PANORAMA OF BRAZILIAN LAW

"A step towards realizing a long standing dream: to provide the world a window to Brazilian law"

LA CONDITION DE L'ÉTRANGER DANS LA CONSTITUTION BRÉSILIENNE DE 1988 Carmen Tiburcio

LE NEOCONSTITUTIONNALISME AU BRÉSIL: VERS L'EFFECTIVITE DES DROITS SOCIAUX ET LA LUTTE CONTRE LA CORRUPTION

George Sarmento

L'IMPORTANCE DU MULTICULTURALISME DANS LES CONSTITUTIONS DES ÉTATS LATINS ET L'ABOUTISSEMENT D'UN NOUVEAU CONSTITUTIONALISME

Fernanda Marcos Kallas

LA QUESTION DES DROITS HUMAINS COMME PRECEPTES OCCIDENTAUX Vivianny Kelly Galvão

MAJOR TRANSFORMATIONS IN CONTEMPORARY LAW AND THE TEACHINGS OF ROBERT ALEXY Luís Roberto Barroso

IDENTITY IN LAW: THE SECOND MEDICAL USE AND THE DRUGS FOR NEGLECTED DISEASES
Marcos Vinício Chein Feres

NEW TRENDS IN MIGRATORY AND REFUGEE LAW IN BRAZIL: THE EXPANDED REFUGEE DEFINITION Catherine Tinker - Laura Madrid Sartoretto

ECONOMIC CRISIS, DEGLOBALIZATION AND HUMAN RIGHTS: THE CHALLENGES OF THE COSMOPOLITAN CITIZENSHIP IN THE VIEW OF DISCOURSE THEORY

Eduardo Carlos Bianca Bittar

THE ROLE OF INTERNATIONAL LAW WITHIN NATIONAL LEGISLATION ON TOBACCO CONTROL Luis Renato Vedovato

BUSINESS PURPOSE AS A TAX AVOIDANCE CONDITION IN CORPORATE REORGANIZATIONS Marciano Buffon - Isaías Luz da Silva

THE APPLICATION OF THE HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION OF 1993 IN BRAZIL Marcos Vinicius Torres Pereira - Lara Oliveira Goncalves

FREEDOM OF PRESS AND JUDICIARY CENSORSHIP IN BRAZIL Marco Aurelio Peri Guedes

PATENTS ON GENE SEQUENCES

Clarisse de la Cerda

THE STATUTE OF THE CITY AND THE MASTER PLAN: INSTRUMENTS FOR SUSTAINABLE CITIES Gabriela Soldano Garcezs - Mariana Vicente Braga Carmello

CONSTITUTIONALISM AND JUDICIALIZATION OF POLITICS: THE "JUDICIAL" RIGHT TO HEALTHCARE IN BRAZIL

Bruno Irion Coletto - Pedro da Silva Moreira

RIGHTS, DEMOCRACY AND DEVELOPMENT: THE JUDICIAL SYSTEM'S ROLE IN DEVELOPING COUNTRIES

Vivian Maria Pereira Ferreira - Natalia Langenegger

THE BRAZILIAN 'ECOLOGICAL-ICMS': A PES SCHEME BASED ON DISTRIBUTION OF TAX REVENUE Matheus Linck Bassani

Panorama of Brazilian Law

Panor. Braz. law Year 3, Nos 3-4, 2015

Rua Pasteur, 181/102 - Santa Helena 36015-420 Juiz de Fora - MG Brazil

www.panoramaofbrazilianlaw.com

HONORARY EDITORS

Prof. Jacob Dolinger, Universidade do Estado do Rio de Janeiro, Brazil Prof. Carmen Tiburcio, Universidade do Estado do Rio de Janeiro, Brazil

EDITORS-IN-CHIEF

Prof. Raphael Carvalho de Vasconcelos, Universidade do Estado do Rio de Janeiro, Universidade Federal Rural do Rio de Janeiro , Tribunal Permanente de Revisão - MERCOSUL, Brazil

Prof. Bruno Rodrigues de Almeida, Universidade Federal Rural do Rio de Janeiro, Brazil

DEVELOPMENT EDITORS

Ruth Navarro, Tribunal Permanente de Revisión - MERCOSUR, Paraguay

ONLINE SUPPORT

Manuel Fernández, Tribunal Permanente de Revisión - MERCOSUR, Paraguay

ISSN 1075-1343 (print) ISSN 2318-1516 (online)

Year 3, Nos 3-4, 2015

Copyright in the collection of articles comprising the Panorama of Brazilian Law is held by the editors of Panorama of Brazilian Law. Isolated material on these pages is copyright Panorama of Brazilian Law or reproduced with permission from other copyright owners. It may be downloaded and printed for personal reference, but not otherwise copied, altered in any way or transmitted to others (unless explicitly stated otherwise) without the written permission of the editors of Panorama of Brazilian Law. With respect to the online issue, hypertext links to other Web locations are for the convenience of users and do not constitute any endorsement or authorization by Panorama of Brazilian Law. For further information please contact raphaelvasconcelos@panoramaofbrazilianlaw. com.The opinions expressed in this publication are those of the authors and do not necessarily reflect the views of the editors.

EDITORIAL BOARD

Prof. Augusto Jaeger Junior, Universidade Federal do Rio Grande do Sul, Brazil Prof. Cláudia Lima Marques, Universidade Federal do Rio Grande do Sul, Brazil Prof. Cláudio Michelon, University of Edinburgh, United Kingdom Prof. Colin Crawford, Tulane University, United States Prof. Conrado Hubner Mendes, Universidade de São Paulo, Brazil Prof. Deo Campos Dutra, Pontifícia Universidade Católica do Rio de Janeiro, Brazil Prof. Diego P. Fernández Arroyo, Institut d'Études Politiques de Paris - Sciences Po, France Prof. Fabrício Bertini Pasquot Polido, Universidade Federal de Minas Gerais, Brazil Prof. Gabriel Valente dos Reis, Universidad de São Paulo, Brazil Prof. Gustavo Vieira da Costa Cerqueira, Université de Strasbourg, France Prof. Iacyr de Aguilar Vieira, Universidade Federal de Vicosa, Brazil Prof. Jamile Bergamaschine Mata Diz, Universidade Federal de Minas Gerais, Brazil Prof. João Maurício Adeodato, Universidade Federal de Pernambuco, Brazil Prof. John H. Rooney, University of Miami, United States Prof. Luiz Edson Fachin, Universidade Federal do Paraná, Brazil Prof. Luís Roberto Barroso, Universidade do Estado do Rio de Janeiro / Supremo Tribunal Federal, Brazil

Prof. Marcelo da Costa Pinto Neves, Universidade Nacional de Brasília, Brazil
Prof. Marcos Vinício Chein Feres, Universidade Federal de Juiz de Fora, Brazil, Brazil
Prof. Marilda Rosado, Universidade do Estado do Rio de Janeiro, Brazil
Prof. Nadia de Araujo, Pontifícia Universidade Católica do Rio de Janeiro, Brazil
Prof. Paulo Borba Casella, Universidade de São Paulo, Brazil
Prof. Rachel Sztajn, Universidade de São Paulo, Brazil
Prof. Véronique Champeil-Desplats, Université de Paris Ouest - Nanterre La Défense, France
Prof. Vicente Marotta Rangel, Universidade de São Paulo, Brazil
Prof. Wagner Menezes, Universidade de São Paulo, Brazil
Prof. Will Kymlicka, Queen's University, Canada
Prof. Zeno Veloso, Universidade Federal do Pará, Brazil

AD HOC CONSULTANTS AND PEER REVIEW BOARD

The following legal scholars are members of the board of ad hoc consultants of the Panorama of Brazilian Law. They have been selected among the 87 reviewers currently enrolled in the site of the electronic magazine.

Prof. Ana Carolina Marossi Batista, Universidade de São Paulo, Brazil Prof. Carolina Araújo de Azevedo, University of Oklahoma, United States Prof. Daniel Giotti de Paula, INTEJUR, Brazil Prof. Danielle Campos, Ludwig-Maximilians-Universität München, Germany Prof. Ely Caetano Xavier Junior, Universidade do Estado do Rio de Janeiro, Brazil Prof. Emília Lana de Freitas Castro, Universität Hamburg, Germany Prof. Flavia Machado Cruz, Universidade Federal Rural do Rio de Janeiro, Brazil Prof. Henrique Sartori de Almeida Prado, Universidade Federal da Grande Dourados, Brazil Prof. Henrique Weil Afonso, Pontifícia Universidade Católica de Minas Gerais, Brazil Prof. Joseli Fiorin Fiorin Gomes, UniRitter, Brazil Prof. Leonardo Ostwald Vilardi, Pontifícia Universidade Católica do Rio de Janeiro, Brazil Prof. Maira Fajardo Linhares Pereira, Universidade Federal de Juiz de Fora, Brazil Prof. Orlando José Guterres Costa Jr, Universidade do Estado do Rio de Janeiro, Brazil Prof. Pedro Baumgratz Paula, Universidade de São Paulo, Brazil Prof. Ricardo Campos, Goethe Universität Frankfurt am Main, Germany Prof. Sergio Maia Tavares, Universidade Federal Fluminense, Brazil Prof. Tulio Louchard Picinini Teixeira, UNIFEMM, Brazil

TABLE OF CONTENTS

EDITORIAL NOTE

EDITORIAL NOTE 7
LA CONDITION DE L'ÉTRANGER DANS LA CONSTITUTION BRÉSILIENNE DE 1988 Carmen Tiburcio
LE NEOCONSTITUTIONNALISME AU BRÉSIL : VERS L'EFFECTIVITE DES DROITS SOCIAUX ET LA LUTTE CONTRE LA CORRUPTION 38 George Sarmento
L'IMPORTANCE DU MULTICULTURALISME DANS LES CONSTITUTIONS DES ÉTATS LATINS ET L'ABOUTISSEMENT D'UN NOUVEAU CONSTITUTIONALISME 65 Fernanda Marcos Kallas
LA QUESTION DES DROITS HUMAINS COMME PRECEPTES OCCIDENTAUX Vivianny Galvão
MAJOR TRANSFORMATIONS IN CONTEMPORARY LAW AND THE TEACHINGS OF ROBERT ALEXY Luís Roberto Barroso
IDENTITY IN LAW: THE SECOND MEDICAL USE AND THE DRUGS FOR NEGLECTED DISEASES 124 Marcos Vinício Chein Feres
NEW TRENDS IN MIGRATORY AND REFUGEE 143
LAW IN BRAZIL: THE EXPANDED REFUGEE DEFINITION Catherine Tinker - Laura Madrid Sartoretto 143
ECONOMIC CRISIS, DEGLOBALIZATION AND HUMAN RIGHTS: THE CHALLENGES OF THE COSMOPOLITAN CITIZENSHIP IN THE VIEW OF DISCOURSE THEORY Eduardo C. B. Bittar
THE ROLE OF INTERNATIONAL LAW WITHIN NATIONAL LEGISLATION ON TOBACCO CONTROL 197

Luís Renato Vedovato

BUSINESS PURPOSE AS A TAX AVOIDANCE CONDITION IN CORPORATE REORGANIZATIONS 222	
Marciano Buffon - Isaías Luz da Silva	
THE APPLICATION OF THE HAGUE CONVENTION ON PROTECTION OF CHILDRENAND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION OF 1993 IN BRAZIL 254	
Marcos Vinicius Torres Pereira - Lara Oliveira Gonçalves	
FREEDOM OF PRESS AND JUDICIARY CENSORSHIP IN BRAZIL 276 Marco Aurelio Peri Guedes	
PATENTS ON GENE SEQUENCES 301	
Clarisse de la Cerda	
THE STATUTE OF THE CITY AND THE MASTER PLAN: INSTRUMENTS FOR SUSTAINABLE CITIES 342 Gabriela Soldano Garcezs - Mariana Vicente Braga Carmello	
CONSTITUTIONALISM AND JUDICIALIZATION OF POLITICS: THE "JUDICIAL" RIGHT TO HEALTHCARE IN BRAZIL 358 Bruno Irion Coletto - Pedro da Silva Moreira	
RIGHTS, DEMOCRACY AND DEVELOPMENT: THE SYSTEM'S ROLE IN DEVELOPING COUNTRIES Vivian Maria Pereira Ferreira - Natalia Langenegger JUDICIAL 394	
THE BRAZILIAN 'ECOLOGICAL-ICMS': A PES SCHEME BASED ON DISTRIBUTION OF TAX REVENUE Matheus Linck Bassani 421	
EDITORIAL POLICY AND SUBMISSION GUIDELINES 440	

A FINAL FOREWORD

"A Panorama of Brazilian Law' is a step towards realizing a long standing dream: To provide the world with a window to Brazilian law".

These were the concluding words of the Foreword I wrote for the collection of essays on various fields of Brazilian law, as co-editor of the "Panorama of Brazilian Law", together with Professor Keith S. Rosenn of the University of Miami, which was published in 1992.

21 years have passed and now a group of the next generation of Brazilian law scholars has undertaken to resuscitate and keep alive the idea of the Panorama by means of a permanent electronic journal.

Professor Carmen Tiburcio, who contributed to the original Panorama and later substituted me as head of the Private International Law Department of the Rio de Janeiro State University, together with Raphael Carvalho de Vasconcelos and Bruno Rodrigues de Almeida, both professors of international law at the UFRRJ are leading this important initiative.

Today, much more than two decades ago - Brazil, one of the BRIC countries - has become an important player in the international economy and its legal system an important factor in the proper development of international commercial relations.

May this effort prosper for years and generations to come.

Jacob Dolinger, 2013

EDITORIAL NOTE

In 1992, a group of prominent Brazilian scholars led by Professors Jacob Dolinger (Universidade do Estado do Rio de Janeiro) and Keith Rosenn (University of Miami) created the journal Panorama of Brazilian Law as an attempt to provide reliable legal information on Brazilian Law for non-Portuguese speakers. Originally planned as a Yearbook, the ancient PBL presented papers related to several branches of Brazilian law written by respected authors. Due to several reasons, this groundbreaking project did not go ahead and the inaugural issue was the only one released.

In order to rescue the goals and ideas of the original project, the first number of the new Panorama of Brazilian Law was issued in 2013 covering several brands of Brazilian law. In 2014, the second issue published 18 articles, which proves that this initiative was not only feasible but strategically necessary. In this year of 2015 the ever first legendary 1992 issue of Panorama of Brazilian Law became available online. On top of that, this third volume of Panorama of Brazilian Law features 17 articles covering several branches of the Brazilian legal order.

Besides its print version, the yearbook is also available in the electronic magazine format (www.panoramaofbrazilianlaw.com) which allows a broader perspective for the broadcasting of articles reaching a greater number of potential researchers.

For this third edition, papers written in English, French, German, Italian, Spanish and Swedish were able to submission. Papers in English and French were selected and are original and unpublished. Versions of papers originally released in Portuguese or published in the context of academic conferences were also accepted.

The Scientific Council is responsible for the Editorial Line of the magazine, whose goals are to spread information about Brazil's legal order and juridical environment among non-Portuguese speakers.

Formal aspects and criteria for publication are found at the www. panoramaofbrazilianlaw.com website under "about" > "submissions" > "author guidelines". The call for papers for its forthcoming volume 4 is already available.

The tolerant and plural perspective of the project, which is opened to all branches of Brazilian law, was determinant for choosing not to establish a hermetic format concerning the logical organization of the articles – neither with respect to its distribution along the yearbook nor in the organization adopted by authors in its papers.

The access to the online magazine is completely free of costs or registration.

The editors of Panorama of Brazilian Law are very happy with the present success and positive repercussions of the project and hope to provide foreign researchers an ultimate way to access Brazilian law.

Brazil, October 2015.

Raphael Carvalho de Vasconcelos Bruno Rodrigues de Almeida