RESENHA DA *TEORIA CRÍTICO-ESTRUTURALISTA DO DIREITO COMERCIAL*, DE CALIXTO SALOMÃO FILHO

REVIEW OF *TEORIA CRÍTICO-ESTRUTURALISTA DO DIREITO COMERCIAL*, BY CALIXTO SALOMÃO FILHO, 2015

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In his *Critical-Structuralist Theory of Commercial Law*, Calixto Salomão Filho, Professor of Commercial Law at the University of São Paulo (USP), seeks to rescue (and renew) a tradition of the critical thinking in Commercial Law. According to his reports, this tradition would have arisen at USP's Faculty of Law in the 1970s and 1980s, through the works of authors such as Modesto Carvalhosa and Fábio Konder Comparato, who respectively (critically) analyzed the draft law and the subsequent law of the partnerships – Law 6,404/76 – and the social function of production assets.

In the theory supported by Salomão Filho, the resumption and renewal (based on innovations and reformulations) of the idea of a critical thinking in Commercial Law are associated with the theoretical-methodological framework of legal structuralism, presented by the author as an alternative to

Law (in particular, the Commercial Law)[1]. Which, in his words, is in a state of lethargy that has lasted for more than 300 years, a period in which it has become much more a tool for the maintenance of existing structures (economic, especially), than as a transformative Law of reality.

Taking a look directly at the law, the author starts from the (critical, repeat) statement that this may be, lately, the branch of a social knowledge that "more closely and more intensely feels and submits itself to the designs of other social sciences" (SALOMÃO FILHO, 2015, p. 253) – Economy mainly. According to this view, the Law has been passively assisted in the formation (and thus contributed to the historical maintenance) of destabilizing economic structures of the legal system, "precisely because they lead to the determination of norms of conduct by standards of power and not by values".

His reactions to these conceptions (which he points out as dominant in Law in general) are particularly focused on the two branches of Law that deal more directly with the organization and legal discipline of economic activity, that is, Economic Law and Commercial Law. Such disciplines in general (and some of their institutes in particular), marked by the determining force of economic power structures formed throughout history, are then placed in a critical perspective, connected by a central point: recognition in both cases, the need for structural changes based on a review of the functioning of the economic system through Law[2].

Some of these destabilizing structures denounced by Salomão Filho (2015), associated to the conservatism that allows them to maintain the support beams, are particularly present in contemporary Commercial Law – in Brazilian law, inclusively –, a field of knowledge in which it is possible to observe the acceptance and even the appreciation of economic power. This discipline of the legal science, the author reports, has been marked by a gloomy picture that is characterized as a real dysfunction, in that simultaneously: i) "it is associated with the maintenance of structures and conservatism, even at a time when the capitalist system

[1] According to the author (Salomão Filho, 2015, pp. 259-261), the option of using the term *structuralism* refers more to a content reason (identification, criticism and transformation of economic and legal structures associated with power relations and which lead to the determination of legal rules by power rather than by values) than to a historical reason (link to an earlier so-called theory). The proposed structuralism is opposed to the systems theory, meaning that it does not see in Law (and in Law theory) a self-referential and programmable system based solely on its own principles and internal functioning. From this perspective, identifying, criticizing and proposing to transform such structures does not imply building a system.

[2] It should be noted here that the proposal (Law transforming economic and social reality) is diametrically opposed to perspectives such as those outlined by Rachel Sztajn (2010), for whom Law only recognizes and validates changes, but does not produce them.

so blatantly calls for fundamental changes"; and ii) "has been reduced to a pragmatic sameness in which buzzwords of businessmen are incorporated to the legal environment and reproduced with legal principles that must be constantly repeated" (SALOMÃO FILHO, 2015, p. 7).

Because of these findings, Salomão Filho seeks to redeem (as he points out himself in the introduction of his *Critical-Structuralist Theory of Commercial Law*) and to renew a perspective of knowledge in which Commercial Law gains new significance and meaning, positioning itself not as a passive observer and receiver of data of the economic-business daily, but as an instrument of economic and social transformations. It is also concerned with the transformation of economic data into values and thus influencing one's own knowledge of business economic life.

The origins and foundations of the state of legal lethargy – due to its submission to economic power – are explained by the author in a brief historical course, which goes back to the emergence of the perspective of the legal rationalism, with its transition to the legal positivism.

Salomão Filho (2015, p. 29) begins its analysis by the so-called internal rupture phase of the legal science, originating from the epistemological movement known as legal rationalism. This rupture, which had its most influential representative in Samuel Pufendorf, can be understood as a split between moral and law, which operates when its foundation rests on logic, not on some religious or ethical element. In this way, there is a rational and self-integrated system of discipline in social relations.

The author points out that these two characteristics, the pursuit of scientific rationality and self-integration, have since followed the legal legal systems of the West (codified law) to the present day. In the first case, the creation and interpretation of Law fundamentally objectify the logical demonstration, replacing the exegetical-historical method. The second characteristic is the belief that such a (logical) method makes possible the solution of all situations of social life (SALOMÃO FILHO, 2015, p. 29).

This movement of concentration of law around logical-formal schemes, together with the affirmation of the self-sufficiency of the legal system, would have led to its closure around itself, paving the way for the emergence of dogmatic positivism in the 19th century, established mainly in Germany through Pandectistic. In the rationalist-pseudo-system, "logic replaces the concept of justice, determining it" (SALOMÃO FILHO, 2015, p. 29).

With the promulgation of the German Civil Code, the *Bürgerliches Gesetzbuch* (BGB, 1900), the so-called juridical positivism (already established in other countries, notably in France) is consolidated

and, in the words of Salomão Filho (2015, pp. 29-30), starts to dominate the civil law scene, further reinforcing "logical and rational elucubrations, increasingly distant from values and its principles", and paves the way for "submission of the Law to the technical purposes of other sciences".

From that point on, "the affirmation and prevalence of the positivist movement have enormous effect on the affirmation and prevalence of the idea of an economic power in the field of law" (SALOMÃO FILHO, 2015, p. 30). Because of this logic of exacerbate rationality, law is now seen as an instrument for achieving economic objectives.

In fact, the contours of the theory developed by Professor Calixto Salomão Filho (2015)[3], due to his critical-structuralist profile and foundation, supports the elaboration of studies and reflections which aims the revision of traditional conceptions rooted in Brazilian Commercial Law. As a consequence, it presents itself as a base for sustaining critical reflections and, more importantly, for constructing alternative propositional contents, always directed at the transformation of structures in the bulge from which it is possible to detect striking features of the influence of economic determinisms in Law.

According to Salomão Filho (2014), the contribution of Law, with regard to the implementation of a progressive and transformative agenda of economic and social reality, depends on direct legislative intervention on certain economic structures (and on the legal institutions that protect them). Not in the sense of an attempt to plan or define the results of the economic process (which would be useless), but rather to protect values that are instrumental in building a broader model of a due economic process, economic and social sense (and not only to the protection of the interests of those who exercise control over the goods of production).

From this perspective of method change, one of the proposals outlined by Salomão Filho (2014) lies in the elaboration or identification of *declaratory interests devices*, for the proper consideration and balancing of the interests involved by the application of Commercial Law. It is an intervention of a structural nature, in order to establish certain interests that must be respected or at least considered in the legal discipline of Commercial Law.

[3] Here, the expression *theory* inserted in the title of the work is repeated. According to the author's own exposition, although it is not a work that sought the completeness of themes, the inclusion of this term in the title is justified by the methodological cohesion around the criticism of structures that obstruct or limit the changes in Commercial Law.

The critical-structuralist view of Salomão Filho is based on an epistemological matrix of thought based on a conception in which the Law is understood as an instrument of economic and social transformations, driven by a *juridical theory of economic and social knowledge*. In this sense[4], the democratically established values of society must influence both the processes of building normative choices (including the configuration or reconfiguration of legal institutes) as well as the interpretations related to Commercial Law[5].

In the *legal theory of economic and social knowledge* the *declaratory interest devices* are presented as a third type or category of legal norm (SALOMÃO FILHO, 2015), alongside traditional principles and rules[6] (according to the classification most commonly adopted by the doctrine).

In this new classification the juridical norm gender would then be composed of principles and rules[7], and declaratory interest devices.

The declaratory devices, in this perspective, consist of a new normative instrument aimed at enumerating (recognition and protection) of interests involved by a certain principle or rule. In addition, the so-called norms-devices are also present as determinants for the interpretation of the others, that means, the norms-principles or rules-rules of Commercial Law related to them (SALOMÃO FILHO, 2014).

This means that, in addition to enumerating the interests involved, such declaratory devices, along with their principles, must also serve as interpretative guides for the rest of the specific legislation on certain areas[8]. According to this reasoning, these legal norms should not be of a general nature – edited for application in a generality of areas (e.g., general theory of the company and theory of credit titles, simultaneously and indistinctly) – being their utility proportional to the degree of specificity (e.g., general theory of the

[4] Within the classification presented by Norberto Bobbio (2006), it is defended the framing of *the juridical theory of the economic and social knowledge* as a philosophical – value and deontological – conception, because it is endowed with a teleological structure that understands Law as an order destined to certain value-ends (in this case, economic and social transformations).

[5] Therefore, economic, not legal instrumentalism is defended here.

[6] As Virgílio Afonso da Silva (2003, p. 607) alerts, "the concept of a legal norm and the discussion of its species are themes of endless controversy, and jurists seem to have great difficulty in getting at least close to some common denominator the object of their discipline".

[7] Regarding the classification of norms as gender, of which the rules and principles would be species, see TAVARES (2010, p. 406). It is also worth noting the position of Lenio Luiz Streck (2012), for whom standards consist of an interpretative concept and normativity emerges, in fact, from a factual framework constituted by rules and principles.

[8] Salomão Filho (2014) expresses an interesting position with regard to how these measures are implemented (declaratory devices), suggesting that they occur not through a code, but through specific regulations or laws, containing only the applicable provisions and principles.

company, only) that can be achieved (SALOMÃO FILHO, 2014) in its normative texts and contents[9].

Professor Salomão Filho did not advance in the deepening of specific questions about all the different subareas of Commercial Law. On the contrary, in the introduction of his work he emphasized that it was characterized by general notes, and that it was not exhausted there. The idea announced in its title, *Critical-Structuralist Review…*, ends up being directed more to a general project of recovery of the tradition and introduction to innovation in the critical thinking in Commercial Law and, in parallel, to the consolidation of a school with present, past and future.

It is presented as a theoretical-methodological basis for critical, reflexive and propositional reasoning, aimed at deepening the studies and understandings on delimited themes whose main purpose lies in the construction of a Commercial Law simultaneously organizing the society and transforming its structures (criticizing, revising and transform). Therefore, Law understood as an instrument of economic and social transformations.

In this trajectory of structuralist criticism and revision of institutes of commercial law, strict adherence to legal dogmatics (here understood as a strictly juridical and formalist perspective) is not accepted, nor it is accepted the interdisciplinary integration of Law solely for the economy (which has in many ways resulted in the pure and simple assumption of economic lessons and, ultimately, in the determination of standards of conduct based on standards dictated by economists).

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[9] On the relation (and the differences) between text and norm, it is suggested reading STRECK (2014).

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