



Qualis A1 - Direito CAPES

Presentation

March 2019

We began another year, a very special one, in which we present the tenth volume of the editorial project of the Law and Praxis Journal. Our first message is to thank for the trust, collaboration and rigorous work of the entire academic community involved in the editorial group and in the works published by the journal. We express our sincere thanks and wish that many other decades of continuous, punctual and permanent publication of critical works in the field of Brazilian and international legal research will come.

Our first issue of this year, (vol.10, n.1, 2019, 25th edition, jan-mar) begins with the traditional twelve unpublished articles of the general section of the journal, followed by reviews and translations, as well as a dossier organized by the researcher Juliana Cesário Alvim (PPGD-UERJ) on “Strategic litigation and Human Rights”.

In our general section, the unpublished works presented are in the fields of the history of law, juridical sociology, law theory and postcolonial studies, among other subjects. In the reviews section, these were elaborated in connection with the dossier of this edition, presenting papers that are reference in the debate on strategic litigation, by Professor Helen Duff and by Professor Luis Roberto Barroso. In the dossier, the works cover a rigorous selection of articles by the invited editor, which discusses central themes in the field of strategic human rights litigation, especially in Brazil and Latin America.

In addition, the journal also has a special section of translations, in which we present a set of unpublished translations from German to Portuguese of texts by Hans



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Revista Direito e Juliana Cesário Alvim Gomes

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Kelsen and Eugen Ehrlich in the context of the historical controversy about the foundation of the sociology of law against legal positivism. Here we thank the translator Henrique Bordini (UFRGS) for his extraordinary work. And for the revision of the translations, coordination of the project, and also for the initiative, we thank Professor Lucas Konzen (UFRGS) for the trust in sending the result of this work for publication in Law and Praxis. We also present a translation of the article “Levels of legitimacy” by Professor Owen Fiss of Yale University, a very current text of the year 2015, also translated as part of the dossier. And, finally, we also bring a translation of the article by Chilean professor Hugo J. Castro Valdebenito on the Chilean prison system, analyzed under the lens of the theory of primitive accumulation. We wish to thank the cooperation of the students of PPGDir UERJ in the realization of the English and Portuguese translations that make up this edition.

It is worth mentioning that this number takes place in a year of reflection on the contours of the editorial project that gave rise to the launch of the journal Law and Praxis in 2009 and that was consolidating throughout the 10 years of publication. We hope, throughout the year, to promote critical debates on the role of law as a social phenomenon in several areas. In this issue, we begin with an approach to strategic human rights practices; in June, we come to the theme of the rights of children and adolescents; in September, we will focus on the theme of institutional racism; in December, we will close this tenth volume with a more comprehensive reflection on the meanings of the critique of law and our editorial project in this context. To this end, we propose a call for papers, which invites Brazilian researchers to reflect on what the criticism of law means and to look at and dialogue with the articles produced and published in this theme throughout the 10 years of Law and Praxis.

We remind you that the editorial policies for the different sections of the journal can be accessed on our website and that the submissions are permanent and always welcome! We thank, as always, the authors, evaluators, collaborators for the trust deposited in our publication.

Enjoy your reading! **Law and Praxis** team



Strategic Litigation and Human Rights

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In attempting to promote social change through litigation before state, regional and supranational institutions, the practice of strategic litigation in human rights operates at borders: law and politics; social movements and institutions; domestic and international plans; conservation and transformation.

This dossier of the Law and Praxis Journal, "Strategic Litigation and Human Rights", intends to critically and constructively exploit these tensions. The papers that compose the dossier are investigations that seek to combine theory and practice in order to analyze the limits and potentialities of the use of the law and the judicial apparatus for the adjudication and promotion of human rights.

From the more general to the more specific discussions, the dossier begins with comprehensive analyzes of the strategic human rights litigation, its characteristics and actors, goes through investigations into concrete cases, and finally addresses procedural issues. The dossier also includes an unpublished translation of Owen Fiss's article, with a review of Helen Duffy's recent book and a review of Luís Roberto Barroso's work, which includes an original interview specially granted for this publication.

We hope to offer a contribution to this field of research still incipient in Brazil and to the advancement of critical reflection by those who act in practice in this activity. The dossier begins with a contribution from me, "At the Crossroads: Limits and Possibilities of the Use of Strategic Litigation for the Advancement of Human Rights and for Social Transformation." From my practical and theoretical experience in the field, I try to show a panorama of the crossroads contained in the theme of strategic litigation in human rights. The article critically addresses the dilemmas surrounding the institute's characteristics, participants, and context, and argues that the potential of strategic



human rights litigation to innovate and destabilize existing systems of inequality and power depends on a complex, critical and contextualized approach in which its limits are observed and discussed, in order to avoid that its process reinforces social hierarchies and produces unexpected and conservative side effects.

The second article is an unpublished contribution by Daniel Bonilla Maldonado of the University of Los Andes and currently Visiting Professor of Sciences Po in Paris. In his article "Pro bono legal work in Brazil: legal transplants, access to justice and lawyer's social obligations", examines the origin, structure and dynamics of pro-bono legal work in Brazil. He argues that this practice derives from a legal transplant carried out without adaptations and that, consequently, did not take root in the Brazilian legal culture. According to the author, although incipient, contributions already made by pro-bono work in Brazil can serve as a basis for extending protection to access to justice and also for the recognition and materialization of the social obligations that advocates have in the context of democracies in the process of consolidation.

The third article is in strict dialogue with the aforementioned. Natalia Serrano, Julián Díaz and Daniel Bonilla present extensive research on the discourse and practices of pro bono work developed in Brazil between 2005 and 2017. "Pro bono legal work in Brazil: Discourse, practices and limits, 2005-2017", in its first part contains an in-depth examination of the context of the pro bono practice, including the frameworks for its legal regulation and deficiencies in access to justice in the country. The second part describes speeches and practices both within the Pro Bono Institute and pro bono law firms, including analyzes of the number of hours devoted to practice, their characteristics, sources and types of cases, and the main obstacles they face.

Evorah Cardoso, in turn, carries out an essay from more than 200 interviews with different public and civil society actors in Brazil and Latin America on different forms of advocacy for social transformation - strategic, structural, mass litigation, pro bono advocacy and popular advocacy. In the first part of her analysis, entitled "Past continuous of lawyering for social change" she critically faces issues such as conflicts between the tradition of popular advocacy and human rights NGOs, professionalization of the sector, and pro bono advocacy work. In the second part, she questions the role of the Judiciary in the face of this specific type of litigation, emphasizing the actions of the Federal Supreme Court. She also deals with the phenomenon of mass litigation that



becomes structural and of the role of the Public Ministry and Public Defender in this process. Finally, in the third part of her contribution, she faces the change in the meanings of strategic litigation and the future of social transformation by judicial means in Brazil.

In dossier's fifth article, "Strategic Human Rights Litigation: challenges and opportunities for litigating Organizations," Leticia Marques Osorio examines how organizations working in strategic human rights litigation have supported new ways of strengthening litigation in the scope of the diverse tools of defense of rights for the change. In addition to outlining the use of the right to address imbalances and inequalities of power, bringing concrete examples of this action, it points to the challenges of the litigation and its implementation, among them the lack of participation of those affected in the agreements and adjustments signed and the excessive costs of strategic litigation. Finally, it suggests reflections to be developed on the subject in the future.

Making an important contribution from the concrete experience of litigation operated from a university clinic before the Federal Supreme Court, Ligia Fabris Campos analyzes the issues at stake in the judgment that determined the minimum of 30% of investment of the political parties in campaigns of candidates women. In addition to dealing briefly with the substantive issue of women in politics, the article "Strategic litigation for gender equality: The case of campaign funding for women" reveals the process of elaborating of the amicus curiae memorial and the measures adopted after the decision to implement the judgment, as well as the new challenges that arise after the trial.

In the seventh article of the dossier, Libardo José Ariza Higuera and Mario Andrés Torres Gómez, from the University of Los Andes in Bogotá, analyzed the infamous process of judicial intervention in the Colombian penitentiary system. "Constitution and Jail: judicialization of the prison world in Colombia" addresses the most important structural decisions of the Colombian Constitutional Court that gave rise to the category of "unconstitutional state of affairs" and to the application of the so-called dialogical constitutionalism that has been advocated and applied in several countries in the region, including Brazil.



Drawing on a procedural perspective, Sergio Cruz Arenhart points out that complex conflicts - along with any difficulty in evaluating other points, such as the extension of jurisdictional activity, effective techniques and participation / representation modalities in the process - also offer difficulty in the field of proof. In "Statistical evidence and its use in complex litigation", it examines the possibility of using statistical evidence in Brazilian law, particularly in the field of complex litigation, drawing attention to the need to consider the form of control of judicial justification that leads to account this type of proof.

In the same section, Eloísa Machado de Almeida discusses the role of amici curiae in the strategic litigation before the Supreme Court. In an article titled "Institutional capabilities of amici curiae in the Supremo Tribunal Federal: accessibility, admissibility and influence" the author examines the institutional capacities conferred on amici curiae and the jurisprudence of the Brazilian Federal Supreme Court, analyzed and classified under conditions of accessibility, admissibility and influence.

In addition to the nine articles listed, the dossier counts with the translation of unpublished text in Portuguese of Professor of Yale Owen Fiss, made by Renan Medeiros. "Tiers of Standing," originally published in the Supreme Court Review of the University of Chicago, addresses the procedural barriers established by the US Supreme Court to avoid deciding certain cases on their merits, especially those concerning national security. In the article, the author criticizes the increasing use of this mechanism to block and obstruct the use of strategic litigation for the protection of human rights.

Diego Gebara Fallah contributes to the dossier by reviewing the book "Strategic Human Rights Litigation: Understanding and Maximizing Impact" by Helen Duffy, Leiden University professor, published in 2018. The book draws on her extensive experience as a litigator in strategic litigation in human rights and seeks to develop an analytical framework to plan and evaluate the impact of this type of case.

Finally, Helena Ferreira Matos and Camilla Borges Martins Gomes present a review of UERJ's Professor of Constitutional Law, Luís Roberto Barroso, entitled "O novo direito constitucional brasileiro: contribuições para a construção teórica e prática da jurisdição constitucional no Brasil" The book provides detailed reports on paradigmatic cases of strategic human rights litigation in which Luís Roberto Barroso acted before the Brazilian Federal Supreme Court, before becoming court minister. The review is enriched



by an interview conducted in January 2019 in which the professor comments on aspects such as the transition from the role of lawyer to that of the judge and the challenges in advancing human rights from that position.

With these contributions, the present dossier hopes to provide the reader with relevant and diverse perspectives on the limits and possibilities of using strategic litigation for the protection and promotion of human rights. We hope that this discussion will expand, gain strength and foster reflections that will result in a more critical and effective theoretical and practical approach to the subject. Good reading!



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