DOI: 10.12818/P.0304-2340.2024v84p45

FROM PROTECTION OF PROPERTY TO A USELESS DISTINCTION: THE CONCEPTS OF PUBLIC UTILITY AND PUBLIC NECESSITY (*UTILIDADE E NECESSIDADE PÚBLICA*) IN THE BRAZILIAN LAW OF EXPROPRIATION (1826-1941)

DE PROTEÇÃO DA PROPRIEDADE A DISTINÇÃO INÚTIL: OS CONCEITOS DE UTILIDADE PÚBLICA E NECESSIDADE PÚBLICA NO DIREITO BRASILEIRO DA DESAPROPRIAÇÃO (1826-1941)

Arthur Barrêtto de Almeida Costa[*]

ABSTRACT

In 1826, the Brazilian parliament established two statutory causes for expropriation: public utility and public necessity. These terms were borrowed from French law, but gained a legislative meaning in Brazil that they did not have in Europe. This article discusses why the two concepts were created and how they were appropriated by doctrine and jurisprudence until they were united in the concept of public "utility or necessity" present in the expropriation law of 1941 and in the 1988 Constitution. I use mainly the annals of parliament to identify the theories that shaped the legal text of 1826 and the expropriation law of 1845. Second, I use texts from legal journals mainly from the early 20th century to identify to what extent the division between public utility and necessity was still operative, especially as it was incorporated in the 1916 civil code. I conclude that the division between public utility and necessity was proposed in 1826 to allow the state greater power to act without giving discretion to the executive branch. In 1845, the rules of expropriation for public utility were relaxed and the distinction lost much of its practical meaning. At the beginning of the 20th century, doctrine still discussed the distinction, but jurisprudence focused on the public character or not of the work. In the end, I discuss the role of history vis-à-vis dogmatics and how historians can

RESUMO

Em 1826, o parlamento brasileiro estabeleceu duas causas legais para a desapropriação: a utilidade pública e a necessidade pública. Esses termos foram tomados de empréstimo do direito francês, mas ganharam no Brasil um significado legal que não tinham na Europa. Este artigo discute por que os dois conceitos foram criados e como foram apropriados pela doutrina e jurisprudência brasileiras até se unirem no conceito de "utilidade ou necessidade" pública presente no decreto-lei de desapropriação, 3365 de 1941 e na Constituição de 1988. Utilizo principalmente os anais do parlamento para identificar as teorias que moldaram o texto legal de 1826 e a lei de desapropriação de 1845. Em segundo lugar, recorrer a textos de revistas jurídicas, principalmente do início do século XX, para identificar em que medida a divisão entre utilidade pública e necessidade ainda operava, especialmente quando foi incorporada ao Código Civil de 1916. Concluo que a divisão entre utilidade e necessidade pública foi proposta em 1826 para permitir ao Estado um maior poder de ação, sem dar poder discricionário ao poder executivo. Em 1845, as regras de expropriação por utilidade pública foram flexibilizadas e a distinção perdeu muito do seu significado prático. No início do século XX, a doutrina ainda discutia a distinção, mas a jurisprudência centrava-se no carácter público ou não da

[*] Doctor in Teoria e Storia del Diritto – Università degli Studi di Firenze. Post-doctoral student at Max Planck Institut für Rechtsgeschichte und Rechtstheorie.
E-mail: arthurbarretto@gmail.com. ORCID: https://orcid.org/0000-0002-6906-0998.

help jurists understand legal texts more adequately.

KEYWORDS: Expropriation. Public utility. Public necessity. History and dogmatics.

obra. No final, discuto o papel da história face à dogmática e a forma como os historiadores podem ajudar os juristas a compreender melhor os textos jurídicos.

PALAVRAS-CHAVE: *Desapropriação. Utilidade pública. Necessidade pública. História e dogmática.*

1. INTRODUCTION: CHASING AN ANCIENT DIFFERENCE

Useless[1]. Misplaced[2]. Merely academic[3]. This is how important Brazilian jurists of the 1920s and 1930s described the difference between the concepts of public utility and public necessity. It is with these two terms that Brazilian law defines since 1826 the "grounds" or "causes" for expropriation. 100 years after these criticisms and almost 200 years after the first appearance of this conceptual pair in Brazilian statutes, some of the most widely read administrative law manuals in Brazil still use these two terms[4], and even discuss how to separate one from the other[5]; it is rare for the distinction to be abandoned by any author[6]. How to explain that such undervalued concepts have persisted for almost 200 years in the Brazilian legal culture?

One might be inclined to suggest that this curious permanence might be explained by a reverence for everything that is foreign, a deference to colonialism, a persistent "mongrel complex" (*complexo de vira-lata*). This is not the case. Even in the 19th century, some Brazilian administrative law scholars mentioned that France had employed the concepts of public utility and necessity, but as Vicente Pereira do Rego points out, the French never used the two concepts together[7]. In fact, a detailed analysis of the French constitutions shows that the Universal Declaration of the Rights of Man and Citizen mentions only *nécessité publique* in its article 17, responsible for protecting property; the constitutions

1 WHITAKER, Firmino. Desapropriação. Revista dos Tribunais, São Paulo, a. 14, vol. 55, pp. 208-209, 1925, p. 28.

2 REIS, Aarão. Direito administrativo brasileiro. Rio de Janeiro: oficina Gráfica Villas-Boas, 1922, p. 347-348.

3 CAVALCANTI, Themistocles Brandão. Instituições de direito administrativo brasileiro, 2º volume. Rio de Janeiro: Livraria Editora Freitas Bastos, 1938, p. 573..

4 JUSTEN FILHO, Marçal. Curso de direito administrativo. 9ª Ed. São Paulo: Editora Revista dos Tribunais, 2013, p. 821-822; CARVALHO FILHO, José dos Santos. Manual de Direito Administrativo. 26ª Ed. São Paulo: Atlas, 2013, p. 821-822.

5 DI PIETRO, Maria Sylvia Zanella. Direito administrativo. 26ª Ed. São Paulo: Atlas, 2013, p. 175-176; MEIRELLES, Helly Lopes. Direito administrativo brasileiro. 43ª Ed. São Paulo: Malheiros, 2018, p. 771.

6 Exception: MELLO, Celso Antônio Bandeira de. Curso de direito administrativo. 25ª Ed. São Paulo: Malheiros, 2008, p. 858-859.

7 REGO, Vicente Pereira do. Elementos de direito administrativo brasileiro. 2ª Ed. Recife: Typographia Commercial de Geraldo Henrique de Mira & C., 1860, p. 133.

of 1791, 1793, 1795[8] do the same. The constitutions of 1814 and 1830[9], art. 10, use the concept of *interêt publique*. The *utilité publique* begins to be mentioned only in art. 545 of the Code Napoleon (1804), and is resumed in the constitution of 1848, art. 11. In Italy, the law of administrative unification (nº 2248 of 1865), annex E, art. 7, spoke only of *necessità*, but the institute itself was called by doctrine *espropriazione per pubblica utilità*[10].

The Brazilian constitution of 1824 itself reads only that the "public good" will authorize the use of private property by the public power; not even the term expropriation is mentioned. Our conceptual pair appears later, in the infra-constitutional legislation. In order to identify how Brazilian legislators created this long-standing division, albeit in different guises, I resorted mainly to the acts of parliament discussing the main Brazilian laws on the subject[11]. I also analyzed the main handbooks of administrative discussing the subject and the court rulings that mobilized the concepts of public utility or necessity published in law journals; with this, I seek to identify not only how the distinction emerged or its origin, but how it was progressively appropriated by the Brazilian legal culture.

I write this text as a historian of administrative law, but with contemporary administrative law scholars in mind. I must therefore discuss why and how I expect to establish an adequate dialogue between the professionals of history and those of dogmatics. In fact, while positive law must devote itself to constructing logically related propositions in a systematic structure applicable to contemporary reality, history is concerned with reconstructing the conditioning factors of discursive and social formations of the past, no matter how chaotic they may be. What law laboriously constructs, history slowly erodes in the chronicle of past contingencies. How, then, can these two bodies of knowledge relate to each other in a fruitful way? Emilio Betti[12] proposes as a contact point between history and dogmatics the issue of problem solving: the legal system of the past would solve a social problem that could also be dealt with by the contemporary system; this contact point would make the two systems interchangeable and enable the interpreter to compare different normative orders so that one enlightens the other – keeping in mind, however,

8 Respectively in: title 1, article 19 and article 358.

9 Respectively in articles 10 and 9.

10 I refer to both countries because they were the two main foreign references of Brazilian administrative law in 19th and early 20th century. Cf. COSTA, Arthur Barrêtto de Almeida. The Tropical Fado that Wanted to Become a European Samba: The Cosmopolitan Structure of Brazilian Administrative Law Investigated with Bibliometric Data (1859-1930). Forum Historiae Iuris, pp. 1-57, 29. September 2021.

11 Lei de 26 de setembro de 1826, decreto 353, de 12 de julho de 1845, o decreto 806 de 23 de setembro de 1854, decreto 816 de 10 de julho de 1855 e decreto 1.664 de 27 de outubro de 1855, decreto 1.021 de 26 de agosto de 1903 e o decreto 4.956 de 9 de setembro de 1903.

12 BETTI, Emilio. Storia e dogmatica del diritto. In: La storia del diritto nel quadro delle scienze storiche. Firenze: Olschki, 1966.

the specificities of legal hermeneutics and historiography. This model, however, was devised for civil law, which has a much longer history; administrative law must cope with the ever changing role of the state, which is a fundamental trait of modern societies. Not only the answers change, but many problems fade away and are born. Comparing solutions, therefore, is of less interest.

As Pietro Costa points out, Betti's project is based on a conception of law inscribed in the unity of "tradition", conforming a "legal thought" that would constitute law[13]. However, behind apparent continuities, a detailed analysis of legal categories can reveal ruptures[14]. Moreover, the mere fact that a given idea is used in different contexts changes its meaning. In this way, reconstructing the legal dogmatics can shed light into the conditioning factors that led a given idea to be thought of in one way or another - and these conditioning factors may or may not continue to exert their effects on the present. As Antônio Manuel Hespanha rightly points out, legal categories are loaded with meanings that are often unavailable to their individual user[15]. Words refer to a history that is not fully controllable from the present. But a keener awareness of their formation makes it possible for those categories that are still employed in the present to be managed more effectively – and legislative texts always convey terms from the past in a major or lesser extent. As Helmut Coing rightly points out, the history of law allows one to understand categories according to their historical presuppositions, that is, their context[16]. This is crucial for true legal interpretation: after all, statutes, decreets and the like always come from the past[17]. Using them without taking into account the context in which they were crafted would be reckless.

I do not intend with this paper to state what would be the "correct" interpretation of the concepts of public utility and public necessity. But I intend to understand in a deeper way the past meanings of an expression that, though detached from its original meaning, is still used in the Brazilian constitution (art. 5, XXIV). By unearthing how those words were born and gradually changed, legal dogmatics will be able to understand them in a more *honest* way[18]. After

13 COSTA, Pietro. História do direito: imagens comparadas. In: COSTA, Pietro. Soberania, representação, democracia. Ensaios de história do pensamento jurídico. Curitiba: Juruá, 2010, p. 33

14 HESPANHA, António Manuel. Cultura jurídica europeia: síntese de um milénio. Coimbra: Almedina, 2012, p. 51 f.

15 Idem., p. 5 f.

16 COING, Helmut. Historia del derecho y dogmatica jurídica. Revista chilena de derecho, vol. 9, n. 2, mayo-agosto, 1981, p. 115 f.

17 MÖLLERS, Thomas. Legal methods: how to work with legal arguments. München: C. H. Bech, 2020, p. 151-160. On the contemporary relevance of the classical interpretative methods, cf. KRELL, A. J.. Entre desdém teórico e aprovação na prática: os métodos clássicos de interpretação jurídica. Revista Direito GV, v. 10, n. 1, p. 295–320, jan. 2014.

18 I took this term from COING, Helmut. Historia del derecho y dogmatica jurídica. Revista

all, if every interpretation is a *re*construction of meaning, it is inevitable to return to the moment of construction. To the past.

2. THE FOUNDATIONS OF A DIVISION: THE LAW OF 9 SEPTEMBER 1826

Four years had elapsed since Brazil had become an independent country when the National Assembly met for the first time in 1826. Among the many bills that were filed in that founding year was the "law for the protection of property". Under this name, the deputies and senators were dealing with what would after a few months become the first document regulating expropriation in Brazil. The name already betrays its intentions: the objective of the norm was first and foremost to defend property owners, not to give the State a tool to intervene and organize the economy. Not without reason, the main thread of much of the debate was the concepts of public necessity and public utility, which defined when the very visible hand of the state could get inside the purse of landowners[19].

The initial two drafts of the bill on expropriation, presented to the senate on 23 June 2 and 8 July 1826 both provided that only public necessity could lead to the taking of private property by the state. But on August 5, a third and definitive draft added public utility as a second cause for expropriation: a breach in the fortress of proprietary absolutism[20].

Debates began in the upper chamber on 4 July 4 1826, concerning mostly what was the meaning of the two grounds for expropriation. The difference between necessity and utility was murky for senators. The Viscount of Barbacena, for instance, defended that they were essentially the same: "My property can only be taken by absolute necessity for the public utility"[21]. Others disagreed, and used the concepts to draw lines on the limits of state intervention. The Viscount of Caravelas argued that it would only be possible to speak of expropriation in cases of absolute necessity. Public utility could not be pursued by expropriation: in such cases, the public officials should seek to buy the property with the agreement of the expropriator, as a private individual would do. The said "necessity for public utility" would imply a further conceptual openness, which could greatly harm owners. After all, the central concept would shift to

chilena de derecho, vol. 9, n. 2, mayo-agosto, 1981, p. 116..

19 This confirms Hespanha's intuition that the 19th-century state constituted a very visible hand that built the conditions for market economies. Cf. HESPANHA, António Manuel. Guiando a Mão Invisível - Direitos, Estado e Lei no Liberalismo Monárquico Português. Coimbra: Almedina, 2004.

20 Cf. GROSSI, Paolo. La proprietà e le proprietà nell'officina dello storico. Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno, n. 17, pp. 359-424, jan./dez., 1988.

21 BRASIL. Anais do Senado Imperial, 1826, livro 3. Secretaria Especial de Editoração e Publicações: 1823, p. 26.

utility, and the idea of necessity, placed in function of the other, would become mere rhetoric, somewhat superfluous to the definition of the true substance of expropriation. The bill, for Caravelas and also for Senator Fernandes Pinheiro, should eliminate the concept of utility and focus on that of necessity.

But it was still possible to deepen the lines of defense of ownership. And this battle would be fought in the terrain of conceptual vagueness. Article 1 of the original bill stated that "the absolute necessity of other people's property, for public utility, is the only case, in which ceases the property right guaranteed by the constitution, title 8, art. 179. § 22". The problem is that the text did not specify what this "public necessity" was. The Viscount of Caravelas opposed this wording, saying that "The right to property is one of the greatest that man enjoys; it is what forces him to live in society: it deserves the most scrupulous attention, and the way it is in the project, is very vague"[22]. For Caravelas, it was necessary to establish precisely the cases in which such a "need" took place. This would prevent the executive branch from enjoying excessive discretionary powers to take over private property. The Viscount of Paranaguá also defended that the cases of necessity should be stated by law. In his opinion, if the constitution itself already employed the concept of necessity[23], the law should "describe more specific cases" that made it clear exactly when public necessity occurred. The Viscount of Maricá, in the same line of reasoning, proposed an amendment discriminating the cases of public necessity, namely: "security, defense, commodity, and public salubrity"[24].

Several senators disagreed with this point of view. Baron de Alcantara and Senator Fernandes Pinheiro were among the supporters of the original version of the bill[25], for example, believing that the concept of public necessity could stand alone and unspecified in the fight against interventionism. Senator Borges argued that it is impossible to foresee all possible occasions of public necessity. The attempt to entrap them within a closed list was vain: first, because any list could exclude hypotheses indispensable to the good proceeding of the public administration and make it impossible to carry out public works. But, more importantly, such an endeavor was destined to fail by the very nature of concepts. Borges claims that such "cases" of public necessity were also relatively indeterminate, so that it would be necessary - at least if one were to take the argument seriously - to better discriminate also other concepts, such as public

22 BRASIL. Anais do Senado Imperial, 1826, livro 3. Secretaria Especial de Editoração e Publicações: 1823, p. 25.

23 Art. 179, § 22, stated that "The Law will establish the cases, in which this unique exception [to the right of property, expropriation] will take place, and will give the rules to determine the compensation".

24 BRASIL. Anais do Senado Imperial, 1826, livro 3. Secretaria Especial de Editoração e Publicações: 1823, p. 27.

25 Idem, p. 26.

salubrity or convenience. But when the cases of public salubrity were defined, not everything would have been said: would it be necessary to get even more specific and try to make the requirements even more concrete? And so on and so forth, leading to a potentially infinite web of norms, explanations and exceptions.

We cannot, however, reduce the debates on the future expropriation law to a combat between champions of the state and defenders of private citizens. The Viscount of Caravelas himself, for example, accused the law of unconstitutionality, and by virtue of the central concept itself. The constitution speaks of the "requirement of the public good", while the first bill only deals with "absolute necessity" for expropriation, a much narrower idea. Caravelas wanted broader possibilities for state intervention, as the constitution demands; but defined possibilities. He feared not public power, but the insecurity that any power induces when it is left unwatched.

On 15 July 1826, the project continued to be discussed with an extensively abridged wording. The crucial change was in the first article: it now referred to "public necessity or utility", and listed the hypotheses in which they occurred: "1º Defense of the state; 2º Security, salubrity, public commodity and decoration; 3º Foundations of houses of youth education, or charitable institutions, and public assistance". The main debates would revolve around the hypotheses in which public necessity or utility would be verified.

Senator João Evangelista criticized - albeit without much enthusiasm - the new wording of article 1. The first problem is a grammatical fuss about the division between the two concepts: for him, one could not say that necessity was the "only exception", since utility would be a separate case. But, apart from this semantic detail, the senator turned his attention to the cases in which the concept could be applied. He sook to add the hypothesis of "subsistence". This would mean empowering the government to regulate the supply of basic goods in times of war, when they could be expropriated in order to be delivered to the population. He feared the abuses of the big capitalists: "in this urgency [of times], whatever the liberal economists may say, the government must prevent the machinations of such monopolists, taking such goods, or taxing their prices"[26]. The second case Evangelista suggested was "humanity". He meant to describe mistreatments from slaveowners to their captives, in which case the master would be forced to sell his slave or free them with fair compensation. Carneiro de Campos contests the usefulness of tackling this issue, which he believed to be of criminal nature[27]: abuses of slaveowners against their slaves

26 BRASIL. Anais do Senado Imperial, 1826, livro 3. Secretaria Especial de Editoração e Publicações: 1823, p. 113.

27 On the criminal legal regime of slavery, cf: SONTAG, Ricardo. Ordine domestico e ordine statale nel Brasile del XIX secolo: la disciplina degli schiavi. In: CAPPELLINI, Paolo;

attacked the rights of the latter, so that an expropriation would be in the *private* interest of the captive, and not in the *public* interest of the government. Public utility/necessity did not come into play, so the State should not deal with the problem of the "servile element" in that law.

The Viscount of Inhambupe criticized the possibility of expropriation for the purpose of building houses of public instruction. For him, expropriation could only occur in cases where "the defense of the state, public safety, public salubrity, and public relief" were at stake. The Viscount of Caravelas, however, disagreed, and the basis, again, is the opposition between necessity and utility. For Caravelas, the cases listed by Inhambupe concerned only necessity, but not the hypotheses of utility. But this is not fortuitous: the latter congressman in fact considered that the greatest convenience for the State could in no way justify the taking of hard-earned property from private individuals. The procedure should be different: "When the state needs private property for such works of public commodity and decoration, it must negotiate with owners, pay generously, and then they will voluntarily cede their rights"[28]. In other words, Caravelas believed that expropriations for public utility could only be voluntary.

Caravelas filed a conciliatory proposition that intended at once to respect property and serve public utility: he suggested that only parliament, by law, could determine that a property was useful to the state. With this, the political and administrative cost for a declaration of necessity/utility would be much higher than if a mere decree sufficed. He considered this fair because "the right to property is what constitutes the strongest bond of society, and therefore it must be deeply respected, and the congress of the nation must be responsible to verify the cases in which, for public utility, the private property must be take "; according to him, this was the procedure adopted in England[29].

Senator Borges disagreed with this proposition. In his view, Caravelas' idea essentially assumed that the executive or the judicial branches would take less care of property than the legislative, which is absurd and dishonorable. Moreover, it is not the proper role of parliament to make this kind of judgment, implementing a law that it itself has voted: interpretation of laws in specific cases is an activity meant for judges, not deputies and senators. The power to expropriate should be left to the executive, which was more knowledgeable in these matters.

CAZZETTA, Giovanni. (Org.). Pluralismo giuridico: itinerari contemporanei. 1ed.Milano: Giuffrè, 2023p. 113-152; SONTAG, Ricardo. 'Black Code'? The Exceptional Legal Regime of Slave Control in Brazil (1830-1888). Ius Fugit, v. 24, p. 109-145, 2021.

28 BRASIL. Anais do Senado Imperial, 1826, livro 3. Secretaria Especial de Editoração e Publicações: 1823, p. 117.

29 Idem., p. 119-120.

Caravelas triumphed. And he was not alone: after these discussions, the Senate drafting committee went back to work and established the text that would become law and be used to distinguish public utility and necessity until the middle of the 20th century. It reads as follows:

> Art. 1. The sole exception that can be made to the fullness of the right of property, according to the imperial constitution tit. 8º art. 179, § 22, will take place when the public good demands the use or employment of the property in the following cases:
> 1º Defense of the State.
> 2º Public safety.
> 3º Public assistance in time of famine, or other extraordinary calamity.
> 4º Public salubrity.
> Art. 2º The same exception will take place when the public good demands the use or employment of the citizen's property for a utility, previously verified by an act of the legislative power, in the following cases:
> 1º Charity Institution.
> 2º Foundation of houses of youth education.
> 3º General convenience.
> 4º Public embellishment[30].

Yet, the debates were not over. Later, during the second reading, on 27 July 1826, art. 1, §2 was particularly discussed. Among the hypotheses for expropriation, the commission had originally added the ruin of public buildings. According to Senator Carneiro de Campos, the commission intended to broaden the previously written notion of "safety", which, alone, could seem to deal only with State security. Senators willed to broaden the meaning of this concept adding hypotheses of private security. Senator Barroso disagreed with this position. He argued that this type of risk, precisely because it is caused by the citizen himself, should be compensated by him. It would be up to the police, in compliance with municipal ordinances, to demand that the building be demolished[31], since the perilous situation of private constructions would no more be the State's responsibility "than if it catches fire, or is ruined by lightning"[32]. As argued by the Baron of Alcantara, this was a problem between

30 Portuguese original: "Art. 1º. A unica excepção feita á plenitude do direito de propriedade, conforme a constituição do imperio tit. 8º art. 179, § 22, terá logar quando o bem publico exigir o uso, ou emprego da propriedade nos casos seguintes: 1º Defesa do Estado; 2º Segurança publica; 3º Soccorro publico em tempo de fome, ou outra extraordinaria calamidade; 4º Salubridade publica.
Art. 2º Terá logar a mesma excepção, quando o bem publico exigir o uso, ou emprego da propriedade do cidadão por utilidade, previamente verificada por acto do poder legislativo, nos casos seguintes: 1º Instituição de caridade; 2º Fundação de casas de instrucção da mocidade; 3º Commodidade geral; 4º Decoração publica.".

31 This reasoning is probably in continuity with *Ancien Regime* ideas of police power, which held much influence over the (former) Portuguese empire. Cf. SEELAENDER, Airton Cerqueira Leite. A "polícia" e as funções do estado: notas sobre a "polícia" do antigo regime. Revista da Faculdade de Direito UFPR, Curitiba, v. 49, dez. 2009.

32 BRASIL. Anais do Senado Imperial, 1826, livro 3. Secretaria Especial de Editoração e

private individuals, that should be solved by them. The Baron of Cairú and the Viscount of Nazaré, in turn, considered the list written by the draft commission insufficient. They recalled cases in which the collapse of houses in Salvador had claimed the lives of local residents, and the danger of rock detachment in quarries near Rio de Janeiro: both were cases of risk to the public that should be managed by the State, and expropriation would be the appropriate way to adjust these constructions[33]. And this apart from the need to preserve the forests to guarantee the city's water supply. It is in this spirit that he proposes the following amendment: "to unite to national property quarries in the vicinity of cities and woodlands that keep water springs"[34]. The amendment was nevertheless ignored.

The bill went through the House of representatives without substantial discussions on the two concepts of public utility and public necessity. On 9 September 1826, the text was finally enacted into law in the precise wording proposed by the Senate drafting committee.

The law followed a clear path: discrete increase of possibilities of state action, but with a profound consideration for private property. Debates were pursued under the realm of liberalism, which prompted representatives to thread very carefully around private property. Originally, the bill proposed only public necessity as a cause for expropriation. When room was made for public utility, the parliament compensated property owners by discriminating strictly in which cases each concept would take place - and, above all, determined that public utility could only be declared by statutory law. Each time the state was given more power, the discretion of the executive branch was symmetrically restricted.

Both concepts were originally available to the senators: necessity was mentioned by several French constitutions and utility, by the Napoleonic civil code. But the mere fact that the more restrictive term was in the higher-ranking norm shows that, in fact, they were regarded in France as synonyms. The Brazilian parliament translated this similarity in the form of a legally meaningful difference: instead of two words expressing a single concept, Brazilian law associated each term with a different concept. In doing so, it was possible to reconcile two tendencies of the Brazilian legal culture of the time: the will to restrict state discretion and a reluctant acceptance that modern society needed an active state. The conceptual pair public utility/necessity was born, then,

Publicações: 1823, p. 117.

33 This conception would later win, as expropriation became in the late 19th century a tool of urbanistic planning. Cf. for instance the so-called *Risanamento di Napoli*, of 1995. GASPARRI, Wladmiro. "Il punto logico di partenza". Modelli contrattuali, modelli autoritativi e identità disciplinare nella dogmatica dell'espropriazione per pubblica utilità. Milano: Giuffrè, 2004.

34 BRASIL. Anais do Senado Imperial, 1826, livro 3. Secretaria Especial de Editoração e Publicações: 1823, p. 117.

at the hands of a parliament that was less interested in expropriating than in protecting property. In the following years, it would become increasingly clear that this conceptual structure did not favor the economic development of the country in an increasingly dynamic environment requiring state intervention. The legislation needed to be more flexible. And it would be.

3. FURTHER DEVELOPMENTS: THE DECREE OF 12 JULY 1845 AND THE CIVIL CODE OF 1916

On 12 August 1834, the Brazilian parliament approved the Additional Act, a statute modifying some points of the Constitution of the empire and promoting the decentralization of the administrative apparatus[35]. One of the main mechanisms by which the administrative structure was deconcentrated was the creation of provincial assemblies, with competence over issues of regional interest. Among them, art. 10, § 3rd entrusted these bodies with the power to deal "with the cases and the form by which expropriation for municipal or provincial utility can take place". With this, national and local public utility were separated, and the regional administrative entities acquired expropriatory capacity. A complicating factor: the Neutral Municipality, was under the jurisdiction of the Imperial Assembly, meaning that the Imperial Parliament should legislate on how expropriation would be carried out in the capital, Rio de Janeiro. Discussions on this issue, however, was only heard in the halls of the Chamber of Deputies and Senate 10 years later.

Between 1843 and 1845, the General Assembly of the empire discussed a bill not only about expropriation for the municipality of Rio de Janeiro, but which modified the entire procedure for expropriation for cases of public *utility* in the whole empire. The bill regulated expropriation in great detail. More interestingly, expropriation for public utility no longer depended on an authorization from the legislative branch. And, interesting for our discussion, the cases of public utility were expanded and detailed:

> Art. 1: The expropriation for public utility, either general or municipal of the Court, will take place in the following cases:
> § 1. Construction of buildings, and public establishments of any nature whatsoever;
> § 2. Foundation of villages, hospices, and houses of charity or education;
> § 3. Openings, widening, or extensions of roads, streets, squares, and cannals;
> § 4. Construction of bridges, fountains, aqueducts, ports, dikes, pier, pastures, and any other establishments intended for public commodity or servitude;
> § 5. Constructions or works destined to decoration or public salubrity[36].

35 On the issue of centralization/decentralization, cf: FERREIRA, Gabriela Nunes. Centralização e descentralização no império: o debate entre Tavares Bastos e visconde de Uruguai. São Paulo: Editora 34, 1999.

36 Portuguese original: "Art. 1º: A desapropriação por utilidade pública geral, ou municipal da Corte, terá lugar nos seguintes casos: § 1° Construção de edificios, e estabelecimentos

The path towards this formulation, however, was not straightforward.

Senator Maya, during the debates in parliament, proposed an amendment[37] separating the cases in which general and municipal expropriation could take place. He believed that keeping the cases the same might create some confusion among the provincial assemblies, who would not know to what extent they could produce laws regarding the taking of property in the interest of their municipalities. Once again, parliament was trying to strictly control the claws of executive power every time they neared private property. For senators Carneiro Leão and Paula Souza, however, the proposal was superfluous: the additional act already marked out precisely the powers of local assemblies. Moreover, they argued that it was not the type of work that should determine the responsible public entity, but the resulting utility - whether general or provincial. The amendment, in the end, was not approved.

The 1845 law represented an important step in the flexibilization of our conceptual pair. Since the notion of public necessity was more demanding and described only great upheavals such as wars and natural disasters, few (or no) expropriations were carried out according to its procedure. It would correspond to situations that today would probably be solved through the institute of administrative requisition. However, as the 1824 constitution established that only expropriation could limit property, all cases of what today we understand as state intervention over private property should be conceptualized as expropriation. Cases of *public utility*, on the other hand, were more in line with the functions of the nascent administrative State that would gain prominence in the second half of the 19th century[38]. In fact, the 1850s were a time of economic growth: construction of railroads, development of industries, expansion of coffee plantations, among many other activities were taking root in Brazil. A State capable of intervening in property was needed, and the law of 1845 provided the conceptual basis for expropriation in a country increasingly dynamic and

publicos de qualquer natureza que sejam; § 2. ° Fundação de povoações, hospitaes, e casas de caridade, ou de instrucção; § 3. Aberturas, alargamento, ou prolongamentos de estradas, ruas, praças e canaes; § 4. Construção de pontes, fontes, aqueductos, portos, diques, caes, pastagens, e de quaesquer estabelecimentos destinados á commodidade, ou servidão publica; § 5° Construcções, ou obras destinadas à decoração, ou salubridade pública.".

37 "Art. 1º Diga-se: – A desapropriação por utilidade geral terá lugar nos casos seguintes: 1º Construção de edifícios, estabelecimentos públicos, etc. 2º Estabelecimento de povoações, hospitais, casas de caridade e instrução. 3º Aberturas, alargamentos ou prolongamentos de estradas e canais. 4º Construção de portos, diques e cais. A desapropriação por utilidade municipal tem lugar nos casos seguintes: 1º Aberturas, alargamentos ou prolongamentos de ruas e praças e pastagens. 2º Construções ou trabalhos destinados à decoração, salubridade e servidão pública. – Maya" BRASIL. Anais do Senado Imperial, 1845, livro 2. Secretaria Especial de Editoração e Publicações: 1845, p. 180.

38 On the relation between administrative law and government intervention, cf. HESPANHA, António Manuel. O direito administrativo como emergência de um governo activo (c. 1800- c. 1910); Revista de história das ideias, nº 26, pp. 119-159, 2005.

dependent on public works[39]. This conceptual framework turned out to be so adequate that it would last for more than 70 years.

After the 1845 law, a long hiatus awaited the legal regulation of public utility/necessity. The last phase of this development, however, was not inaugurated by a statute of administrative law: the Civil Code of 1916, article 590, listed the cases of public utility and necessity, consolidating the legislation at the beginning of the 20th century. The specifications of the cases of necessity correspond to those of the first Brazilian law on the subject (1826) with slight changes:

> § 1 - The following are considered cases of public necessity
> I. The defense of the national territory.
> II. The public safety[40].
> III. Public assistance in cases of calamity[41].
> IV. Public salubrity[42] [43].

The cases of utility, on the other hand, changed more. The imperial legislation, somewhat vaguely, spoke only of founding charitable institutions, educational establishments, "general comfort" and "public decoration". The 1916 Code, more concrete mentioned:

> § 2º Are considered cases of public utility:
> I. The foundation of villages and establishments of public assistance, education or instruction.
> II. The opening, enlargement or extension of streets, squares, channels, railroads and in general, any public ways.

39 On the growing use of expropriation in late 19th and early 20th century Brazil, cf. COSTA, Arthur Barrêtto de Almeida. Expropriation and the Challenge to Liberal Thought: Multinormative Management of State Intervention beyond the Conflict Liberty vs. Authority: (Brazil, 1826–1930). Administory 5, no.1, pp. 79-95, 2020.

40 Carvalho Santos considered that the expression. *Segurança* also included public order. CARVALHO SANTOS, João Manoel de. Código civil interpretado: principalmente no ponto de vista prático. Direito das Coisas (arts. 554-673). Volume VIII. Rio de Janeiro: Carvalho Filho, 193, p. 204.

41 "Exemplos: nos casos de secas, como as do nordeste" Idem, p. 205. The same example of the "flagelo produzido pelas secas do norte do Brasil" was cited by José da Silva Costa. SPÍNOLA, Celso. *Desapropriações por necessidade ou utilidade pública*. 2ª Ed. Rio de Janeiro: Livraria Jacinto, 1941, p. 29.

42 Feancisco Baltazar da Silveira affirmed thatit woud be possible to include in this hypothesis the expropriation of peaks for reforestation. SILVEIRA, Francisco Baltazar da. Faculdade que tem o Governo para desapropriar, e impedir derrubada de matas. O Direito: Revista de Legislação, Doutrina e Jurisprudência, Rio de Janeiro, a. 3, v. 6, pp. 370-374, 1875.

43 Portuguese original: "§ 1º Consideram-se casos de necessidade publica: I. A defesa do território nacional; II. A segurança pública; III. Os socorros públicos, nos casos de calamidade; IV. A salubridade pública".

> III. The construction of works or establishments destined to the general good of a locality, its decoration and hygiene.
> IV. The exploration of mines[44].

The terms are clearer and more defined; the actions described are more varied, reflecting a state that was still incorporating more functions into its daily activities[45]. The opening of public roads and the exploitation of mines, for example, were added. After all, as much as some concepts remained and certain words did not change, the State of the early twentieth century was very different from that of the 1840s.

Why the Civil Code, and not an administrative statute? This question was faced by Clóvis Beviláqua, the main author of the first Brazilian Civil Code. For him, "the topic of expropriation for public necessity or utility belongs to the sphere of public law, because it is constitutional law that grounds it, and administrative law that develops it and adapts it to the conditions of collective life"[46]. Its place in civil law is merely to complete the list of modes of extinction of property: nothing more.

Presence in the civil code is not the same as doctrinal acceptance. Clóvis Beviláqua criticized the distinction between public necessity and public utility, for they would be essentially the same thing[47]. But he recognizes that cases of necessity seem to bear greater gravity, which, in theory, could (tenuously) justify the persistence of the differentiation. João Manuel de Carvalho Santos states that the list of cases of utility and necessity is not exhaustive, but simply exemplary[48]. This is a first indication that the original meaning of the distinction was beginning to fade away. If the original idea of this division was to control and potentially hinder State action, it loses much of its meaning when the center of government action becomes the idea of public service[49]; the cases of public

44 Portuguese original: "§ 2º Consideram-se casos de utilidade pública: I. A fundação de povoações e de estabelecimentos de assistência, educação ou instrução publica; II. A abertura, alargamento ou prolongamento de ruas, praças, canais, estradas de ferro e em geral, de quaisquer vias públicas; III. A construção de obras, ou estabelecimento, destinados ao bem geral de uma localidade, sua decoração e higiene; IV. A exploração de minas".

45 Cf. for instance the uses of the concept of police. CORREA, Gustavo Zatelli. Poder de polícia e construção jurídica do Estado: uma análise das obras de direito administrativo da Primeira República. Trabalho de Conclusão de Curso (Bacharelado em Direito). Universidade Federal de Santa Catarina, Centro de Ciências Jurídicas, Florianópolis, 2013.

46 BEVILÁQUA, Clóvis. Direito das coisas. 1º volume. Rio de Janeiro: Editora Freitas Bastos, 1941, p. 210; BEVILÁQUA, Clóvis. *Código civil dos Estados Unidos do Brasil comentado*. Vol. III. 3ª Ed. Rio de Janeiro: Livraria Francisco Alves, 1930, p. 134.

47 BEVILÁQUA, Clóvis. *Código civil dos Estados Unidos do Brasil comentado*. Vol. III. 3ª Ed. Rio de Janeiro: Livraria Francisco Alves, 1930, p. 135.

48 CARVALHO SANTOS, João Manoel de. Código civil interpretado: principalmente no ponto de vista prático. Direito das Coisas (arts. 554-673). Volume VIII. Rio de Janeiro: Carvalho Filho, 1934, p. 204.

49 On the state of administrative law in early 20th century Brazil, cf. Airton Seelaender (2021).

utility and public necessity, originally conceived as strict limits, become then mere indications. Let us now see how the Brazilian administrative doctrine of the empire and the first republic reacted to and interpreted these transformations.

4. A MERELY ACADEMIC DISCUSSION: VIEWS FROM THE LEGAL LITERATURE BETWEEN THE 19TH AND 20TH CENTURIES

Brazilian doctrine discussed the concepts public utility and necessity from the second half of the 19th century onwards. Yet, by then, the division between the two causes of expropriation was already sclerotic: since the procedure of the 1826 law was rarely used and almost all expropriations followed the 1845 law on public utility, the debate had few practical consequences. Nevertheless, some authors still took the trouble to explore the differences between the two concepts.

Veiga Cabral adequately understood the system: for him, the division established by the 1826 law "imposes on the Administration solemn formulas and convenient precautions to verify the cause of the use or employment of the Citizen's property"[50]. He did not focus on each concept, but clearly implies that both of them are meant to protect property and hinder expropriation. Our analysis showed that the general thrust of the debates confirms this impression, but that Brazilian legislation was more subtle than that.

Authors often resort to non-statutory terms to explain and justify expropriation. Some ideas used were "public good"[51], "public interest"[52] or even "necessity of public order"[53]. "Utility" and "necessity", the legislative terms, overlapped in so many ways that there was little point in scrutinizing the differences between them: jurists preferred to use other analytic tools to build their theories. Viveiros de Castro, for example, says explicitly that the cases of public utility include necessity, meaning that the 1891 Brazilian constitution, art. 72, § 17 did not need to deploy both concepts[54]. Aarão Reis wrote[55] that recent developments in the civil service had rendered even more nebulous a

On the resistance against the rising administrative state, cf. Airton Seelaender (2020).

50 VEIGA CABRAL, P. G. T. Direito administrativo brasileiro. Rio de Janeiro: Tipografia Universal de Laemmert, 1869, p. 402

51 OLIVEIRA, José Rubino de. Epítome de direito administrativo brasileiro. São Paulo: Leroy King Bookwater, 1884, p. 228.

52 VIVEIROS DE CASTRO, Augusto Olímpio. Tratado de ciência da administração e direito administrativo. 3 Ed. Rio de Janeiro: Jacintho Ribeiro dos Santos, 1914, p. 285.

53 REIS, Aarão. Direito administrativo brasileiro. Rio de Janeiro: oficina Gráfica Villas-Boas, 1922, p. 347-348.

54 VIVEIROS DE CASTRO, Augusto Olímpio. Tratado de ciência da administração e direito administrativo. 3 Ed. Rio de Janeiro: Jacintho Ribeiro dos Santos, 1914, p. 282.

55 REIS, Aarão. Direito administrativo brasileiro. Rio de Janeiro: oficina Gráfica Villas-Boas, 1922, p. 347-348.

differentiation that was already unclear[56]. Works of embellishment, desiccation or construction of railroads, which previously were clearly of simple utility, became more and more a matter of "homeland defense".

Solidônio Leite is another author who would rather do away with the distinction. The ends of any expropriation must be useful, and the sacrifice of property must be necessary, according to him; it did not to make sense to treat the two concepts as if they were competing realities and not part of a continuum[57]. Whitaker follows the same reasoning to call the duplicity of concepts "useless"[58]. Moreover, the very cases listed in the Civil Code show the mixture between the two concepts. When listing the hypotheses of utility, the law cites cases that may be of imperious necessity: an example is hospitals or bridges built for the defense of the State[59].

Doctrine only differentiated the two concepts because the legislation established different lists of hypotheses that could be classified as public utility or necessity. But some jurists criticized these very enumerations for restricting state power too much[60] – even though they remained wary of excessive administrative leeway[61]. Alcides Cruz, compared the cases of utility and necessity presented by the civil code with those mentioned by the Rio Grande do Sul and French legislation to prove that there is no way to effectively specify the cases of necessity and public utility[62]. In a similar way, Paul Deleuze (1920) states that the cases of public utility and necessity depend on the economic needs of each nation at a specific historical moment[63]. Therefore, they can be altered as conditions change. One example is that the defense of the national territory may cease to be a case of public necessity if the League of Nations achieves its goal of securing peace between states. At the same time, the development of aviation would, over time, turn the construction of airports into a cause of public utility.

56 A sign of a "transitional administrative law?". Um sinal de um "direito administrativo de transição"? Cf. GUANDALINI JR., Walter; TEIXEIRA, Lívia Solana Pfuetzenreiter de Lima. Um Direito Administrativo de Transição: o conceito de direito administrativo na cultura jurídica da Primeira República Brasileira (1889-1930). Direito, Estado e Sociedade, n. 58, p. 422-459, jan/jun 2021.

57 LEITE, Solidônio. Desapropriação por utilidade pública. Rio de Janeiro: Editores J. Leite e Cia, 1921.

58 WHITAKER, Firmino. Desapropriação. Revista dos Tribunais, São Paulo, a. 14, vol. 55, pp. 208-209, 1925.

59 LEITE, Solidônio. Desapropriação por utilidade pública. Rio de Janeiro: Editores J. Leite e Cia, 1921, p. 47.

60 VIVEIROS DE CASTRO, Augusto Olímpio. Tratado de ciência da administração e direito administrativo. 3 Ed. Rio de Janeiro: Jacintho Ribeiro dos Santos, 1914, p. 283.

61 PORTO CARRERO. Lições de direito administrativo. Rio de Janeiro: Oficinas Gráficas do Jornal do Brasil, 1918, p. 387.

62 CRUZ, Alcides. Direito administrativo brasileiro. Rio de Janeiro: Francisco Alves e Cia; Paris: Aillaud, Alves e Cia, 1914, p. 216-217.

63 DELEUZE, Paul. *Theoria jurídica da desapropriação*. Rio de Janeiro: 1920.

In short, the very discrimination of the hypotheses of public utility and necessity, which conferred some concreteness to the distinction, was called into question by the doctrine.

Despite many attacks, some still held that the public necessity and public utility could be separated.

Though some of these jurists were not entirely convinced that the two concepts could be thoroughly separated, they still developed them out of conviction that jurists should explain the concepts offered by statutory law, and not to think them critically. An example is Porto Carrero[64]. He fought the theory of Viveiro de Castro, who defended the uselessness of the expression - or rather, that the use of two words would be a mere matter of "love for clarity". To say so, for Carrero, would be to admit that the legislator used "an unnecessary term" which would be an almost sacrilegious censure to the primacy of the statutory text[65]. Carrero admits that everything that is necessary is also useful, so that one concept would be contained in the other. But certain property owners, deprived of "ethical spirit" and consideration for the public good, would not admit to being deprived of their goods for mere utility. The stronger concept of necessity would be a way to convince these more recalcitrant owners to accept the sweeping action of the law.

Paul Deleuze proposed clear criteria. In his view, the difference between public necessity and public utility is that the former guarantees the existence of the political community, while the latter concerns the improvement of the conditions of social existence[66]. Leite contended that the two functions can mix in the same work, meaning that the distinction was not very useful[67]. Nevertheless, Deleuze's view seems to have been adopted by others, such as Eurico Sodré[68]. Nevertheless, the same Sodré argues that, since there is no longer a distinction between the processes established according to the two causes for expropriation, the separation of the two concepts has become "more or less of

64 PORTO CARRERO. Lições de direito administrativo. Rio de Janeiro: Oficinas Gráficas do Jornal do Brasil, 1918, p. 380.

65 Both of the two mostly widely read books on legal hermeneutics at the time endorsed the principle that "statutory law does not employ useless words": PAULA BATISTA, Francisco de. *Compêndio de Hermenêutica jurídica:* para uso das faculdades de direito do império. 3ª Ed. Pernambuco, 1872, p. 16; MAXIMILIANO, Carlos. *Hermenêutica e aplicação do direito*. 20ª Ed. Rio de Janeiro: Forense, 2011 [1925]. p. 204.

66 DELEUZE, Paul. Theoria jurídica da desapropriação. Rio de Janeiro: 1920, p. 9-10.

67 LEITE, Solidônio. Desapropriação por utilidade pública. Rio de Janeiro: Editores J. Leite e Cia, 1921, p. 34. To defend his position, he cited Lorenzo Meucci. The Italian author defends the theory that utility refers to the end of expropriation, while necessity refers to the means. For him, utility "could never be discerned from necessity" ("mai potrebbe si discernire da quello di necessità") MEUCCI, Lorenzo. Istituzioni di diritto amministrativo. 6ª Ed. Torino: Fratelli Bocca, 1909, p. 552-553.

68 SODRÉ, Eurico. A desapropriação por necessidade ou utilidade pública. São Paulo: Saraiva, 1928, p. 8.

words, and does not affect the institute" of expropriation[69]. The key is, in his opinion, not to separate these two concepts, but to realize that both of them demand a *moral interest* for expropriation to take place. It is not possible to bring forward an expropriation grounded on a merely pecuniary interest, as would be the case of a purchase by the State with the objective of reselling land for a higher price. Much less an expropriation on private interests. Here, we already see that the public utility/necessity pair begins to work together to oppose other ideas, and the exact nature of the discussion moves away from the separation between the two terms.

Paul Deleuze offers what is perhaps the most articulate endorsement of the distinction. For him, the role of the judiciary should be more restricted in cases of public utility[70] than in cases of necessity: the unequal involvement of magistrates gave sense to the distinction. The judge should only evaluate whether, in theory, the objective fits the hypotheses laid in the law, but should not discuss whether in fact the public work in question contributes to the utility of the nation; this type of evaluation should be up to the executive branch alone. In terms of usefulness, the law specifically provides the types of works that can be performed, which already sufficiently restricts the actions of the executive branch. In the case of public necessity, the opposite is true. The legal hypotheses are broad, and it is impossible to foresee in advance the specific measures that must be adopted to guarantee the existence of the nation. This allows the judiciary to evaluate to what extent the specific measures proposed by the government are really suitable to achieve the objectives imposed by law[71]. Once again, executive power is at stake. Furthermore, in the author's view, expropriation should occur only after two evaluations: regarding the work to be performed and the property to be used. First, the utility or necessity of the measure that the administration intends to adopt is discussed, and whether it fits the legal hypotheses. Secondly, whether the property that the state intends to use is necessary for the work to be executed. This last necessity, however, must be relative, not absolute. This means that the property is considered necessary if it is one of several options that can be used to carry out the work[72].

69 Idem, p. 9.

70 Celso Spínola cites this difference as an argument for stating that there is a doctrinal basis for the division between expropriations for public utility and for public necessity SPÍNOLA, Celso. Desapropriações por necessidade ou utilidade pública. 2ª Ed. Rio de Janeiro: Livraria Jacinto, 1941, p. 22.

71 A less complex version of this argument can be found in: PIMENTEL, Francisco Mendes. Desapropriação por utilidade pública. Competência das Câmaras Municipais. Defesa do particular, no próprio processo da desapropriação, contra o ato administrativo manifestamente inconstitucional ou ilegal. Revista Forense, Belo Horizonte, v. 40, pp. 253-258, Jul./Dez., 1923.

72 If it were required that the property be the only one needed, in a situation where more than one property could be used for the work, it would be impossible to carry it out, as the owner

Other authors also focused on the role of the judiciary to discuss why the concepts utility/necessity existed[73].

We can see then that in the first decades of the 20th century, only a few authors take the trouble to flesh out the distinctive features of public utility and public necessity. The terms seem to somewhat overlap, and the lack of a separate procedure for both diminishes the interest of the matter. The doctrine debates much more whether the distinction still made sense than its content. Generally, 20th century doctrine seems much less wary of executive discretion, which explains why the two concepts, originally carved to allow state action without liberating the executive branch, were consistently left aside.

5. REINVENTING THE MEANING OF PUBLIC UTILITY AND NECESSITY IN THE EARLY 20TH CENTURY

In this section, I will discuss some cases published in law journals from the end of the empire and the first republic that discussed the concepts of public utility and public necessity. By doing so, we will be able to understand to what extent this conceptual pair was relevant to practitioners, which may be one of the reasons for its persistence over time.

Only a few cases actually employ the concepts of public utility and public necessity as they were originally envisaged. One was described in an opinion written by João de Lima Pereira[74]. The Municipal Council of São Paulo

of one property could always claim that it was the other building that could be used.

73 Araújo Castro: "O judiciário não pode entrar na apreciação da oportunidade do ato da desapropriação, mas pode, sem dúvida, examinar, por um lado, se esta se acha compreendida em algum dos casos enumerados no Código Civil e, por outro lado, se a indenização representa o justo valor do imóvel expropriado". SILVA, Alfredo Bernardes; ESPÍNOLA, Eduardo; BEVILÁQUA, Clóvis; CASTRO, Araújo; LACERDA, Paulo de (pareceres).. Desapropriação. Casos de necessidade ou utilidade pública. Perigo iminente. Defesa. Amplitude. Verificação judicial. Indenização prévia. Depósito. Revista de Direito Civil, Comercial e Criminal, vol. 67, Rio de Janeiro, pp. 451-472, jan., 1923, p. 470. Eduardo Espínola: "Mas, do ponto de vista da oportunidade do ato administrativo, a verificação judiciária não vai tão longe em matéria de utilidade do que em matéria de necessidade. A lei não pode, com efeito, deixar ao Poder Judiciário o cuidado de determinar se a realização de tal obra pública é oportuna". ESPÍNOLA, Eduardo; BEVILÁQUA, Clóvis; CASTRO, Araújo; MAXIMILIANO, Carlos; SILVA, Alfredo Bernardes da; GARCEZ, Martinho; LACERDA, Paulo M.; LACERDA DE ALMEIDA; DELEUZE, Paul (Pareceres). Desapropriação por necessidade e utilidade pública. Revista do Supremo Tribunal Federal, Rio de Janeiro, vol. 43, pp. 321-359, Ago., 1922, p. 356 f. This view of Espínola and Deleuze, however, cannot be overestimated. Both acted as consultants for the São Paulo Northern Railway, a company that had an interest in seeing the distinction between necessity and public utility reinforced. It is significant, then, that the two most consistent defenses of the value of separating the two concepts came from a forensic context in which the authors' clients would benefit from this conceptual dualism. On the case of the São Paulo Northern, cf. SILVA, André Luiz da. Um francês no interior paulista: Paul Deleuze e o caso da São Paulo Northern Railroad Company (1909 – 1916). Dissertação (Mestrado em História). Instituto de Ciências Humanas, Universidade Federal de Pelotas. Pelotas, 2013.

74 PEREIRA, João de Lima. A estética como motivo de utilidade pública. Revista dos Tribunais, São Paulo, a. 17, vol. 65, pp. 275-282, 1928.

partially expropriated a terrain, meaning that the rest of it would be unable to sustain a building of the size demanded by the municipal regulations. The city asked whether it could expropriate neighboring areas and unite them to be sold in a proper size. Pereira argued that, since public decoration was a cause for public utility (Civil Code, art. 590, § 2nd, III), by analogy, it was possible to expropriate to prevent ugly constructions. Other cases, however, departed from the original meaning of the concepts of public utility and public necessity, using the idea of "public utility" to discuss other issues: for instance, if a municipality could expropriate land for the *utility* of a neighboring town[75], of if the idea of "necessity" asked for a determination of the precise parcel of land to be expropriated, or allowed for any useful building to be expropriated[76]. Of these three cases, only the one discussed by Lima Pereira actually discussed the contents of public utility. And none actually operated with the distinction.

This grows even more evident when we analyze cases that raise an even more fundamental discussion, related to the second part of the expression: how can we determine if the utility or necessity at play is public and not private? It is mainly around this question that the most ardent debates revolved[77]. For example, a constantly revisited case discussed whether it was of public utility to expropriate land for the School of Engineering of Porto Alegre, a private institution, to build a railroad[78]. Another example concerns a case of expropriation carried out in Santa Catarina for the construction of a hydroelectric power plant[79]. The expropriation decree stated that the hydroelectric plant would be used to supply power to industrial establishments in the region. This reasoning, according to the opinion of Bento de Faria, was illegal because it would entail

75 LINS, Jair. Desapropriação por utilidade municipal. Revista Forense, Belo Horizonte, v. 52, pp. 241-244, Jan./Jun., 1929.

76 BARBOSA, Ruy. Desapropriação por utilidade pública. Justificação. Revista dos Tribunais, São Paulo, a. 7, vol. 26, pp. 245-257, 1918.

77 Examples: TRIBUNAL DE JUSTIÇA DE SÃO PAULO. Desapropriação. Discussão da constitucionalidade. Revista dos Tribunais, São Paulo, a. 3, vol. 9, pp. 90-91, 1914; TRIBUNAL DE JUSTIÇA DE SÃO PAULO. Desapropriação. Necessidade pública. Exame pelo poder judiciário. Embargos n. 7836. Revista dos Tribunais, São Paulo, a. 5, vol. 18, pp. 180-181, 1916.

78 TRIBUNAL DE JUSTIÇA DO RIO GRANDE DO SUL. Desapropriação por decreto estadual. Competência da justiça local. Alegação de inconstitucionalidade. *Revista Forense*, Belo Horizonte, v. 48, pp. 124-126, Jan./Jun., 1927; GONZAGA, Tolentino (parecer). Desapropriação. Interesse particular. Inadmissibilidade. Decreto inconstitucional. Meio de anulá-lo. Revista de Direito Civil, Comercial e Criminal, vol. 76, Rio de Janeiro, pp. 481-485, abr., 1925; PRATES, Manoel Pacheco; LARCERDA DE ALMEIDA; ALMEIDA, Estevam de; PUJOL, Alfredo (Pareceres). Desapropriação por interesse de um instituto particular de ensino. Revista Forense, Belo Horizonte, v. 48, pp. 79-84, Jan./Jun., 1927.

79 BENTO DE FARIA, Antônio. Desapropriação. Como devem ser fixados os seus casos. Quando não se justifica. Quando pode ser total ou parcial. Arbitradores. Nomeação ex-ofício. Quando tem lugar. Preceitos legais. Antinomia. Como devem ser interpretados. Revista de Direito Civil, Comercial e Criminal, vol. 13, Rio de Janeiro, pp. 490-496, 1909.

to allow private, and not public, interest to drive expropriation. Other examples could follow[80].

The doctrinal literature was out of pace with the problems arising in legal practice. Theoretical jurists almost always dealt with the distinction between necessity and utility, which spawned from statutory law; it had had its relevance in the past - especially, after 1845, when separate procedures were established for each of these grounds. But since the state almost never took the stony path of necessity, the distinction between the two poles became meaningless, although it remained unchanged in law. Practice, as expressed by the various opinions and some cases I have just cited, shows that the sore point was actually the distinction between public and private utility/necessity. This dyad, however did not appear in the statutes: the law had not a list of interest that could be considered public and not private. But it is precisely this question that drives the discussions of lawyers and judges. The concepts have been transformed: they moved from an emphasis on the nouns (utility or necessity) to a focus on the adjectives (public or private).

6. LEGAL CONCEPTS BETWEEN PARLIAMENTS AND LAW BOOKS: FINAL REMARKS

A fossil from the 1820s: here the distinction between public necessity and public utility. From the first Brazilian expropriation law to the 1988 constitution, these two words always appear together in statutes. However, their meaning is deeply connected to which role the state was expected to play in the first decades of independent Brazil. This division arose in the Brazilian parliament precisely to make expropriation difficult, especially for the executive branch. In the second half of the 19th century, however, with the advance of the administrative state, it was necessary foster public intervention in the economy, though prudently. The distinction began accordingly to lose meaning. But, since each concept entailed a different procedure of expropriation, the distinction retained some relevance.

This would not last forever. The expropriation regime inaugurated by the 1826 law began its slow decline in 26 August 1903, when Legislative Decree 1021 unified expropriation procedures at the federal level. In 14 June 1938, Legislative Decree 496 extinguished the state expropriation legislations, in the context of the national legislative unification promoted by the Vargas

80 For example, Francisco Mendes Pimentel (1923) was asked to give an opinion on whether a City Council could expropriate a large plot of land for the purpose of opening new streets and then divide it into lots and resell it to private individuals; he answered negatively. PIMENTEL, Francisco Mendes. Desapropriação por utilidade pública. Competência das Câmaras Municipais. Defesa do particular, no próprio processo da desapropriação, contra o ato administrativo manifestamente inconstitucional ou ilegal. *Revista Forense*, Belo Horizonte, v. 40, pp. 253-258, Jul./Dez., 1923.

government. Finally, decree-law 3.365 of 1941 unified the two concepts, and listed the former cases of public necessity under the name of mere utility. The 1916 Civil Code, which differentiated the two concepts, was replaced in 2002 by another code that no longer describes the causes of expropriation.

Yet, to this day, Brazilian doctrine still discusses the difference between the two concepts. Why?

I cannot give definitive answers, but I can advance some hypotheses. Firstly, the force of inertia. Jurists, in reading their predecessors, may uncritically reproduce concepts and debates from the past. Moreover, many of the prestigious books currently in circulation are reeditions with originals written when the 1916 Civil Code was still in force; that is, when the distinction between public necessity and public utility was still adopted by the legislation. Marçal Justen Filho's book, which was firstly published only in 2005, for example, does not attempt to define what is public utility and what is public necessity. Second, most of these books have their eyes on the law and decrees, and more recently on some jurisprudence. Therefore, the precise terms of statutes are taken deeply seriously, while complex reality of Brazilian public administration and its need is not always at the forefront.

Discussing the apparently simple issue of the distinction between public utility and public necessity, I intend to show how the dialogue between history and dogmatics may prove fruitful. These two concepts, relegated at most to the margins of the current textbooks of administrative law, actually encapsulate an entire mentality in evolution. When we touch them, we can open an entire window into the ideological disputes raging in the Brazilian parliament in 1826, and we are able to perceive how a deep philosophical dispute generated an ingenious political and legal solution that reverberated throughout countless political regimes and state models.

But more than that, this simple story demonstrates how legal texts cannot be analyzed innocently, as if they were a mere list of axioms, of dogmas removed from history. Each statute, each decree is deeply immersed in the social context in which it was written – by actual human hands. They are the product of a particular political environment and coagulate legal conceptions available at the time of their drafting. The words that appear in them are not a fortuitous juxtaposition of terms. But neither are they the work of the omniscient mind of an absolute legislator. To understand why a given normative text uses one word and not another, and why it articulates concepts in a certain way, it is necessary to investigate the configuration of parliament when it was enacted and the intellectual environment that surrounded it. Jurists ignoring this fact might fall into hermeneutic juggling trying to understand terms that could be much more easily be explained by skilled history.

Dogmatics, however, must be dominated by history. The "original" meaning of a concept is by no means the only one that can - or should - be adopted in the present. Furthermore, the statutes are often a complex web of distinct temporalities, frequently at odds with each other. The very concept of public necessity/utility dates back to the 1820s, but was reworked in the 1845 law and in the 1916 Civil Code, which were produced in a completely different context, in which a different conception of the State was already at stake. The dyad was incorporated into an even more distant world when it was inserted in the 1988 constitution. Public utility and public necessity are daughters of both the 1820s and the 1840s, 1910s and 1940s. Each of these periods provide a building block for the Babel of public necessity/utility. It is not the "history" of one time or another that will provide direct answers to the challenges of the present. But if history does not provide answers, it is still indispensable for those searching for the best answers. Without history, concepts turn into empty houses that can be filled by the indolent will of the interpreter. History may not point to the right way, but it can at least suggest that certain routes are inappropriate. If law is invariably produced in the past to be applied in the present, the jurist's interpretive activity will inevitably involve two steps: a decontextualization and a recontextualization. But in order to perform the first step, it is first necessary to know the context, otherwise the interpreter will remain blind to the often profound meaning of certain apparently meaningless bizarre words, or to the prosaic and concrete character of apparently profound concepts. This article showed people falling in both traps.

To separate public utility from public necessity is far removed from the current reality of both the state and law. The old principle that the law does not use useless words, which would require working out this distinction, is nothing but a mystification and a de-historicization of legislative texts. It is much more interesting to understand the past meanings of this distinction, and the reasons why it no longer applies to the present - or, perhaps, how it can be reinvented to understand the contemporary state. These minimal traces of the past sprinkled over statutory texts provide a precious window into history for the jurist of the present. One that can inspire reflection and creation.

HISTORIOGRAPHY

COSTA, Arthur Barrêtto de Almeida. Expropriation and the Challenge to Liberal Thought: Multinormative Management of State Intervention beyond the Conflict Liberty vs. Authority: (Brazil, 1826–1930). Administory 5, no.1, pp. 79-95, 2020.

COSTA, Arthur Barrêtto de Almeida. The Tropical Fado that Wanted to Become a European Samba: The Cosmopolitan Structure of Brazilian Administrative

Law Investigated with Bibliometric Data (1859-1930). Forum Historiae Iuris, pp. 1-57, 29. September 2021.

COSTA, Pietro. História do direito: imagens comparadas. In: COSTA, Pietro. Soberania, representação, democracia. Ensaios de história do pensamento jurídico. Curitiba: Juruá, 2010.

BETTI, Emilio. Storia e dogmatica del diritto. In: La storia del diritto nel quadro delle scienze storiche. Firenze: Olschki, 1966.

COING, Helmut. Historia del derecho y dogmatica jurídica. Revista chilena de derecho, vol. 9, n. 2, mayo-agosto.

FERREIRA, Gabriela Nunes. Centralização e descentralização no império: o debate entre Tavares Bastos e visconde de Uruguai. São Paulo: Editora 34, 1999.

FOLJANTY, Lena. Legal transfers as process of cultural translation: On the Consequences of a Metaphor. *Max Planck Institute for European Legal History Research Paper Series* No. 2015-09.

GASPARRI, Wladmiro. "Il punto logico di partenza". Modelli contrattuali, modelli autoritativi e identità disciplinare nella dogmatica dell'espropriazione per pubblica utilità. Milano: Giuffrè, 2004.

GROSSI, Paolo. La proprietà e le proprietà nell'officina dello storico. *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno*, n. 17, pp. 359-424, jan./dez., 1988.

GUANDALINI JR., Walter; TEIXEIRA, Lívia Solana Pfuetzenreiter de Lima. Um Direito Administrativo de Transição: o conceito de direito administrativo na cultura jurídica da Primeira República Brasileira (1889-1930). Direito, Estado e Sociedade, n. 58, p. 422-459, jan/jun 2021.

HESPANHA, António Manuel. Guiando a Mão Invisível - Direitos, Estado e Lei no Liberalismo Monárquico Português. Coimbra: Almedina, 2004.

HESPANHA, António Manuel. O direito administrativo como emergência de um governo activo (c. 1800- c. 1910); Revista de história das ideias, nº 26, pp. 119-159, 2005. Avaliable at: https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbnxhbnRvbmlvbWFudWVsaGVzcGFuaGF8Z3g6NGYwYjBlNmUxY2IwMGExMQ

HESPANHA, António Manuel. Historia del derecho y dogmatica jurídica. In: Diccionario Histórico Judicial de México. Ideas y instituciones. Ciudad de Mexico: Suprema Corte de Justicia de la Nación, 2011.

HESPANHA, António Manuel. *Cultura jurídica europeia*: síntese de um milénio. Coimbra: Almedina, 2012.

KRELL, A. J.. Entre desdém teórico e aprovação na prática: os métodos clássicos de interpretação jurídica. Revista Direito GV, v. 10, n. 1, p. 295–320, jan. 2014.

MÖLLERS, Thomas. Legal methods: how to work with legal arguments. München: C. H. Bech, 2020.

SEELAENDER, Airton Lislie Cerqueira Leite. O Direito Administrativo e a Expansão do Estado na Primeira República: Notas preliminares a uma história da doutrina administrativista no Brasil. Revista do IHGB, v. 485, p. 165-202, 2021.

SEELAENDER, Airton Lislie Cerqueira Leite. Preaching Against the Earthquake. The Rise of State Intervention and the resistance to It in Brazilian Constitutional and Administrative Law. Giornale di Storia Constituzionale, v. 40, p. 227-239, 2020.

SEELAENDER, Airton Cerqueira Leite. A "polícia" e as funções do estado: notas sobre a "polícia" do antigo regime. Revista da Faculdade de Direito UFPR, Curitiba, v. 49, dez. 2009.

SILVA, André Luiz da. Um francês no interior paulista: Paul Deleuze e o caso da São Paulo Northern Railroad Company (1909 – 1916). Dissertação (Mestrado em História). Instituto de Ciências Humanas, Universidade Federal de Pelotas. Pelotas, 2013.

SONTAG, Ricardo. 'Black Code'? The Exceptional Legal Regime of Slave Control in Brazil (1830-1888). Ius Fugit, v. 24, p. 109-145, 2021.

SONTAG, Ricardo. Ordine domestico e ordine statale nel Brasile del XIX secolo: la disciplina degli schiavi. In: Paolo Cappellini; Giovanni Cazzetta. (Org.). Pluralismo giuridico: itinerari contemporanei. 1ed.Milano: Giuffrè, 2023.

CORREA, Gustavo Zatelli. Poder de polícia e construção jurídica do Estado: uma análise das obras de direito administrativo da Primeira República. Trabalho de Conclusão de Curso (Bacharelado em Direito). Universidade Federal de Santa Catarina, Centro de Ciências Jurídicas, Florianópolis, 2013.

REFERENCES

BARBOSA, Ruy. Desapropriação por utilidade pública. Justificação. Indispensabilidade do imóvel para a obra a executar. Competência do poder judiciário para apreciar a utilidade. Violação da garantia constitucional. Indenização. Leis sobre. A quem compete decretar. Inconstitucionalidade da legislação estadual. Expropriação ilegal. Direito do prejudicado. Ação. Justiça competente. Inexistência de conexão entre esta ação com o arbitramento do valor do imóvel. Conflito de jurisdição. Ao que deve se limitar a decisão. Competência por conexão. Quando se verifiem. Quando não altera a ordem normal das jurisdições. *Revista dos Tribunais,* São Paulo, a. 7, vol. 26, pp. 245-257, 1918.

BENTO DE FARIA, Antônio. Desapropriação. Como devem ser fixados os seus casos. Quando não se justifica. Quando pode ser total ou parcial. Arbitradores. Nomeação ex-ofício. Quando tem lugar. Preceitos legais. Antinomia. Como de-

vem ser interpretados. *Revista de Direito Civil, Comercial e Criminal*, vol. 13, Rio de Janeiro, pp. 490-496, 1909.

BEVILÁQUA, Clóvis. *Código civil dos Estados Unidos do Brasil comentado*. Vol. III. 3ª Ed. Rio de Janeiro: Livraria Francisco Alves, 1930.

BEVILÁQUA, Clóvis. *Direito das coisas*. 1º volume. Rio de Janeiro: Editora Freitas Bastos, 1941.

BRASIL. *Anais do Senado Imperial, 1826, livro 3*. Secretaria Especial de Editoração e Publicações: 1823.

BRASIL. *Anais do Senado Imperial, 1845, livro 2*. Secretaria Especial de Editoração e Publicações: 1845.

CARVALHO FILHO, José dos Santos. *Manual de Direito Administrativo*. 26ª Ed. São Paulo: Atlas, 2013.

CARVALHO SANTOS, João Manoel de. *Código civil interpretado:* principalmente no ponto de vista prático. Direito das Coisas (arts. 554-673). Volume VIII. Rio de Janeiro: Carvalho Filho, 1934.

CAVALCANTI, Themistocles Brandão. *Instituições de direito administrativo brasileiro, 2º volume*. Rio de Janeiro: Livraria Editora Freitas Bastos, 1938.

CRUZ, Alcides. *Direito administrativo brasileiro*. Rio de Janeiro: Francisco Alves e Cia; Paris: Aillaud, Alves e Cia, 1914.

DELEUZE, Paul. *Theoria jurídica da desapropriação*. Rio de Janeiro: 1920.

DI PIETRO, Maria Sylvia Zanella. *Direito administrativo*. 26ª Ed. São Paulo: Atlas, 2013.

ESPÍNOLA, Eduardo; BEVILÁQUA, Clóvis; CASTRO, Araújo; MAXIMILIANO, Carlos; SILVA, Alfredo Bernardes da; GARCEZ, Martinho; LACERDA, Paulo M.; LACERDA DE ALMEIDA; DELEUZE, Paul (Pareceres). Desapropriação por necessidade e utilidade pública. *Revista do Supremo Tribunal Federal,* Rio de Janeiro, vol. 43, pp. 321-359, Ago., 1922.

GONZAGA, Tolentino (parecer). Desapropriação. Interesse particular. Inadmissibilidade. Decreto inconstitucional. Meio de anulá-lo. *Revista de Direito Civil, Comercial e Criminal*, vol. 76, Rio de Janeiro, pp. 481-485, abr., 1925.

JUSTEN FILHO, Marçal. *Curso de direito administrativo*. 9ª Ed. São Paulo: Editora Revista dos Tribunais, 2013.

LEITE, Solidônio. Desapropriação por utilidade pública. Rio de Janeiro: Editores J. Leite e Cia, 1921.

LINS, Jair. Desapropriação por utilidade municipal. *Revista Forense*, Belo Horizonte, v. 52, pp. 241-244, Jan./Jun., 1929.

MAXIMILIANO, Carlos. *Hermenêutica e aplicação do direito*. 20ª Ed. Rio de Janeiro: Forense, 2011 [1925].

MEIRELLES, Helly Lopes. *Direito administrativo brasileiro*. 43ª Ed. São Paulo: Malheiros, 2018.

MELLO, Celso Antônio Bandeira de. *Curso de direito administrativo*. 25ª Ed. São Paulo: Malheiros, 2008.

PIMENTEL, Francisco Mendes. Desapropriação por utilidade pública. Competência das Câmaras Municipais. Defesa do particular, no próprio processo da desapropriação, contra o ato administrativo manifestamente inconstitucional ou ilegal. *Revista Forense*, Belo Horizonte, v. 40, pp. 253-258, Jul./Dez., 1923.

MEUCCI, Lorenzo. *Istituzioni di diritto amministrativo*. 6ª Ed. Torino: Fratelli Bocca, 1909.

OLIVEIRA, José Rubino de. *Epítome de direito administrativo brasileiro*. São Paulo: Leroy King Bookwater, 1884.

PAULA BATISTA, Francisco de. *Compêndio de Hermenêutica jurídica:* para uso das faculdades de direito do império. 3ª Ed. Pernambuco, 1872.

PEREIRA, João de Lima. A estética como motivo de utilidade pública. *Revista dos Tribunais,* São Paulo, a. 17, vol. 65, pp. 275-282, 1928.

PORTO CARRERO. *Lições de direito administrativo*. Rio de Janeiro: Oficinas Gráficas do *Jornal do Brasil*, 1918.

PRATES, Manoel Pacheco; LARCERDA DE ALMEIDA; ALMEIDA, Estevam de; PUJOL, Alfredo (Pareceres). Desapropriação por interesse de um instituto particular de ensino. *Revista Forense*, Belo Horizonte, v. 48, pp. 79-84, Jan./Jun., 1927.

REIS, Aarão. *Direito administrativo brasileiro*. Rio de Janeiro: oficina Gráfica Villas-Boas, 1922.

REGO, Vicente Pereira do. *Elementos de direito administrativo brasileiro*. 2ª Ed. Recife: Typographia Commercial de Geraldo Henrique de Mira & C., 1860.

SILVA, Alfredo Bernardes; ESPÍNOLA, Eduardo; BEVILÁQUA, Clóvis; CASTRO, Araújo; LACERDA, Paulo de (pareceres).. Desapropriação. Casos de necessidade ou utilidade pública. Perigo iminente. Defesa. Amplitude. Verificação judicial. Indenização prévia. Depósito. *Revista de Direito Civil, Comercial e Criminal*, vol. 67, Rio de Janeiro, pp. 451-472, jan., 1923.

SILVEIRA, Francisco Baltazar da. Faculdade que tem o Governo para desapropriar, e impedir derrubada de matas. *O Direito: Revista de Legislação, Doutrina e Jurisprudência*, Rio de Janeiro, a. 3, v. 6, pp. 370-374, 1875.

SODRÉ, Eurico. *A desapropriação por necessidade ou utilidade pública*. São Paulo: Saraiva, 1928.

SPÍNOLA, Celso. *Desapropriações por necessidade ou utilidade pública*. 2ª Ed. Rio de Janeiro: Livraria Jacinto, 1941.

TRIBUNAL DE JUSTIÇA DA BAHIA. As Câmaras Municipais são incompetentes para autorizar desapropriação. *O Direito: Revista de Legislação, Doutrina e Jurisprudência*, Rio de Janeiro, a. 3, v. 8, pp. 365-367, set./dez., 1875.

TRIBUNAL DE JUSTIÇA DE SÃO PAULO. Ação possessória. *Gazeta jurídica: revista mensal de legislação, doutrina e jurisprudência do estado de S. Paulo*, São Paulo, v. 24, a. 8, pp. 75-79, set./dez., 1900.

TRIBUNAL DE JUSTIÇA DE SÃO PAULO. Desapropriação. Discussão da constitucionalidade. *Revista dos Tribunais,* São Paulo, a. 3, vol. 9, pp. 90-91, 1914.

TRIBUNAL DE JUSTIÇA DE SÃO PAULO. Desapropriação. Necessidade pública. Exame pelo poder judiciário. Embargos n. 7836. *Revista dos Tribunais,* São Paulo, a. 5, vol. 18, pp. 180-181, 1916.

TRIBUNAL DE JUSTIÇA DO RIO GRANDE DO SUL. Desapropriação por decreto estadual. Competência da justiça local. Alegação de inconstitucionalidade. *Revista Forense*, Belo Horizonte, v. 48, pp. 124-126, Jan./Jun., 1927.

VEIGA CABRAL, P. G. T. *Direito administrativo brasileiro*. Rio de Janeiro: Tipografia Universal de Laemmert, 1869.

VIVEIROS DE CASTRO, Augusto Olímpio. *Tratado de ciência da administração e direito administrativo*. 3 Ed. Rio de Janeiro: Jacintho Ribeiro dos Santos, 1914.

WHITAKER, Firmino. Desapropriação. *Revista dos Tribunais,* São Paulo, a. 14, vol. 55, pp. 208-209, 1925.