civilização Brasileira.

Ferreira, J. and Delgado, L. de A. N. (2003) *O Brasil Republicano O tempo do nacional-estadismo: do início da década de 1930 ao apogeu do Estado Novo.* Rio de Janeiro: Civilização Brasileira.

Finnemore, M. and Sikkink, K. (2001) ‘Taking stock: The constructivist research program in international relations and comparative politics’, *Annual Review of Political Science*, 4, pp. 391 - 416.

Flick, U. (2009) ‘Introduçao à Pesquisa Qualitativa’, *Introdução à pesquisa qualitativa.*, 3rd edition, Porto Alegre: ARTMED.

Focarelli, C. (2012) *International Law as Social Construct: The Struggle for Global Justice*, *International Law as Social Construct: The Struggle for Global Justice*. Oxford: Oxford University Press.

Fraser, N. (2013) ‘Nancy Fraser on Marx and Habermas’, *International Critical Thought*. Routledge, 3(3), pp. 259–267.

FUNAI (2010) *Quem São*. Available at: http://www.funai.gov.br/index.php/indios-no-brasil/quem-sao (Accessed: 5 May 2019).

Fustel de Coulanges (2006) *A Cidade Antiga*. Edited by F. Ozanam. São Paulo: Editora das Américas S.A. Available at: http://www.ebooksbrasil.org/eLibris/cidadeantiga.html (Accessed: 12 October 2020).

Gadamer, H.-G. (1999) *Verdade e Método*. 3rd edn. Petropólis: Vozes.

Gadamer, H.-G. (2001) *El Giro Hermeneutico*. Madrid: Catedra.

Galé, P., Nassif, L. and Aarão Reis Filho, D. (2014) ‘Brasilianas especial com Daniel

Aarão - 50 anos do Golpe Militar'. Brazil: EBC. Available at: http://tvbrasil.ebc.com.br/brasilianas/episodio/brasilianas-especial-com-daniel-aarao-50-anos-do-golpe-militar.

Gaus, G. F. (1983) 'The Modern Liberal Theory of Man'. New York: St. Martin's Press.

Gearty, C. (2014) 'The State of Human Rights', *Global Policy*, 5(4), pp. 391–400.

German Empire (1919) *The Constitution of the German Empire (Weimar Constitution)*. Available at: http://germanhistorydocs.ghi-dc.org/pdf/eng/ghi_wr_weimarconstitution_Eng.pdf (Accessed: 12 October 2020).

GIBBS, G. (2009) *Análise de dados qualitativos: coleção pesquisa qualitativa.*, *Cloning*. Porto Alegre: ARTMED.

Glaser, B. and Strauss, A. (1967) *The Discovery of Grounded Theory: Strategies for Qualitative Research*. Mill Valley: Sociology Press.

Glesne, C. (2005) *Becoming Qualitative Researchers*, *Becoming Qualitative Researchers: An Introduction*. Boston, Mass: Pearson.

Glesne, C. (2011) *Becoming qualitative researchers : an introduction, 4th ed.* Boston, Mass: Pearson.

Goodman, A. (2019) *Indigenous Leader Sônia Guajajara: The Amazon Is Burning & Its Defenders Are Being Assassinated | Democracy Now!*, *Democracy Now*. Available at: https://www.democracynow.org/2019/12/9/indigenous_leader_sonia_guajajara_at_cop25 (Accessed: 9 December 2019).

Grau, R. (2004) *A Ordem Econômica na Constituição de 1988*. 9th edn. São Paulo: Malheiros.

Guimarães, U. (1988) 'Discurso proferido na sessão de 5 de outubro de 1988'. Brasília: Câmara dos Deputados. Available at: https://www2.camara.leg.br/atividade-legislativa/plenario/discursos/escrevendohistoria/25-anos-da-constituicao-de-1988/constituinte-1987-1988/pdf/Ulysses Guimaraes - DISCURSO REVISADO.pdf (Accessed: 12 December 2019).

Häberle, P. (1997) 'Hermenêutica Constitucional – A sociedade aberta dos intérpretes da constituição: contribuição para a interpretação pluralista e procedimental da

constituição.' Porto Alegre: Sergio Antônio Fabris.

Häberle, P. (2000) *Teoría de la Constitución como Ciencia de la Cultura*. Madrid: Tecnos.

Häberle, P. (2004) 'L'Etát Constitutionnel'. Paris: Economica.

Hailbronner, M. (2017) 'Transformative Constitutionalism', *The American Journal of Comparative Law*. Oxford University Press, 65(3), pp. 527–565.

Hale, T., Held, D. and Young, K. (2013) *Gridlock: the growing breakdown of global cooperation*, Cambridge: Polity Press.

Hamacher, W. and Jesus, R. M. (2014) 'On the Right to Have Rights: Human Rights; Marx and Arendt', *CR: The New Centennial Review*. Michigan State University Press, 14(2), pp. 169–214.

Held, D. (2002) 'Law of States, Law of peoples: Three Models of Sovereignty', *Legal Theory*. 2002/08/12. Cambridge University Press, 8(1), pp. 1–44.

Heller, A. (1986) *Teoría de las Necesidades en Marx*. Barcelona: Península.

Henrique de Campos Meirelles, M. da F. (2016) 'EMI nº 00083/2016 MF MPDG'. Brasília: Ministério da Fazenda. Available at: http://www.planalto.gov.br/ccivil_03/projetos/expmotiv/emi/2016/83.htm (Accessed: 12 October 2020).

Henriques, A. (1964) *Ascensão e Queda de Getúlio Vargas*. São Paulo: Editora Record.

Herrera, J. F. (2009) *Teoria Crítica dos Direitos Humanos*. Rio de Janeiro: Lumen juris.

Hobbes, T. (1968) *Leviathan 1651*. Harmondsworth: Penguin.

Hobsbawm, E. J. (2007) *A Era do Capital*. 13th edn. São Paulo: Paz e Terra.

IBGE (2019) *Extrema pobreza atinge 13,5 milhões de pessoas e chega ao maior nível em 7 anos*, *IBGE*. Available at: https://agenciadenoticias.ibge.gov.br/agencia-noticias/2012-agencia-de-noticias/noticias/25882-extrema-pobreza-atinge-13-5-milhoes-de-pessoas-e-chega-ao-maior-nivel-em-7-anos (Accessed: 18 November 2019).

INESC, I. de E. S. (2016) *A PEC 55 é o tratamento adequado para a saúde fiscal do Brasil? - INESC*. Available at: https://www.inesc.org.br/en/a-pec-55-e-o-tratamento-

adequado-para-a-saude-fiscal-do-brasil/ (Accessed: 12 October 2020).

IPEA, I. de P. E. A. (2018) *Indicadores Regime Militar*. Brasília.

King, M. L. (2003) *A Testament of Hope: The Essential Writings and Speeches*. Edited by J. M. Washington. New York: HarperOne.

Klare, K. E. (1998) 'Legal Culture and Transformative Constitutionalism ', *South African Journal on Human Rights*, 14(1), pp. 146–188.

Kratochwil, F. (1989) *Rules, Norms, and Decisions On the Conditions of Practical and Legal Reasoning, International Relations and Domestic Affairs*. Cambridge: Cambridge University Press.

Lassalle, F. (1998) *A Essência da Constituição*. 4th edn. Rio de Janeiro: Lumen juris.

Leroy-Beaulieu, P. (1874) 'De la colonisation chez les peuples modernes'. Paris: Guillaumin et cie, pp. 2 p. \U+25a1\., vii, 616 p. Available at: file://catalog.hathitrust.org/Record/100325053.

Linhares, M. Y. L. and Cardoso, C. F. S. (2000) 'Historia geral do Brasil'. Rio de Janeiro, RJ, Brasil: Editora Campus.

Loewenstein, K. (1976) 'Teoria de la Constitución'. Barcelona: Ariel.

Lorca, A. B. (2014) *Mestizo international law: A global intellectual history 1842-1933, Mestizo International Law: A Global Intellectual History 1842-1933*. Cambridge: Cambridge University Press.

Lowe, V. (1989) 'Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs. By Friedrich V. Kratochwil.', *The Cambridge Law Journal*, 48(3), pp. 527 - 529.

Luz, M. A. (2013) *Agadá: dinâmica da civilização africano-brasileira*. 3rd edn. Salvador: EDUFBA.

Macedo, A. C. (2015) *Encruzilhadas da Interpretação: cuidado e significação na umbanda*. Universidade de São Paulo.

MacPherson, C. B. (1990) *The Political Theory of Possessive Individualism: Hobbes to Locke*. 13th edn, *The Western Political Quarterly*. 13th edn. Oxford University Press.

Marés, C. F. (2003) *A função social da terra*. Porto Alegre: Sergio Antônio Fabris

Editor.

Marx, K. (1999) *Capital, Das Kapital, Volume 1*. Moscow: Progress Publishers.

Marx, K. and Engels, F. (2008) *O Manifesto do Partido Comunista*. 14th edn. Bragança Paulista: São Francisco.

Mata, A. M. C. (2007) *Derechos Económicos, Sociales y Culturales*. Bilbao.

Montesquieu, C. de S. (1996) *O Espírito das Leis*. São Paulo: Martins Fontes.

Montesquieu, C. de S. (2012) *Do espírito das leis*. São Paulo: Saraiva.

Morgenthau, H. and Thompson, K. (1985) *Politics Among Nations*. 6th editio. New York: McGraw-Hill.

Moyn, S. (2010) *The Last Utopia: Human Rights in History*. Cambridge: Harvard University Press.

Moyn, S. (2014) 'Human Rights and the Uses of History'. London: Verso.

Moyn, S. (2015) 'A Powerless Companion: Human Rights in the Age of Neoliberalism', *Law and Contemporary Problems*, (77), pp. 147–169.

Moyn, S. (2018) *Not Enough: Human Rights in an Unequal World*. Cambridge: Belknap Press.

Moyn, S. (2020) *Socialists Have Long Fought to Disempower the Supreme Court. That's More Urgent Than Ever Now.* Available at: https://jacobinmag.com/2020/09/supreme-court-socialists-ruth-bader-ginsburg-death (Accessed: 12 October 2020).

Napolitano, M. (2014) *1964: História do Regime Militar Brasileiro*. São Paulo: Contexto.

Neto, L. (2013) *Getúlio (1930–1945): Do governo provisório à ditadura do Estado Novo, Cia das Letras*. São Paulo: Companhia das Letras.

Niebuhr, R. *et al.* (1942) 'The United Nations fight for the four freedoms.' Washington: U.S. Govt. Print. Off., p. 15 p. Available at: http://hdl.handle.net/2027/mdp.39015028181090.

OAS, O. of A. S. (1969) *Pact Of San Jose - Costa Rica*. Available at:

http://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm (Accessed: 10 October 2020).

OHCHR (2016a) 'Oral Statment by Mr. Philip Alston at the 32nd Session of the UN Human Rights Council'. Geneva: United Nations.

OHCHR (2016b) *Report on austerity measures and economic and social rights*.

OHCHR (no date) *OHCHR - Status of Ratification*. Available at: https://indicators.ohchr.org/ (Accessed: 10 October 2020).

OHCHR, O. of the H. C. for H. R. (1993) 'Report on austerity measures and economic and social rights'. Geneva: United Nations. Available at: https://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf.

OHCHR, O. of the H. C. for H. R. (2008) *Office of the United Nations High Commissioner for Human Rights Frequently Asked Questions on Economic, Social and Cultural Rights*. Geneva.

Okely, J. and Callaway, H. (2001) *Anthropology & Autobiography*. New York: Routledge.

Oliveira, L. (2015) *Viver em Lisboa - Século XVI*. São Paulo: Alameda.

de Oliveira Mazzuoli, V. (2018) *Curso de Direito Internacional Público*. São Paulo: Editora Fonseca.

OXFAM (2019) *Os números das desigualdades no Brasil*. Available at: https://www.oxfam.org.br/os-numeros-das-desigualdades-no-brasil (Accessed: 18 June 2019).

Palmares (2019) *Palmares Fundação Cultural*. http://www.palmares.gov.br/?page_id=95 (Accessed: 21 June 2018)

Palmer, R. (2002) 'Que es la Hermenéutica?' Madrid: Arcolibros.

Parente, T. C., Lucas, A. C. and Cordeiro, R. A. (2017) 'Contemporary slavery in Brazil: What have companies(not) done to prevent it?', *RAM. Revista de Administração Mackenzie*. 18(4), pp. 39–64.

Paz Gonzalez, I. de (2018) *The social rightsjurisprudence in the inter-american court*

of human rights. Cheltenham: Edward Elgar.

Philpott, D. (2001) *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations*. Princeton: Princeton University Press.

Piovesan, F. (2002) *Direitos Humanos e o Direito Constitucional Internacional*. 5th edn. São Paulo: Max Limonad.

Piovesan, F. (2004) 'Direitos sociais, econômicos e culturais e direitos civis e políticos ', *Sur. Revista Internacional de Direitos Humanos* . 1(1), pp. 20–47.

Piovesan, F. (2017) *Temas de Direitos Humanos*. 10th edn. São Paulo: Saraiva.

Pope Leo XIII (1891) 'Rerum Novarum'. Vatican. Available at: http://www.papalencyclicals.net/leo13/l13rerum.htm.

Postone, M. (1993) *Time, Labor, and Social Domination: A Reinterpretation of Marx's Critical Theory*. Cambridge: Cambridge University Press.

Prado Junior, C. (1981) *História econômica do Brasil*. 26th edn. São Paulo: Brasiliense.

Prado Junior, C. (2012) *Evolução Política do Brasil*. São Paulo: Companhia das Letras.

Pressburguer, T. M. (1998) 'Terra, propriedade, reforma agrária e outras velharias', in Varella, M. D. (ed.) *Revoluções no campo jurídico*. Joinville: Oficina de Comunicações Editora, pp. 297–310.

Ramos, A. de C. (2009) 'Supremo Tribunal Federal brasileiro e o controle de convencionalidade: levando a sério os tratados de direitos humanos', *Revista da Faculdade de Direito, Universidade de São Paulo*. 104, pp. 241-286

Ramos, A. de C. (2020) *Curso de Direitos Humanos*. São Paulo: Saraiva.

Repórter Brasil (2020) *Dados sobre trabalho escravo no Brasil*. Available at: https://reporterbrasil.org.br/dados/trabalhoescravo/ (Accessed: 12 October 2020).

Ribeiro, D. (2000) *The Brazilian People*. Gainesville: University Press of Florida.

Ribeiro, J. A. (2001) *A era Vargas*. Rio de Janeiro: Casa Jorge Editorial.

Riedel, E., Giacca, G. and Golay, C. (2014) 'The Development of Economic, Social, and Cultural Rights in International Law', in *Economic, Social, and Cultural Rights in International Law*. Oxford: Oxford University Press.

Robbins, L. (1961) *The Theory of Economic Policy in English Classical Political Economy*. London: Macmillan.

Rodrigues, R. (2016) *Projeto de Lei do Senado n° 220, de 2016*. Brasília: Senado Federal.

Roosevelt, F. D. (1941) 'Four Freedoms speech'. Washington.

Rousseau, J.-J. (1755) 'A Discourse on Political Economy'. Paris. Available at: https://www.files.ethz.ch/isn/125495/5020_Rousseau_A_Discourse_on_Political_Economy.pdf.

Rousseau, J.-J. (1964) 'Oeuvres Complètes, III'. Gallimard: Bibliothèque de la Pléiade.

Russel-Wood, A. J. . (1987) 'The gold cycle', in Bethell, L. (ed.) *Colonial Brazil*. Cambridge: Cambridge University Press, pp. 190–243.

Salvador, V. do (Frei) (1918) *História do Brasil*. São Paulo: Weiszflog Irmãos.

Sarantakos, S. and Stevens, L. (1998) *Social Research*. Macmillan Education, Limited. Available at: https://books.google.com.br/books?id=zjtdDwAAQBAJ.

Schmidtz, D. and Brennan, J. (2010) 'A Brief History of Liberty'. Malden: Wiley-Blackwell.

Schoenste, L. (2014) *Transparência Brasil: Clãs políticos seguem dominando Congresso na próxima legislatura*. São Paulo. Available at: http://excelencias.org.br/docs/parentes_ 2015-2018 vf.pdf.

Schreiber, M. (2018) *Com gastos acima do teto, Judiciário recria auxílio-moradia para juízes, BBC*. Available at: https://www.bbc.com/portuguese/brasil-46613485 (Accessed: 5 May 2019).

Schwandt, T. A. (1994) 'Constructivist, interpretivist approaches to human inquiry', *Handbook of qualitative research*. California: SAGE Publications.

Schwandt, T. A. (2007) 'The SAGE Dictionary of Qualitative Inquiry. Third Edition', California: SAGE Publications.

Schwarcz, L. M. and Starling, H. M. (2016) *Brasil: Uma biografia*. São Paulo: Companhia das Letras.

Schwartz, S. B. (1987) 'Plantation and peripheries', in Bethell, L. (ed.) *Colonial Brazil*.

Cambridge: Cambridge University Press, pp. 67–144.

Scorsolini-Comin, F. (2016) *Técnicas de entrevista: método, planejamento e aplicações*. São Paulo: Vetor.

Seiber, J. E. (1998) 'Planning ethically responsible research.', in Bickman, L. and Rod, D. J. (eds) *Handbook of applied social research methods.* Thousand Oaks: Sage, pp. 127–156.

Shalders, A. (2018) *Juízes do STF já ganham mais que colegas europeus, mesmo antes de reajuste aprovado hoje*, *BBC*. Available at: https://www.bbc.com/portuguese/brasil-45124032 (Accessed: 5 May 2019).

Da Silva, J. A. (2014) *Curso de Direito Constitucional Positivo*, São Paulo*:* Malheiros Editores.

Da Silva, J. A. (2000) *Aplicabilidade das Normas Constitucionais*. 4th edn. São Paulo: Malheiros Editores.

Da Silva, J. A. (2005) 'Curso de Direito Constitucional Positivo', São Paulo*:* Malheiros Editores.

De Sousa Santos, B. (1995) *Pela Mão de Alice: O Social e o Político na Pós-Modernidade*. 12th edn. São Paulo: Cortez.

Souza, J. (2019) *A elite do atraso: da escravidão à Bolsanaro*. Rio de Janeiro: Estação Brasil.

Stack, S. Thomas, G., Meyer, J., Ramirez, F., and Boli J.,. (1989) *Institutional Structure: Constituting State, Society, and the Individual.* California: SAGE Publications.

Stewart, I. (2004) 'Men of Class: Aristotle, Montesquieu and Dicey on Separations of Powers and the Rule of Law', *Macquarie Law Journal*, 4, pp. 187 - 223.

STF (2008) 'RE 670422'. Brasília: Tribunal Pleno.

STF (2017) 'RE 646721'. Brasília: Tribunal Pleno.

STJ, C. da J. F. (2019a) *PORTARIA Nº 24, DE 15 DE JANEIRO DE 2019*. Available at: http://www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/59626660/do1-2019-01-18-portaria-n-

24-de-15-de-janeiro-de-2019-59626630 (Accessed: 6 June 2019).

STJ, C. da J. F. (2019b) *RESOLUÇÃO Nº 512, DE 11 DE JANEIRO DE 2019*. Available at: http://www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/59077204 (Accessed: 6 June 2019).

Supremo Tribunal Federal, S. (1977) *RECURSO EXTRAORDINÁRIO : RE 80004 SE*. Available at: https://stf.jusbrasil.com.br/jurisprudencia/14614120/recurso-extraordinario-re-80004-se (Accessed: 11 October 2020).

Supremo Tribunal Federal, S. (2008) *RE 466.343*. Brasília.

Supremo Tribunal Federal, S. (2017) *ADI 5680*. Brasília.

Trento, A. (1989) *Do outro lado do Atlântico: Um século de imigração italiana no Brasil*. São Paulo: Livraria Nobel.

Trindade, A. A. C. (2007) 'The Right of Access to Justice in the Inter-American System of Human Rights Protection', *The Italian Yearbook of International Law*, xvii, pp. 7–24.

Trindade, A. A. C. (2008) 'The Human Person and International Justice', *Columbia Journal of Transitional Law*, 47(1), pp. 16–30.

Trindade, A. A. C. (2010) *International law for humankind : towards a new jus gentium*. Leiden: Martinus Nijhoff Publishers.

Trindade, A. A. C. (2011) *The Access of Individuals to International Justice*. Oxford: Oxford University Press.

UNICAMP, U. de C. (2018) *Fosfoetanolamina, de 'pílula do câncer' a caso de polícia | Unicamp*. Available at: https://www.unicamp.br/unicamp/ju/noticias/2018/04/03/fosfoetanolamina-de-pilula-do-cancer-caso-de-policia (Accessed: 15 October 2019).

United Nations, U. (1966) *International Covenant on Economic, Social and Cultural Rights(ICESCR),*. United Nations.

United Nations, U. (1969) *Vienna Convention on the Law of Treaties of 1969*. Vienna.

Vasak, K., Alston, P. and Unesco (1982) 'The International dimensions of human rights'. Westport: Greenwood Press.

Vieira, O. V. (2008) ‘A Desigualdade e a Subversão do Estado de Direito’, in Sarmento, D., Ikawa, D., and Piovesan, F. (eds) *Igualdade, Diferença e Direitos Humanos*. Rio de Janeiro: Lumen juris.

Vieira, P. A. (1998) ‘Padre Antônio Vieira Convertendo os Índios do Brasil’. Brasília: Senado Federal. Available at: https://www2.senado.leg.br/bdsf/bitstream/handle/id/1021/196283.pdf?sequence=4.

Vilhena, O., Baxi, U. and Viljoen, F. (2013) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa*. Pretoria: Pretoria University Law Press.

Vuillemenot, A.-M. *et al.* (2010) ‘Intimité et réflexivité. Une introspection du divers’, in Vuillemenot, A.-M. et al. (eds) *Intimité et réflexivité du chercheur en anthropologie*. Louvain- la-Neuve: L’Harmattan, pp. 2–15.

Wendt, A. (1992) ‘Anarchy is what states make of it: The social construction of power politics’, *International Organization*. 46(2), pp. 391 - 425.

Wendt, A. (1995) ‘Constructing International Politics’, *International Security*. 20 (1), pp. 71 - 81.

World Bank (2020) *World Development Indicators*. Available at: https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG.

Yin, R. K. (2001) ‘Pesquisa Estudo de Caso - Desenho e Métodos’, Porto Alegre: *Bookman*.

Zebulum, J. C. (2017) ‘O JULGAMENTO DO CASO DA FOSFOETANOLAMINA E A JURISPRUDÊNCIA DO SUPREMO TRIBUNAL FEDERAL’, *Revista de Direito Sanitário*, 17(3), p. 212 - 223.