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REVIEW

THE INDISPENSABILITY OF LEGAL REGULATION IN THE RURAL FIELD BY CONTEMPORARY AGRARIAN LAW – AN ANALYSIS OF THE WORK "THE DEMOCRATIC REGULATION OF SURPLUS IN THE RURAL AREA: THE STILL INDISPENSABLE AGRARIAN LAW" BY JOÃO PAULO DE FARIA SANTOS

A IMPRESCINDIBILIDADE DA REGULAÇÃO JURÍDICA NO CAMPO PELO DIREITO AGRÁRIO CONTEMPORÂNEO – UMA ANÁLISE DA OBRA "A REGULAÇÃO DEMOCRÁTICA DO EXCEDENTE NO CAMPO: O AINDA INDISPENSÁVEL DIREITO AGRÁRIO" DE JOÃO PAULO DE FARIA SANTOS

LA IMPRESCINDIBILIDAD DE LA REGULACIÓN JURÍDICA EN EL CAMPO POR EL DERECHO AGRARIO CONTEMPORÁNEO – UN ANÁLISIS DE LA OBRA "LA REGULACIÓN DEMOCRÁTICA DEL EXCEDENTE EN EL CAMPO: EL TODAVÍA INDISPENSABLE DERECHO AGRARIO" DE JOÃO PAULO DE FARIA SANTOS

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ABSTRACT

This review aims to critically analyze the doctoral thesis of João Paulo de Faria Santos, entitled "The Democratic Regulation of Surplus in the Countryside: The Still Indispensable Agrarian Law," which defends the continued relevance of legal regulation in the Brazilian countryside. To support this thesis, the author presents the historical, political, and legislative perspective of the agrarian question, aiming to understand the formation of Agrarian Law as a branch of Economic Law. Additionally, the transition of land into an economic good (commodity) tradable in the land market is examined. This good, therefore, is strategically stripped of its collective dimension to acquire an individual/private character, protected by Modern Law as an absolute right. However, as a result of the global crises of the late 19th century, a new way of thinking about Law emerged, resulting in the creation of Economic Constitutionalism and the recognition that property has a social function of a collective nature. In the Brazilian context, the author presents how the agrarian question has been addressed since colonization, through the Land Statute (considered fundamental for the institutionalization of Agrarian Law) of 1964, and culminating in the Federal Constitution of 1988. It can be concluded that, given the paradoxes witnessed in Brazil, such as hunger coexisting with bumper crops and the growth of "Agribusiness Law," the role of the State and agrarian reform remain crucial for sustainable development and for safeguarding the public interest.
Keywords: Contemporary Agrarian Law. Agrarian Question. Legal Regulation of Capital in the Countryside. Social Function of Property.

RESUMO

A presente resenha objetiva analisar criticamente a tese de doutorado de João Paulo de Faria Santos, intitulada "A Regulação *Democrática* do Excedente no Campo: O Ainda Indispensável Direito Agrário", a qual defende a contínua relevância da regulação jurídica no campo brasileiro. Para sustentar a tese, o autor apresenta a perspectiva histórica, política e legislativa da questão agrária, com vistas a se compreender a formação do Direito Agrário enquanto ramo do Direito Econômico. Adicionalmente, examina-se a transição da terra para um bem econômico (mercadoria) transacionável no mercado de terras. Esse bem, portanto, é estrategicamente desconstituído de sua dimensão coletiva para adquirir um caráter individual/privado, resguardado pelo Direito Moderno enquanto um direito absoluto. Todavia, em decorrência das crises globais do final do século XIX, emergiu uma nova forma de se pensar o Direito, resultando na criação do Constitucionalismo Econômico e no reconhecimento de que a propriedade tem uma função social, de caráter coletivo. No contexto brasileiro, o autor apresenta a maneira como a questão agrária foi tratada desde a colonização, passando pelo Estatuto da Terra (tido fundamental para a institucionalização do Direito Agrário), de 1964, e se chegando à Constituição Federal de 1988. Conclui-se que, diante dos paradoxos testemunhados no Brasil, como a fome coexistindo com as supersafras e o crescimento do "Direito do Agronegócio", a atuação do Estado e a reforma agrária permanecem cruciais para o desenvolvimento sustentável e para a salvaguarda do interesse público.
Palavras-chave: Direito Agrário Contemporâneo. Questão Agrária. Regulação Jurídica do Capital no Campo. Função Social da Propriedade

RESUMEN

Esta reseña analiza críticamente la tesis doctoral de João Paulo de Faria Santos, titulada «La regulación democrática del excedente en el campo: la aún indispensable ley agraria», que defiende la vigencia de la regulación jurídica en el campo brasileño. Para fundamentar su tesis, el autor presenta la perspectiva histórica, política y legislativa de la cuestión agraria, con el fin de comprender la

formación del Derecho Agrario como rama del Derecho Económico. Asimismo, se examina la transformación de la tierra en un bien económico (mercancía) comercializable en el mercado de tierras. Este bien, por lo tanto, se despoja estratégicamente de su dimensión colectiva para adquirir un carácter individual/privado, protegido por el Derecho Moderno como un derecho absoluto. Sin embargo, a raíz de las crisis mundiales de finales del siglo XIX, surgió una nueva concepción del Derecho, que dio lugar al constitucionalismo económico y al reconocimiento de que la propiedad tiene una función social de carácter colectivo. En el contexto brasileño, el autor presenta cómo se ha abordado la cuestión agraria desde la colonización, a través del Estatuto de Tierras (considerado fundamental para la institucionalización del Derecho Agrario) de 1964, y culminando en la Constitución Federal de 1988. Se concluye que, ante las paradojas observadas en Brasil, como la coexistencia de hambrunas y cosechas abundantes y el auge del Derecho Agrario, el papel del Estado y la reforma agraria siguen siendo cruciales para el desarrollo sostenible y la salvaguarda del interés público.
Palabras clave: Derecho Agrario Contemporáneo. Cuestión Agraria. Regulación Jurídica del Capital en el Campo. Función Social de la Propiedad.

INTRODUCTION

The thesis analyzed here is titled "The Democratic Regulation of the Agricultural Surplus: The Still Indispensable Agrarian Law" and was produced by João Paulo de Faria Santos in 2020 for the Graduate Program of the Law School at the University of São Paulo (USP).

Firstly, the introduction confronts the reader with provocative questions about Brazilian reality, as the author places side by side situations so opposite they seem almost irreconcilable, but are in fact more connected than one might imagine: Brazil as a country of record harvests and, simultaneously, of hunger; and the Covid-19 pandemic as a period when commodity exports reached high levels, but the tables of Brazilians were also emptier than usual, as prices rose incessantly.

In this vein, Santos relates such paradoxes to the Brazilian agrarian issue, which, as he describes, gained importance in progressive circles in the 1950s and 1960s, a period when changes in the structure of the countryside and land organization seemed more imperative than ever, paving the way for the emergence of a new branch of Brazilian law: Agrarian Law. However, the author is quick to point out that the notions of Agrarian Law and agrarian reform did not arise from a sudden progressive impulse during the 20th century, but are part of a set of historical, social, and academic phenomena far more comprehensive than those that occurred during the brief past century.

From the introduction, it is evident that the thesis intends to delve into national and international history, analyzing the path taken by the agrarian issue until reaching the current reality of Agrarian Law – a context extremely welcome for any legal scholar. Here, Santos makes a point of explaining that he will address the past of Constitutionalism, in order to demonstrate how land went

from being conceived as a simple commodity to being considered an asset of collective importance, and during this process, ended up influencing the consolidation of Economic Law and Agrarian Law itself as areas primarily in the service of public, not private, interest. The author then describes the hypothesis to be analyzed throughout the thesis, namely, that offering a legal perspective to the problem of land remains relevant today, and therefore, Agrarian Law is still indispensable.

1 ON THE INDISPENSABILITY OF CONTEMPORARY AGRARIAN LAW: THE LESSONS OF JOÃO PAULO DE FARIA SANTOS

"Chapter I – Economic Law as the Law of Economic Organization," the best-written part of the thesis, offers an essential historical overview to understand the transition between the liberal worldview and interventionism aimed at regulating the economy and social welfare. The author explains that the ideals of individualism, economic freedom, and absolute private property – counterpoints to the *Ancien Régime* – guided the rise of the bourgeoisie and the solidification of its power during the 18th and 19th centuries. During this period, pandectics, a school of legal thought based on Roman writings, emerged to ground the understanding of Law for the new ruling class.

The text makes it clear that, by valuing Private Law in an abstract and autonomous way, pandectics relegated Public Law to a secondary plane, subservient to private relations and neutral to changing reality. This arrangement was very favorable to the bourgeois class but ignored the historical and social processes that human society tends to undergo. By defending the existence of a universal, definitive legal order detached from the struggles of peoples, pandectics removed the innovative and renewing aspect of Law, leading to a rigidity that would prove unsustainable.

As history has often shown, it sometimes takes a major crisis or an unprecedented catastrophe for humanity to change its course. This is what the first half of the 20th century confirmed. Although prominent authors, such as Karl Marx, had already pointed out the flaws of liberal thought and the consequences of unbridled capitalism, it was the outbreak of world conflicts and devastating economic crises that caused long-established ideas to be questioned. In this sense, the "purity" of Law and its closeness to the absolute idea of property gave way both to the rescue of the historical dimension of legal production and to the notion of a State that regulates, intervenes, and imposes limits on that property.

Even before the 1929 New York Stock Market crash and the Second World War (1939-1945), the need to renounce the model of a State that allowed property owners, including landowners, to act as they pleased – the State indifferent to economic reality – seemed latent. After all, with the problems brought by the European liberal model – expressed in the form of income concentration,

misery, and popular dissatisfaction – the economy needed to cease being a mere private matter and become a problem for the entire community. It is in this context that the phenomenon of Economic Constitutionalism comes to life in the form of the 1917 Mexican Constitution and the 1919 Weimar Constitution, documents that came to challenge the liberal civils ideology, introducing the State as an agent of the economic order and one of the responsible parties for regulating what would become known as the "social function of property."

It is understood that this imposition of duties correlative to the rights of property owners is the hallmark of the primacy of collective interest, which in turn results from the return to the protagonism of Public Law over Private Law. It comes to be understood that the economy does not concern only the individual sphere but concerns the entire nation, deserving, therefore, appropriate legal treatment by the State. Thus, Economic Law is born, autonomous in relation to Civil Law and closely linked to the concrete world and the regulation of economic activity, aiming to achieve certain ends – such as social welfare, for example.

From this moment on, the thesis begins to relate the historical transformations, Economic Constitutionalism, and Economic Law to the structuring of Agrarian Law, as the latter also emerges as an autonomous public branch, to be discussed by everyone and not just a few powerful individuals. To better explain, Santos states that one of the legacies of the two world wars was the proof of how efficient a planned economy can be, so that, after the end of the conflicts, many countries – including the most capitalist ones, like the USA – began to see the existence of sectors and assets that should receive special attention and regulation from the State. Thus, Karl Polanyi enumerates three strategic legal assets (*bens jurídicos estratégicos*) that should fall under the purview of Public Law: money, labor, and land.

In general terms, the perspective brought by these changes was that when land is treated as a simple commodity, it becomes commercialized and minimized as nature, followed by its concentration in the hands of a few or its destruction. In the case of Economic Constitutionalism, which preceded the formation of Economic Law and, consequently, Agrarian Law, land ceases to be simply a product to be owned and traded by private individuals and becomes something socially relevant. Thus, when speaking of Agrarian Law, which deals precisely with the legal asset "land," it is fundamental to think about its teleological dimension; in other words, it is necessary that, as one of the branches closely linked to Economic Law, Agrarian Law be oriented towards objectives that benefit society as a whole, whether in terms of optimizing production, reducing land concentration, or financially incentivizing productive activities.

One last relevant point of this first chapter is the author's description of the plans that were (some partially) implemented in Brazil: starting with JK's *Plano de Metas* (Goals Plan), which combined planning and development; passing through João Goulart's Triennial Plan (*Plano Trienal*), which proposed reforms of economic structures (*reformas de base*), including agrarian reform; also the dictatorship's Development Plan (*Plano de Desenvolvimento*), which proposed growth and regulation but did not undergo social debate at any of its levels, becoming more a sample of totalitarianism than of democratic practice; and, finally, the 1988 Federal Constitution is discussed, which provides for a regulated economic order and functions, according to Santos, as a middle ground between liberal idealism and Soviet idealism, i.e., markets do not operate without regulation, nor are they destroyed.

Next, we have "Chapter II – Agrarian Law as the Legal Translation of the New Economic Organization of the Rural in the 20th Century," in which the author again addresses the historical aspect, but this time focusing on the formation of Agrarian Law in the global context. From Santos's explanation, it can be inferred that the agrarian issue occupied a central role not only in debates during the transition from liberalism to interventionism but also before, in the context where ideologies alternative to capitalism were emerging. Regarding this, the thesis discusses the absence of the social aspect in capitalist rural property, especially when talking about peasants, since the logic of profit delegitimizes small property. However, even in the socialist conception, small producers should not keep their lands, which would go to the State. Here, Santos states that this confluence of thoughts was not enough to remove the protagonism of peasants in consolidating Agrarian Law and in the struggle for agrarian reform.

The thesis is very didactic when describing the case of the Mexican Revolution, which culminated in the already mentioned 1917 Constitution. In Mexico, thanks to peasant pressure, the absolute commodification of land was blocked, confirming its classification as an asset belonging to the nation (original property) that was only, in a way, granted by the State to individuals (derived property). According to this reasoning, one of the pillars of the civils and liberal logic falls, as private property is no longer seen as a natural right.

In this line, the innovations brought by the Mexican Revolution reverberated in various parts of Latin America and the rest of the world, including Brazil. It became evident that it was necessary to treat the problem of land in a specific way, giving birth to this area of study that, as already stated, was part of Public Law and was focused on the resolution and regulation of demands important to society, such as the autonomy of traditional communities, agrarian reform, food sovereignty, and the rights of rural workers.

It is impossible to dissociate what is today understood as Agrarian Law from the Italian tradition, after all, it was precisely in Italy that the foundations of this branch were established. Santos cites, as a milestone of Agrarian Law, the publication of the *Rivista di Diritto Agrario* in 1922, which officially inaugurated discussions about the emancipation of the legal treatment of land in relation to Civil Law. Important exponents of the period were Gian Gastone Bolla and Antonio Carrozza, as well as the Spaniard Alberto Ballarín Marcial. The production of such authors was so relevant that, in continuation of the break with the liberal tradition, countries began to incorporate in their Constitutions the agrarian issue allied with the "social function of property," in addition to establishing their own Agrarian Codes.

The social function of property is a neuralgic point of the examined thesis, with Santos touching more than once on the fact that a right without limitation would lead to chaos. This view becomes predominant with the incorporation of land into the constitutional thematic, because giving someone the subjective right to own a piece of land, without proposing a correlative duty, is harmful to the collective interest, since land is an essential asset for human sociability – besides being, obviously, an inseparable part of nature.

In this vein, there was a shift from property-as-speculation to property-as-function, in order to direct Agrarian Law towards the improvement of common life and not just private life. Furthermore, disputes around expropriation and the nationalization of the means of production were also growing, agendas that definitively put an end to absolute private property by establishing the notion of the State as an agent capable of intervening and taking away an individual's property for the sake of public interest.

Certainly, Brazil did not escape this conjuncture, since, throughout the 20th century, it became inescapable that agrarian reform was essential for the country. The thesis begins its "Chapter III – Formation, Consolidation, and Crisis of Agrarian Law in Brazil," with the author resorting to chronology to elucidate how the current national picture of the agrarian issue was reached.

Briefly, Santos deals with the beginnings of Portuguese colonization in Brazil, which brought the *sesmarias* model – very linked to cultivation and productivity – and, later, consolidated the plantation system, which, like that adopted in the USA, brings monopoly both of labor (enslaved workforce) and land (large monocultural properties geared to the external market). This history made Brazil one of the world's largest producers of primary commodities, which continues to this day. However, despite the early importance of the agrarian sector for the national reality, land received tardy treatment in the legal system, this being only a result, like many of the Brazilian government's initiatives, of foreign pressure. The English Crown, eager to expand its consumer markets, pressured

Brazil heavily to abolish slavery, so that in 1850 the so-called Land Law (*Lei de Terras*) was enacted – responsible for ensuring that land could only be acquired through purchase and sale, burying possession and drastically hindering access to the countryside. This legislation was nothing more than the attempt to retain the monopoly of land, as the monopoly of labor was gradually dissolving.

While, in the author's words, the captivity of man was turning into the captivity of land, the government began to seek more effective ways to regulate the countryside, as the alternatives chosen until then, such as the control of the coffee surplus, generated little beyond imbalance between supply and demand. Attempts were made throughout the 20th century to establish an economic order in Brazil focused on fostering the national market and providing inputs for industrialization and development. In this, it is worth noting that the social function of property had already been alluded to in the 1934 Constitution; however, the first major project for the countryside was that of Getúlio Vargas's Estado Novo, which, although focused on the urban sector, brought important regulatory aspects for the rural area, notably regarding the sugarcane-alcohol sector.

After the end of the Estado Novo, the next major project was that of João Goulart, who, confronted with the rise of the *Ligas Camponesas* (Peasant Leagues) and the need for agrarian reform and supply of the internal market, began to encourage land distribution and the fight against land concentration. Intending to implement the so-called "reforms of base" (*reformas de base*), Goulart proposed restructuring the Brazilian countryside through a National Agrarian Reform Plan (PNRA) that would be adjusted annually. However, Jango's ideas did not come to fruition, as the 1964 Military Coup brought another type of government to power.

During the dictatorial period, some previously discussed guidelines were applied by the military government, such as Constitutional Amendment No. 10 (linked to the 1946 Federal Constitution), which provided for the autonomy of agrarian law and sanctioning expropriation (paid for by public debt bonds). Furthermore, it was during the dictatorship that the Land Statute (Law No. 4,504/1964) was published, establishing the conception of Economic Law to Brazilian Agrarian Law and regulating rural contracts.

Rightly, the thesis delves into the two factors that explain this reality during the dictatorship: 1) the pressure from the USA, which encouraged agrarian reforms around the world to reduce the chance of uprisings and revolts similar to those that occurred in Russia and Cuba; and 2) the need to suppress dissent in the countryside without, however, altering the large structures, incorporating the encouragement of colonization of the agricultural frontier as a strategy to absorb the large mass of landless workers. According to the author, truly changing the agrarian environment was never the intention of the military government; the very creation of the National Institute of Colonization and

Agrarian Reform (INCRA) was only one of the many ways the government ensured that reform remained on paper, without it being too apparent.

After dealing with all this, the thesis addresses, in a less organized manner, the topic of rural credit, which also dates to Vargas's time and emerges as an aid aimed at financing, investment, and commercialization in the countryside. Upon realizing that rural production time is very different from consumption time, providing subsidies to producers becomes a necessary measure to ensure they can continue their activities. In view of this, the National Rural Credit System (SNCR) was created by Law No. 4,829/1965, and since then, taking rural credit has been considered essential for the survival of many producers, although, even today, small suppliers receive much less credit than large farmers and ranchers, who are already economically established. For Santos, the *Manual de Crédito Rural* (Rural Credit Manual), which regulates credit concession, is considered very technocratic and undemocratic.

With this panorama, the thesis finally examines the 1988 Federal Constitution, the one responsible for placing the social function as an unamendable clause (*cláusula pétrea*) (Article 5, item XXIII and Article 60, §4º), confirming property as a right-duty and detailing agricultural and land policy (Article 184 and following). On the other hand, even with the advances brought, since the promulgation of its official text – from which many proposals on agrarian reform and combating land concentration were removed – little has advanced in terms of Agrarian Law to achieve an effective restructuring of the countryside, and, as can be inferred from the text, the federal government only adopted a reactive posture, responding with actions only when provoked by some event. Therefore, it is said that, during the New Republic period, there was an official forgetting of the agrarian issue, although the population still remembered. Even with attempts and sketches of Agrarian Reform Plans, there was no significant progress, and currently there is no proper settlement plan.

The text emphasizes that the forgetting of the agrarian agenda does not mean that Agrarian Law became less important; quite the contrary. What occurred from the 2000s onwards were profound changes in the rural economy, with the so-called "commodities boom" and the organization of an agro-industrial structure, leading to the strengthening of "Agribusiness Law." Now, more than ever, it becomes imperative to discuss land concentration, deindustrialization – motivated by the predominance of primary product exports – the weakening of the internal market, and supply problems in the country.

The expansion of neoliberalism and the more intense presence of international oligopolies make urgent the discussion about the role of Agrarian Law, which, as already pointed out, should be one of legal protection and achievement of constitutional objectives aimed at societal improvements.

The author argues that large-scale soy production, for example, brings income to its producers but does not bring food to the people's table and does not seem to culminate in benefits for the national industry and the internal market. According to the statistical data listed, family farming and small property are the most responsible for providing the variety of food necessary to supply the Brazilian population, but they still do not receive the same incentives dedicated to large producers.

2 FINAL CONSIDERATIONS

Amidst so many conflicts provoked by a new conservatism – with pandectist roots – that has emerged alongside this "Agribusiness Law," it is perceptible that the legal regulation of the agrarian sector is as essential and indispensable now as it was at the beginning of the 20th century.

Given timid advances on the subject – such as the establishment of the Food Acquisition Program and changes in the Bidding Law –, transformations and difficulties imposed by a constantly changing world, the thesis allows us to conclude that the function of the State as a regulatory agent of the surplus and an intercessor for collective interests must continue to be exercised, confronting market forces and aiming to guarantee national development in a sustainable manner, thus not forgetting the vitality of agrarian reform and the valorization of small property.

In summary, the thesis is extremely well-written and detailed, with emphasis on the first chapter, and brings up a theme that never goes out of style, i.e., the agrarian issue. Not only the historical perspective but also the political and legislative analyses made by the author are very relevant for understanding the formation of Agrarian Law.

In any case, the thesis offers rich material for the law student, notably for those interested in pursuing the agrarian and/or constitutional fields.

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