The Theories of Constituição Dirigente and Transformative Constitutionalism and Their Reception by Brazilian Constitutional Theory: An Approach Based on Critical Comparative Law

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Abstract: Two of the most important constitutional theories developed in contemporary times, transformative constitutionalism and the idea of "Constituição Dirigente", significantly impacted the Brazilian constitutional debate. Both are recurrent objects of reflection and influence how Brazilian constitutionalists formulate their thinking regarding their constitution. On the other hand, this evident case of legal transfer has rarely been analyzed from the perspective of legal comparison theory. The question this research intends to answer is to what extent these legal ideas were incorporated, considering the complexity of integrating foreign legal concepts. Our initial hypothesis centers on the argument that, despite important exceptions, most of the Brazilian doctrine received both theories in an objectified and recontextualized way, leading to an uncritical reflection and, sometimes, epistemologically colonized doctrine.
Keywords: Legal Comparison Theory; Transformative Constitutionalism; Constituição Dirigente; Legal Transfers

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A. Introduction

"Constituição Dirigente" is one of the most influential and important constitutional theories developed in Portuguese legal scholarship in the 20th century. The impact of the "dirigismo constitucional" on Brazilian constitutional theory led to unavoidable perspectives of the comparative constitutional debate, which even affected several teaching programs of constitutional law in the Lusophone world. On the other hand, the theory of Transformative Constitutionalism stands out in contemporary Latin American debates on how the law accounts for the change of social realities of countries on the continent. Both theories

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present converging and distancing aspects, which enable essential debates on the search for social reality change from the action of the law in peripheral realities. It is known that constitutional ideas are bound to migrate, and the ones above have found fertile ground in Brazil. We are, therefore, talking about legal transfer. Consequently, they should be addressed in the Brazilian debate from the perspective of Comparative constitutional law. However, this is not the case in many academic works. This leads us to question whether the transfer of constitutional ideas is or is not a process of intellection reasoned by the theory of legal comparison in Brazilian constitutional thinking. Were themes spinning the theory of legal comparisons, such as legal transfers, legal translation, or legal formats, approached by constitutional scholars in Brazil? If so, which perspective was adopted to incorporate such "legal items"? Have Brazilian scholars adopted the orthodox or the critical view of comparative law?

Our primary hypothesis points to the understanding that, despite the refinement of some studies, none of them adopted the theory of comparative law to build their reflections. This jeopardized a critical dialogue between the original theories and Brazilian constitutional thinking. To confirm this hypothesis, we intend to analyze the reasoning of some of the leading constitutional law manuals and studies published in Brazil's most recognized scientific journals about both concepts and their connection with the Brazilian constitutional reality. It is essential to point out that this primary study does not aim to exhaust the existing literature in Brazil about the two concepts. It was intended primarily to depict some works that have interacted with those theoretical constructions and appointing their limits and framings based on the analytical instruments from comparative law theory. Bearing this in mind, we will adopt the critical theory of comparative law as a reading key, mainly applied to legal transfers. Due to the nature of our study, we have adopted a descriptive and analytical methodological process[1] favoring qualitative research[2] of a theoretical and bibliographical nature[3]. In this sense, we adopted the hypothetical-deductive method, assuming our hypothesis as a conjecture to respond to the abovementioned problem.[4]

B. Legal Transplants: A Critical Perspective

For Michele Graziadei, the expression "legal transplant" is a metaphor to mean the diffusion of a law, or the process of diffusion of a law, which results in altering a specific legal

1 *Veronique Champeil-Desplats,* Méthodologies du Droit et des Sciences du Droit, Paris 2014.

2 *Madeleine Grawitz,* Méthodes des sciences Sociales, Paris 2001; *Jean Poupart / Jean-Pierre Deslauriers / Lionel-H. Groulx / Anne Laperrière / Robert Mayer / Álvaro Pires*, A Pesquisa Qualitativa. Enfoques epistemológicos e metodológicos, Rio de Janeiro 2020; *Miracy Barbosa de Sousa Gustin / Maria Tereza Fonseca Dias / Camila Silva Nicácio,* (Re)pensando a Pesquisa Jurídica. Teoria e Prática, Lisboa 2020.

3 *Umberto Eco*, Como se faz uma tese, São Paulo 2020.

4 *Marina de Andrade Marconi / Eva Maria Lakatos*, Metodologia científica, São Paulo / Atlas 2007; *Karl Popper*, A lógica da pesquisa científica, São Paulo 1975.

system by appropriating foreign ideas.[5] In the context of constitutional law, for example, Choudhry proposes a metaphor of "migration of ideas," which emphasizes his analysis of the motion of the theoretical constructions along several legal systems without implying a process of control of its originality or incorporation.[6] Though he is not the author of the idea, we owe to Alan Watson and his essential book *Legal Transplants: An Approach to Comparative Law,* one of the central debates on comparative law about migrating "legal items" from one legal system to another.[7] According to Watson, analyzing the adoption of legal rules in private law, the success of legal borrowing may be observed without the involved systems being contextually connected. The idea under analysis, which could be easily altered in its process of incorporation by the new legal system, is the focus of scholars.[8] Such perspective, understood here as acritical, argues that the success or possible failure of the legal borrowing claims no connection with some intellective approach of the actors involved in the process. [9] For Watson, a "transplant" is successful once its occurrence has been identified, that is, the factual transference of the legal item, not its possible positive or negative consequences.[10]

Michele Graziadei, on the other hand, recognizes that historically, legal idea transference results from using force, especially in the processes of domination over people in Latin American and African countries throughout colonization. At present, the author resumes that the substantial interference of the work of legal professionals, mainly from the academy and constitutional courts, may enhance the role of prestige.[11] The prestige of the legal professors and judges becomes the prevailing factor in legal transfer. Factors such as "successful" results in their systems of origin or even identification by those reproducing the transferred element with its original authors may justify adopting a legal transplant. Such prestige, in turn, would face significant challenges in public law. Mark Tushnet advocates the unfeasibility of public law norms transfers, especially constitutional ones. Due to

5 *Michele Graziadei,* Comparative Law as the Study of Transplants and Receptions, in: Mathias Reimann / Reinhard Zimmermann (eds.), The Oxford Handbook of Comparative Law, Oxford 2015, p. 443.

6 *Sujit Choudhry*, The Migration of Constitutional Ideas, Cambridge 2007, pp. 1-36. To defend the possibility of transplanting "legal ideas," see *Stefan Goltzberg,* Les sources du Droit, Paris 2016, pp. 108-118.

7 Along with Günter Frankenberg, we will say "legal items" when referring to norms, jurisprudence, and legal ideas.

8 *Alan Watson,* Legal Transplants. An Approach to Comparative Law, Athens, GA 1974, p. 294. For a historical perspective on the formation of the classical theory of legal transplants, see *John W. Cairns*, Watson, Walton, and the History of Legal Transplants, Georgia Journal of International and Comparative Law 41 (2014), pp. 638-696.

9 *William Ewald,* Comparative Jurisprudence (II): The Logic of Legal Transplants, The American Journal of Comparative Law 43 (1995), pp. 489-510.

10 *Ewald,* note 9, pp. 489-510.

11 *Michele Graziadei*, Legal Transplants and the Frontiers of Legal Knowledge, Theoretical Inquiries in Law 10 (2009), p. 739.

their characteristics, public law norms result mainly from a particular social-cultural reality. It is then unproductive to carry out what the author calls "normative recommendations" to the constitutional formulation process of a society unlinked to the author of the recommendations. In brief, the mere transposition of ideas or legal institutes, be it by imposition or, mainly, by influence, as some theorists of the Comparative Constitutional Law defend, is, for the author, "pointless."[12] It is upon prestige that discourses full of ideology, another critical factor for Graziadei concerning legal transplants, call attention. According to Graziadei, ideology is a "belief-oriented action and fulfills the needs of building a consensus or a resistance to a transplanted norm. It transforms power into influence". Ideology would perform, thus, as an "interface between individual practice and collective action."[13]

Therefore, it is fundamental to acknowledge the appeal of ideology in transferring legal items among legal systems. As well as social actions, legal transfers are mediated actions and demand an understanding of the intended legal instruments, such as language and communication. The comparativist cannot risk neglecting the analysis of these factors in his research under the danger of carrying out "a mere reproduction of form and content of the original."[14] The lengthy observation of the language context is also essential to thoroughly study legal transfer. It plays a central role as it allows us to identify the importance of ideology in conducting and legitimizing the transferred norms. The analysis of the context of language is also an excellent ally for comparatists to identify discourses of legitimization of domination or reforms usually disguised in so-called technical or neutral discourses, all under the universalist stamp. It also makes us wonder if legal transfer processes departed from violent colonization had not changed and adjusted to strategies encompassing new forms of colonization.

For the Global South, such an issue gains further relevance as theoretical decolonial and post-colonial keys enable us to understand complex processes of intellectual delegitimization in the relationship of colonized peoples and their colonizers and the resulting epistemological hindrances.[15] These hindances not only act as legitimizers of legal items generated in the Global North (or recognized by the North as an influential theory, capable of being exported and worthy of intellectual debates by the academic community) but also account for a process of legal epistemicide Such epistemological "castration" makes the legal imagination that could bring about processes of legally contextualized and original

12 *Mark Tushnet*, Some Skepticism about Normative Constitutional Advice, William & Mary Law Review 49 (2008), p. 1474. For the complexity of carrying out legal comparison within the scope of public law, see *Theunis Roux*, Comparative Public Law, in: Paul Daly / Joe Tomlinson (eds.), Researching Public Law in Common Law Systems, Cheltenham 2022, pp. 151-174.

13 *Graziadei*, note 11, p. 738.

14 *Graziadei*, note 11, p. 735.

15 *Gaston Bachelard,* La formation de l'esprit scientifique, Paris 1967.

responses unfeasible.[16] Epistemicide is characterized as a "persistent process of producing cultural indigence." This indigence is supported by an intellectual inferiority that does not allow any critical reflection about the "legal items" developed outside the Brazillian legal community. The result of this silent operation is "a form of kidnapping of reason in a double sense: through the denial of the rationality of the Other or through the cultural assimilation that is imposed on them."[17] As we will try to show, this process seems to happen in a part of the Brazilian academia when they deal with legal transfers. This leads us to look for a critical alternative to thinking about legal transfers like those proposed by Gunther Frankenberg. Such formulation, we understand, enables us to analyze certain reflexive positions of jurists from the Global South, especially those about intellectually delegitimizing processes and legal theories' reproductions acritically formulated in the North. [18]

In the same way, and differently from Watson's perspective, for example, Frankenberg's theoretical construction provides a critical view that directly dialogues with the hypothesis of this research, helping us to understand where Brazilian jurists are careless in incorporating legal ideas promoted abroad. To withdraw from such converging, the universalist and acritical process mainly applied to studies of legal transplants from the Watsonian dominant view, Frankenberg proposes the well-known Ikea theory of constitutional transferences, which is based on the analysis of displacements of the constitutional norms (best called constitutional ideas) from a legal system to another. According to the author, the metaphor of Ikea bears two main goals. The first is to reveal the political perspective in every process of legal items transference to fulfill the "constitutional making." For the author, it is crucial to undoing the myth of idealism and naturalism surrounding this kind of study, which overlaps a more critical analysis of the whole process and its consequences. Transfers carry much more than legal ideas on their surfaces. Along with them, migrate important premises and consequences that the comparatist cannot neglect. Thus, in Edward Said's wake, the comparatist must perform a "decoupage," detailing the process of theories and legal ideas transfer. The initial goal of this process, the author goes on, is to identify the feasible steps of the legal transfer and then proceed to a more strict and critical analysis. Those steps cannot be seen as a rigorous sequence in one direction. On the contrary, they should be perceived as various ways to be taken while we investigate importing or exporting legal materials.[19] The author points out the need for a decoupage process for us

16 *Aparecida Sueli Carneiro,* A construção do outro como não-ser como fundamento do ser, São Paulo 2005, p. 96. For details on the concept of epistemicide, see *Boaventura de Sousa Santos / Maria Paula Meneses (eds*), Epistemologias do Sul, São Paulo 2017.

17 *Carneiro,* note 16, p. 97.

18 For the role of the jurist located in the Global South as the mere uncritical reproducer of theories developed in the Global North, see *Daniel Bonilla Maldonado*, Los bárbaros jurídicos. Identidad, derecho comparado moderno y el Sur global, Bogotá 2020.

19 *Günter Frankenberg*, Order from Transfer. Comparative Constitutional Design and Legal Culture, Cheltenham 2013, p. 9.

to analyze transplanted legal items. It would allow the identification of a primary strategy of decontextualization of the transplanted materials. When crossing their "cultural borders," such materials lose their epistemological characteristics and follow their course among legal communities carrying no history, purpose, or identity.[20] Eventually, they undergo reification, that is, a process of objectification of the legal ideas while they travel. Thus, a vast set of terms considered alive, such as "norm" or "institution," lose their purpose and meaning, which deprives them of their historical, social, and cultural context. They are no longer the result of a specific cultural phenomenon and become true "commodities." At a second moment, formalization turns the materials into mere texts, inadequate for interpretative debates or epistemic conventions able to enhance their meaning. Consequently, institutions or complex theories are limited to merely descriptive contents or propositions of some institutional organization or arrangement.[21] Such sliding of meanings and lack of foundations is even more significant when carried out by epistemologically colonized legal communities, in which the sheer existence of such items is acritically celebrated as a better solution once it stems from the Global North and is, therefore, referred by the only portion of the international legal community able to present effective responses for all the complexity regarding Law.

There is a process we consider the most dangerous among legal transfers: the idealization of the "commodities" trend, that is, the appearance transformation of such norms, doctrines, or institutions. It means they are addressed as objects with positive values likely to fulfill the receiver's expectation. Epistemicide finds an essential and influential accomplice in legal transfers, especially for their supposed scientificity and abundance of academicisms to simulate criticality and, eventually, nest in intellectual productions as soon as they become reproductions when implemented. Thus, institutions are presented as highly fruitful and functional, foreign doctrines gain the stamp of best arguments to enhance debates on cultural contexts significantly different from their origin, and foreing jurisprudence is known as the most accurate hermeneutics in any court. All this is underlain by discourses of authority disguised in the prestige of the transplant "donor." The result of idealization is the detachment of the idealized object from its reality, the implementation of a pre-determined ideology, which performs the dissimulation of several aspects of the transferred item and the building of an "official history" of the product that should be assumed as unquestionable by the receiving legal system.[22] The local legal elite, with no critical analysis of this "imported product," recklessly incorporates the process of idealization. It addresses foreign legal items as aseptic data and primarily as an item with an intrinsic value higher than local production. As a result, it legitimizes its adoption and definite

20 On the different views regarding the relationship between law, culture, and legal transplants, see *Roger Cotterrell*, Is There a Logic of Legal Transplants?, in: David Nelken / Johannes Feest (eds.), Adapting Legal Culture, Oxford 2001, pp. 71–92.

21 *Frankenberg*, note 19, p. 11.

22 *Frankenberg*, note 19, p. 11.

normalization in the national debate. At this point, a fourth constructive step of the transfer is "recontextualization." "Recontextualization", according to Frankenberg, means the legal item going through a series of movements that adapt, introduce, and modify the original object in its process of reinterpretation and redesignation in the new legal system.[23] There is, therefore, a real mutation in meaning, a mandatory transformation, from the rupture with idealization to the insertion of the transferred object in the new legal system via a consequent change of use. Such a process runs two serious risks, the author continues. First of which, "immunological reactions" by the receiving system. That is, the abstraction of the transferred item may not be sufficiently manipulable and encounter political and social resistance, besides the risk of the idealized item not making sense in the new legal system. Carrying out a "deficient adjustment" is a further risk. It may occur when the item can not be adapted nor used for the lack of important information about it, such as the import of models of institutions or even of highly contextualized doctrines, as recurrent in Brazil.

The comparatist's role is to disregard the simplification of many studies and focus on the most critical moments of decontextualization, resignification, idealization, and recontextualization that every legal transplant inevitably undergoes. Effective dialogue among foreign legal communities about legal items is a daily act, especially among Western countries. Each legal community of the Global South must be attentive to the risk of processes of intellectual colonization bearing an acritical transfer or, worse, an epistemologically colonized. Important theoretical constructions received in Brazil underwent such a process and, as we may identify, suffered recurrent acritical incorporations. On the other hand, they were also accepted amidst conscientious debates and fruitful dialogue of the transplant poles. The concept of "Constitucionalismo Dirigente" is a case.

C. "Constituição Dirigente" and its reception by Brazilian doctrine: from idealization to criticism

As we know, the idea of "Constituição Dirigente" may be considered the most significant contribution of renowned Portuguese constitutionalist Professor J.J. Gomes Canotilho to the constitutional theory in the world. Brazilian doctrine, overwhelmed by the theory developed by the Portuguese professor from Peter Lerche's initial conception, built profitable debate about Canotilho's ideas and their transfer to several fields of the legal Brazilian legal doctrine, especially constitutional law. The expression "Constituição Dirigente" features frequently in Brazilian doctrine, particularly after the 1988 federal constitution.[24] The theory understands "Constituição Dirigente" as a "Fundamental Law" that does not resign to its text's limitations to merely perform "individualization of organs or competencies and

23 *Frankenberg*, note 19, p. 19.

24 For the difference between the terms "Constituição Dirigente" coined by Canotilho and "directive constitution" created by Peter Lerche, see *Gilberto Bercovici*, Revolution through Constitution: the Brazilian's directive constitution debate, Revista de Investigações Constitucionais 1 (2017), pp. 7-18.

procedures in the public authorities' scope." Much the opposite, the constitution would be bonded to the idea of a program: "The constitution would command the action of the state and impose to competent organs the fulfillment of its established programmatic goals." The Portuguese Constitution of 1976 was considered by researchers the "ideal type" of "Constituição Dirigente."[25] The term, in turn, winds up being assimilated by Brazilian authors and stands out in manuals of Law in the country. Topics as "the meanings or conceptions of the term constitution,"[26] "classification of Brazilian constitution,"[27] and the debates about what became known in the Brazilian doctrine as the "crise da Constituição Dirigente," besides reflections about what was agreed as morally reflexive constitutionalism"[28] integrate the most respected manuals of the Brazilian legal community.

Notwithstanding the vital discussion about Canotilho´s self-criticism of his initial concept of "Constituição Dirigente," the present study has opted, aiming to verify our initial hypothesis, to focus on the analysis of the reception of this theory. José Afonso da Silva, for example, understood the constitution of 1988 as ruling (dirigente) because it defined how the state should behave to ensure better social and economic opportunities for individuals under its aegis.[29] Canotilho's theory introduced a change in the role of the constitution, which became a guiding pole for public policies to be adopted to meet the purposes determined by them. To Gilberto Bercovici, "the tasks and purposes of the State included in the constitutional text and the constitutional principles are propositions of material legitimization of a country's Constitution."[30] To this day, the Brazilian doctrine is prone to acknowledge the Federal Constitution of Brazil as a tributary of the Constituição Dirigente's theory. Such reading is present in famous manuals of constitutional law[31] and even in more analytical texts about the Constitution. Interpreting the concept of a ruling constitution is intended to better comprehend articles in the Brazilian constitution. José Luiz Quadros de Magalhães, for example, when analyzing article 3 of the 1988 Federal Constitution, uses the Portuguese author to enlighten the normative and asserts that "for Professor Canotilho, the "Constituição Dirigente" works on behalf of the enlargement of

25 *José Joaquim Gomes Canotilho,* Direito Constitucional e Teoria da Constituição, Coimbra 2003, p. 217.

26 *Bernardo Gonçalves Fernandes*, Curso de Direito Constitucional, Salvador 2020, p. 81.

27 *Gilmar Ferreira Mendes / Paulo Gonet Branco,* Curso de Direito Constitucional, São Paulo 2021, p. 113.

28 *Claudio Pereira de Souza Neto / Daniel Sarmento*, Direito Constitucional. Teoria, História e Métodos de trabalho, Belo Horizonte 2021, p. 195.

29 *José Afonso da Silva*, Aplicabilidade das normas Constitucionais. São Paulo 1998, p. 136.

30 *Gilberto Bercovici*, A problemática da constituição dirigente: algumas considerações sobre o caso Brasileiro, Revista de Informação Legislativa 36 (1999), p. 38.

31 *Pedro Lenza*, Direito Constitucional, São Paulo 2022, p. 267.

the state's tasks, incorporating economic and social purposes bonded with the several legal regulation instances. The politics is not a free instance unlinked to constitutional norms."[32]

Virgílio Afonso da Silva, in turn, understands that the Brazilian constitution "intends to alter the *status quo* by defining goals to be pursued and establishing public policies in several sectors" and adds, "It is, therefore, a ruling-intended constitution." Following the author's thinking, we view the constitution with clear intent and "potential" to alter the state's reality, establishing an array of programs spread out in its text, especially in articles 3 (fundamental principles) and 170 (under financial and economic order).[33] The many parallels made by several authors with the Portuguese author's theoretical formulation are evident. In Bercovici's words, the "Constituição Dirigente" transforming effect was a supposed search to legitimize a Social State that would replace the Liberal State. For the author, "if the democratic constitutional state does not identify with the formal State of Law and wants to legitimize itself as Social State, the problem of ruling constitution arises, which perpasses a beyond formal limits legitimation of the State of Law, on a social transformation basis."[34] Even Canotilho's critical reflection about his original formulation, which results in the formulation of the "morally reflexive constitutionalism," appears to have been accepted by Brazilian doctrine as fundamentally descriptive. However, essential manuals describe the author's criticisms without addressing their reflections on the Brazilian theoretical production.[35] Bercovici, exposing Canotilho's new conclusions, writes that the Portuguese constitutionalist asserts that "constitutional texts with ruling stamp (such as the 1976 Portuguese Constitution and the 1988 Brazilian Constitution) were not able to absorb society's changes and innovation, being out of the scope of the social whole, tending to perform a mere supervising function in society, no longer directive."[36]

We notice the adoption of two postures by the Brazilian doctrine. The first focuses on understanding the concept's formulation, goals, and purposes. The idea of "Constituição Dirigente" is, therefore, properly scrutinized on a scientific-rigor basis. On the other hand, incorporating Canotilho's theoretical formulation to understand the Brazilian constitution itself, notably a fundamental legal transfer to the Brazilian constitutional theory, does not seem to be viewed in its comparatist dimension. It results in a process of no reflection enriched by the intellectual tools this area of Law can offer. It is worth highlighting, for example, that part one of the most influential constitutionalist Brazilian doctrine, when delving into Comparative Constitutional Law, takes the "normative influence" of the Portuguese constitution and of Canotilho's theory despite not making progress in

32 *Paulo Bonavides / Jorge Miranda / Walber de Moura Agra,* Comentários à Constituição Federal de 1988, Rio de Janeiro 2009, pp. 34-35.

33 *Virgílio Afonso Silva,* Direito Constitucional Brasileiro, São Paulo 2020, pp. 38, 90.

34 *Bercovici,* note 30, p. 39.

35 *Fernandes*, note 26, p. 83.

36 *Bercovici*, note 30, p. 41.

understanding the incorporation of legal materials beyond the normative as doctrinal.[37] We, then, have a process of analysis by part of the Brazilian doctrine, which disregards legal transfer complexity for Comparative Constitutional Law. It points to the fact that a possible decontextualization of the legal item was disregarded. This decontextualization is a severe problem when, for example, a large part of the doctrine does not even scrutinize the importance of contributions from the Theory of Law, such as those linked to doctrinal interpretation or the production of normative meanings and the interpretive activity of the jurist, marked by relations of power and ideology in the process of incorporating these ideas.[38]

The debate about the historicity of the incorporated theory, that is, of its formulation process from a specific historical context, the end of the Portuguese dictatorship and the "Revolução dos Cravos," is not even mentioned in a footnote in most of the literature. This way, the "Constituição Dirigente" theory crosses the ocean halfway, jeopardizing the comprehension of its definitive aspect, deeply affecting its perception in Brazil and its consequent reception. This decontextualization, in turn, promotes reitification of the term that, changed into a commodity, is exploited as an instrument of idealization by those who, in addressing the term, intend only to add a series of theoretical framings from Portugal, without a critical reflection about its transfer to the Brazilian constitutional thinking, the local complexities in Brazil and the unfoldings of such incorporation. In brief, the term is naturalized with idealization and features in constitutional debates as data, undergoing no recontextualization whatsoever, filling spaces in the academic discussion or courts in a mostly acritical way. Thus, a significant contribution built outside the Brazilian legal community is incorporated despite not being critically analyzed and missing countless opportunities for a profitable debate about the legal item to account for new theoretical responses to Brazilian constitutional challenges. On the other hand, this acritical perspective of incorporating the meaning of "Constituição Dirigente" cannot be understood as the only one by the Brazilian doctrine. There are, undeniably, essential studies that critically reflect on the meaning of the "Constituição Dirigente" for Brazilian Law.

It must be remarked that, despite the essential reflections about that legal item transfer process, none of them was intended as a work of Comparative Constitutional Law, using methodological tools or the theoretical instrumental from the field. It was not even possible to identify the use of the expressions "transfer" or "transplant" in those authors' works. Such a gap in Brazilian academic production is not limited to constitutional law. It is, above all, one of the hindrances faced by legal scholarship in Brazil. Luís Roberto Barroso, referring to the criticism made by Canotilho in his initial elaboration and discoursing about the morally reflexive constitutionalism in his constitutional law manual, saves a footnote for a possible future investigation. The complex concept formulated by Canotilho and its incorporation into the Brazilian constitutional theory is summarized by the Brazilian author:

37 *José Afonso da Silva*, Um pouco de Direito Constitucional Comparado, São Paulo 2009, p. 75.

38 *Adrian Sgarbi*, Teoria do Direito: Primeiras lições, Rio de Janeiro 2007, p. 507.

> *"It is worth observing, however, that the Portuguese constitution of 1976 bore an ideology, a specific project of power, socialism inspired. It was never the case of the Brazilian Constitution of 1988, which, from the beginning, housed a pluralist model. Strictly speaking, the expression ruling Constitution can not convey the same meaning in Portugal and Brazil."*[39]

Such assertion, extremely relevant to a complete understanding of the incorporation process of that legal item, dialogues no doubt with the idea of recontextualization from the critical theory of comparative law. Its consequences, therefore, are fundamental to thoroughly understanding the term. Thus, we may even question whether it would be appropriate to classify the Brazilian Constitution as "Constituição Dirigente." Despite the importance of the insight, not progressing in making such a distinction may block the whole process likely to identify the idealization of the expression when being received in Brazil. It hampers the analysis that could enlighten a series of obstacles to the concept's effectiveness from new theoretical framings by the Brazilian theory itself.

Overall, two conclusions can be drawn from this omission. Either part (a leading one) of the Brazilian doctrine is missing the opportunity to reflect on this legal item, or, in fact, it purposely does not want to carry out this contextual discussion. Another collaboration that flirts with Comparative Constitutional Law, although not doing justice to it in its analysis, was given by professors Lênio Luiz Streck and José de Bolzan de Morais. In a collective work awarded the most important Brazilian literary prize, the authors address the theme "Constituição Dirigente" from a perspective that takes into consideration the dialogue with the Portuguese theoretical formulation, its contextualization in Brazil, without, however, tapping into the available tools in comparative law. They understand that "with the option in art. 1st – Democratic State of Law – the Brazilian Constitution of 1988 undeniably incorporates the thesis of compromissory ruling constitutionalism". Then, it indisputably establishes the transfer of the theory from Portugal and acknowledges the contextualization of the theory in "Portugal's process of re-democratization, after a long period of authoritarianism.[40] In the same way, a fundamental feature of the Portuguese constitution, rarely exposed in manuals, is its revolutionary aspect. To the authors, the text "adopts a (...) revolutionary character".[41] Therefore, we notice an effort by the authors to enlighten the decontextualization of the legal item in as much as they make clear:

> *"(...) the Brazilian Constitution kept a distance from that revolutionary vein which was explicit in the Portuguese Constitution. Indeed, while the former pointed to the transformation of the model of production of the Portuguese State, the latter – even*

39 *Luís Roberto Barroso,* Curso de Direito Constitucional Contemporâneo, São Paulo 2015, p. 250.

40 *Lênio Streck / José Luiz Bolzan de Morais*, Artigo 3º, in: Gilmar Ferreira Mendes / José Gomes Canotilho / Ingo Wolfgang Sarlet / Lenio Luiz Streck (eds.), Comentários à Constituição do Brasil, São Paulo 2018, p. 330.

41 *Streck / Morais*, note 40, p. 331.

> *though it meant expressive progress – resigned to pointing to the transformation of the model of State (Democratic State of Law), limiting, economy wise, to establishing the bases (political core) of a Social State (Welfare State)".*[42]

We may notice that the elaborated writing shows us the process of reifying the text's meaning despite the Portuguese being a source and "inspiration" for Brazilians. Its reification is enhanced as it shows that "the Brazilian Constitution does not embody, different from the Portuguese Constitution which embodied, in its origin, a revolutionary-normative function."[43] In the analysis of the self-criticism carried by Canotilho to his formulation, the authors grant the historical importance to that theoretical concept and, without tackling the internal process of idealization, due to it not meeting the purpose of the text, highlight the fact that "it seems indispensable having a guiding theory of Constitution as a theory that protects the factual historical specificities of each national State." Such assertion directs us to a reflection that dialogues with what, as seen, the critical theory of legal comparison will call recontextualization of the received legal item. This finding also opens the possibility for the interpreter of this legal item to develop new arguments around this concept in Brazil, using, if desired, and in critical dialogue with the most current reflections of Canotilho himself, a possible radical reinterpretation of it, recovering one of its original meanings. Following another path, the authors elaborate a proposition that, even addressing acritically as a series of "type ideas" liable of being shared as "a universal minimum core," a "democracy and fundamental human rights binomial," or "a general-universal basic core" that would be the base of "a general theory of the Constitution and of the Western Constitutionalism," reflects on an indispensable reinterpretation. At the end of their reflections, the authors find the need for a constitutional theory elaborated in Brazil that considers not only the theoretical compromissory developed in Portugal but also "further constitutional substracts apt to comfort a theory of the Constitution derived from regional specificities and national identity of each State" and, thus, they advance towards a Theory of a "Constituição Dirigente" adequate to Countries of Late Modernity.[44]

There is, indeed, a necessary effort by the authors to reinterpret the transfered legal item in its adequacy to the particularities of the Brazilian social and economic background. It lacks, however, resorting to the Comparative Constitutional Law.

42 *Streck / Morais,* note 40, p. 331.

43 *Streck / Morais*, note 40, p. 332.

44 For details, see among others, *Lênio Luiz Streck*, Uma abordagem hermenêutica acerca do triângulo dialético de Canotilho ou de como é ainda válida a tese da Constituição dirigente (adequada a países de modernidade tardia), in: George Salomão Leite / Ingo Wolfgang Sarlet (eds.), Direitos Fundamentais e Estado constitucional, São Paulo 2009, pp. 50-78.

D. Transformative Constitutionalism: From an inspirational image to critical frustration

The concept of Transformative Constitutionalism, well known in debates about the possibilities of a contribution from Law on behalf of social transformation, features exciting characteristics for comparative law. The concept itself is a product of legal transfer made by the courts and the doctrine in South Africa and is the result of a dialogue with ideas of subjective rights built in Germany.[45] Similarly, the dialogue between Latin America and South Africa about this legal item has yielded several profitable results despite their political and legal differences.[46] Although it was not developed for the legal reality of a country in the Global North, the theory was given attention from large academic centers in this region and has received renewed attention in the past few years, especially in the European debate. In this sense and given the epistemological colonization that prevails in the Brazilian academy, it is not wrong to say that Transformative Constitutionalism could be understood today as an intellectual production "from the global north" for many Brazilian researchers.

In the classic conceptualization by Karl Klare, influenced by Critical Legal Studies, Transformative Constitutionalism may be characterized as:

> *"a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative Constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in Law."*[47]

Klare is assertive in enhancing the importance of the theoretical background while elaborating his production. The author clarifies that his arguments are "animated" by political and moral commitments, which may be considered controversial but hold, above all, a "highly egalitarian, caring, multicultural community governed through participatory, democratic

45 *James Fowkes*, Transformative Constitutionalism and the Global South: The View from South Africa, in: Armin von Bogdandy / Eduardo Ferrer Mac-Gregor / Mariela Morales Antoniazzi / Flávia Piovesan / Ximena Soley (eds.), Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune, Oxford 2017, p. 97. For the concept of transformative constitutionalism, see *Karl E. Klare*, Legal Culture and Transformative Constitutionalism, South African Journal on Human Rights 14 (1998), pp. 146-188.

46 This does not mean, Fowkes continues, that "this contribution does not pursue the regional analogy between Africa and Latin America, chiefly because that analogy, in this context at least, remains hard to draw. The project of Law in the Latin American region and of the *Ius Constitutionale* Commune en América Latina (…) is heavily connected to regional dialogue, at the center of which lies an active regional court. Similar claims could not be made in relation to Africa today, notwithstanding the recent creation of an African Court with the power to make binding orders", p. 98.

47 *Klare*, note 45, p. 160.

processes."[48] The main goal of Transformative Constitutionalism, Diego Arguelhes analyses, "reflects a project to change society into something it currently is not, beyond simply preserving past achievements, or rejecting and breaking with some features of the recent national past." Arguelhes goes on in Latin America and argues that such a project has the very local constitutions as important allies, which "can be read as expressing a shared commitment to fighting exclusion.[49] Using a critical perspective, James Fowkes understands that Transformative Constitutionalism may be used for what it is or intends/would like to be. Despite its bold propositions to alter social reality from constitutional interpretation performance, Transformative Constitutionalism would be, to mention an example, restricted by legal liberalism impositions. Therefore, Fowkes continues, it would be possible to attribute strengths and weaknesses of Transformative Constitutionalism to ideological positions of the actors who should materialize their premises, especially from the state's supreme court performance, the main actors of the process.[50] Addressing Sanele Sibanda, Fowkes highlights that we must consider the liable limits of the intended social transformation by the liberal power's framework, encrusted in the judicial authority, and that may impose substantial impediments to the aimed change. Again, the courts' performance plays a leading role in the project. For Jorge Roa Roa, the role of constitutional justice in Transformative Constitutionalism is intrinsically connected to Robert Alexy's idea, according to which judges may be considered legitimized, acting as true "argumentative representatives" of excluded people or groups. At identifying the threat or loss of their rights in society, such groups could access the courts to safeguard their rights at risk. According to the author, "transformative constitutionalism rejects the imposition of limits on the judicial function that seek to avoid or mitigate judicial intervention to protect economic, social, cultural, and environmental rights." [51] In that sense, Roa goes on, judges play the central role of undeniable importance but must not be the only players in the transformation process of legal texts. Society takes the seat of significant action, which will boost social change, and should also be granted respect and deference by the judiciary. In Latin America, for instance, the court should be committed to congregating fundamental changes for the region and promoting "effective compliance to social promises of regional constitutions."[52] Dixon and Roux understand that the South African court had two distinct positions after the legal system delivered the new constitution in 1994. First, from 1995 to 2007, the court adopted the position of a significant ally of the African National Congress (CNA/ANC) to implement the constitutional project. At a second moment, though, the court changes

48 *Klare*, note 45, p. 151.

49 *Diego Werneck Arguelhes*, Transformative Constitutionalism: A View from Brazil, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, pp. 168-169.

50 *Fowkes*, note 45, p. 101.

51 *Jorge Ernesto Roa Roa*, El rol del juez constitucional en el constitucionalismo transformador latino-americano, MPIL Research Paper Series 11 (2020), p. 4.

52 *Roa Roa*, note 51, pp. 8-13.

into a position of distrust towards the African National Congress "apparently sensing that South Africa's dominant-party democracy is the major threat to the consolidation of liberal democratic constitutionalism."[53] The success in implementing the transformation process in society through a transformative constitution should consider aspects of the court's internal dynamics and, primarily, the conditions external to the court, such as society's politics and Legal Culture. According to them, "a court or other constitutional decision-maker that fails to take politics seriously will inevitably fail to translate constitutional parchment into practice" and add, "But so too will a court that fails to take Law and Legal Culture seriously: courts can only ever succeed in implementing a constitution through arguments that the domestic Legal Culture accepts as legally plausible or legitimate."[54]

The institutional instability in South Africa allows us to understand the success or failure of implementing a constitutional court that aims to implement a democratic constitution bonded with sensitivity to political conditions required for its application and to the development of doctrines able to support the legitimacy of future possible interventions by that court.[55] This reality shows us that studies focused on understanding Transformative Constitutionalism converge not only to understand the significant role of the normative set determined by the constitution. They highlight that part of court members and, consequently, their ideology and the role played by society are also indispensable elements to the transformative project application. In sum, Legal Culture matters. This process announces the complexity of incorporating this theoretical formulation developed in South Africa. The transfer of that legal item, notedly the liability of a constitution working as a mechanism of ignition to a process of social change, is a highly contextualized phenomenon, full of internal dynamics with comings and goings of effectiveness. It makes us ponder over a possible identification, despite the involved researchers' best intentions, of the import of this legal item to Brazilian reality. Would we not be, as many did with "Constituição Dirigente," transferring the theory of Transformative Constitutionalism in an acritical and irreflexive way? Would it not be necessary to resort to comparative law, especially to understand how to profit from this theoretical innovation to produce a critical reflection that accounts for Brazilian constitutional theory? For example, would it be enough to assert that it is possible "to understand the federal constitution of 1988 from a transformative perspective, even if we admit it is not transformative in all its aspects" to have a fruitful dialogue

53 *Rosalind Dixon* / *Theunis Roux,* Marking Constitutional Transitions: The Law and Politics of Constitutional Implementation in South Africa, University of New South Wales Law Research Series 64 (2018), p. 5.

54 *Dixon / Roux*, note 48, p. 18.

55 For one reconstruction of the political instabilities in South Africa, see *Bruce Ackerman*, Constituições Revolucionárias, São Paulo, 2022. These instabilities can help us understand the complexity of stabilizing the implementation of the social transformation idea contained in South Africa's constitution.

about this possible legal transfer?[56] Should we not consider the risk of an idealization of Transformative Constitutionalism, which could lead to a dangerous understanding of judges' need to lead part of the social change? Would we not be losing the complexity of incorporating this legal item when, for example, we restrict our analysis to transforming society to moral issues and the defense of minorities, as some Brazilian doctrines seem to do?

The Brazillian legal culture is much more complex than some scholars would like it to be. Brazilian doctrine knows this despite not liking to talk about it. Despite its recent decisions to protect racial and gender minorities, the court has demonstrated itself as an ally of neoliberalism.[57] Neglecting the neoliberal subjectivity that predominates today in the court, verified through a series of setbacks to workers' rights, prevents us from considering whether Brazilian judges can contribute to the complex and intersectional social transformation necessary in Brazil.[58] The celebrated participation of the Brazilian court in moral themes arose from, among others, the transferred idea that "transformative constitutionalism casts, therefore, a good degree of judicial activism in the sense that interpretation of constitutional norms underlies inclusive values."[59] Is it a way of idealization by that court, distracting us from the Brazilian court's views of economic themes, marked by neoliberal subjectivity and support to structural reforms that make workers' rights more vulnerable? Like other Brazilian political institutions, the Supremo Tribunal Federal has been deciding insistently in a conservative and economy-exclusionary way. It makes us wonder if it is not hasty to assert that the Brazillian judges can act like agents of Transformative Constitutionalism in one society historically characterized by social exclusion.

As we can see, when we abandon the study of comparative law, we miss the opportunity to identify critical and complex processes of decontextualization of the imported legal items. We miss the chance to scrutinize their course to a new contextualization, able to alert us about deficient adjustments, as done by the critical theory of legal comparison. Part of the Brazilian doctrine states that the Transformative Constitutionalism carried out in Brazil "starts from some assumptions common to transformative constitutionalism" and would be allied to the doctrinal perspectives of constitutional effectiveness and neoconstitutionalism. Thus, according to that doctrine, due to advances in some paradigmatic judgments, all linked to the liberal perspective, on issues such as fundamental rights and

56 *Ana Carolina Lopes Olsen / Katya Kozicki*, O constitucionalismo transformador como instrumento de enfrentamento do racismo estrutural: o papel do STF, Suprema - Revista de Estudos Constitucionais 1 (2021), pp. 82-118.

57 For the decision of Supremo Tribunal Federal, see Supremo Tribunal Federal, STF enquadra homofobia e transfobia como crimes de racismo ao reconhecer omissão legislativa, https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=414010 (last accessed on 18 October 2023).

58 For details, see Supremo Tribunal Federal, STF decide que é lícita a terceirização em todas as atividades empresariais, https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=388429&ori=1 (last accessed on 18 October 2023).

59 *Olsen / Kozicki*, note 56, p. 95.

democracy, "it is possible to recognize the performance of a transformative function by constitutional right."[60] On the other hand, it is not possible to perceive any questioning about the ideological position of the actors who are "materializing these premises." In the same way, unsurprisingly, the author focuses her examples of advances in this model of Transformative Constitutionalism outside the field of workers' social rights. It seems that what happens is the idealized adaptation of a commodity to fit it into a culturally particular phenomenon full of economic, political, and social contradictions and challenges that would deserve their theoretical formalization. Therefore, transferring this legal item in this way to explain the Brazilian reality seems an acritical, inappropriate move. What we have here is one recontextualization. On the other side, the Brazilian doctrine carries this critical attention, which, as in the "Constituição Dirigente" case, does not resort to comparative law to embody its ponderations.[61] Diego Arguelhes, for example, in analyzing the limits and possibilities of Transformative Constitutionalism in Brazil, argues that the country is a negative example, different from its neighbor, Colombia. In his analysis of a possible project of Transformative Constitutionalism in Brazil, the author reaches some conclusions. For him, Brazil may be considered a negative case due to the Supreme Court's performance after the new constitutional enactment, having been opposed to the transformative project. When we investigate the case of establishing Transformative Constitutionalism in South Africa, we may identify one of the significant Transformative Constitutionalism challenges faced in the country: the lack of connection between the conservative legal culture and the new federal constitution. The same is remarked by Arguelhes in the Brazilian case, when reporting the difficulty of the court being a relevant actor in the society transformation process even twenty years later than the constitution's promulgation.[62] As shown in some studies, over the twenty years following the new constitution's promulgation, the court, probably influenced by highly respected Brazilian jurist Minister Moreira Alves, supposedly adopted a defensive conservative position, retaining possible transformations admitted by the constitution. Recently, one of the court's most influential judges, and now its president, is Luis Roberto Barroso, a minister who supports the neoliberal economic perspective. Conservatism may have changed its target, but it is still at the top of the Brazilian Judiciary.[63] Likewise, another challenge in Transformative Constitutionalism implementation in Brazil is the mismatch of courts and other powers regarding its definition and further disagreement about constitutional requirements, how it can fulfill its promises,

60 *Patrícia Perrone Campos Mello*, Constitucionalismo, transformação e resiliência democrática no Brasil: O Ius Constitucionale Commune na América Latina tem uma contribuição a oferecer?, Revista Brasileira de Políticas Públicas, Brasília 9 (2019), pp. 253-285.

61 For one example of critical reflection, see *Diego Werneck Arguelhes / Evandro Süssekind*, Constitucionalismo transformador: Entre casas de máquinas e "engenharia social judicial", Revista Direito E Práxis 13 (2022), pp. 2557–2594.

62 *Werneck Arguelhes*, note 49, p. 167.

63 *Siddharta Legale Ferreira / Eric Baracho Dore Fernandes,* O STF nas "Cortes" Victor Nunes Leal, Moreira Alves e Gilmar Mendes, Revista Direito GV 9 (2013), pp. 23-45.

and who should be the leader of this status quo alteration process. Another lesson learned from the author is the possibility that the simple change of the "language in courts" may be seen as sufficient for legal community alteration regarding the role of courts. Memorable decisions, classified as bold by peers, may convey the unreal idea that courts are making changes to the transformative project, notably if they have assimilated Transformative Constitutionalism vocabulary. This feeling may produce what Arguelhes names "mission accomplished syndrome," leading to a dangerous perception by the legal community that advances are being interrupted or retaliated by the other powers as a response linked to that protagonism by courts. Worse still, it leads to disregard for those very decisions. This would create a discourse that, although pleasing to the public, is little transformative. We would be generating, thus, a real "optical illusion". The author then complements that,

> *"Judges might choose cases with transformative potential and issue rulings requiring major, structural changes in the way the government deals with certain issues—while, at the same time, they refrain from following up on what happens after these decisions are taken. They reap the benefits of being associated with Transformative Constitutionalism discourse and move on to the next issue, leaving the status quo largely undisturbed".*[64]

We noticed, therefore, that the studies here addressed did not aim to be Comparative Constitutional Law projects, which may be the core reason for us to pinpoint their incompleteness and deficiency. The production of accurate criticism about Transformative Constitutionalism's handling in Brazil must be considered and thoroughly analyzed. It does not mean, however, doing without consideration of comparative law aspects, especially studies featuring legal transfers. Letting go of one such important tool constitutes dangerous neglect when we intend to better understand constitutional ideas that highly influence and justify judicial decisions and the reflections from academia in the Brazilian Constitutional theory.

E. Conclusion

Incorporating legal ideas produced mainly in the Global North is one of the most striking characteristics of the Brazilian legal academy. Often presented as genuine arguments of authority, foreign theoretical productions enliven the internal debate and strategically influence many of the decisions taken by Brazilian courts. Theories such as Transformative Constitutionalism and the "Constituição Dirigente" are presented as a point of reference for several reflections that intend to scrutinize the Brazilian Constitution of 1988 and contribute to explaining Brazilian constitutionalism. Some contributions do not make use of the critical, theoretical instruments offered by the theory of legal comparison and end up

64 *Werneck Arguelhes*, note 53, p. 168.

reproducing deficiencies that could be avoided if the theoretical framework of comparative law were used during the legal transfer process and carried out with the incorporation of both theories in the Brazilian debate. The transfer of constitutional ideas is a reality that will only be well-taken advantage of when the theory of legal comparison is incorporated into academic debates. The examples of the incorporation of "Consituição Dirigente" and Transformative Constitutionalism into Brazilian doctrine listed in this work reinforce the urgency of this need.