

THE INTERFACE STATE AND ECONOMY AND LEGAL REGULATION OF THE MARKET: CHALLENGES FOR SUSTAINABLE DEVELOPMENT IN BRAZIL

A INTERFACE ESTADO – ECONOMIA E REGULAÇÃO JURÍDICA DO MERCADO: DESAFIOS PARA O DESENVOLVIMENTO SUSTENTÁVEL NO BRASIL

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RESUMO

O presente artigo versa sobre a interface Estado e Economia, tendo como objeto a Constituição Federal e o Direito Econômico. Investigar-se-ão as faces positiva e negativa dessa relação sistemática. O corte epistemológico desenha-se a partir da análise entre os valores constitucionais, como justiça, ética e humanismo e sua imbricação com o capitalismo enquanto elemento primordial ao progresso material. Justifica-se falar de axiologia constitucional e capitalismo, haja vista as profundas desigualdades sociais e regionais havidas no País, e também pelo fato de ambos serem essenciais à realização do ser humano e ao desenvolvimento sustentável brasileiro. A problemática que emerge é investigar se ocorre uma análise jurídica da economia ou se há submissão do direito à economia. Hipoteticamente, a implantação de um capitalismo humanista é fator de desenvolvimento. O marco teórico assenta-se em modernas teorias humanistas, com utilização do método dedutivo e exaustiva investigação bi-bliográfica.

Palavras-Chave: Estado. Regulação Jurídica do Mercado. Capitalismo Humanista. Desenvolvimento Sustentável Brasileiro.

ABSTRACT

This article deals with the State and Economy interface. having as object the Federal Constitution and the Economic Law. We will investigate the two sides, positive and negative of this systematic relationship. The epistemological cut is drawn from the analysis between constitutional values, such as justice, ethics and humanism, and its overlap with capitalism, as a primordial element to material progress. It is justified to speak of constitutional axiology and capitalism, given the deep

social and regional inequalities in the country, as well as the fact that both are essential to human achievement and to sustainable development in Brazil. The problem that emerges is to investigate whether there is a legal analysis of the economy or whether there is a submission of the right to the economy. Hypothetically, the implantation of a humanist capitalism is a development factor. The theoretical framework is based on modern humanist theories, using the deductive method and exhaustive bibliographical research.

KEYWORDS: State. Legal Regulation of the Market. Humanist Capitalism. Development.

I INTRODUCTION

In this scientific article, we intend to analyze the connection between State and Economy, and the legal regulation of the market, as agents of utmost importance in the realization of the human being and in the construction of a sustainable platform.

Having as object the Federal Constitution and Economic Law, the aim is to investigate the nature of the State and its relationship with private initiative. In specific terms, the focus is to demonstrate that the imbrication between law and economics is not irreconcilable, but complementary, with the contradictions presented in the social concreteness being the fruit of the economic domination of law.

The present theme is justified by the fact that poverty, hunger, violence, corruption, and other social evils are rampant in society, demanding effective measures from the government to solve the problem.

Despite the fact that the 1988 Federal Constitution adopted capitalism as the economic regime of the Brazilian State, it draws it in the form of an ethical, human, and social capitalism, as it seeks to reconcile apparently contradictory elements, such as private property and social function.

Hence the importance of establishing the true roles of law and economy, which, acting together, can and should contribute to the full realization of the human being.

Capitalism has the merit of rationalizing production, service provision, and profit, which are not spurious, harmful, or forbidden, but rather are necessary for the realization of fundamental rights; and the law, in turn, has the virtue of equalizing the different interests at stake, fairly distributing the goods produced among all social actors involved, whether workers or businessmen.

The fundamental rights embodied in the Magna Carta, if put into practice, have the potential to build a new model of society based on sustainable development.

However, the problem arises of verifying why, despite the current Political Charter listing very important rights for the elevation of human dignity, "dehumanization", alienation, and capitalist exploitation prevail? Why are these rights not realized?

Thus, a specific topic is opened to investigate the ideological and hindering causes of sustainable development. The question to be answered is: Legal analysis of the economy or economic submission of the law?

The epistemological cut takes place precisely in the analytical perspective of the relationship between constitutional values, such as justice, ethics, and humanism, and the economic order, as an indispensable element for the development of the country.

The hypothesis raised intends to demonstrate that only the legal regulation of the market, by means of a constitutional axiology, is capable of resolving the tensions between the different social classes. The methodological solution, therefore, consists in the implementation of a humanistic capitalism.

For this purpose, the theoretical framework is based on a set of authors, who defend the interpretation of the Constitution through the filter of the dignity of the human person, supporting the importance of the State, the Law and the market economy, but as instruments for the effectiveness of fundamental rights. The methodology used in this work is deductive, accompanied by extensive bibliographical research.

The objective axiology of the State was trapped in the world of "should be," while the hidden face of power materialized, making ontological the mythological figure of Hobbes' Leviathan, defining the true nature of the State.

2 THE SPURIOUS LINK BETWEEN STATE AND CAPITALISM

The goal is to discover, through a cross-section of reality, the true nature of the relationships between the main actors who have the power to dictate the level of quality of life for all members of society.

Political and economic actors have always maintained hidden alliances behind the scenes of power. Therefore, it is observed that capitalist agents, through subtle strategies and their economic influence, sponsor political campaigns, so that they can transform the State into a chancellor body that supports their interests.

This is because the political actors in charge of expressing the popular will, through the state structure, are completely committed to the interests of the ruling classes:

Este é um dos grandes problemas do estudos jurídicos e constitucionais do Brasil na atualidade: a falta de uma reflexão mais aprofundada sobre o Estado. É necessário que os juristas retomem a pesquisa sobre o assunto, voltem a se preocupar com uma Teoria do Estado. Isto se reveste de maior importância no caso do Estado brasileiro, que, além de tudo, é subdesenvolvido. Conhecer, assim, os obstáculos à atuação do Estado brasileiro e buscar alternativas para superá-los é fundamental, e nossa opinião, na sua (re)estruturação para a promoção do desenvolvimento (BERCOVICI, 2005, pp. 42-43).

Therefore, despite the importance of the creation and maintenance of the State, as well as the adoption of an economic system that accelerates sustainable development, the truth is that both agents need to be adapted to a vision that prioritizes the quality of life of the people.

The power of the State is delegated through a vote of confidence that society places in it, expecting it to fulfill its role in establishing a qualitative, developed social life, based on opportunities for all, in the constant effort to combat the inequalities produced by capitalism.

This is the reason for the State's existence: the pursuit of the common good, which is why it is inconceivable that its political structure be compromised with powerful private interests.

However, by divorcing itself from its mission, maintaining contracts and secrets with certain economic agents interested only in the expansion of their wealth, the State becomes an ideological symbol of domination, succumbing before an increasingly demanding capitalist order:

[...] é importante chamar a atenção para o seguinte fato: numa fase da história em que se atinge tão alta concentração de poder econômico como no caso do capitalismo de monopólio, a máquina do Estado torna-se um instrumento dos grupos monopolistas dominantes. O monopólio, visto implicar uma concentração de poder dentro do sistema capitalista, resulta num controle político muito mais forte e estreito sobre a sociedade e a política do governo (CATANI, 1984, p. 73).

One of the main problems why the State should not become a hostage of the economic system is precisely because besides losing its political autonomy, it neutralizes the possibilities of growth for the common citizen, given that it is the agent responsible for sustainable development.

The historical lesson learned from the unethical partnership between state and private initiative, results in retrogression, exploitation, and deep socioeconomic inequalities, resulting in state inertia regarding its mandatory role of projecting and achieving development:

O desenvolvimento é condição necessária para a realização do bem-estar social. O Estado é, através do planejamento, o principal promotor do desenvolvimento. Para desempenhar a função de condutor do desenvolvimento, o Estado deve ter autonomia frente aos grupos sociais, ampliar suas funções e readequar seus órgãos e estrutura (BERCOVICI, 2005, p. 51).

It should be noted that the State, by its very condition as the agent that promotes the public interest, should not omit to engender a planned and strategic intervention in the economic market, in order to balance economic interests, market and labor relations, as well as the production and distribution of wealth.

Nowadays, in view of globalization and the integration of countries into economic blocs on various continents, the ethical role of achieving social welfare is also an obligation imposed by international organizations, as determined by the Bill of Rights of the Organization of American States (OAS):

O desenvolvimento é responsabilidade primordial de cada país e deve constituir um processo integral e continuado para a criação de uma ordem econômica e social justa que permita a plena realização da pessoa humana e para isso contribua (OEA, 1948, Artigo 33).

Not by chance, in order to fulfill their function of promoting the common good of society, the constitutions of the States bind their actions in the economic domain as a way to guarantee development, today considered sustainable, given that it involves economic progress, social welfare, and environmental protection:

As normas jurídicas que regulam a atividade econômica resultam do entendimento de que o Estado possui função de equilibrar as forças de mercado, dirigindo-as a uma política que ele próprio desenvolve. Assim, um grau maior ou menor de intervenção na atividade econômica é necessário para a sua operacionalidade. A identificação do grau de intervenção é que nominou o Estado em liberal, socialista e neoliberal, e o critério de tal classificação está exatamente no quanto interveio o Estado na atividade econômica (MASSO, 2013, p. 30).

In this way, the discipline of Economic Law was developed, which has the essential characteristic of being the State's instrument of intervention in the economic market, so that the law of the strongest does not prevail, in view of the State's mission to regulate the economic domain, in order to carry out its development project.

In the case of capitalist states in which economic agents have wide freedom of action, given that entrepreneurship, ownership of the means of production, and profit are fundamental elements of this system, coupled with the fact that political agents are coopted by the lords of capital, it becomes an arduous mission to impose concrete rules to balance the economic market.

It is not by chance the interest rates, citizen indebtedness, prices, financing costs, and inflation are characteristic points of this system, which escape the control of the legal norm or of any fair economic policy:

A intervenção do Estado no domínio econômico, nos estados apitalistas, é exceção. A livre-iniciativa e a propriedade privada são bases desse sistema que se desenvolve, em regra, pela liberdade de apropriação de bens e dos meios de produção. Essa é a repetida condição de intervenção do Estado. Entretanto, sustentar a excepcionalidade da intervenção, atualmente, significa apenas reconhecer o menor ou maior grau da intervenção. O sistema capitalista deparou-se com alguns desconfortos proporcionados por essa liberdade ilimitada dos agentes econômicos, que eram apenas controlados pelas próprias regras de mercado. Prestigiou-se, inicialmente, a grande empresa que, quanto maior fosse, mais méritos lhe eram conferidos. [...] Embora os ideólogos dessa época acreditassem que as próprias forças de mercado se equivaleriam, o que na verdade ocorreu foi uma concorrência inicial que, contudo, precedeu uma economia concentrada, culminando em mercados oligopolizados (MASSO, 2013, p. 30).

Once a critical look at reality allows the individual to conclude that the State is not developing the role for which it was created, if it ever fulfilled it, having succumbed to an inhumane capitalist order, the question remains: What is the future of the common citizen?

Clearly, maintaining the status quo of a state is in the interest of those who occupy the highest structures of political power, as well as the owners of capital; however, the subjugation and exploitation of citizens, unfulfilled political and legal promises, corruption, poverty, and violence are issues that need to be addressed in light of an era that has made the formal validity of human rights flourish.

When the State is inefficient with regard to its obligations to promote development, there is a certain preoccupation to implement policies of a strictly welfare nature, in a desperate attempt to repair the gaps caused by the infamous capitalist system and its intentional omission:

Vital Moreira anota que os conflitos sociais decorrentes da injustiça na distribuição da renda e na exploração dos trabalhadores faz com que o Estado tenha de assumir uma postura assistencialista (como, por exemplo, o sistema previdenciário alemão, em 1880) (GABARDO, 2003, p. 120).

3 THE BRAZILIAN POLITICAL-LEGAL OPTION FOR CAPITALISM

It should be emphasized that the criticism made to capitalism, so far, does not mean that it does not present positive points or that it should be discarded. It is obvious that the capitalist system has the logistical merit of making the management, production, distribution, and availability of goods and services essential to society more efficient.

It should be noted that in an extremely competitive market, a company cannot afford to be inefficient, which is why one of the positive aspects of capitalism is to adopt a methodology that makes it possible to extract from an enterprise and investment the maximum profitability, optimizing production and reducing costs and losses.

Thus, this economic regime is important because it leverages the economy and provides material resources that are indispensable for human development, considering that the enforcement of human rights demands an economic and financial cost.

Furthermore, the figure of the company, within its activity and sustainable function, is essential not only for economic development, but also as an agency for the enforcement of human rights:

A empresa é vista como um sistema em que se desenvolvem diversas atividades que extrapolam o âmbito econômico. Torna-se personagem direto do desenvolvimento social, e deve, portanto, atuar nesse papel como um instrumento de concretização dos direitos humanos e de melhoria na qualidade de vida das pessoas, sem se descuidar da preservação dos recursos naturais (SILVEIRA, et al., 2013, p. 18).

The challenge, then, is to harmonize the efficient and economic aspect of capitalism with a primer of ethical values, thus enabling an exchange between business and respect for others. In fact, the very concept of sustainability presupposes ethical conduct, as it shows concern for social equity and the preservation of the natural environment, the latter being indispensable to the perpetuation of life:

Ato contínuo, as empresas passaram a desenvolver uma responsabilidade totalmente nova e especial, preocupando-se não só com o lucro como um fim em si, mas também como um meio de desenvolver a sociedade como um todo, atendo-se também ao aspecto trabalhista, consumerista, ambiental, tributário e toda sorte de aspectos relevantes à sociedade como um todo e vinculados a uma compreensão dos direitos humanos de terceira dimensão (SILVEIRA & MEZZAROBA, et al., 2011, p. 148).

It is undeniable that the post-modern company, centered in the monovision of profitability, has become obsolete, in view of the new ethical-legal obligations imposed on it, such as the social and environmental function, fruit of the innovations in the field of human rights, brought by the Political Letter of 1988:

A empresa privada na atualidade precisa, portanto, ser “funcionalizada” a partir dos valores constitucionais engendrados pelos Direitos Fundamentais, tais como dignidade da pessoa humana e função social da propriedade. Neste sentido, “funcionalizar” é “atribuir ao instituto jurídico uma utilidade ou impor-lhe um papel social” (SILVEIRA & MEZZAROBA, et al., 2011, p. 304).

It should be said, in passing, that democracy and capitalism form the preferred political-economic dualism of the West, and consequently of globalization, so that the options adopted by Brazil would be no different. At this stage:

A Ordem Econômica na Constituição de 1988, em seu art.170, optou pelo modelo capitalista de produção, também conhecido como Economia de Mercado (art. 219), cujo coração é a livre-iniciativa (MORAES, 2009, p. 809).

Capitalism, as seen, dissociated from ethical and humanistic ends, acts under the exclusive primacy of profit, which makes it worse when considering its transition from the competitive model to the monopolistic one, so that, under such biases, it ends up disregarding the existence of the set of rights that promote human dignity engendered by the national legal system.

Seeking to correct such divergences, the current Federal Constitution breaks with the traditional liberal perspective of unrestricted freedom, informing that there would be state interventionism in the economic field, in order to protect social and fundamental rights:

A Constituição reelabora e dá contornos próprios ao capitalismo que declara, desenhando-o na forma de “capitalismo social”, estruturado na Carta Magna, sobretudo nos seus arts. 52 e 170. Naquele, quando dispõe sobre a garantia da propriedade privada e sua vinculação ao desempenho de uma função social (art.

52, XXII – “É garantido o direito de propriedade” e art. 52, XXIII – “A propriedade atenderá a sua função social”). Ademais, o modo de produção capitalista, depurado pelos elementos da democracia social, é assegurado no artigo inaugural do capítulo que trata dos princípios gerais da atividade econômica, no título “Da Ordem Econômica e Financeira” (art. 170) (DERANI, 2008, p. 9).

Despite the social and humanist design that the Brazilian Political Charter outlines by emphasizing the social function of property, the social values of labor, the valorization of human labor, and the principle of human dignity, it can be observed that in practice the opposite occurs, in view of the precarious socioeconomic condition of citizens and workers, as well as the low salaries paid.

Having said that, we can observe the problem of the abyss created between the abstractness of the law and the concreteness of human relations, because the economic power of companies overrides the fragility of the individual and the mere legal formality.

We must not forget that the laws of the market are based on rigid mathematical premises, in which the law of supply and demand prevails, a postulate that allows - especially in times of crisis and unemployment - the businessman to pay wages close to the minimum legally required, because he knows he can count on a vast "reserve army"; as well as to raise the price of a product according to its demand.

Furthermore, in spite of the unquestionable benefits brought by new technologies, these, when not supervised by the Public Power, can destroy jobs and reduce human labor activity to simple repetitiveness. Not by chance, the law prohibits the "technologism" or automation of work (art. 7, XXVII, of the Federal Constitution). As a consequence, there is no room for promotion, exercise of creativity, or negotiation for better salaries.

Therefore, it is essential for the state to act pragmatically, in order to balance the relations between capital and citizens, workers and consumers, making the norm effective:

É fundamental a atuação do Estado para a materialização destes princípios e de todos os que visam a um maior equilíbrio nas relações sociais e integração de seus partícipes. Afinal, o Estado, ao longo dos dois últimos séculos, tem assumido um papel complementar das relações de produção, pautadas originalmente na satisfação de interesses individuais (DERANI, 2008, p. 9).

However, in Brazil, given the current political, economic and social situation, as well as the installed ethical and moral instability, this energetic action by the State, on behalf of the popular interest, is far from materializing.

It is possible to infer that the capitalist matrix - in the traditional molds - and the very lack of effectiveness of the constitutional norms, show that the current Political Letter, although it has brought considerable innovations, has not significantly changed the structures of economic power and the overlapping of its objectives, considering that the tensions and conflicts of interests between the different classes are a constant in Brazilian society.

4 LEGAL ANALYSIS OF THE ECONOMY OR ECONOMIC SUBMISSION OF THE LAW?

It should be noted that, depending on the answer given to the question "Legal Analysis of Economics or Economic Submission of Law", it will be established which scientific branch will take precedence in Brazilian society.

Thus, the underlying problem in the relationship between Law and Economics is to define which parameters will guide the directions of sustainable development in the country, whether the legal norm or the rules of the market.

We believe that the lines constructed in this work so far have been sufficient to demonstrate that the vision of a traditional capitalism and the (neo) liberalist conception of absence of intervention or minimum state interference in the economic order are inefficient for the neutralization of conflicts between social classes and the correct balance between them.

It is precisely the supremacy of economic interest over collective interest that is responsible for producing serious social ills, such as hunger, unemployment, poverty, violence, tightening of laws, encouragement of a prison state, etc.

For this reason, the conduction of sustainable development via market economics is a premise largely contrary to the legitimate rights and interests of society as a whole. To demonstrate the validity of this argument, it is enough to check the relationship between Brazil's Gross Domestic Product (GDP) and its position in the Human Development Index (HDI).

Brazil, despite being the 8th richest country in the world in 2017¹, ranks 79th on the Human Development Index, according to a United Nations (UN) report produced in 2016 based on data collected in 2015².

It is evident in the economic field that the Gross Domestic Product refers to the country's capacity to produce wealth (goods and services), to multiply assets; but the central mathematical and legal question is to know how much of this wealth will be equally distributed, resulting in a high quality of life for citizens, as well as in the improvement of public services, factors that are assessed by the Human Development Index.

The numbers presented above prove the disparity between Brazil's Gross Domestic Product and its place in the Human Development Index, showing that the national capitalist economy is extremely concentrating of wealth, which is why they want the state to withdraw from the economic market.

In this sense, it is important to say that the legal order should guide the economy, establishing the "rules of the game", regulating the market in a legal and axiological way, based on a set of ethical, fair, and humanistic values, because otherwise the exacerbated stratification of society, the unfair distribution of income, and the social problems mentioned above tend to perpetuate in time and space.

It is important to say that ideology reigns in both legal and economic systems, in such a way that the perverse effect of these systems is of no interest to society, and it is therefore necessary to correct the economic ideology first, in order to, a posteriori, rehabilitate the concrete effectiveness of the law. That is why,

A esse respeito, cabe mencionarmos o que Marx afirma no Livro I de O capital, referindo-se criticamente às teorias dos economistas burgueses sobre o salário: "todas as ciências, com exceção da economia política, reconhecem que as coisas frequentemente apresentam uma aparência oposta à sua essência". É fácil, porém, entendermos por que isso ocorre: o objeto dessa ciência é o próprio modo de produção, no qual os interesses antagônicos das classes sociais precisariam ser explicitados, e isso contraria frontalmente os da classe dominante, que, é óbvio, prefere esconder a exploração capitalista (ALVES, 2005, pp. 9-10).

¹ Disponível em: <desacato.info/as-dez-maiores-economias-do-mundo/> (Acessado em 7 de nov. de 2017).

² Disponível: <<https://g1.globo.com/.../em-79-lugar-brasil-estaciona-no-ranking-de-desenvolvimento...>> (Acessado em: 7 de nov. de 2017).

In this way, the supposed divergence raised by the question about legal analysis of the economy or economic submission of the Law finds a solution in the constitutional proposition of the dignity of the human person.

This is because the applied Law seeks the full human realization, while the market economy has as its main objective the hunt for profit. In the current Constitution, it is obvious that these two legal goods are in a hierarchical position, because human dignity prevails over patrimonial goods, a fact that could not be different in a political charter considered to be axiological and democratic.

The search for a healthy quality of life in which poor people - who, evidently, have not had the same set of conditions and opportunities as the better-off - can have access to a more dynamic, gratifying, and rewarding work performance; to an efficient, qualitative, and effective system of public services, from which health and education stand out; and to an ecologically balanced environment; depends not on a capitalist conscience, but on the democratic imposition of the Federal Constitution.

From this exposition, we can see that the legal regulation of the Brazilian economic market is a necessary measure, even more so from the point of view of axiological regulation, given the objectives in question, because this is a condition for the possibility of realizing human potential.

One has to consider that only the Law, given its authority, legitimacy and coercive force, can contain man's negative impulses - whether natural or social, this is a controversial scientific issue - which, if left to purely human discretion, can cause serious damage to life in society.

Selfishness, evilness, insensitivity and lack of solidarity, among others, are very characteristic traits of man, and it would not be coherent to let the capitalist good will dominate such instincts, since human history and experience show that only the rule of law can contain them:

A meta constitucional da atividade econômica é a preocupação com a plena realização do ser humano, a melhora das condições de vida de todos, assim, a regulação jurídica da ordem econômica objetiva o homem, sendo humanista, é um exemplo da compreensão de Carlos Ayres Brito: "O direito enquanto meio, o humanismo enquanto fim" (SILVEIRA & MEZZAROBÀ; et al., 2011, pp. 194-195).

The Law has neither the power nor the pretension to instill ethical-moral virtues in the human heart; however, life in society requires a minimum of evaluative behavior, which is why the most primitive instincts of human nature need to be controlled in the name of the common good.

Note that the liberal or neoliberal ideology - which has nothing to do with "neo" - has only served to weaken the State and to form a monopoly capitalism, which, through the construction of large transnational corporate groups, has also unbalanced the market, making evident the need for a greater and better State action in the economy. Thus:

Como se sabe, com a globalização foi imposto o ideário neoliberal, que propugna a liberalização do comércio, da ação das empresas transnacionais e das transações financeiras internacionais. Junto com isso, os princípios neoliberais nduzem a assumir opções pelas privatizações das empresas públicas e a minimizar a intervenção estatal, desregulando as operações dos mercados (SABOIA & CARVALHO, 2007, p. 34).

Therefore, it is unacceptable, in a scenario of uncertainties and, furthermore, based on history and on empirical factors, which show the failure of letting the economy function according to its own pretensions, to talk about self-regulation of the market or non-intervention or minimum intervention by the State.

One must consider that the economic agents are responsible for the strategic control of the market, politics, and Law, and consequently repel state interference, because they wish to maintain their privileges, a fact that is only possible in the face of state omission and through the appropriation of the social product, which belongs to the whole of society that participates directly and indirectly in it.

The intervention of the Brazilian State in the economic order is justified by the current democratic Constitution and by the need to balance the interests of various social actors, and, as the promoter of fundamental rights, it should encourage economic progress as a means of achieving social justice that can guarantee better conditions for all. Hence the pre-eminence of law over economics, since the latter aims to achieve specific ends for small groups, while the former aims to achieve those of society as a whole.

In this vein, it becomes perfectly possible to reconcile the interests at stake, granting the necessary and balanced freedom to the economic market, under the directive and ethical-legal action of the State.

It is understood that, only by placing both sciences in a correct perspective and hierarchy in the scale of values and importance, is it possible to bring sustainable development to Brazil.

The market is a reverberation of society, i.e., it reflects the political and legal choices of society, which, through democracy, manifests the rules on the set of legal-economic relations. Thus, the Law, as the political product of the general will, becomes the antecedent reality and the economic market the consequent one:

O mercado, em nosso entender, é uma escolha política e jurídica da sociedade, não é uma realidade fática preexistente ao Direito. O mercado é um instituto jurídico, um conjunto de relações governadas pelo Direito, basta lembrar a necessidade dos conceitos jurídicos de bens e contratos para o coreto funcionamento do mercado (SILVEIRA & MEZZAROBÀ; et al., 2011, p. 195).

One must also consider the nature and the objectives pursued by the market. The market is an artificial human construction, a product of social choices and realized through the state instruments of politics and Law. It becomes, thus, an abstract entity, but, like the State, with a clear and profound action in social reality.

In spite of its legal institutes and its economic rules - artificial and abstract elements - the economic market has a psychological profile, a fact that denotes that it is built and directed by people, and it should therefore act to achieve the noblest objectives, which are to meet human needs for a qualitative life, because

O mercado não é composto apenas por bens e contratos, regulados pelo Direito, mas, sobretudo, por seres humanos, a finalidade do mercado é atender às necessidades humanas. Na compreensão de Natalino Irti, o mercado é um locus artificialis, e não um locus naturalis, pois, é uma ordem normativa construída, e não uma ordem encontrada na originária natureza dos homens. Assim, o mercado é um organismo artificial, construído por uma escolha consciente a partir da decisão política do Estado. A lei é a mão visível do mercado (SILVEIRA & MEZZAROBÀ; et al., 2011, pp. 195-196).

Finally, in compliance with the constitutional rules, which point to a legal regulation of the economic market, aiming at the collective interest in the dictates of social justice and observing the metaprinciple of human dignity, as inferred in arts. I, III, and 170, one concludes that the law, at least in the Brazilian system, is prior and superior to the economic order.

For this reason, there must be an analysis and legal preponderance over the economy, to the detriment of a submission of the law to the economic sciences. The constitutional hermeneutic filter of human dignity and social justice are necessary and sufficient parameters for the prevalence of Law, since they aim to implement sustainable development with quality of life for all.

5 LEGAL REGULATION OF THE CAPITALIST MARKET THROUGH AN ETHICAL AND HUMAN AXIOLOGY

Despite what has already been said about the capitalist system and its search for rationalization and optimization of production, services, and profits, it is very true that, besides being the economic regime widely preferred in western democracies, its methods are extremely efficient and necessary to society.

This is because capitalism heats up the economy and fosters the country's economic/material growth. Thus, politics and Law must act vigorously in the sense of not only encouraging economic activity, but also controlling it in order to achieve the collective interest.

It is obvious that capitalism cannot act without brakes, because this would result in even more damage to the environment, the social spheres, and the economy itself, given the empire of the will of the strongest over the weakest. So, the solution is to foster the market economy to extract the material resources necessary to achieve a sustainable platform:

É preciso decisão política e dinheiro para ampliar ao máximo a plataforma da sustentabilidade, com monitoramento e transparência das ações dos países em torno da necessidade de mitigação e redução de danos ambientais, mas também monitoramento e controle das ações que promovam a mitigação e a redução da pobreza e da exclusão (SILVEIRA; SANCHES & COUTO, 2013, p. 113).

Sustainable development here is understood under the perspective of three extremely important angles and with distinct roles: a) as material progress, this being seen in the country's industrialization, besides the construction of innovative technologies, bringing about investments, jobs, compatible salaries, elevation of the internal and external foreign exchange, and continuous increase of the Gross Domestic Product, as well as the creation of several sustainable energy matrixes, such as wind, solar, marine energy, etc.; b) social, political, and legal promotion, seen in the concrete effectuation of a healthy quality of life, measured by the fair distribution of national wealth, by access to highly qualitative public services, such as health, housing, education, health care, education, housing, etc. b) social, political and legal promotion, seen in the concrete realization of a healthy quality of life, measured by the fair distribution of national wealth, by access to highly qualitative public services, such as health, housing, education, work, professionalization, etc., access to state-of-the-art technologies and to the consumer market, and leisure; in the political and juridical prism it comprises a broad democratic space, such as freedom, access to justice, and effective participation in the decision-making bodies of public power; and c) environmental preservation, meaning the intelligent and efficient administration of environmental resources, a common good of the people.

It remains that the creation of a national platform for sustainability goes through the strengthening of the economic market, given that the materialization of a project of this magnitude requires considerable economic potential:

Nesse diapasão é evidente a possibilidade do exercício da atividade econômica lucrativa pelos particulares a qual não é apenas garantida, mas também incentivada uma vez que o progresso gerado pela economia é a fonte de realização de grande parte das políticas públicas no sentido da promoção do bem estar de todos de forma indistinta, objetivo fundamental da nossa república (CF, art. 3º, IV) (SILVEIRA & MEZZAROBÀ; et al., 2011, p. 191).

However, it has been proven that economic activity cannot operate in an absolutely free and autonomous way, totally at the drift of the Law, which is why it remains to establish a scientific methodology capable of reconciling the economic potential of capitalism with the values set forth in the Federal Constitution:

É necessária a intervenção do Direito na Economia para melhor distribuição da riqueza gerada pela mesma, criando os alicerces de uma democracia econômica que respeite os direitos humanos. A ordem econômica constitucional objetiva e garante a instalação de uma sociedade de bem-estar, para a realização do ser humano e atendimento de todas as suas necessidades e, não meramente, a efetivação do cálculo econômico (SILVEIRA & MEZZAROBÀ; et al., 2011, pp. 201-202).

This methodology consists essentially of the legal regulation of the market by a constitutional axiology based on ethics and humanism. Only through an ethical and humane stance is it possible to reconcile different but interchangeable interests.

It is inconceivable that, in the Brazilian social reality permeated by a historical and cultural economic precariousness, a perverse hermeneutics and interpretation should be applied to the reading of the economy and the application of the Law.

In this vein, we must strive for the concrete implementation of the panorama projected by the constitution, which draws a socialized capitalism, in which it seeks to reconcile private property and its social function.

The institute of the social function of property reveals ethical and human concern, because it indicates the need to build a democratic, fair, solidary and developed society, with a guaranteed quality of life that is highly compatible with people's dignity.

It is necessary to recognize that a State that intends to be fair, democratic and of social welfare must incorporate in its mechanisms, institutions and employees not only efficiency - a strictly technical, cold and functional judgment, which is often related to statistics and numbers - but also ethics and humanism, directing the economic power so that it can be imbued with these values and practice them:

Dentro da perspectiva moderna, também é possível observar que a própria exigência da eficiência como base de sustentação do Estado era defendida pelos humanistas cívicos, que, todavia, a colocavam absolutamente condicionada à ética (GABARDO, 2003, p. 64).

Humanism is the Constitution's central note, embodied in the principle of human dignity - understood as a value intrinsic to each person - and indicates a set of rights capable of enhancing the innate and learned capacities of the human being, which is why no sector of society can escape its interference.

For this reason, it is possible to speak of a humanistic capitalism, since it undertakes wealth-generating activities, which are indispensable to the construction of a model of life that is perfectly capable of meeting all human needs.

Furthermore, capitalism as an economic model materialized in private institutions and companies is run by people, who, imbued with an ethical, just, and humane spirit, or compelled by the rule of law, can apply the principles necessary for human and sustainable development.

In the Brazilian democracy designed by the current Political Letter, ethical and human values prevail, with property assets being secondary and aimed at the satisfaction of the human being:

O humanismo deve prevalecer como norma jurídica interna e externa. [...] O capitalismo humanista não nega os mercados, tampouco a propriedade privada e o direito de livre-iniciativa econômica, pelo contrário, garante-os, todavia, na linha de Norberto Bobbio, desataca não apenas a estrutura da ordem constitucional econômica, mas também sua finalidade – o bem de todos, portanto, o direito encerra um instrumento para atingir o referido fim (humanista) (SILVEIRA & MEZZAROBIA; 2011, et al., p. 206).

It is important to emphasize that every paradigm shift implies confronting ideas and positions that are already rooted in public and private power institutions, making it necessary to break them through the prevalence of the Constitution.

In this aspect, it is up to the Judiciary, seen as the most reliable and closest to the common citizen, and also the responsible for the implementation of a sustainable model of society - as it has the Power and the duty to apply the constitutional rule - to concretely effectuate the constitutional axiological content concerning justice, ethics, and humanism.

It should be pointed out, however, that the current Brazilian political and legal structures have been the caudatories of economic Power, since the former uses its resources to promote its political platform; the latter is reduced to the simple repetition of institutionalized and standardized legal and jurisprudential understandings:

[...] Como bem destaca Werneck Vianna, uma série de fatores necessitavam ser perscrutados perante a magistratura concreta com o fim de indagar qual o perfil do magistrado e até que ponto havia, de fato, a democratização da prática judicante. É preciso se indagar 'para que' e 'a quem' o Poder Judiciário está servindo. Diferentemente dos militares e embaixadores, sob os quais a 'instituição' procede a uma contínua e reiterada domesticação e homogeneização ideológica, munida, ademais, de mecanismo apto à exclusão do pensamento dissonante, na magistratura, por sua organização e história, essa possibilidade de uniformização resta presente [...], mas um tanto quanto difusa (ROSA, 2006, p. 247).

Meanwhile, the great challenge of our times is to break the historical anti-democratic paradigm, which must be replaced by a new model built in the "image and likeness" of the Federal Constitution. This is only possible through the political and legal awareness of the population, so that it can actively participate in the structures of public Power.

Therefore, only through a new paradigm based on ethical and humanistic values will it be possible to realize the human being, moving him from the axis of alienation-exploitation to the center of his importance and dignity. This will be perfectly possible with the methodological application of a capitalism impregnated with constitutional axiology,

Desse modo, resta evidente a adoção do humanismo como valor e finalidade da ordem econômica no plano interno. O objetivo do mercado nacional,

nesses termos, é a realização do ser humano. Como é difuso, os Direitos Humanos têm um componente cultural mais acentuado que o natural, assim as constantes mudanças e necessidades de novos valores axiológicos para proteção do ser humano, permite-nos afirmar os Direitos Humanos como um processo de evolução histórica (SILVEIRA & MEZZAROBA; 2011, et al., p. 208).

Finally, despite the harmfulness produced by traditional and savage capitalism, which is perpetrated by an omission of a political and juridical structure, the urgent need to implant in the economic order in force the values of a humanistic capitalism emerges. This is because, in the face of the constant changes brought about by globalization and through the insistent permanence of serious social ills, the establishment of a new "status quo" is required, based on the elevation of the dignity of the human person:

O capitalismo humanista ao integrar os direitos humanos no plano nacional e internacional na ordenação da ordem econômica encerra o paradigma adequado para a consecução e realização dos mandamentos constitucionais incidentes pela implantação da economia humanista de mercado, "com vista à concretização e satisfatividade dos direitos humanos de primeira, de segunda e de terceira dimensão" (SILVEIRA & MEZZAROBA; 2011, et al., p. 209).

The human rights that empower the individual, inscribed in the Brazilian Constitution under the title of fundamental, encompass individual, collective, social and political rights, and involve material items, such as food, housing, a compatible salary; as well as intellectual, such as education; and psychological, such as freedom, equality, expression, etc. This legal archetype - fruit of jusnaturalist, humanist, and libertarian conquests - is essential to human development.

In this vein, it should not be forgotten that only by means of a hermeneutic, interpretation, and axiological application of politics, economics, and law can fundamental rights be materialized, which are constant targets of misinterpretation and omission:

Por trás de toda ficção, por trás de todo artifício intelectual para interpretar a realidade há, sobretudo quando se trata da realidade política, uma vontade de interpretá-la de determinada maneira. A ficção, na teoria política, não é neutra, meramente lógico-descritiva; a ficção é ideologia, está dirigida à justificação de um determinado modelo de sociedade (ROBLES, 2005, p. 29).

Above all, the implementation of a new society, based on ethical, human, and sustainable values, is not a utopia or ideology, but a feasible project, not only because capitalist logic can be reconciled with constitutional values, but also because both play different roles, but are of the utmost importance for the realization of the common good.

Law and economics are complementary, because their activities enable sustainable development. The economy produces the necessary material wealth, and the law determines the fairness of the distribution of these goods.

Therefore, there is no contradiction in terms when the terminology "humanist capitalism" is used, since the term "capital" means the economic power necessary for development, while the complement "humanist" represents the sine qua non condition for the achievement of collective well-being.

6 CONCLUSION

In conclusion, it is important to say that in the genesis of the State, due to the fact that society arose as a natural and planned need of man, joining efforts to overcome common problems, the indispensability of a preponderant entity emerges.

It was realized that the purpose of the State is, through the law, to contain the negative impulses of man, neutrally establishing peace, order, and the common good. However, natural equality was overcome by social stratification, due to the productive forces of capitalism.

Capitalism, despite being an economic model that aims at profit, was adopted and encouraged by the current Federal Constitution. To correct its deficiencies, the Constitution redesigns capitalism, informing that its actions must comply with certain human and social parameters.

Therefore, the overlapping interests of traditional and savage capitalism make politics and law symbolic and ideological instruments, and it is necessary to establish a new paradigm for the interpretation and application of the economy and constitutional norms.

This paradigm consists of the legal regulation of the market through ethical and human values. Thus, the concept of "humanistic capitalism" is not contradictory, since law and economics are complementary, playing distinct and relevant roles in the construction of a sustainable platform.

This is because it was understood that capitalism produces material wealth that is the condition for the possibility of realizing fundamental rights and consequently of implementing a sustainable society, with the law, in turn, guaranteeing that this wealth will be distributed in a fair and egalitarian way.

It was added that it is primordial to raise the political and legal awareness of the population so that they participate in a more effective and concrete way in the formation of the general will, in order to change the institutionalized and retrograde mentality of public institutions.

The methodology, therefore, to overcome the problem that emerges from the tensions between the different interests present within society, is to put the market economy in the constitutionally correct perspective, that is, to regulate it by ethical and humanistic values, in order to realize the potentiality of the human being.

Only with the implementation of a capitalism classified as humanist, it becomes possible to bring together and reconcile the legal and economic sciences, and, finally, to realize the ethical, fair, human, and developmental constitutional project.

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