José Rodrigo Rodriguez

Perversion of Law: Six Cases*

Résumé

Cet article introduit le concept de la „perversion du droit" en ses figures : la légalité discriminatoire et les espaces d'autarchie. En même temps il discute trois cas de perversion de droit. Le texte démontre que l'idée de pervertir le droit signifie de le tenir à l'écart du contrôle public et de conférer l'apparence de légitimité aux actes arbitraires. Finalement, l'article présente certains cas de perversion de droit dans la «National Technical Commission on Biosecurity » (CTNBio), le droit du sport, de la politique fiscale, du droit des cités, du secret fiscal et de l'emploi des stagiaires.

Zusammenfassung

Dieser Aufsatz stellt das Konzept der "Perversion des Rechts" in seinen Gestalten diskriminierende Legalität und Räume der Alleinherrschaft vor. Gleichzeitig diskutiert er drei Fälle der Perversion des Rechts. Der Text zeigt, dass der Gedanke, Recht zu pervertieren bedeutet, dieses von öffentlicher Kontrolle fern zu halten und willkürlichen Akten den Anschein der Rechtsmäßigkeit zu verleihen. Zuletzt werden einige Fälle der Perversion von Recht in der „National Technical Commission on Biosecurity" (CTNBio), im Sportrecht, der Steuerpolitik, dem Städterecht, dem Steuergeheimnis und der Beschäftigung von Praktikanten dargestellt.

1. Democracy crisis?

It is becoming a commonplace to assert that Brazil and other western countries are experiencing a period of democracy crisis, given that such a political regime is gradually becoming unable to make its prior project effective at all, that is, to build up and maintain formal and informal institutions capable of establishing rules emerging from the public debate held by both male and female citizens so as to govern life in society.

As a matter of fact, globalization, taken as a process which has been accelerated since the fall of the Berlin Wall in 1989, has contributed to relativize the power of states worldwide, particularly as a result of the process of privatization of regulation by transnational companies and private entities (such as FIFA, for instance), which are able to enforce the validity of their agreements and rules worldwide. Additionally,

* Professor of Law, UNISINOS/Brazil; Senior Researcher, CEBRAP/Brazil; Thanks to *William Scheuermann, Marcos Nobre, Ricardo Terra, Simone Schuck, Mauricio Flores, Winnie Bueno, Bianca Tavolari, Flavio Prol, Gabriel B. de Brito, Andreas Mederberger* and *Eva Weiler* for the comments of earlier versions of this article. Thanks to *Tatiane Honorio Lima* for its English version.

KritV 2/2018, DOI: 10.5771/2193-7869-2018-2-127

those companies and entities have done without the intervention of state jurisdiction so as to resolve their conflicts in favor of arbitration or suited dispute resolution mechanisms, like the summary exclusion from the market of those men and women who do not comply with those corporations' rules.[1]

Furthermore, regional entities like the European Union and a range of international organizations – most of them bearing an economic nature, such as the World Trade Organization (WTO) – have been establishing international standards devoted to restrict the room for maneuver of national states in an increasingly interdependent world. In the current context, being sanctioned by the WTO may lead companies and countries, both the poor and rich ones, to incur considerable financial losses.[2]

More recently, a series of social movements around the world have expressed their annoyance in relation to their respective political regimes, since they seem to have lost the ability to express those social movements' will and, what is more, the popular will in all.[3] In some countries these movements gave rise to political organizations intended to be an alternative to the traditional political parties, as is the case for *Podemos*, a Spanish political party which is already taking part in electoral disputes in that country.

Taking into account the Brazilian context, on the one hand, it is possible to perceive that events like the protests of June 2013, the movements against the World Cup, as well as the several popular protests and the subsequent institutional crises have kept the country in a permanent social and political upheaval somehow. On the other hand, the Brazilian political parties and the political system taken as a whole have not seemed to succeed in promptly delivering a suitable solution up to now. No partisan force seems to have been able to convert the demands of those movements into a positive political agenda and, for that reason, many analysts interpret such a situation as a sign of deterioration of our political system.

As far as *Marcos Nobre's* (2013) thoughts and writings are concerned, the aforementioned phenomenon might possibly be explained by the so-called 'peemedebismo' concept, a typical feature of our political culture which would have both shielded the Brazilian political system against the influence of society and contributed to the outbreak of the protests seen in June 2013[4] and later on.

According to *Nobre* (2013), once the Brazilian political culture is shaped under the influence of PMDB, it features mainly great political agreements open to new participants, provided that they are strong enough to claim their participation in the public fund spending, which in turn is managed by those who were assigned a position in the

1 TEUBNER, Gunther. "A Bukowina Global sobre a Emergência de um Pluralismo Jurídico Transnacional", In: *Revista de Ciências Sociais e Humanas*, v. 14, n. 33. Piracicaba: Impulso/ Unimep, 2003; TEUBNER, Gunther. *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford: Oxford University Press, 2012.

2 VARELLA, Marcelo D. *Internacionalização do direito: Direito internacional, globalização e complexidade*. Tese de Livre-Docência em Direito Internacional – USP. São Paulo, 2012. Available at: <https://www.uniceub.br/media/186548/MVarella.pdf>. Accessed on Nov. 3, 2015.

3 GOHN, Maria da Glória. *Manifestações de Julho de 2013 no Brasil e nas Praças dos Indignados no Mundo*. São Paulo: Vozes, 2014.

4 NOBRE. Marcos. *Imobilismo em Movimento: Da democratização ao governo Dilma*. São Paulo: Companhia das Letras, 2013.

government and are thus able to ensure the right to prevent initiatives which would question their most immediate interests in case they were taken.

One may state that such a theory is related to both a conspiracy and cabinet politics, focused on the distribution of positions among the political parties, or even to a sort of politics devoted to avoiding an open public debate at all costs. If for some reason debate is strictly necessary, then a political clinch which respects the power of veto of those various groups participating in the agreement should be reached. Therefore, it is quite simple to understand that the more extensive the agreement is and the greater the number of participants is, the greater the number of vetoes will be and the more rigid and closed the politics will become in relation to society's interests.[5]

2. Forms of perversion

The analysis of democracy crisis from this macroscopic point of view, which in turn approaches the limits of both the political system and the state power, does not reach nor exclude careful reflections on the health of this regime made from an analysis of those microscopic processes responsible for perverting the rule of law by causing the democratic regime to lose contact with popular sovereignty.

As we shall see, such processes are not necessarily connected to the so-called brand-new social movement, nor to the process of globalization at all. Neither are they related to the partisan politics dynamics nor to the functioning of the political system. However, those processes also have the capability to significantly erode the power of popular sovereignty, causing formal institutions to keep distant from and immune to the popular will.

Processes like these ones, as we shall discuss later on, are the result of power projects carried on by different social agents who were interested in escaping the rule-based democracy, i.e., interested in dodging the existing social conflicts within several national states as well as within the transnational sphere by creating institutional mechanisms completely safe from the influence of male and female citizens (some transnational regulatory organizations, like FIFA, may be taken as an illustration of that fact).

In addition, such processes may be able to create *autarchic spaces* tending to either disappear soon after they were created – on the occasion of a decision-making procedure –, or definitely remain embedded in certain sectors or departments of formal institutions, state or non-state ones, always to serve the purpose of keeping them free from the influence of the public debate but under the appearance of legality, as is the case for the National Technical Commission on Biosecurity (CTNBio), something which will be further developed below.

Similarly, it is also possible to identify *discriminatory legality* strategies which make use of the general form of law and whose perverted aim is to target only specific groups or certain people.[6] This form of perversion creates legal rules which state abstract and general permissions and prohibitions which do not even make any express

5 Idem, ibidem.

6 RODRIGUEZ, José Rodrigo. "As figuras da perversão do direito: para um modelo crítico de pesquisa jurídica empírica". *Revista Prolegómenos Derechos y Valores*, v. 19, n.37, pp.

reference to the problems and practices they end up actually regulating in a discriminatory manner. For example, animal sacrifice is prohibited in some Brazilian municipalities supposedly on behalf of the population's hygiene and health, being such an action something which makes religious practices of African origin unfeasible, though.[7]

I have been referring to these uses of law by means of the expression 'perversion of law',[8] for they have to deal with regulatory designs or institutional decisions which seem to be legal at first, but whose ultimate effect, regardless of the intentions or explicit justification of their agents, is to neutralize the popular sovereignty by immunizing certain decision-making processes or institutions from the influence of various social agents in conflict.

In this regard, it is necessary to go beyond the face value of the positive law in order to identify the cases of perversion of law. In other words, it is essential to go beyond the legal rules which formally justify such decisions and institutions so as to investigate the meaning and effects of such rules in the process of interaction among the suitable social agents, as it will be explained in the cases discussed below. Therefore, this proposal for a conceptual construction ultimately and necessarily aims at being applied to empirical research projects. Thus, the idea of perversion of law will only function properly if it is employed in a very detailed analysis of a particular decision-making process and in its related effects.

From a more abstract perspective, it is important to highlight that most authoritarian and discriminatory practices these days tend to be pursued under the appearance of legality, as surprisingly as it may seem. Even the aforementioned 'peemedebismo' practice may be seen from this perspective as the perfectly licit formation of a coalition of political parties which intend to govern the country in alliance. Such a phenomenon is far from being new, in spite of the fact that it has been poorly studied from this specific theoretical point of view: authoritarian regimes – having Nazism as a starting point – and autarchic practices of different shades have made use of the so-called 'constitutional masks'[9] or 'legal masks' – an expression taken from an important law historian – so as to implement and develop their plan of action.

Rarely has power being presented naked at all, a sort of power with nothing else which could dispense with the justification of the grammar of law, that is, a sort of power which could abdicate underpinning its action in a legal rule which might legitimatize it, being such a rule either from public or private law, i.e., created from either a sovereign entity or private agents' will.[10] Long ago it was possible to find judges like

99-124, 2016; RODRIGUEZ, José Rodrigo. "Luta por direitos, rebeliões e democracia no século XXI: algumas tarefas para a pesquisa em direito". In: STRECK, Lênio L., ROCHA, Leonel. S. Rocha; ENGELMANN, Wilson (orgs.). *Constituição, sistemas sociais e hermenêutica*. Porto Alegre: Livraria do Advogado, 2015.

7 The analysis of this case is going to be the subject of a future text co-authored with Winnie Bueno, master's degree student in Law at UNISINOS – RS.

8 See note 7.

9 DIPPEL, Horst. *História do Constitucionalismo Moderno. Novas Perspectivas*. Lisboa: Fundação Calouste Gulbekian, 2007, p. 18.

10 TEUBNER, Gunther. "Bukowina global sobre a emergência de um pluralismo jurídico transnacional". *Direito e Globalização*, v.13, n. 33, pp. 09-31, 2003.

Lord Justice Farewell and *Lord Justice Kennedy*, who were capable of openly denying the right to habeas corpus to the inhabitants of the English colonies in the face of the clearly expressed fear that they could end up eliminating the white people, as they were in a larger number.[11]

Considering an even more abstract perspective, this phenomenon could be taken as an expression of the process of modernization in which tradition, religion, and moral have no more the ability to function as an element of cohesion within the social interactions. In other words, they are no more capable of providing with basic values to a rather pacified social life and, for that reason, the rule of law gains centrality more and more for being able to enforce the compliance with legal rules in a coercive way, as well as for allowing the change of these very rules by means of public debate.[12]

Seen from such a perspective, the diverse figures of perversion of law may be faced as a clue about the force of law as a sort of grammar of power legitimization in today's world: even in situations of autarchy, power is compelled to assume a legal form in order to reach a minimum of society's agreement with it. Be that as it may, identifying situations of autarchy nowadays means on most occasions to scrutinize and evaluate legal rules apparently in accordance with the Constitution and with the other legal rules from the same hierarchy, or the ones which utilize the contract form disconnected from the idea of equivalent exchange, only to impose power from one part on another.

It is crucial to elucidate that I make use of the expression 'perversion of law' in order to designate a somewhat 'autocratic law', so to say, as opposed to a 'democratic law' whose genesis is determined by the social conflicts. To *Franz Neumann*, the author who inspires this analysis, the term 'rule of law' would be synonymous with my idea of 'democratic law', while the expression 'no-law' would correspond to my concept of 'autocratic law'. Following the tradition of the Marxist critique of *Hegel's Philosophy of Law*, the perversion being dealt with here has to do with spotlighting those promises broken by the effectively existing institutions, as it is revealed indeed in *Franz Neumann's The Rule of Law*, particularly in the chapter concerning *Hegel's* thinking.

According to *Neumann*, the Hegelian theory of the state as an ethical unity would only make sense if those interests of diverse social groups were identical, i.e., if the whole civil society had a common and unified interest.[13] In the absence of such an assumption, such a theory could be used (as in fact it was) for conservative purposes as an authoritarian state theory, by describing the state as an ethic unit in a society split by the labor exploitation. However, as *Neumann* points out, such a theory may be taken as a revolutionary one, provided that the inexistence of harmony among social classes may be demonstrated by the very existence of the proletariat.[14]

11 NEUMANN, Franz. "A mudança de função da lei no direito da sociedade burguesa". *Revista Brasileira de Estudos Políticos*, Belo Horizonte, n. 109, pp. 13-87, jul./dez. 2014, pp. 36-37.

12 HABERMAS, Jürgen. *Direito e Democracia: entre facticidade e validade*. Rio de Janeiro: Tempo Brasileiro, 1991.

13 NEUMANN, Franz L. *O Império do Direito*. São Paulo: Quartier Latin, 2013 a, p. 293.

14 Idem, ibidem, pp. 294-295.

The historical section of *The Rule of Law* [15] sought to make the investigation of the various institutional manifestations of the rule of law in Europe at that time more concrete. That research shows that the English tradition of the rule of law connected the society's will to the creation of legal rules in a historical and necessary way, something which gave rise to an institutional model capable of conveying the complexity of social conflicts by means of formal institutions. On the other hand, the German tradition addresses the idea of 'rule of law' (*Rechtsstaat*) with no reference at all to such a term to describe a necessary relationship between state and society: so as to make the 'rule of law' come into existence, it is enough to make power limit itself and standardize its behavior to a certain extent, even though the source of the rules which underlie its action is not based on popular sovereignty. Such institutional form thus takes on clearly autarchic contours, while remaining immune to the dynamics of social conflicts.

Neumann's research was not restricted to the more abstract aspects of the institutions of the rule of law. Under the influence of *Karl Renner's* writings,[16] *Neumann* was also concerned with the setting of those diverse legal institutes – for instance, fundamental rights, property, and contract –, explicitly revising *Marx's* theory at this point. According to *Neumann*, *Marx* focused only on processes of revolutionary institutional changes where a certain legal order is completely replaced by another. Yet, these processes may occur within a given social order based on the state of social conflicts.[17]

The diverse figures of perversion of law, as I claim in my theoretical formulation, bring into question the democratic rule of law, for they neutralize the popular will. In a democracy, as *Rousseau* puts in his classical definition,[18] we only abide by those rules to which we offer our consent. In a democracy thus we all are both citizens and subjects at the same time. So in order to make a regime like this one possible (as *Franz Neumann* showed us), both society and the state must remain in tension. These two areas of social life can never overlap each other, but they must both communicate with and affect each other permanently, with no prospects of ultimate reconciliation at all.[19]

It is well known that the need to separate society and state is not clearly set down in *Rousseau's* work. Throughout several passages from his work *The Social Contract*, this author seemed to bet on the possibility of constructing a relatively uniform social will which might be able to resolve its conflicts through the homogenizing idea of 'general will'. In this regard, to postulate the need for a 'general will' may cause the elimination of the individual freedom to the advantage of the interest of the social whole, something which may bring about an overlapping of state and society.

15 NEUMANN, Franz L. *O Império do Direito*. São Paulo: Quartier Latin, 2013 a; NEUMANN, Franz L. "O conceito de liberdade política". *Cadernos de Filosofia Alemã. Crítica e Modernidade*, v. 22, pp. 107-154, 2013 b.

16 NEUMANN, Franz L. *O Império do Direito*..., p. 54-59, p. 84-97.

17 Idem, ibidem, pp. 95-97.

18 ROUSSEAU, Jean-Jacques. *Do Contrato Social*. São Paulo: Penguin/Companhia das Letras, 2011.

19 NEUMANN, Franz L., *O Império do Direito*...

So as to avoid such an outcome, *Franz Neumann* states in the very introduction of *The Rule of Law*[20] that his concern is addressed to the social contract considered as a form rather than content, that is, *Neumann* is interested in analyzing the social contract seen as an institutional mechanism capable of transforming those ever-present social conflicts into an unstable, provisional, non-substantialized 'social will', a sort of changing consequence of permanent conflicts.

As far as this way of thinking is concerned, the debate on democracy ends up being confused mostly with the debate on the institutional design of the rule of law, i.e., with the discussion about the best manner to devise democratic institutions so that male and female citizens are not alienated in relation to state power.[21] After all, those democratic rule-of-law institutions demand that legal rules should be established from the public debate, taking into account all those social agents' interests. So as to achieve such a goal, formal institutions ought to be designed so that they properly grasp the diverse social agents' will.

Instead of *Rousseau's* so-called general will, *Franz Neumann* thus places the rule of law (or the 'democratic law' in the terminology of this text), that is, a set of institutions whose role is firstly to constrain those who hold political, economic and social power to justify and substantiate their actions when confronted with the social whole which is regulated by positive law; and secondly to express the conflicting society's changing will. In *The Rule of Law*, *Neumann* has not much to say about the possibility of finding a permanent balance among those conflicting interests from a male and female citizens' point of view. To put it another way, what would be the subjective presuppositions for the maintenance of the rule of law? Such a question started to be examined by him in a text written shortly after his death, 'Anxiety and Politics'.[22]

Keeping to the main thread of argument, the rule of law (so as to cope with its task) must produce a series of *legal standards of conduct* in order to establish what citizens should or should not do, or even what they can or cannot do either. Besides, this institutional form produces *legal standards of competence* which allow society to create its own standards of conduct within certain limits, as it may be seen in those contracts whose terms can be examined by the judiciary in case of violation of certain public interest rules, such as the rules on the agents' legal capacity, the legal object, the respect for environmental limits, and so on. In this regard, the standards of competence enable the acknowledgment of the validity of real semi-autonomous legal systems, parallel to the state law, like those rules created by indigenous communities, despite the possible occurrence of conflicts between these two legal systems,[23] something which *Neumann* did not explored in his writings.

As far as *Neumann's* theory is concerned, though, it is clear that democracy cannot be reduced to the rule of law, being the latter seen as a sort of legal regulation of con-

20 idem, ibidem.

21 NEUMANN, Franz L. "O conceito de liberdade política". *Cadernos de Filosofia Alemã. Crítica e Modernidade*, v. 22, pp. 107-154, 2013 b.

22 NEUMANN, Franz. "Angústia e Política", *Dissonância: Revista de Teoria Crítica*, v. 1, n. 1, pp. 104-154, 2017.

23 RODRIGUEZ, José Rodrigo. "Inverter o espelho: o direito ocidental em normatividades plurais", em: REIS, Rossana Rochas (org.). *Política de direitos humanos*. São Paulo: Editora Hucitec, 2010.

duct and a sort of permission for social legal regulation, in spite of the fact that it contains an essential dimension of its continuance in plural and controversial societies. Indeed, to the author, there will be no democracy if there are no institutional safeguards to carry out the necessary separation and communication between the state and society. Likewise, there will be no democracy if we do not undergo a situation of open social conflict about the distribution of wealth, of symbolic power and of any other power resource. So, every single figure of perversion of law, by removing from the public debate the discussion about a given set of legal rules and institutions with some influence over the distribution of power, is an affront to democracy.

So democracy can be seen as one of the possible answers to a sort of polytheism of values established by modernity, as *Max Weber* once noted. It is a form of sociability able to peacefully deal with the political, religious, and social pluralism, tending to reduce the economic inequality among the various social groups. After all, only within a democratic regime and under a rule of law are the various individuals and groups able to perceive themselves as underprivileged and then fight for a better distribution of power and social recognition. Well, were Western societies capable of coming to a general agreement on the rules which should regulate the social dynamics, were everybody capable of sharing the same moral values and ethical principles, were we all satisfied with the manner we organize work and the distribution of wealth, it would not be necessary to live under a democratic rule of law.

In a situation of consensus like this one, the whole social conduct could be evaluated on the basis of clear and uncontroversial legal rules, being dispensable to build a full apparatus so as to make legal rules meet the social will. It is rather easy to realize that democracy reaches a crisis point thus once it is no more able to respond to social conflicts, that is, when it loses the ability to establish legal rules and ever-renewing institutions stemming from the conflict among the various social agents. The naturalization of law and state in any given manner therefore is essentially antidemocratic.

So based on these reflections, it is possible to claim that the task of a critical theory of law is to examine formal institutions throughout their complexity firstly to observe what kind of institutional alternatives could be able to give way to those desires and social demands in the best possible way, something which I have referred to as a search for *institutional utopias*,[24] following the example of *Neumann's* analysis on the various settings of the rule of law in Europe of his time, as well as of his analysis of the relationship between fundamental rights and legal institutes, with a view to the possibilities of its change of function in response to social conflicts. On the other hand, it is worth scrutinizing the figures of *perversion of law*, namely the various ways to organize and operate formal institutions to prevent its communication with the social conflicts and thus to avoid its transformation.

24 RODRIGUEZ, José Rodrigo. “"Utopias" institucionais antidiscriminação. As ambiguidades do direito e da política no debate feminista brasileiro”, *Cadernos Pagu*, n.45, julho-dezembro, pp.297-329, 2015.

3. Six cases

3.1 Opening remarks

The figures of perversion of law undermine the legitimacy of the democratic regime by making the legal rules and institutions immune to the will of both male and female citizens, since, as it was already said, the study of a possible 'democracy crisis' cannot be restricted merely to macroscopic issues, such as the elections and the political party field. As we shall see, it is often in the minutiae of the rule-of-law institutions that the popular sovereignty tends to lose its power and importance to describe the content of the legal rules responsible for shaping its citizens' life destiny.

I intend to present below some of the latest research outcomes which contributed to elucidate some perversion-of-law mechanisms. Despite dealing with quite different matters – like FIFA, National Technical Commission on Biosecurity (CTNBio), economic policy, issues concerning urban zoning, tax secrecy, and male and female law interns' work –, those researches draw attention to situations in which the rule of law defies the popular will influence. Moreover, all of them were either conducted under my mentoring or somehow related to my researches developed within the Law and Democracy Center of the so-called Brazilian Center of Analysis and Planning (CEBRAP), as well as in the Graduate Program (LL.M. and Ph.D) at Vale do Rio Sinos University (UNISINOS).

It is important to notice that some of the situations of perversion of law to be presented below may be described as deliberated strategies devoted to give a legal appearance to actions which seek to counteract the popular sovereignty' effects, while other situations, on the other hand, consist in the naturalization of structural elements of our capitalist societies – take as an example the discussion about law and fiscal policy, about FIFA and the debates held at CTNBio as a result of the action of a series of social agents with no explicit intentionality at all. So as to constitute a figure of perversion of law, the identification of an explicit intention to make institutions immune to the social conflicts is thus not required.

In these three cases, law is summoned to certify and legitimate practices that define the limits between what is possible or not to be achieved, between what one may say that it is the effectiveness of the world as it is presented today and what a different world could be, a different potential reality. In these cases thus the perversion of law reveals its whole conservative potential by providing us with something which is the appearance of what it ought to be, i.e., the appearance of something which 'it is what it is´ for being 'lawful'. Such use of law is an evident strategy to try to neutralize any transformative action by presenting the world, which we know to be essentially changeable, as something that should be as it always has been.

3.2 Scientific controversies at CTNBio

José Renato Barcelos' master's thesis 'Controversies Surrounding the Seeds and the Fundamental Right to the Protection of Genetic and Cultural Heritage'[25] analyzed a series of decisions given by the body responsible for Biosecurity in Brazil – namely the National Technical Commission on Biosecurity (CTNBio) – regarding the requests for commercial release of Genetically Modified Organisms (GMOs).

The study aforementioned sought to identify the rationale underlying such decisions, particularly focusing on the reasoning used by the members of this deliberative board, a place where even though scientists are the majority, civil society's representatives are also there. Initially, the goal of the agency would be precisely to encompass the most diverse views on genetic research so as to give rise to decisions which would be representative of the controversies on those subjects existing in civil society.

The research focused on requests for commercial approval of approved genetically modified crops, collected on the CTNBio Internet website (www.ctnbio.org.br), particularly on the technical opinions written by the reporters of the requests for commercial release. Such documents concentrate a set of essential elements for the research aforementioned, including those which reveal to the rationale supporting the decisions made by the board.

The research analyzed 163 out of 244 technical opinions concerning requests for commercial release of GMOs in three crops (corn, soy, beans) out of five crops in total (corn, soy, beans, cotton, eucalyptus), available at the source of research. The choice of these three crops has to do with the fact that they are responsible for the bulk of the economic and productive base of the family agriculture, as well as for that of the indigenous communities, traditional populations, Quilombola communities, agrarian reform settlers, and so forth.

The research showed that in the reference period of data collection and analysis, 45 requests for commercial release of GMOs were both submitted to and granted by CTNBio. Such decisions were led by 99 different reporters and informed by the technical opinions aforementioned.

Taking into account that CTNBio is a body comprising diverse members, apparently designed to encompass various positions on the topic, it was expected that some sort of debate could be carried out among the representatives of the various social segments on a range of aspects concerning the commercial release of GMOs. Yet, that was not what the collected data showed.

25 BARCELOS, José Renato. *Controvérsias em Torno das Sementes e do Direito Fundamental à Proteção do Patrimônio Genético e Cultural*. Dissertação de Mestrado (mimeo), UNISINOS: São Leopoldo, 2016. The thesis was carried out under my mentoring within the Graduate Program in Law at UNISINOS. I would like to thank its author for writing a summary of the results achieved in his study, which served as a basis for the writing of this extract of my essay. I would like to highlight that the dialogue between this study and my categories of analysis does not necessarily imply that the author agrees with my theoretical assumptions. Such a statement still holds true for all the works mentioned from now on, except for *Daniel Zugman's* master's thesis, an author who seems to expressly embrace my theoretical framework and who also got down to autonomous readings of *Franz Neumann's* work, which in turn inspired my writings and thinking.

Firstly, it is quite difficult to assess the rationale underlying the decisions, for they bring together a huge amount of information, such as *ad hoc* technical opinions, scientific papers, foreign researches, analysis of case studies, reporters' technical opinions, miscellaneous publications, and so on an so forth. So given this wealth of information, it is not easy to identify the overwhelming reasons for decision making.

Secondly, important issues for society, such as biosecurity, precautionary conduct and risk management and analysis were brought up in several occasions, but they were rather barred by most scientists, who make up a majority which proposes voting at whim. On the other hand, society's representatives do not have power within CTNBio at all, which in turn has no other mechanisms for popular consultation or discussions with society, like the holding of public hearings.

The requests which were submitted to CTNBio for commercial release of GMOs and made by biotechnology companies were all granted, despite the denounces regarding the lack of accuracy in a number of scientific studies which served as a basis for these decisions, being the latter ventilated by society's representatives at CTNBIO and by The Brazilian Health Regulatory Agency (ANVISA) as well.

The dominant group openly advocates a science model which privileges technological performance – in this case, an agronomic performance – at the expense of the implementation of a precautionary conduct focused on biosafety and on risk management and analysis.

There is no discussion or attempt to reach consensus within CTNBio, only a mere general and fast approval of requests for approval of commercial GMOs. The crucial element for the decisions is the number of votes of the dominant group: it is not possible to notice the existence of an effective debate among the various members of CTNBio from the documentation collected.

In this context, the research suggests that CTNBio may be considered as an autarchic space, one of those figures of perversion of law. There is no way to accurately pinpoint its decision-making criteria and isolate the key reasons for the decision-making process. This majority, which in turn always decides the same way, is composed of scientists who share the same view of science and simply disregard the opposing opinions, not even bothering to refute them by making use of reasoning.

3.3 FIFA between law and force

Tiago Silveira de Faria' master's thesis '*Lex* Fifa: Autonomy and Power of a Transnational Legal Order'[26] studies FIFA's 'normativity', classifying it as a transnational legal order, a concept by *Gunther Teubner*. Such orders are characterized by the fact that they are thematically specialized and claim validity beyond the rules created by the states and public international law bodies.

26 FARIA, Tiago Silveira de. *Lex Fifa: Autonomia e Poder de uma Ordem Jurídica Transnacional*. Dissertação de Mestrado (mimeo), UNISINOS: São Leopoldo, 2016. This thesis was carried out under my mentoring within the Graduate Program in Law at UNISINOS. I would like to thank its author for writing a summary of it, which served as a basis for the writing of this extract of my essay.

The thesis shows that the *lex* FIFA is a peculiar transnational sports legal order which has both hard and soft law elements. So the study suggests that FIFA may be considered the core of a sort of 'corporate law' for relying on a comprehensive entity, formally structured to control its members and ensure mechanisms of membership and dismissal from the entity.

Also, the thesis reminds us that FIFA experiences today an unprecedented crisis, resulting from the maximization of its rationality without politicization or legitimacy intended to be universal. This assertion of autonomy without control is apparently contributing to the entity's arbitrary exercise of power, something which could be classified as a means to create an autarchy space.

The author brings sources which corroborate the idea that these transnational legal orders tend to become totalitarian indeed, becoming a means of domination which allows little room for questionings or political opposition. This tendency could be reversed by a possible democratization of such mechanisms through the constitutionalization of political rights and the decentralization of power exercise.

According to the analysis, though, the attempt of state intervention to politicize the sports subsystem or to repair the alleged perversion of law – undertaken by entities such as FIFA – has many limitations. For example, even if the Federal Supreme Court of Switzerland persists in assuming appellate jurisdiction of judgments handed down by the highest court of arbitration for sports held by FIFA, the transnational sports organizations may transfer their head offices to countries which accept greater autonomy of the *lex sportiva*.

The mobility of legal sports entities and their power to exclude states from competitions or international tournaments make this transnational legal order sovereign in the face of the states. The escape from state jurisdiction aims at protecting the subsystem. After all, FIFA's rules would end up weakened if they could be examined by the judicial courts of 209 associations affiliated to it.

When the confrontation occurs, FIFA does not enter the state arena of dispute. Its strategy is to exert a strong coercion on the litigants or third-party beneficiaries in order to make them withdraw the suit, under the threat of a series of sports sanctions. The normative conflict between state law and FIFA's rules remains on the theoretical level, since the tendency is that no court will actually decide it.

The withdrawal of suit, whose nature is dispositive, makes the state jurisdiction have its hands tied. Even though the judge of the cause may intend to continue the suit, he or she is obliged to abide by the party's decision and approve the withdrawal. FIFA is able to make use of its power even in legal proceedings in which the parties do not belong to the sports subsystem. For instance, cases in which team supporters get sentences in favor of their soccer teams and are constrained by the latter to withdraw the suits due to the fear of suffering reprisals by FIFA.

3.4 The Legal Regime of Fiscal Policy

Flávio Marques Prol's master's thesis 'Law and Economics: a Study of the Legal Regime of Fiscal Policy in Brazil',[27] accomplished at the Faculty of Law of the University of Sao Paulo, analyzed the roles played by law while establishing the Brazilian fiscal policy. The legal regime of fiscal policy is a set of principles and rules regulating the management of both public debt and expenditure. The research carried out an analysis of the functions of such a legal regime along with considerations on the role played by law when it comes to socially legitimize the fiscal policy goals.

The author argues in his thesis that the legal regime of fiscal policy was reformed in the 1990´s with a view to promoting the agenda of fiscal adjustment and sustainability of public debt in the management of fiscal policy. Such a reform entailed considerable changes mainly in four areas: 1) fiscal prerogatives were centralized in the Brazilian Federal Union to the detriment of states and municipalities; 2) there was a fiscal power centralization in the executive branch of the government rather than in the legislative branch; 3) legal restrictions concerning the management of fiscal policy were instituted, including limitations regarding personnel expenditures and public debt; and at last 4) new mechanisms for transparency and accountability of fiscal policy were created.

Contrary to what is usually argued in the literature on this theme, which tends to highlight those domestic factors which brought about the regime reform, *Prol's* research proposes an interpretation which combines domestic factors with international influences to explain the reform determinants.

The last chapter of his thesis examines the effects of the implementation of the new legal regime for fiscal policy until 2014, something which allows us to realize that although the legal rules and principles have effectively reduced the room for fiscal maneuver of states and municipalities by both centralizing fiscal powers in the executive branch of the government and creating new mechanisms for transparency and accountability of fiscal policy, it is possible to claim that there is still considerable room for discretion in the establishment and management of fiscal policy within the federal executive branch, something which goes against the reform proponents' goals from the 1990's.

In this last chapter particularly, the research suggests an approach to the concept of *autarchy spaces*. By analyzing current trends of institutional development of the legal regime of fiscal policy, the research shows that those agents dissatisfied with the policy outcomes in the 2000's nowadays put forward proposals which aim at changing the institutional spaces with power to decide on this matter.

The proposal is basically centered on the creation of what the international organizations call independent fiscal institutions, i.e., bodies which are independent of traditional political branches of the government – namely executive, legislative and judi-

27 PROL, Flávio Marques. Direito e Economia: Um Estudo do Regime Jurídico da Política Fiscal no Brasil, Dissertação de Mestrado (mimeo), USP: São Paulo, 2014. I would like to thank the author, with whom I have been discussing over the years at the Law and Democracy Center of the Brazilian Center of Analysis and Planning (CEBRAP), to provide me with a summary of his thesis, contributing thus to the writing of this essay.

ciary –, but publicly funded, being responsible for monitoring, analyzing, and suggesting fiscal policy (in some bolder proposals, by definition).

As it is possible to perceive, such an agenda of institutional reform of public finances involves central aspects of political institutions from any democratic state. The budget has always represented a prime field for political, democratic, and legal dispute. The fiscal decisions about both the number and type of public projects which should be financed have been traditionally interpreted as being part of the jurisdiction of the legislative and/or executive branches, usually via the budget.

The Brazilian case shows that the establishment of fiscal rules so as to delimit the discretion of fiscal decision makers was a first relevant moment of the reform of the fiscal policy legal regime and of those political institutions, being the creation of independent fiscal institutions the second one apparently. The democratic legitimacy of the fiscal policy management seems to be disputed precisely in the context of these institutional reforms.

One may say that the fiscal policy is legitimate either because it was politically defined and is in line with traditional democratic rules, or because it is protected from the politicians who were supposed to define it themselves – being such a fiscal policy defined according to supposedly technical criteria about the estimated public debt sustainability.

3.5 The Legal Pitfalls of the Right to the City

From her master's thesis 'Law and City: a Theoretical Approach', developed at the Faculty of Law of the University of Sao Paulo, *Bianca Tavolari*[28] has been thinking over the relationship between law and those social conflicts taking place in cities, the latter traditionally seen as a field study of urban law.

Her participation in the observation of a number of urban processes which have occurred in the city of Sao Paulo, published in the form of intervention texts on the website 'ObservaSP' (https://observasp.wordpress.com), which certainly deserve an organized and more developed rewriting, brings up interesting examples to illustrate some modalities of perversion of law.

The text 'Concession of Areas under Overpasses: Legal Pitfalls', written in partnership with *Luanda Vannuchi*,[29] analyzes in the heat of the moment a competitive bidding for costly concession of use and urban renewal or regeneration of those areas under *Julio de Mesquita Filho* overpass and its surroundings, located in Bixiga district. The notice with invitation to bid was released last year (2016), on December 28, by the so-called Sé subprefecture (that is, the office of an administrator junior to

28 I would like to thank the author for indicating her articles, which served as a basis for this extract of my essay, as well as for the conversations we have had over the years at the Law and Democracy Center of CEBRAP. Her thesis was the following: TAVOLARI, Bianca. *Direito e cidade: uma aproximação teórica*. Dissertação de Mestrado (mimeo), USP: São Paulo, 2015.

29 TAVOLARI, Bianca; VANNUCHI, Luanda. "Concessão dos baixos de viadutos: armadilhas jurídicas", Observa SP, https://observasp.wordpress.com/2016/02/18/concessao-dos-baixos-de-viadutos-armadilhas-juridicas/, consultado em 23 de fevereiro de 2016.

the city mayor, being responsible for the administration of some districts of Sao Paulo city), located downtown Sao Paulo, and it is already undergoing changes in view of its huge flaws.

According to the authors, 'the bid notice was a surprise for the artistic groups and small marketers who had already occupied the area but were not even informed of its drafting, despite maintaining close dialogue with the subprefecture'. On February 3, the invitation to bid (ITB) was announced at a pre-bid meeting advertised by the subprefecture through its website, which required both a confirmation in advance from the possible bidders who would like to attend it and a controlled entry into the auditorium.

An initial remark is worth its while here. The institutional form chosen to advertise and discuss the terms of the ITB did not favor the participation of those who were interested in and possibly affected by the bid, something which may give a clue about the fact that such a bidding process would have as a hidden goal excluding probable candidates from tendering, such as Teatro Oficina, Terreyro Coreográfico, Rede Social Bela Vista, the black movement, architecture firms, Conseg Bela Vista, and Secovi. Those are entities which regardless of the manner of advertising chosen, attended the pre-bid meeting which took place at the City Hall.

Well, although the bidding process has adopted a legal form free from apparent illegalities, it seems to be aimed at getting rid of the current occupants of the area who could be possible candidates, without giving them the possibility to intervene in the bidding process or make a tender offer of their own pursuant to the ITB. Such impossibility becomes more evident when the authors examine the bid notice and point out the highest price criterion as its structuring axis: 'this ITB aims at choosing the bid with the greatest value of private investments' (item 1.2.).

According to the authors, the quality of the bid in this case is not an indispensable criterion for its submission and approval. It is true that, as it is stated in the text, there is a municipal decree regulating the matter (No. 48378/2007) which establishes that 'Article 12. The evaluation of the bids should stick to the criterion of the best financial compensation for the areas going through the bidding process, being unacceptable that the bidder's intended use or any another technicality constitutes a criterion for the classification of the bids'. However, as the text shows, the Brazilian Federal Acquisition Law regulating bids and contracting (No. 8666/1993) allows one to choose the criteria for 'the best technique' or 'the best technique and price' in order to contract public works and engineering projects (Article 46). Similarly, the Brazilian Public Concessions Law (No. 8987/1995) establishes that the criterion for best technical bid may be applied in the evaluation of the bids (Article 15).

Additionally, the authors explain that the ITB prohibits small businesses and microenterprises to make a tender offer (item 5.3), for they would not have conditions to invest the minimum of almost R$ 13 millions, something which was also envisaged by the ITB. However, the document allows consortia comprising up to five companies to submit their bids (item 5.5.).

Well, what would be the reason to exclude small and medium-sized enterprises from the ITB, supposing that they were able to form a consortium and promise investments in the value required by the municipal government? Another relevant aspect: the ITB requires that the qualified bidders must have some management experience in

equivalent size areas (of 11,500 m2 or even more), as well as in the exploitation of business areas, parking lots and public restrooms (item 8.3.1).

It is likely that only shopping mall managements and major hotels fit such a qualified bidder profile, something which would enable the five largest shopping mall controllers running their business in the state of Sao Paulo to create a consortium so as to be awarded the government contract almost with no competition at all.

The ITB is still under discussion, though, so all these questions are open and may be revised. But I would like to emphatically repeat that it is interesting to notice that regardless of the intentions of the municipal government, this ITB may be considered as a clear example of *false legitimacy* taken the way it is. By means of an apparently universal and generic legal formulation, such a law aims at causing selective effects, being easy to identify those potential candidates who are surreptitiously excluded from the ITB (hypothetically ineligible bidders) and the ones who would possibly benefit from it (supposedly qualified bidders).

So those businesses which are already making use of the area, like the so-called Mara Café, or even grocery stores, patisseries and slaughterhouses, some of them running there for more than twenty years, could be evicted from the area, as is explicit in the extract below taken from the bid notice.

CLAUSE 40 – ON TODAY'S MARKETERS
40.1. All the rights and obligations arising from the Terms for Permission to Use (TPU), which were granted for the area to third parties from the time of signature of this BID CONTRACT, shall be subrogated to the CONCESSIONAIRE, and the latter may opt:

I – to maintain the Terms for Permission to Use (TPU) until the deadline dictated by the grantor;
II – for the mutual rescission of the Terms for Permission to Use (TPU), by agreement between the contracted parties; and
III – for the unilateral rescission by the concession grantor in case the grantees do not comply with what is established by the municipal decrees

The bidder which is awarded the government contract can opt thus for a mutual or unilateral rescission of the local marketers' contracts. The authors clarify that

> *Most of these questionings have been publicly raised at the pre-bid meeting on February 3. The lack of dialogue with the population before the release of the ITB, which occurred almost at the end of the year, and the direct relation between the total amount of money paid by the private bidder and the public interest involved in the bid were some of the aspects criticized by several of those who attended the pre-bid meeting, both those who opposed to the concession model and those who were in favor of it. (TAVOLARI e VANUCCHI, 2016)*

Taking into account a series of confused responses provided by the representatives of the City Hall who attended the pre-bid meeting, 'the director of development of SP-Urbanism, *Gustavo Partezani*, admitted that the ITB contains several flaws, being ne-

cessary thus to summon a public hearing after the Brazilian Carnival so as to review structural points of the ITB.' (TAVOLARI e VANUCCHI, 2016)

3.6 The Tax Secrecy Criteria

In his master's thesis 'Process of Legal Implementation and Tax Law: Transparency, Justification and Autarchy Spaces within Tax Secrecy", developed at FGV DIREITO SP (Sao Paulo Law School of Fundação Getúlio Vargas), *Daniel Leib Zugman* applied the concept of *autarchy space* (which I myself developed in my earlier works) to the analysis of tax secrecy.[30]

Zugman noted that 'the term 'tax secrecy' is used in such a convinced way to convey the impression that it has very clear contours'. However, its legal implementation is not subject to reconstruction in rational terms.

To begin with, the Tax Secrecy Guide, being the major interpretive act of the Federal Revenue of Brazil related to this topic, is not available to the public, in spite of the fact that this guide contains the official interpretation applied by the chief Brazilian tax administration body. *Zugman's* master's thesis analyzed 130 decisions given by the Federal Revenue of Brazil on the subject, which did not develop any kind of reasoning but rather quoted legal rules suitable for the case, such as the article 198 of the Brazilian Tax Code.

According to the author, it was not possible to 'identify a general and abstract concept which has been applied in all decisions under analysis. A formal-logical reasoning, which seeks to deduce from general and abstract propositions some solutions to concrete cases, was not identified at all'.

Zugman's thesis also shows that some authorities fall back on moral or political values to put aside what establishes the article 198 without presenting any systematized reasoning which could justify the use of such elements. Moreover, the Brazilian federal tax administration bodies have diverging opinions on the subject. There are disagreements of mainly three types: (i) among different federal tax administration bodies in relation to the same sort of information; (ii) among different federal entities about the same piece of information; and (iii) conflicting positions supported by the same body at different moments.

The author argues that in order to undo this autarchy space concerning fiscal secrecy in Brazil, it would be necessary to give publicity to the implementation of rules so as to make the interpretative process be publicly controlled as well. In *Zugman's* view, the existence of secrecy is already a sign of the potential for transformation which the publicity of such acts has.

The transparency of the tax rule implementation process implies greater sharing of expectations among the agents, performing thus the ultimate function of the law system, that is, to filter and organize expectations, making both the intersubjective connections and the limits and goals of state activities intelligible.

30 ZUGMAN, Daniel Leib. *Processo de Concretização Normativa e Direito Tributário: Transparência, justificação e zonas de autarquia do sigilo fiscal*. Dissertação de Mestrado (mimeo), Direito SP-FGV: São Paulo, 2014.

3.7 Internship or the Precariat?

The research project 'Fight for Rights: the 2014 strike organized by male and female interns of the State Court of Rio Grande do Sul (TJRS)', carried out within the Graduate Program and Basic Scientific Research Program at UNISINOS under my mentoring, aims at investigating the causes and consequences of the TJRS interns' strike for their rights, which happened late in 2014 in Rio Grande do Sul state in Brazil.

Early in November 2014, male and female interns working for the State Court of Rio Grande do Sul were told through an electronic newsletter that the court closure during holiday season (between December 20, 2014 and January 6, 2015) would not be paid to the interns, in spite of being paid to all other court workers and being something which would go against the procedure adopted in the previous holidays, when full payment of their grants was available.

So taking that into consideration, male and female interns mobilized themselves and, as they decided to paralyze their activities, they promoted public acts and even registered a claim and filed a petition for injunction against TJRS. After repeatedly refusing to review their position, the interns were demobilized, causing them the innermost feeling that they had their rights violated somehow.

It is important to point out that the intern's particular socioeconomic condition sets up some obstacles and draws attention to another case of perversion of law. As far as *Carlos Eduardo Pereira Siqueira's* analysis in this research is concerned, TJRS made decisions which could be qualified as autarchic to a certain extent.

While analyzing the social organization within the contemporary economic structures, *Guy Standing*[31] could identify precarious ways of life, establishing thus some characteristics of the so-called 'precariat' as a social class drowned in a sea of permanent insecurity relations, vulnerability, flexibility and disaggregation.[32]

> The precariat has class characteristics. It consists of people who have minimal trust relationships with capital or state, making it quite unlike the salariat. And it is has none of the social contract relationships of the proletariat, whereby labor securities were provided in exchange for subordination and contingent loyalty, the unwritten deal underpinning welfare states.[33]

In practice, the intern's workforce is used by many employers as a means of obtaining cheap dispensable labor.[34]

31 STANDING, Guy. *O precariado: a nova classe perigosa*. Belo Horizonte: Autêntica Editora, 2014.

32 We will not deal with the controversies concerning the characteristics of the 'proletariat' as being a 'class-for-itself' or not. In Brazil, *Ruy Braga* (2012) brings up such a debate, diverging from *Guy Standing*. We will limit ourselves to the concept of precariat as a result of the current economic pressure on male and female workers, which has produced ways of life whose precariousness reaches extreme levels.

33 STANDING, Guy. *O precariado*..., p. 25.

34 Idem, p. 120.

> The internships are a threat to youth in and around the precariat. Even if a payment is made, the interns are doing cheap dead-end labor, exerting downward pressure on the wages and opportunities of others who might otherwise be employed.[35]

The internship is a precarious labor relationship which secures very few rights. The Law No.11788/2008 excluded male and female interns' labor from the employment relationship hypothesis (article 3º), relieving labor liabilities from those who benefit from the intern's labor. Ephemeral relationships are built between the employers and interns because of the temporary nature of such relationships (article 11 stipulates that internship contracts are allowed to last a maximum of two years). Besides, the payment of minimum wage, Christmas bonus salary, social security benefits, among other labor rights is not ensured either.

To make things worse, there is no intern's Union for male and female law interns (at least in Rio Grande do Sul state). So they are prone to their immediate superiors' direct orders with little organization regarding the work dynamics within the state court, since each judge has a different working method, particularly within the benches, which may have quite unlike sizes and profiles all around the state.[36]

Also, there are evidences that the workforce from the Brazilian courts has been replaced by male and female interns. Research interviews conducted with some leaders of the intern's strike movement report that many benches are mostly composed of male and female workers of this kind, with cases where a civil servant's resignation gave rise to the replacement of this vacant position by an internship job.

In the situation being scrutinized within the research, the 'nature' of such a work relationship underpinned the exclusion of interns from the debate on human resources policies, and also 'backed' discriminatory treatment, for only male and female interns were not paid for the court's holiday period.

Corroborating the suspicion of workforce replacement, the data published on the TJRS website shows that 27.6% of the state court workforce (both trial and appeal courts) were composed of male and female interns, considering the total amount of judges, civil servants, and interns. Even though the article 17 of the Law No. 11788/2008, which regulates the maximum number of interns per government body, cannot be applied to undergraduate interns (as it is stipulated in § 4º), it is worth to perceive the impact of the huge representativeness of the internship relationships. Even the most traditional doctrine considers that:

> The idea of establishing the maximum number of interns aims at avoiding the transformation of permanent job positions into temporary internship ones, where no employment relationship is established, at the same time labor costs are decreased. Also, it intends to prevent the company from replacing permanent workforce with interns, with lower labor costs.[37]

35 Idem, p. 122.

36 In case this analysis encompasses the internship in law firms, it seems reasonable to claim that such an organization will be even worse, for they have different profiles and particular work cultures.

37 MARTINS, Sérgio Pinto. *Direito do Trabalho*. São Paulo: Editora Atlas, 2012, p. 173.

These considerations are important because they show us to what extent the special subordinated position of male and female interns is related to structural obstacles actually set up by the TJRS administration. It is possible to claim that a broadening of the autarchy space is taking place here, since state regulation is leaving room for the unilateral will of TJRS, which is functioning as a sort of private entity in this case.

Much of the TJRS workforce is out of the public control via administrative law, being thus regulated by private law *nota bene*, even when public agencies are the interested ones. So male and female workers who were supposed to carry out their tasks under the protection of public law are in fact subject to both a legal regime with less rights and unilateral and arbitrary decisions made by government agencies.

In this condition, if we accept *Neumann's* view that the state comprises the strained and complex relationship between sovereignty and the rule of law,[38] a sort of imbalance between these elements will take place so that the sovereign power with no social control will then prevail. According to the author, 'every institution is called sovereign when it has non-delegated and unlimited power to issue general rules and single commands (decisions)'.[39]

As far as such a state power is concerned, currently the state activities are usually divided into three basic branches of government: the legislative, the executive, and the judicial ones. Hence, there would be control mechanisms to avoid the concentration of power by a body or person, taking into account *Montesquieu's* classical formulation on the tripartite system in particular. However, the TJRS judges – especially those holding the highest positions – in the case we are studying ended up exercising judicial, legislative and executive functions in relation to the same case.

Firstly, they unilaterally established the legal rule which would be applied to the payment of intern's compensation during the court closure in the holiday season. They created by means of a resolution of the 'Commission for Internship Supervision' the regulation establishing the court closure between December 20 and January 6, bearing in mind the pay cut already.

Secondly, once a petition for injunction was actually filed by the interns so as to invocate the jurisdiction, TJRS proceeded as the judge of the case, approving the established regulation in a preliminary injunction and then in a final decision later on. Thirdly, TJRS promoted the implementation of the measures in a self-executing way, accomplishing the abstract provision of the legal rule in a factual-social level.

Considering such a concentration of functions in the same court, the judiciary was in practice a review-level of its own decision. So as to question the court proceeding, the same court was invocated, something which reveals on the one hand the excessive presence of the sovereign power, but on the other hand a shy incidence of law. According to *Neumann*,

> In a sociological sense, an institution is called sovereign if it has not only legal rights of this kind [non-delegated and unlimited power], but also if it has both the ability to maintain the legal rules and commands issued through these rights. The-

38 NEUMANN, Franz L. *O Império do Direito. Teoria política e sistema jurídico na sociedade moderna*. São Paulo: Quartier Latin, 2013 a, p. 38.

39 Idem, ibidem, p. 69.

refore, in a rather sociological sense of sovereignty, it is included an element of both law and power.[40]

In the complexity of the relationship between sovereignty and the rule of law, even if the state action has to be coated in juridicity, the power to subordinate may have just a formal reflection in legislation. This is because, in circumstances such as the one presented in this master's thesis, it will be legal what the court declares so, with no real possibility of control of such an act by society or any another power, setting up thus a case of *autarchy space*.

4. Final Remarks

One of the main roles of the critical legal research is to watch state power in order to demand justifications from it, as well as identify the moments when it tends to decide autarchically, hiding its real goals and excluding society's influence from it. Therefore, the critical researcher aims at both denouncing situations where the rule of law is evoked as a form with no connection with the nature of the action carried out, and identifying decision-making spaces with no rational criteria and movements aiming at avoiding the influence of the social conflicts on the formulation of legal rules.

So as to pinpoint this sort of situation, it is necessary to pay attention to the institutional aspect, i.e., it is crucial to rebuild the functioning of the institutions in details in order to recognize its manner to either react or try to stay immune to the public debate expressing the conflicts within society. This form of institutional analysis has been conducted mainly by a number of male and female researchers in law, such as those ones aforementioned.

Performing this task means going beyond the literal meaning of law and seeking to understand its sense in the context whereby it is being evoked, bearing in mind the interests, effects and actions of the diverse social agents involved in conflicts. So the use of varied research methodologies to cope with this context is taken for granted.

Regardless of their affiliation or not to the Critical Theory field or even to my conceptual construct, all the master's thesis aforesaid sought to elucidate the underlying rationale of a series of institutions which wield power within and out of the state, by comparing its visible side, its legally regulated goals, with its effective practice, reconstructed from different research sources.

For example, the study about CTNBio compared the aims established by law regarding the performance of such an institution with its effective practice, which was rebuilt particularly from technical opinions so as to show how the practice of this body does not achieve its objective to rationally discuss the authorization of research on GMOs with the participation of civil society.

Likewise, by means of the reconstitution of decisions and the examination of public documents, the research on tax secrecy shows in several different ways how the justification of the meaning and those limits of secrecy cannot be rebuilt rationally, being

40 NEUMANN, Franz L. *O Império do Direito. Teoria política e sistema jurídico na sociedade moderna*. São Paulo: Quartier Latin, 2013 a, p. 69.

always made *ad hoc* and with no explicit reasons, something not expected in a rule of law.

So, as it was previously stated, all the analyses aforementioned provide us with paradigmatic examples of what I call *perversion of law* in its figures, that is, *autarchy space* and *false legality*, inviting critical thinking about the criteria underlying the justification of decisions made by institutional bodies which evoke the rule of law as a criterion of legitimacy.

It is no longer a matter of determining the rationale of law, or rather its democratic or autarchic character (as I claimed in my terms), based on transcendent values placed beyond the positive law and in a typical procedure of natural law. Actually, it has to do with comparing the promises made by the rule of law and its institutions with its effective practice.

In *Franz Neumann's The Rule of Law*, two meanings assigned to law are distinguished, that is, the political and the rational ones. In its political meaning, law is everything that emanates from the will of a given sovereign power, i.e., a power capable of imposing its rules even when confronted with the recalcitrant citizens' will. As far as its rational meaning is concerned, law may be incompatible with some of the sovereign's commands, for what is at stake here is its universal character, i.e., its ability to respond to the interests of all social groups in conflict.

It is clear that achieving the very association between law and those aspirations of society is an impossible and undesirable task. There will always be new social interests arising from the public sphere, there will always be new social groups emerging and mobilizing against something. So trying to make society, state and law match within a context like this one means resorting to authoritarian models of domination. Also, it will not always be possible to reconcile the diverse demands for rights in view of the budget limits of each state, the limits of state sovereignty influence and the necessary clashes among the various social agents' demands.

That said, the role of democracy and that of the critical researcher is to contribute to decrease the distance between law and society by identifying and voicing the social interests which are not being taken into account by the formal institutions, ensuring openness and the capacity to respond of these institutions.

Furthermore, in another analytical perspective and considering the social agents in conflict, it is part of the role of the Critical Theory to think over possible institutional alternatives which could be able to include, figure and reconcile the diverse social demands in conflict, bearing in mind that the task of trying to reconcile demands is a conflicting social practice which may rely upon the collaboration of Critical Theory, which in turn will not obviously intend to have the final word on the subject, at the risk of resting upon metaphysics.

In any case an essential part of such tasks lies in the research and identification of the figures of perversion of law in its different modalities, both in the cases aforementioned and in so many others which are still to be discovered.

References

BARCELOS, José Renato. Controvérsias em Torno das Sementes e do Direito Fundamental à Proteção do Patrimônio Genético e Cultural. Dissertação de Mestrado (mimeo), UNISINOS: São Leopoldo, 2016.

BRAGA, Ruy. A política do precariado: do populismo à hegemonia lulista. São Paulo: Boitempo/ Programa de Pós Graduação em Sociologia – USP, 2012.

DIPPEL, Horst. História do Constitucionalismo Moderno. Novas Perspectivas. Lisboa: Fundação Calouste Gulbekian, 2007.

FARIA, Tiago Silveira de. Lex Fifa: Autonomia e Poder de uma Ordem Jurídica Transnacional. Dissertação de Mestrado (mimeo), UNISINOS: São Leopoldo, 2016.

GOHN, Maria da Glória. Manifestações de Julho de 2013 no Brasil e nas Praças dos Indignados no Mundo. São Paulo: Vozes, 2014.

MARTINS, Sérgio Pinto. Direito do Trabalho. São Paulo: Editora Atlas, 2012.

NEUMANN, Franz L. O império do direito. Teoria política e sistema jurídico na sociedade moderna. São Paulo: Quartier Latin, 2013 a.

____."O conceito de liberdade política". Cadernos de Filosofia Alemã. Crítica e Modernidade, v. 22, pp. 107-154, 2013 b.

____. "A mudança de função da lei no direito da sociedade burguesa". Revista Brasileira de Estudos Políticos, Belo Horizonte, n. 109, pp. 13-87, jul./dez. 2014.

____. "Angústia e Política", Dissonância: Revista de Teoria Crítica, v. 1, n. 1, pp. 104-154, 2017.

NOBRE. Marcos. Imobilismo em Movimento: Da democratização ao governo Dilma. São Paulo: Companhia das Letras, 2013.

PROL, Flávio Marques. Direito e Economia: Um Estudo do Regime Jurídico da Política Fiscal no Brasil, Dissertação de Mestrado (mimeo), USP: São Paulo, 2014.

RODRIGUEZ, José Rodrigo. "As figuras da perversão do direito: para um modelo crítico de pesquisa jurídica empírica". Revista Prolegómenos Derechos y Valores, v. 19, n.37, pp.99-124, 2016.

_____. ""Utopias" institucionais antidiscriminação. As ambiguidades do direito e da política no debate feminista brasileiro", *Cadernos Pagu*, n. 45, julho-dezembro, pp.297-329, 2015.

_____. "Luta por direitos, rebeliões e democracia no século XXI: algumas tarefas para a pesquisa em direito". Em: STRECK, Lênio L., ROCHA, Leonel. S. Rocha; ENGELMANN, Wilson (orgs.). Constituição, sistemas sociais e hermenêutica. Porto Alegre: Livraria do Advogado, 2015.

_____. "Inverter o espelho: o direito ocidental em normatividades plurais", em: REIS, Rossana Rochas (org.). Política de direitos humanos. São Paulo: Editora Hucitec, 2010.

_____. Fuga do Direito: Um estudo sobre o direito contemporâneo a partir de Franz Neumann. São Paulo: Saraiva, 2009.

ROUSSEAU, Jean-Jacques. Do Contrato Social. São Paulo: Penguin/Companhia das Letras, 2011.

STANDING, Guy. O precariado**:** a nova classe perigosa. Belo Horizonte: Autêntica Editora, 2014.

TAVOLARI, Bianca. Direito e cidade: uma aproximação teórica. Dissertação de Mestrado (mimeo), USP: São Paulo, 2015.

TAVOLARI, Bianca; VANNUCHI, Luanda. "Concessão dos baixos de viadutos: armadilhas jurídicas", Observa SP, https://observasp.wordpress.com/2016/02/18/concessao-dos-baixos-de-viadutos-armadilhas-juridicas/, consultado em 23 de fevereiro de 2016.

TEUBNER, Gunther. "A Bukowina Global sobre a Emergência de um Pluralismo Jurídico Transnacional", In: Revista de Ciências Sociais e Humanas, v. 14, n. 33. Piracicaba: Impulso/Unimep, 2003.

_____. Gunther. Constitutional Fragments: Societal Constitutionalism and Globalization. Oxford: Oxford University Press, 2012.

VARELLA, Marcelo D. Internacionalização do direito: Direito internacional, globalização e complexidade. Tese de Livre-Docência em Direito Internacional – USP. São Paulo, 2012. Disponível em: <https://www.uniceub.br/media/186548/MVarella.pdf>. Acesso em: 03 nov. 2015.

ZUGMAN, Daniel Lieb. Processo de Concretização Normativa e Direito Tributário: Transparência, justificação e zonas de autarquia do sigilo fiscal. Dissertação de Mestrado (mimeo), Direito SP-FGV: São Paulo, 2014.