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CONSEQUENTIALISM, PRAGMATISM AND ECONOMIC ANALYSIS OF LAW: SIMILARITIES, DIFFERENCES AND SOME MISCONCEPTIONS

CONSEQUENCIALISMO, PRAGMATISMO E ANÁLISE ECONÔMICA DO DIREITO: SEMELHANÇAS, DIFERENÇAS E ALGUNS EQUÍVOCOS

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ABSTRACT

Brazilian law is currently faced with the importation of theories such as consequentialism, pragmatism and the Economic Analysis of Law. The purpose of this article is to indicate the existence of a deformation trend of these imported theories, which would undergo a kind of *brazilianization*. An anthropophagy occurs – the swallowing of foreign theories, and their remake in Brazilian style –, resulting in a possible misinterpretation of such theories. To this end, it delimits the concepts referring to such theories, as well as explains how they have been used in Brazil.

Keywords: Consequentialism. Pragmatism. Law and Economics. Conceptual Delimitation.

RESUMO

O direito brasileiro se depara, hoje, com a importação de teorias como o consequencialismo, o pragmatismo e a Análise Econômica do Direito. O objetivo deste artigo é indicar a existência de uma tendência de deformação dessas teorias importadas, que passariam por uma espécie de *brasilianização*. Ocorre uma *antropofagia* – a deglutição de teorias estrangeiras, e o seu refazimento *à brasileira* –, resultando numa possível interpretação equivocada de tais teorias. Para tal, delimita os conceitos referentes a tais teorias, bem como explicita a forma como elas vêm sendo usadas no Brasil.

Palavras-chave: Consequencialismo. Pragmatismo. Análise Econômica do Direito. Delimitação conceitual

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INTRODUCTION

Brazilian law was faced with the fact that consequences matter. If the standard of the Brazilian jurist was that of the Franco-German dogmatist, today the Anglo-American empiricist standard is gaining strength[4].

Dogmatics, which previously occupied the central axis of Brazilian legal research, are now seen by some as outdated, even outdated.

The Law of Introduction to the Rules of Brazilian Law – LINDB - was even amended to standardize the importance of the practical consequences of the decision-making process[5].

It is not enough for the modern Brazilian jurist to investigate the institutes. There is a growing need for a new methodology, less self-centered and more open to inflows from other disciplines of human knowledge, such as economics[6].

Authors such as Gustavo Binenbojm even assert that Brazilian Law (especially Public Law) is currently undergoing a pragmatic turn[7]. This turn, this change, this new look at the Law orbits three concepts, often used in a wrongly fungible way: Economic Analysis of Law (AED); Legal Pragmatism; and Consequentialism,

The journey of theoretical ideas does not always take place, however, without major turmoil. When entering the national territory, it is feared that such theories undergo a kind of

[4] The statement that opens this article can be placed in parentheses. This is not a discovery of consequences under Brazilian law. In fact, it is even implausible that, over centuries of experience, Brazilian jurists have never been aware of the social, economic and political impacts of their decisions. The consequences of legal decisions and measures have always been on the horizon of awareness of Brazilian law. A simple consultation of Carlos Maximiliano's classic "Hermeneutics and interpretation of law" proves the point: "[p]ore concerned with hermeneutics, especially after the exegesis of data from sociology, with the probable result of each interpretation. He takes it at a high price: he is guided by it; it varies with a view to it, when the text admits more than one way of understanding and applying it. As far as possible, avoid a consequence incompatible with the general good; adapts the device to the victorious ideas among the people in whose bosom the expressions of law subject to examination prevail". (MAXIMILIANO, Carlos. Hermenêutica e aplicação do direito. Rio de Janeiro: Forense, 2011, p. 165). In this, by the way, trivial sense, consequentialism is nothing new. However, the consequentialism we will talk about in this chapter, and which was incorporated into Brazilian law through the LINDB reform, is not this trivial kind of consequentialism. Nevertheless, the alert is necessary as a way out so that the risk - probably already materialized - of the institute's Brazilianization is not run.

[5] V. art. 20, LINDB, fruit of the reform brought by Law No. 13.655/2018: "In the administrative, controlling and judicial spheres, decisions will not be made based on abstract legal values without considering the practical consequences of the decision".

[6] MENDONÇA, José Vicente Santos de. A verdadeira mudança de paradigma do direito administrativo brasileiro: do estilo tradicional ao novo estilo. **Revista de Direito Administrativo**. Rio de Janeiro, v. 265, p. 178/198, jan/abr. de 2014.

[7] BINENBOJM, Gustavo, **Uma teoria do direito administrativo direitos fundamentais, democracia e constitucionalização**, Rio de Janeiro; São Paulo: Renovar, 2008.

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anthropophagy[8], generating a kind of Brazilianized vision of the institute, a version that can reverberate through a process of academic replication[9].

Brazilian intellectual history is no stranger to importing ideas out of place, as Roberto Schwarz calls it. During the death throes of the Empire, the absorption of ideas of a liberal hue by a predominantly slave-owning society caused perplexity, resulting in an "also unique chemistry"[10].

This article suggests an image that reflects the current situation: a new anthropophagy, which devours consequentialism, pragmatism and AED, replaces what would be the old anthropophagy, which swallows up deontological theories such as the Theory of Principles.

In addition to academic malpractice, there is also the risk of using new theories such as consequentialism in order to support judicial particularisms, such as the criticism made to the application of the Theory of Principles[11]. It's the fear that consequentialism becomes consequentialism[12].

There is, therefore, the existence of a true new wave of imports. However, the concern arises: will the newly imported institutes be used correctly?

It is necessary to delimit the concepts of consequentialism, pragmatism and Economic Analysis of Law, in an adequate way, in order to understand their similarities and differences.

If ideas are out of place, then I need to try to put them in place. That is the purpose of the article. It is not just a question of theoretical preciosity. Ideas have consequences[13]: homeland jurisprudence even uses such concepts in a fungible way[14].

The explanation will follow a line according to the chronological precedence: therefore, the consequentialism will be analyzed first, to be faced, after, the legal pragmatism and, finally, the Economic Analysis of Law. The order will also facilitate the understanding of why there is a certain confusion between the terms, especially in relation to consequentialism and pragmatism.

[8] With the year 2022 approaching, it is auspicious to talk about anthropophagy, as it is the centenary year of the Week of Modern Art of 1922, which foreshadowed the famous Anthropophagic Manifesto, of 1928. V. **Revista de Antropofagia**, v. 1, n. 1, maio de 1928. Disponível em: <https://digital.bbm.usp.br/bitstream/bbm/7064/1/45000033273.pdf>. Acesso em 2 de março de 2021.

[9] This is the case, for example, of post-positivism, considered common in Brazil, and whose existence is considered impossible in foreign academia. In this sense: PETROSKI, Karen. Is Post-Positivism possible? **German Law Review**, v. 12, n. 2, p. 663-692, fev. de 2011.

[10] SCHWARZ, Roberto. As ideias fora do lugar. *In*: "Ao vencedor as batatas", São Paulo: Duas Cidades, 4ª edição, 1992, pp. 1-16.

[11] SUNDFELD, Carlos Ari. Princípio é preguiça? *In*: Ronaldo Porto Macedo Jr. e Catariana Barbieri (org). **Direito e interpretação – racionalidades e instituições**. São Paulo: Saraiva, 2011, pp. 287-305.

[12] MENDES, Conrado Hübner. Jurisprudência impressionista. **Época**, 14 set. 2018. Disponível em: <https://epoca.globo.com/conrado-hubner-mendes/jurisprudencia-impressionista-23066592> . Acesso em 17 de fev. de 2021.

[13] In appropriation to the title of the Brazilian edition of the work of WEAVER, Richard M. **As ideias têm consequências**

[14] The topic will be dealt with, in due course, in the section preceding the conclusion. São Paulo: É Realizações, 2012.

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The idea of this article is not to make judgments that evaluate theories. On the contrary: the aim is to present them in their best possible form, avoiding scarecrows[15].

The article will be developed as follows: (i) the first section will briefly differentiate the common law from continental law, relating the different systems with different ways of thinking about the legal phenomenon; (ii) the second part will define consequentialism, pragmatism and the Economic Analysis of Law; and (iii) the third section will bring examples of the application of consequentialist decisions in Brazil, in order to observe what appears to be a mistakenly fungible use of the term to, finally, conclude.

1. ANGLO-AMERICAN LAW AND CONTINENTAL EUROPEAN LAW: TWO SYSTEMS, TWO WAYS OF THINKING

2.

Our Law follows the tradition of Roman jurists, who, faced with the daily legal practice, created a series of institutes and norms to guarantee the praxis, norms that, later on, underwent major codification processes. The so-called continental system, of Roman and, later, French and German influx, thus, starts from a deductive and subsumption reasoning, in which operators seek to frame facts of legal experience in institutes.

Anglo-Saxon Law, called common law, in turn, arises from the experience of English courts, which were faced with everyday legal conflicts and, from them, drew generalizations to be applied in subsequent cases. Inductive reasoning predominates. It differs from its Roman counterpart in that there were no major encoding processes. English law, later passed to the colonies, is, in this way, a right of the courts.

The difference between the two systems affects legal reasoning and research. In countries with a Roman-Germanic tradition (treated by Anglophony as civil law), treaties and comments by legal authors have a systematic nature and formulate general theories about codes and legislation. The study of Law in such countries is of an academic nature.

[15] The preoccupation with taking a theory in its best possible form is exemplified by Coleman when dealing with the positivism v debate. natural law, a debate that is also so fond of caricatures: “our immediate ambition should be to see if we might formulate the natural lawyer's claim charibaly so it might be the source of insight rather than ridicule”. (COLEMAN, Jules. The Architecture of Jurisprudence. **The Yale Law Journal**, v. 121, n. 1, 2011. Disponível em: https://www.yalelaw journal.org/pdf/1009_3fnvkd8i.pdf. Acesso em: 30 out. 2020, p. 7).

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In Anglo-Saxon (common law) countries, on the other hand, there is not a large amount of systematizing doctrine [16], the main study being the study of concrete cases. Legal education, here, emphasizes the practice and the importance of what the courts decided in a specific case[17].

The common law system would therefore be sensitive to the practical reality and the consequences generated by the application of the Law[18]. No wonder the American legal realism emerged in the United States, according to which the application of the Law does not end "within the courts", and not even within the legal system, being important for the study of Law the reality in what is the order and, above all, the reality to which the decision maker is subject[19].

Legal realism is a current of thought that has important names such as Oliver Wendel Holmes Jr., who even held the position of Supreme Court Justice.

Didactically, we can think of the Anglo-American system as a right of practice, while continental European law would be a right of ideas. Both ways of thinking about the legal phenomenon have repercussions, as said, both in the practical experience of Law and in its teaching and methodology.

2. CONCEPTS

2.1. CONSEQUENTIALISM

In a superficial sense, consequentialism can be understood as a class of ethical normative theories whose central assertion is the idea that the consequences of a given conduct should be the measure of its correctness.. Samuel Scheffler[20] says:

> "[c]onsequentialism, in its purest and simple form is a moral doctrine which says that the right act in any given situation is the one that will produce the best overall outcome, as judged from an interpersonal standpoint which gives equal weight to the interests of everyone. Somewhat more precisely, we may think of a consequentialist theory of this kind as coming in two parts. First, it gives some principle for ranking overall states of affairs from best to worst from an impersonal standpoint, and then it says that the right act in any given situation is the one that will

[16] It is important to mention the notorious exception of Christopher Columbus Langdell, author of a systematizing work on Contract Theory in the scope of the Common Law: Selection of cases on the law of Contracts. Boston: Little, Brown and Company, 1879. But even so, the method is hybrid, as it turned to a systematization based on the cases, which still occupied the role of the main object of study.

[17] On the difference between legal systems, see DAINOW, Joseph. The Civil Law and the Common Law: some points of comparison. **The American Journal of Comparative Law**, v. 15, n. 3, pp. 419-435. 1966-1967. Disponível em: <https://www.jstor.org/stable/838275>. Acesso em 17 de fev. de 2021.

[18] The common law's claim to sensitivity to factual reality can be seen, however, as a retrospective reading of historical facts. This reading was influenced by the authors of North American Legal Realism, who seek to base their theoretical claims on the very nature of common law.

[19] For more information on US legal realism, see: LEITER, Brian. Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis. In: _____. **Naturalizing Jurisprudence**: Essays on American Legal Realism and Naturalism in Legal Philosophy. Nova Iorque: Oxford University Press, 2007, p. 121-135.

[20] SCHEFFLER, Samuel. **Consequentialism and its critics**. Oxford: Oxford University Press, 1988, p. 8.

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> produce the highest-ranked state of affairs that the agent is in a position to produce". (SCHEFFLER, 1988, p. 8)

Didactically, it is important to distinguish the following points: (i) the correctness of the act is gaugeable by its consequences in general terms; and (ii) the appraiser will consider the act well-evaluated if, in that circumstance, the agent produced, according to criteria determined by the appraiser, the best possible consequences.

Jussi Suikkanen[21], says:

> "[c]onsequentialist theories have two elements. According to the axiological element, agents' options can always be ranked in terms of how much aggregate value their consequences have. The second, normative element then determines that an act is right if and only if the agent does not have an option that would have a higher evaluative ranking". (SUIKKANEN, 2009, p. 1)

The consequentialist perspective, taking into account the definition brought up, is not, it should be noted, one that targets an ideal situation. No: the assessment of consequences is based on an idea of the best possible improvement in the current state of the art.

It is to say, in other words, that the action taken was the best possible within the universe of courses of action available to the agent.

Consequentialism is embedded within moral philosophies. As a moral philosophy, it evaluates the morality of a given act based on the value of its consequences.

One can speak of two kinds of consequentialism: (i) consequentialism of acts; and (ii) rules consequentialism. Act consequentialism examines each act individually in light of its results. The consequentialism of rules, in turn, determines that the action will be morally adequate when it obeys a rule whose observance is the one that produces the desired result. This distinction must be taken into account, as it will be taken up later when we deal with the Economic Analysis of Law.

It includes philosophical currents such as utilitarianism, perhaps the most famous philosophy of consequentialist hue, against which John Rawls opposed in his book *A Theory of Justice*[22].

Strictly speaking, it can even be said that, in recent times, the most fashionable currents in the philosophy of law oscillate pendularly between two extremes: one of a utilitarian character; the other with a deontological hue[23]. It is safe to say that in this range that goes from one extreme to the

[21] SUIKKANEN, Jussi. Consequentalism, constraints and the good-relative-to: a reply to Mark Schroeder. **Journal of Ethics & Social Philosophy**. Discussion note, mar. 2009.
[22] Ibidem, p. 2.
[23] "For many years, experts have persistently portrayed virtually every idea about justice on one of two continents. According to this cartography, the utilitarian territory is inhabited by points of view that stipulate a goal and deduce a concept of justice from that goal or objective, usually specifying a set of principles, rules and institutions that, it is hoped, will be useful for its realization . The most talked about goal in recent times has been the maximization of happiness. This goal is formalized in the principle of utility (or the principle of greatest happiness), which is the central idea of the classical utilitarian tradition. (...) The deontological continent (in the jargon of modern moral philosophy) is the only other recognized territory. The category of deontological views is united by the conviction

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other, consequentialism approaches the utilitarian pole, although some famous defenders of this line do not see themselves as utilitarians[24].

Richard Posner claims that utilitarianism is a kind of consequentialism[25], insofar as, from the utilitarian perspective, what is at stake is precisely the assessment of the consequences of an act, decision or measure based on the criterion of maximizing pleasure and minimizing pain[26]. It is the ethics of the 19th century industrial bourgeoisie[27].

In any case, consequentialism differs, therefore, from applications of the Theory of Principles[28] as standards that point to ideal situations, optimization warrants, as explained by Virgílio Afonso da Silva, based on his reading of Robert Alexy[29]. Principles, in German dogmatics, are reasons for instructions (*Gründe für Weisungen*)[30]. They would point, ex ante, to a certain ideal decision.

The consequentialist moral-philosophical evaluation operates ex post, as it takes into account the consequences of the act. Therefore, it does not create ideal conduct parameters to be followed

that justice is a matter of precise duties that cannot be trumped by any other consideration, not even for the purpose of achieving highly desirable goals. The rudimentary reasoning from which this set of viewpoints springs is that some things are right, whether they are good or not". (JOHNSTON, David. Breve história da justiça. São Paulo: WWF Martins Fontes, 2018, p. 1-2)

[24] This is the case, for example, of Richard Posner who in "Law, pragmatism and democracy" states that his theory of adjudication - the legal consequentialism or everyday pragmatism - is not properly a consequentialism, which is, according to the author, "the set of philosophical doctrines that evaluate actions by the value of their consequences: the best action is the one with the best consequences". (POSNER, Richard A. Law, Pragmatism, and Democracy. [S. l.]: Harvard University Press, 2005, p. 60)

[25] "The dominant brand of consequentialism is utilitarianism, which shares some features with pragmatism but is certainly distinct from it. It is one thing to care about consequences, including consequences for utility (welfare), and another to be committed to a strategy of maximizing some class of consequences, a commitment that, as the large critical literature on utilitarianism attests, can lead to just the kind of dogmatic absurdities that pragmatists are determined to avoid" (Ibidem, p. 65)

[26] "Benthamism rested on a basis of psychological hedonism, the theory that every human being seeks by nature to attain pleasure and avoid pain. This was not, of course, a novel doctrine. It had been propounded in the ancient world, notably by Epicurus, while in the eighteenth century it was defended by, for example, Helvitius in France and Hartley and Tucker in England. But though Bentham was not the inventor of the theory, he gave a memorable statement of it. «Nature has placed mankind under the governance of two sovereign masters, pain and pleasure… They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire, but in reality he will remain subject to it all the while»". (COPLESTON, Frederick Charles. A History of Philosophy. [S. l.]: Newman Press, 1964. v. 8, p. 8) The utilitarian principle is stated as follows: "[i]f we make these assumptions and pass over the difficulties inherent in any hedonistic ethics, we can then say that right actions are those which tend to increase the sum total of pleasure while wrong actions are those which tend to diminish it, and that we ought to do what is right and not do what is wrong. We thus arrive at the principle of utility, also called the greatest happiness principle. This «states the greatest happiness of all those whose interest is in question, as being the right and proper, and only right and proper and universally desirable, end of human action»". (Ibidem, p. 9-10)

[27] Cf. MARÍAS, Julián. História da Filosofia. São Paulo: Martins Fontes, 2004, p. 394 e segs.

[28] From Ronald Dworkin's perspective: "[r]acting in legal terms means applying to specific legal problems, such as those I have described, a wide web of principles of a legal nature or political morality" (DWORKIN, Ronald. A justiça de toga. trad. Jefferson Luiz Camargo. São Paulo: WMF Martins Fontes, 2010, p. 72).

[29] SILVA, Virgílio Afonso da. O proporcional e o razoável. **Revista dos Tribunais**, n. 798, p. 23-50, 2002.

[30] RESSING, Maximilian. Prinzipien als Normen mit zwei Geltungsebenen: zur Untersheidung von Regeln und Prinzipien. **Archiv für Rechts und Sozialphilosophie**, v. 95, n. 1, p. 28-48, 2009.

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by the decision-making agent. Utilitarianism can be seen, therefore, as a specialized consequentialism, as it brings a specific criterion for evaluating a certain conduct[31].

Only the consequence of the decision taken is evaluated from the perspective of an external observer, capable of seeing the repercussions beyond the parties involved.

When we bring consequentialism to the scope of Law, it is important to differentiate what would be the legal consequences from the real consequences. Legal are the consequences relating to legal propositions, which are achieved as certain prerequisites are met.

Different is the case of the real consequences, which are the consequences of applying the Law, in the real world. Such consequences can be subdivided into real micro-level consequences and real macro-level consequences. Those at the micro level concern the parties relating to a given legal relationship; while the macro ones are those consequences that reverberate in society as a whole[32].

Consequentialism is a moral philosophy. Its object concerns morality. His realm is the philosophical discussion about the nature of morals. It is a question of defining the value of a certain conduct based on the value of its consequences. Keeping this observation in mind will be useful to differentiate it from pragmatism, which we have come to characterize.

2.2. PRAGMATISM

Pragmatism is a philosophical tradition according to which words and thoughts are to be regarded as instruments for prediction; Problems solution; and actions, rejecting the idea that the function of thought is to describe, represent or reflect reality.

The pragmatic tradition holds that a number of topics inherent in philosophical consideration, including the nature of knowledge, language, concepts, meanings, beliefs, and science, will be better understood in terms of their practical use and success. In short, one thing is what you do with it in practice; concepts do not reveal the essences of things, but what is intended to be done with them.

Pragmatism originated in the second half of the century. XIX, in the United States, through the work of authors such as Charles Sanders Peirce; William James; and John Dewey, who formed the so-called Metaphysics Club.

[31] HAUSMAN, Daniel; MCPHERSON, Michael. Utilitarianism and Consequentialism. *In*: **Economic Analysis, Moral Philosophy and Public Policy,** 2ª ed., pp. **99**–117. Cambridge: Cambridge University Press, 2006. doi:10.1017/CBO9780511754289.010.
[32] MATHIS, Klaus. Consequentialism in Law. *In*: Efficiency, Sustainability, and Justice to Future Generations, 3 Law and Philosophy Library, 1998.

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Peirce developed what was later known as the pragmatic maxim, in his text How to make our Ideas Clear, included within a hypothetical discussion between Catholics and Protestants about the nature of the sacrament of the Eucharist and the doctrine of Transsubstantiation[33].

William James, in a series of lectures given between 1906-1907, described what the pragmatic method would be[34] as the method for resolving metaphysical disputes that would otherwise be thought to be endless. Discussions such as "Is this world one among many?"; "Are we free or predestined?"; "material or spiritual?" they would be interpreted from the respective practical consequences. Note that pragmatism has an iconoclastic dimension in relation to the discourse of philosophical metaphysics itself, proposing itself as a kind of final point in relation to previously endless discussions. The application of the pragmatic methodology is, therefore, contrary to a philosophical investigation prone to Byzantine discussions[35]. The mention of praxis would serve as a guide for solving the stir.

Three great characteristics are attributed to pragmatism: anti-foundationalism; consequentialism; and contextualism. Pogrebinschi develops these themes through the following synthesis[36]: (i) anti-foundationalism consists of a posture of rejection of metaphysical abstractions, immutable transcendental categories, it would be the refusal of the idea of certainty and immutability inherent in traditional philosophical concepts about truth and reality; (ii) consequentialism consists in evaluating acts or theories based on their consequences; and (iii) contextualism consists of the idea that philosophical investigation should pay attention to the context in which the investigated object is inserted.

Stanley Fish focuses on the distinction between foundationalism and anti-foundationalism:

> [b]y foundationalism I mean any attempt to ground inquiry and communication in something more firm and stable than mere belief or unexamined practice. The foundationalist strategy is first to identify that ground and then only to order our activities that they become anchored to it and are rendered objective and principled. (...)
> Anti¬foundationalism teaches that questions of fact, truth, correctness, validity, and clarity can neither be posed nor answered in reference to some

[33] PEIRCE, Charles Sanders. How to make our Ideas clear. *Popular Science Monthly*, v. 12, p. 286-302, jan. 1878, p. 293.
[34] JAMES, William. Pragmatism: a new name for some old ways of thinking. Cambridge: Cambridge University Press, 2014.
[35] What is at stake, from a pragmatist perspective, is the resolution of real and concrete problems that afflict society. In other words, what matters is action: the essences of things are what we do with them. From a legal standpoint, pragmatism, according to Ronald Dworkin – who is a critical voice for this kind of thinking – considers that "anyone with political power should use that power to try to make things better in any way possible, given its institutional position and degree of power" (DWORKIN, Ronald. A justiça de toga. trad. Jefferson Luiz Camargo. São Paulo: WMF Martins Fontes, 2010, p. 35). In this sense, any theoretical discussion, metaphysical or not, is useless, as it does not lead us to the solution of practical and concrete problems.
[36] POGREBINSCHI, Thamy. Será o neopragmatismo pragmatista? Interpelando Richard Rorty. **Novos estud. - CEBRAP**, São Paulo , n. 74, p. 125-138, Mar. 2006. Disponível em: <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0101-33002006000100008&lng=en&nrm=iso>. Acesso em 28 Jan. 2021. http://dx.doi.org/10.1590/S0101-33002006000100008.

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> extracontextual, ahistorical, nonsituational reality, or rule, or law, or value; rather, antifoundationalism asserts, all of these communities are intelligible and debatable only within the precincts of the contexts or situations or paradigms or paradigms that give them their local and changeable shape. It is not just that antifoundationalism replaces the components of the foundationalist worldpicture with other components; instead, it denies to those components[37]. (FISH, 1989, p. 342-343)

Pragmatism, as already said, encompasses a number of topics of philosophical discussion. However, we are interested in legal pragmatism. How is the relationship between philosophical pragmatism and legal pragmatism?

The interaction between Law and pragmatic philosophy took place even in the early stages of the movement, in the so-called The Metaphysical Club, which gathered, in addition to the aforementioned Dewey; James; and Peirce, then-future Supreme Court Justice Oliver Wendell Holmes Jr[38].

It is warned, however, that legal pragmatism should not be interpreted as a mere application of philosophical pragmatism to the reality of Law. Legal pragmatism is understood as a normative theory of the decision-making process undertaken by agents of Law (mostly judges, but not only).

About the relationship between philosophical pragmatism and legal pragmatism, Arguelhes and Leal[39] says:

> And what about legal pragmatism? As stated, the intuition that there is some relationship between the two is certainly justifiable. However, it would be risky to state simply and directly that legal pragmatism can be understood as an application of pragmatist philosophy to jurisdictional activity. In fact, currently, both defenders and critics of legal pragmatism as a normative theory of judicial decision seek to discuss it in its own terms, without placing the merits of the demerits of pragmatist philosophy at the forefront of the debate. (ARGUELHES e LEAL, 2009, p. 176)

The development of legal pragmatism is closely associated with the work of Richard Posner, professor at Chicago Law School, and former judge of the seventh circuit of the US Federal Court of Appeals, an equally important thinker for the Economic Analysis of Law.

Posner has a series of works on legal pragmatism and lists twelve generic statements that are useful for understanding the institute[40]:

[37] FISH, Stanley. **Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary & Legal Studies**. [S. l.]: Duke University Press, 1989, p. 342-343.
[38] MENAND, Louis. *The Metaphysical Club: a Story of Ideas in America.* Nova York: Farrar, Straus & Giroux. 2001.
[39] ARGUELHES, Diego Werneck; LEAL, Fernando. Pragmatismo como (meta)teoria normativa da decisão judicial: caracterização, estratégias e implicações. In: SARMENTO, Daniel (Org.). Filosofia e Teoria Constitucional Contemporânea. Rio de Janeiro: Lumen Juris, 2009, p. 171/211, p. 176.
[40] POSNER, Richard. **Law, Pragmatism and Democracy.** Cambridge, MA: Harvard University Press. 2003. P. 60-61

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(i) legal pragmatism is not just a euphemism for ad hoc particularistic decisions. It involves systemic considerations and not only contemplates specific consequences for the case examined;

(ii) only in specific cases will the pragmatist judge assign decisive weight to the systemic consequences, however. In many other cases, the specific consequences of the case will be decisive.;

(iii) The ultimate criterion for pragmatist adjudication is reasonableness;

(iv) Legal pragmatism is not a form of consequentialism, understood as the set of philosophical doctrines that evaluate the virtue of actions exclusively by the value of their consequences;

(v) Legal pragmatism turns its gaze to the future, considering adherence to past decisions more as a necessity than an ethical duty;

(vi) The legal pragmatist believes that there are no analytical procedures that distinguish legal reasoning from other forms of practical reasoning;

(vii) Legal pragmatism is empiricist;

(viii) As an empiricist, he is not hostile to all theories, only in relation to ideas that use abstract morals and political theories to guide judicial decision-making;

(ix) Legal pragmatism is not a supplement to formalism;

(x) Legal pragmatism is sympathetic to the sophistic and Aristotelian conception of rhetoric as a form of reason;

(xi) the pragmatic judge tends to favor specific arguments over general arguments;

(xii) legal pragmatism is both different from legal realism and critical legal studies (critical legal studies, abbreviated as crits).

Items iv; xi; and xii deserve comments.

According to Posner, legal pragmatism would not be a form of consequentialism, as the most common expression of consequentialism - utilitarianism - although it coincides with legal pragmatism in certain points, would require, if adopted, that the judge was understood with a maximizing strategy of usefulness, only, which could cause dogmatic absurdities with which legal pragmatists would not agree.

The pragmatic judge, according to the aforementioned author, would tend, as said, to favor specific arguments over general arguments. Thus, they would be more sensitive to rhetoric than adherents of other currents of legal thought. Difficult legal issues, the hard cases, do not have a right a priori answer, being cases in which the rhetoric and the specific argumentation of the concretely examined case would play a relevant role in the solution of the problem.

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Posner states that philosophical pragmatism would be just a kind of "pragmatic attitude", characterized by a predisposition to evaluate judgments and actions from a perspective that takes into account the consequences at the expense of concepts, abstractions and generalities[41]. Despite such disbelief, philosophical pragmatism would still be an academic theory, different from what he calls everyday pragmatism.

Legal pragmatism, as a decision-maker's posture, owes more to everyday pragmatism, well defined by the popular use of the term "pragmatic", meaning a practical individual, "down-to-earth", disbelieving in utopias[42], than to philosophical pragmatism.

Legal pragmatism looks to the Law in order to assess the practicality of its institutes. Insofar as it is empiricist and evaluative, the great merit of legal pragmatism is the possibility of conferring falsity on the hypotheses developed about the application of a certain law institute, allowing for an experimental application.

Gustavo Binenbojm, in this sense, states that "the pragmatic stance is, therefore, essentially critical and experimental, always open to new possibilities that may falsify the hypotheses previously described as true"[43].

The classic application of legal pragmatism concerns the case *Bush v. Gore*, in which the United States Supreme Court suspended the recounting of Florida's votes, a recount required by state law and which successively reduced Bush's advantage over Gore. The pragmatic argument put forward by the Supreme Court was that a recount would be institutionally negative and would undermine the legitimacy of the then newly elected President Bush[44].

In the context of the discussion involving this decision, Posner articulated, in a clear and emphatic way, the view of legal pragmatism that he defends:

> "Pragmatic" as an adjective for anything to do with the judicial process still causes shudders. It seems to open up views of judicial willfulness and subjectivity and to mock the rule of law; it seems to equate law to prudence, and thus to be Machiavellian. All that pragmatic adjudication need mean, however—all that I mean by it—is adjudication guided by a comparison of the consequences of an alternative resolution of the case rather than an algorithm intended to lead the judges by a logical or otherwise formal process to the One Correct Decision, utilizing only the canonical materials of judicial decision making, such as constitutional text and previous judicial opinions[45].(POSNER, 2001, p. 186)

[41] ARGUELHES, Leal, op. cit., p. 177.
[42] POSNER, op. cit., p. 50.
[43] BINENBOJM, Gustavo. Poder de Polícia, Ordenação, Regulação: transformações político-jurídicas, econômicas e institucionais do Direito Administrativo Ordenador. Belo Horizonte: Fórum, 2016. P. 55.
[44] POSNER, Richard. Bush v. Gore as Pragmatic Adjudication, *in*: **A Badly Flawed Election: Debating Bush v. Gore, the Supreme Court, and American Democracy**, Ronald Dworkin eds., 2002.
[45] POSNER, Richard A. Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts. [S. l.]: Princeton University Press, 2001, p. 186.

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This is not a judicial free-for-all, but a judgment comparing the possible alternative consequences of a given award. Comparison that will even take into account what Posner calls systemic consequences, that is, the requirements of consistency and predictability of the Law, the requirements of its past represented by precedents, legal texts and doctrinal opinions[46].

Posner's conception, if the idea of systemic consequences is taken into account, is somewhat similar to that of rule-consequentialism.

Still in the context of the case Bush v. Gore, one can ask the question – said to be hyperpragmatic by Posner – about whether a judge could – rather, should – reverse the outcome of an election given the fact that the choice of voters would represent, from that judge's perspective, a disastrous consequence[47].

[46] In Posner's words: "[s]ystemic consequences are not excluded. The pragmatic judge does not squint myopically at the consequences of the case at hand, oblivious to the possible consequences of his decision for future cases. He recognizes that the needs of the future, along with the limitations of judges' knowledge, may rule certain consequences out of consideration, such as a preference for one Presidential candidate over another" (Ibid., p. 186). Posner's legal pragmatism is a kind of consequentialism. Everything revolves around comparing the possible consequences of a given court decision. But this comparison is not blind. As with utilitarianism, there is a principle that guides this comparison. And this principle is the preservation of the predictability and internal consistency of the Law: what Posner calls "systemic consequences", that is, the consequences that concern the integrity of the legal system - judicial precedents, normative texts and doctrine - in relation to its capacity to serve as planning instruments for the future actions of individuals and society. Dworkin, despite opposing Posner's pragmatist conception, provides a very accurate summary of this theory of adjudication: "[the] judge who is a pragmatist in this everyday and consequentialist sense does not disregard precedent and technical-legal argumentation: on the contrary, he has awareness of them, taking into account both the positive consequences that result from systematic judicial respect for traditional legal argumentation and doctrine, which include encouraging people to plan matters of interest with confidence, and the negative consequences that may result from a judge ignoring the traditional doctrine on certain occasions, which includes the frustration of these expectations and the weakening of the general benefit of systematic respect for them. But the pragmatic judge is also aware of the dangers of slavish deference to orthodox legal reasoning; he knows that, in certain circumstances, he can get better results, even in the long run, by reaching a decision that will result in some particularly important benefit, or that he will avoid some particularly serious risk, even if such a decision openly challenges established doctrine. Therefore, pragmatic judges need to balance the long-term benefits of respecting doctrine with the long-term benefits that, on occasion, flow from ignoring it. As Posner states, '[no]there is an algorithm to reach such an equilibrium (...). The judge should try to make the decision that is reasonable, after a careful examination of all things, a context in which 'all things' includes the sources of law and classical jurisprudence (...), but also the consequences, insofar as they can be discerned from the decision of the case in question'". (DWORKIN, Ronald. A justiça de toga. trad. Jefferson Luiz Camargo. São Paulo: WMF Martins Fontes, 2010, p. 135-136)

[47] The question is interesting, as it raises the problem of knowing whether the judges' political-ideological preferences can be taken into account when evaluating the consequences of a possible decision. In the case under discussion, a judge with conservative leanings might look favorably on a decision that favored Bush, just as, on the contrary, a judge with liberal leanings would view a decision that won Gore's case one of more palatable consequences. . Posner states that "[p]ragmatic adjudication is concerned with consequences but does not in itself determine their weight or valence. It accepts that each judge will, within the bounds of permissible judicial discretion (that is, with due but not slavish regard for the rule-of-law virtues), cast his vote on the basis of personal values, temperament, unique life experiences, and ideology" (POSNER, Richard. **Law, Pragmatism and Democracy.** Cambridge, MA: Harvard University Press, 2003, p. 333). Once again, systemic consequences – here a certain appreciation for the qualities of the rule of law – function as a limit, as a final barrier to consequentialist considerations. Personal preferences, and even political-ideological views, of judges can – and certainly will – influence their decisions and, more than that, their calculations of consequences. This is not a problem as long as it does not call into question the stability and predictability that is expected of the legal system: the systemic consequences act as a keystone of Posner's consequentialism.

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In order for us to evolve, it is necessary, for now, to bear in mind that legal pragmatism, although concerned with the consequences of court decisions, is not an exclusively consequentialist approach in the fashion of utilitarianism. It is to say, in other words, that it does not have a pre-determined concept (which goes against its anti-foundational vocation) regarding what would be the desirable consequences for any context, such as what would be useful for utilitarians.

This feature is important to demonstrate that pragmatism is not incompatible with the Economic Analysis of Law. Legal pragmatism is permeable to the influx of other theories and areas of knowledge – economics would thus provide a substrate for a pragmatist decision. The pragmatist decision does not end, however, in measuring the consequences through economic criteria.

2.3. ECONOMIC ANALYSIS OF LAW

Emerging in the United States from the late 1950s to 1960s, the Economic Analysis of Law (Law and Economics), abbreviated as AED, is nothing more than the application of the assumptions of Economic Theory to the analysis of Law institutes, either through a descriptive bias, or through a normative bias.

The origin of the Economic Analysis of Law is related to North American Legal Realism, and is opposed by another movement from Realism, the Critical Legal Studies – CLS. AED and CLS have in common the "proposition of alternative ways of framing the legal phenomenon".[48] The crits, as CLS supporters are called, are marked by a political commitment to denounce the Law as a form of authoritarian control of society. The AED is supposedly politically neutral, although it is accused by the crits of promoting neoliberalism[49].

Economic Analysis takes on a scientific pretension. Defining what science is at the expense of what is not considered science is the so-called problem of demarcation[50], not being a problem of simple solution. The unproblematic application of the scientific method can, however, serve as a separation criterion.

Law, by incorporating theoretical paradigms of Economics, strengthens itself as a science, as its theoretical conclusions become testable using more exacting methods[51].

[48] ARAÚJO, Thiago Cardoso. Análise Econômica do Direito no Brasil: uma leitura à luz da Teoria dos Sistemas. Rio de Janeiro: Lumen Juris, 2017, p. 282.
[49] ZANATTA, Rafael. Desmistificando a Law & Economics: a Receptividade da Disciplina Direito e Economia no Brasil. **Revista dos Estudantes de Direito da UNB (REDUnB)**, v. 10, 2012.
[50] THORNTON, Stephen. "Karl Popper". **The Stanford Encyclopedia of Philosophy** (Spring 2021 Edition), Edward N. Zalta (ed.), no prelo. Disponível em: <https://plato.stanford.edu/archives/spr2021/entries/popper/>. Acesso em 18 de fev. de 2021.
[51] Thus, supplying the missing element for a better characterization of Law as a science, cf. ULEN, Thomas. A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law. **University of Illinois Law Review**, v. 2002, n. 4, pp. 875-920, pág. 893: *I claim that there are already some elements of the scientific method in the study of law but that there are some important defining elements that are missing – namely,*

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The Economic Theory makes it possible to carry out behavior predictions, that is, how agents will react to certain laws, e.g., as well as evaluate the economic efficiency of institutes and the distribution of wealth generated by them[52].

The main insight that economics provides for legal analysis would be the idea that people respond to incentives, a generalist assertion of price theory. The law serves to encourage desirable behavior and discourage undesirable behavior, encouraging or discouraging the production of social resources and the efficient allocation of resources. AED is, at its root, a behavioral theory[53].

Early AED scholars imported a series of assumptions from economics about how people respond to incentives, known generically as rational choice theory. Such a theory is not, however, closed, fluctuating between two extremes of a spectrum: thin and thick, which will be developed now.

Thin, thin conceptions understand that human behavior is rational based on the setting of generic criteria of rationality, while thick, thick conceptions determine more specific criteria so that the rationality of a certain conduct is attested[54].

The AED is, therefore, nothing more than the use of assumptions of economic theory to both justify institutes of the legal system and to evaluate them. It is not, therefore, a normative theory of judicial decision, for example, that defends the use of a kind of economic consequentialism as a tool for judicial decision.

Dilemmas analyzed by the AED can be formulated from the following structure: "does the current patent legislation generate incentives or restrictions to technological innovation?"; "does the possibility of the Public Administration unilaterally extinguish an administrative contract make public contracts more or less efficient?"; "strict civil liability in consumer contracts generates more or less wealth" and so on.

a wiedespread and commonly accepted theoretical core or paradigm and accepted standards and methods of empirical or experimental validation..

[52] COOTER, Robert; Ulen, Thomas. **Law & Economics** – 6a ed. Essex: Pearson, 2014. Towards a critical perspective of the predictive capacity of social sciences in general, and even of statistical-mathematical methods, v. Elster, Jon.Excessive Ambitions, **Capitalism and Society**: v.. 4, n. 2Iss. 2, artigo 1, pp. 1-33, 2009. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209382#. Acesso em 19 de mar. De 2021.DOI: 10.2202/1932-0213.1055.

[53] KOROBKIN, Russel; ULEN, Thomas. Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics. **California Law Review**, vol. 88, n. 4, p. 1051–1144. 2000.

[54] Idem.

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There is, therefore, an Economic Analysis of Property[55], of Civil Liability[56], of the Contracts [57] etc.

The Economic Analysis of Law has seminal texts, highlighting The Problem of Social Cost, by Ronald Coase [58], from which derives the so-called Coase Theorem, according to which in one world transaction costs are equal to zero, changing a legal liability rule would have no effect on resource allocation[59].

AED analyzes the institutes and practice of Law in light of economic efficiency. Efficiency is a key concept in economics, and can be approached from two perspectives: (i) Pareto Efficiency; (ii) Kaldor-Hicks Efficiency.

According to the Pareto Efficiency model, a given allocative change will be efficient if it improves the situation of an individual, at least, without, however, worsening that of any one. The concept of efficiency assumed by Kaldor-Hicks, on the other hand, understands that a given allocative change will be efficient if it allows the gains of the winners to offset the losses of the losers - it is enough, note, that the change allows for compensation, not requiring that, in fact, compensate[60].

The Economic Analysis of Law can be divided, epistemologically, into two levels: positive AED and normative AED. The positive level, also called descriptive, states that the concepts of microeconomics are of value for the study of the legal phenomenon, using an explanatory capacity offered by economic theory.

The normative level, also called prescriptive, evaluates legal institutes in light of economic efficiency. It even questions whether the concept of justice should be identified with efficiency[61].

[55] DEMSETZ, Harold. Toward a Theory of Property Rights. **The American Economic Review**, v. 57, n. 2, Papers and Proceedings of the Seventy-ninth Annual Meeting of the American Economic Association. p. 347-359. 1967. Disponível em: <https://www.jstor.org/stable/1821637?seq=1#metadata_info_tab_contents>. Acesso em 29 de janeiro de 2021.
[56] SCHWARTZ, Gary T. Reality in the economic analysis of tort law: does tort law really deter. **UCLA Law Review**, v. 42, p. 377, 1994. Disponível em: <https://heinonline.org/HOL/Page?public=true&handle=hein.journals/uclalr42&div=17&start_page=377&collection=journals&set_as_cursor=2&men_tab=srchresults>. Acesso em: 29 de janeiro de 2021.
[57] SHAVELL, Steven. Specific Performance Versus Damages for Breach of Contract: An Economic Analysis. **Texas Law Review**, v. 84, n. 4, p. 831. 2006. Disponível em: <http://www.law.harvard.edu/faculty/shavell/pdf/Shavell-SpecPerf-06.pdf>. Acesso em: 29 de janeiro de 2021.
[58] COASE, Ronald. The problem of social cost. **Journal of Law and Economics**, v. 3, p. 1-44, out. de 1960.
[59] ELLICKSON, Robert. Of Coase and cattle: a dispute resolution among neighbors in Shasta Count. **Stanford Law Review**, n. 38, p. 623-687, 1986. Disponível em: <https://www.jstor.org/stable/1228561?seq=1#metadata_info_tab_contents>. Acesso em: 29 de janeiro de 2021.
[60] POSNER, Richard. The Value of Wealth: a comment on Dwokin and Kronman. **The Journal of Legal Studies**, v. 9, n. 2, pp. 243-252, mar. 1980.
[61] SALAMA, Bruno. "O que é Direito e Economia?". **Direito UNIFACS**, n. 160, 2013. Disponível em: < https://revistas.unifacs.br/index.php/redu/article/view/2793/2033>. Acesso em 3 de março de 2021.

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The Economic Analysis of Law is, therefore, both an explanatory science and an evaluation methodology[62], This methodology assesses the economic consequences of the Law.

The normative AED, insofar as it evaluates as efficient a certain consequence of an application of the Law, is nothing more than a form of consequentialism of rules[63], considering that it assesses the consequences of a given act based on rules established ex ante. It is a consequentialism based on the Theory of Efficiency.

The evolution of the AED as an object of study took place in the context of common law, in which, as a rule, it is up to the judge to say the right. This creative aspect of the Law brings to the routine of the judicial decision questions such as "what is the function of the Law?", and even a greater concern with the consequences of a given decision because, unlike the countries of Roman tradition, the judge does not judge - as a rule – based on a codified right – which makes it end up attracting the burden of a bad decision to itself and not to a legislator who has glimpsed, in the abstract, the solution for the future concrete case.

3. CONSEQUENTIALISM, PRAGMATISM, ECONOMIC ANALYSIS OF LAW AND BRAZIL

Consequentialism, pragmatism and Economic Analysis entered Brazil in a scenario in which the expansion of the Theory of Principles reached a turning point, in which the use of principology - especially constitutional - is observed as a way to support a decision-making particularism of magistrate of all grades.

The new wording to LINDB is thus shown as a legislative attempt to react to a form of application of principles that was called by Carlos Ari Sundfeld as laziness[64].

The incorporation of new methodologies – more practical – thus takes place in a context of opposition. If consequentialism, as a philosophy, is opposed to deontology, it is not surprising that, in Brazil, there is this antagonism towards a decision-making standard that emphasizes practical consequences of decisions when the judge makes use of principled arguments, whose deontological nature seems to be evident[65].

[62] GICO JUNIOR, Ivo Teixeira. Notas sobre a Análise Econômica do Direito e Epistemologia do Direito. **Direito UNIFACS**, n. 160, 2013. Disponível em: < https://revistas.unifacs.br/index.php/redu/article/view/2794>. Acesso em 3 de março de 2021.
[63] CSERNE, Péter. Consequence-Based Arguments in Legal Reasoning: A Jurisprudential Preface to *Law and Economics*. In: Mathis K. (eds) Efficiency, Sustainability, and Justice to Future Generations. Law and Philosophy Library, vol 98. Springer, Dordrecht, 2012.
[64] SUNDFELD, Carlos Ari. Princípio é preguiça? *In*: Ronaldo Porto Macedo Jr. e Catariana Barbieri (org). **Direito e interpretação – racionalidades e instituições**. São Paulo: Saraiva, 2011, pp. 287-305.
[65] In this sense, see article 20, LINDB: Art. 20. In the administrative, controlling and judicial spheres, it will not decide on the basis of abstract legal values without considering the practical consequences of the decision.

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The pragmatic turn[66], when combined with a methodology such as Economic Analysis, it can mitigate the bad consequences of a decision-making jurisdiction, based on a requirement to bear the argumentative burden of the practical consequences of an application of abstract principles. The Law would thus become more accurate and predictable.

The Economic Analysis of Law, in a normative version, can be developed, therefore, as a normative theory about the judicial decision[67], inserting jurisdictional activity in the economic system, demonstrating that judicial decisions, in addition to having consequences, have economic consequences.

If these are the optimistic points regarding the incorporation of consequentialist theories in Brazil, there is the fear that a consequentialism to the Brazilian will emerge, according to which the "practical consequences" become a mere theoretical argument - such as the dignity of the human person - of low semantic density, able to support any decision-making, or even proactive, particularism[68].

This risk is maximized, above all, in a context of increasing judicial protagonism.

If reasonableness is the wild word today, tomorrow “practical consequences” or “economic efficiency” may come to replace it. The use of the terms consequentialist and pragmatism is not strange to the jurisprudence of the Supreme Court, as can be seen from the examples listed below:

The Original Action n. 1773, of the report of the Min. Fux[69], says:

> From this viewpoint, pragmatism revolutionizes the way in which the institutional functions of magistrates are problematized, as well as the relationship between judicial practice and deontological philosophy. Increasingly, constitutional courts have explicitly adopted the consequential discourse to resolve conflicts, especially in contexts of political and economic crisis. Once a distant idea, pragmatism has become common place in adjudicative practice. (BRASIL, 2018)

The mention of pragmatism here is in opposition to deontological ideas, associating it too much, however with consequentialism, citing a “consequential discourse”. In fact, a superficial

[66] Binenbojm, op. cit.
[67] MARTINS, Daniela Berwanger; PAZETO, Matheus Lolli. Breves linhas sobre a inclusão da Análise Econômica do Direito na prolação de uma decisão judicial. *In:* **Reflexões sobre Direito e Economia** (Armando Castelar Pinheiro et al. org). pp. 145-164. Rio de Janeiro: FGV Direito Rio, 2020.
[68] Leal notes the paradox that importing theories, in an attempt to give more certainty to the judicial decision-making process, often ends up increasing uncertainty by providing new theoretical tools for decisionism: Greater determination efforts do not necessarily lead to greater limitation of discretion . On the contrary, as stated, they can only make the decision-making process more uncertain. Take, for example, the plurality of methods available to guide the constitutional interpretation in the country and the growing difficulty in anticipating results and the paths to substantiate decisions in the Supreme Court. The attempt to “control” constitutional interpretation through decision-making methods and theories that appeal to counterfactual elements or vague prescriptions, rather than increasing the predictability of outcomes, actually allows very different theoretical foundations to be freely selected to justify any decision.
(LEAL, Fernando. Regulando a incerteza: a construção de modelos decisórios e os riscos do paradoxo da determinação. Revista de investigações constitucionais, Curitiba, v. 3, n. 3, p. 219, set./ dez. 2016.)
[69] Ação Originária 1.773, Supremo Tribunal Federal, Rel. Min. Luiz Fux, Decisão Monocrática de 26/11/2018.

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view can see an overlapping relationship between pragmatism (legal) and consequentialism, remembering, however, that consequentialism is a moral philosophy that judges the morality of acts according to their practical consequences. Pragmatism, therefore, is consequentialist, but there are other forms of consequentialism, such as utilitarianism (an example of rule consequentialism, as already mentioned).

Another case that evokes such ideals, also reported by Min. Fux, is the RE 1.083.955[70], in which it is stated that: "The regulatory controls, in the light of consequentialism, are commonly dynamic and unpredictable". The idea here is to mention the mutability of regulatory controls due to what would be a consequentialist perspective, based on the consequences of a given regulation. The mention of consequentialism, however, seems to be done in a rhetorical way, evoking today's usual references to figures such as reasonableness and proportionality.

Another interesting decision, and one that deserves even greater emphasis, concerns the ADI 5543/DF, as reported by Min. Fachin. The aforementioned action of concentrated control of constitutionality rebels against norms that prohibit the donation of blood by homosexuals. If one of the tonics of this article is the concern with the bad-importation of foreign theories, there is, in this ADI, a kind of scarecrow made in relation to consequentialism, stating that the discrimination against the blood donation of homosexual men would be due to an "immeasurable consequentialist interpretation". This view of consequentialism is as worrying as that which associates legal positivism with Nazism[71].

Despite a certain casualness in the references to consequentialism and pragmatism, pessimism should be curbed: if reasonableness and proportionality can easily be evoked rhetorically as escape routes in the decision-making process, they are because of the difficulty in being falsified.

The same cannot be said, however, about the mention of the practical consequences of a given decision, which can be empirically demonstrated. It is thus linking the normative plane to reality[72], answering the question: "what is the practical consequence of a given legal institute?", thus guaranteeing the Law's ability to change reality.

If anthropophagy is one of the hallmarks of Brazilian culture – which is commendable, since the attitude of receptivity to new theories always enriches the debate – sometimes a reverse anthropophagy is needed, in which we seek to reconstruct what was consumed in its previous form . That was the purpose of this article: to delimit the concepts of consequentialism, pragmatism and

[70] RE 1083955 AgR, Relator(a): LUIZ FUX, Primeira Turma, julgado em 28/05/2019, publicado em 07/06/2019.
[71] To deepen the discussion, v. BORGES VALADÃO, Rodrigo. A luta contra a teoria pura do direito na República de Weimar e o caminho para o nacional-socialismo. **Revista Eletrônica da PGE-RJ**, v. 3, n. 3, 30 dez. 2020.
[72] PARGLENDER, Mariana, SALAMA, Bruno. Direito e consequência no Brasil: em busca de um discurso sobre o método. **Revista de Direito Administrativo**, v. 262, p. 95-144, jan./abr. 2013.

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Economic Analysis of Law before anthropophagic digestive processes, combined with academic repetition, make it impossible.

CONCLUSION

This article identified the existence, in Brazil, of a tendency to import and transform foreign theories. Not only do such theories change, they sometimes end up amalgamating.

Authors of Brazilian Law even identify in Brazilian jurisprudence a history of not so rigorous use of imported theories – such as the Theories of Principles, which is used, in a rhetorical way, to support judicial particularisms.

We proposed, therefore, that there is a new wave of importing theories, which includes consequentialism, pragmatism and the Economic Analysis of Law. The concern raised was towards a possible misuse of such theories.

The hypothesis of this article is that, if ideas are badly imported, it is important to properly conceptualize and differentiate the concepts. In this way, we seek to expose consequentialism, pragmatism and the Economic Analysis of Law under the terms in which they were originally treated.

To do this, we explain the concepts; we identify the similarities; and we delineate the conceptual separation line.

Consequently, consequentialism would be a moral philosophy according to which the morality of a given action is evaluated based on its consequences. There are two kinds of consequentialism: act consequentialism and rule consequentialism. The first evaluates the act from its consequences, having only the act as a reference; the second evaluates the act according to adherence to a previously determined set of rules.

Pragmatism, as a philosophical current, understands that words and thoughts should be considered instruments for prediction; Problems solution; and actions, rejecting the idea that the function of thought is to describe, represent or reflect reality.

Legal pragmatism, in turn, is understood as a normative theory of the decision-making process undertaken by legal agents.

Finally, the Economic Analysis of Law takes care of applying the assumptions of Economic Theory for the analysis of legal institutes, either through a descriptive bias, or through a normative bias.

There are especially similarities between consequentialism and pragmatism. One of the three characteristics associated with pragmatism is even consequentialism. The Economic Analysis of

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Law, in turn, can be understood as a kind of consequentialism of rules guided, especially in its normative aspect, by a theory of economic efficiency[73].

If the article demonstrated that such concepts have a common tangency zone, it cannot be said, however, that they are synonymous or that they can be used in a fungible way. It is therefore necessary to identify the correct conceptual scope of each of the theories, in order to avoid incorrect application, which does not contribute to the dissemination of such theories and approaches. On the contrary: by creating an intellectual apparatus with poorly defined borders, a scarecrow is created, subject to denunciation and criticism[74].

If the experience of the Brazilian legal academy points to a tendency to Brazilianize imported theories – an echo of the Anthropophagy of the Modernists – this article seeks a kind of preventive reverse engineering. Presenting the correct definition of theories, before the swallowing process becomes irreversible, is the way to, at least ideally, fight against the trivialization and misuse of concepts by the operators of Brazilian Law. It is to fight, thus, so that consequentialism, pragmatism and the Economic Analysis of Law are not the new Proportionality.

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[73] On the theoretical dimensions of the Economic Analysis of Law, Ulen states that: "Let me begin with an argument about theory. There seems to be much more of it in legal scholarship than was the case twenty years ago. Probably the most obvious culprit in this regard is law and economics. Whatever else they have done, scholars working from that perspective have assiduously explored the legal system to see the extent to which law is efficient. They have articulated a comprehensive theory—both positive and normative—that asserts that, for example, the rules and standards of property law should (and largely do) foster the efficient use of society's scarce resources, that contract law should (and largely does) efficiently lower the transaction costs of forming and completing consensual agreements, that tort law should (and largely does) efficiently minimize the social costs of accidents, and that po argely do) efficiently choose between settlement and litigation.116 These same tools—microeconomic analysis of legal decision making on the assumption that everyone involved is a rational actor—has also been extended into the areas of public law, such as corporate law,117 criminal law,118 bankruptcy,119 and family law." (ULEN, Thomas. A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law. University of Illinois Law Review, v. 2002, n. 4, pp. 875-920, pág. 909).

[74] These ill-defined and ill-defined ideas and concepts become easy targets for criticism. These criticisms, which, precisely because they aim at not the best version of these ideas, but the Brazilianized version, tend to multiply and consolidate, as if what had occurred were in fact a refutation as a rule. In fact, it was just a rebuttal to a scarecrow that has little or nothing to do with the idea in its original version. A typical example of this scarecrow is what usually happens with criticisms of positivism. Brazilian critics, with few exceptions, treat positivism as a type of radical legalism discredited around the world. In this light, it is relatively easy to criticize positivism. The problem is that it is not, in kind, positivism, but just a scarecrow, a mere shadow, blurred, of positivism as presented by its main exponents, such as, for example, HLA Hart, John Gardner and Joseph Raz. The same goes for the ideas dealt with in this article: if it is a question of criticizing consequentialism, pragmatism or the economic analysis of law, it is necessary, first of all, to know what is being talked about, that is, it is necessary to define, as rigorously as possible, and according to the understanding of the main defenders, what is consequentialism, what is pragmatism and what is the economic analysis of law. Only after that is it possible to do a real work of criticism. Criticism of true ideas and concepts, and not attenuated or even, in the case of Brazilianization, deformed versions.

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