

The 'Darwin' of German legal theory—Carl von Savigny and the German School of Historical Law

Augusto Zimmermann

The German School of Historical Law became known throughout Europe at the end of the Napoleonic wars, when many German jurists opposed the introduction of a uniform legal code to the Germanic Confederation. The leading legal historicist of the time, Friedrich Carl von Savigny (1779–1861), still holds a status in German 'legal science' which is akin to Charles Darwin for the 'science' of biological evolution. Savigny, whose jurisprudence is extremely influential even to the present day, emphasized the historical limitations of the law and approached legality as a mere expression of evolving convictions and aspirations of any particular people over a period of time. The only standards which remained in such a legal philosophy were contextual and relative, since these standards would have no other support apart from the temporary conditions of society. Unfortunately, German legal historicism contributed not only to historicist legal analysis but also to the development of two of the most deadly totalitarian ideologies this world has ever seen: Marxism and National Socialism.

The philosophical origins of German legal historicism go back to the 18th century and are rooted in a 'romantic' reaction against natural-law philosophy. This was a reaction against the rationalism, universalism, and individualism which was perceived in natural-law philosophy and its claim concerning the natural rights of the individual. Instead of a law covering the world with a rational system of universal values and principles, German historicists approached law as a result of the *Volksgeist*; i.e. the 'spirit of the people' immersed in the ongoing movement of the 'collective life' organized in the State.

German legal historicism claimed that the evolution of law is linked to the growth of the nation as a living organism. This growth would derive its strength from the inner powers of the *Volksgeist*. Because law was deemed the product of culture and social condition, not logic or reason, its natural progression should neither be accelerated nor obstructed by the legislator. Rather, the organic evolution of the law was assumed to take place as an evolving process of historical growth, which occurs both naturally and unconsciously, from one age to another. Such idea of natural legal progress was not an argument for the freedom of individuals and small corporations, but it amounted to a justification of the organic power of the state. This so being, the state would act as the sovereign manifestation of the collective will of the nation. Indeed, German legal historicism regarded the state as an organic entity and, as such, the living embodiment of the nation's cultural, intellectual, ethical, and spiritual manifestations.

Carl von Savigny—the 'Darwin' of German legal theory

From an aristocratic family of Prussian soldiers, diplomats and lawyers, Friedrich Carl von Savigny (figure 1) was the most distinguished representative of the German School of Historical Law. On the foundation of the University of Berlin, in 1810, he was appointed the chair of law, a position which he held until 1842. In 1819, Savigny became Counsellor to the Court of Revision and Cassation at Berlin, and in 1842 he was appointed the Prussian Minister of Justice, a post which he filled until 1848.

Savigny came on to the scene at a time when Hegelians desired to show and share in the processes of 'social evolution'.¹ He felt that a certain sense of historical evolution was a necessary element in the study of law.² Because Savigny saw laws being formed by the silently operating forces of custom and popular consent, codification was deemed by him a hindrance to the evolution of the law. And yet, Savigny also protested against the tradition of natural law, believing that such doctrine prevented nations from securing the free development of legal progress. The appreciation of history would be a safeguard against the 'self-deception' of supposing that somebody's values is something that can to be applied to everybody else. Thus Savigny contended that the origin and historical evolution of legal institutions and rules should emphasize the peculiar characteristics of a given people among all others.³

Savigny also argued that given the historical limitations of the legal process, law should be grounded in a 'popular



Figure 1. Friederich Carl von Savigny (1779–1861) was founder of the German Historical School, and regarded law as the mere expression of social conditions. He believed in the organic evolution of the law, contending that the State is not a formal construct of the law but a corporation evolving from a great number of legal agreements formed between the distinct smaller corporations.

consciousness’ which evolves over time so as to reflect the general ‘spirit of the community’. And yet, the legal codes of the 18th century were framed on a rationalist premise by which the state creates a legal system based on universal moral values that are supposedly valid in all times and all circumstances. Savigny refused to accept such axiom and believed, instead, that “each nation has some peculiarities of custom and attitude which cannot be learned from their written codes or treatises or even wholly from their judicial decisions”.⁴ His *Volksgeist* theory was antagonistic to the idea of universal moral laws which must be applied for all nations and cultures.

Savigny conceded, however, that legislation (apart from ‘political’ legislation, which he did not discuss) could be used to improve procedure and to record established customary law. He adopted a strictly Hegelian position to oppose legal codification:

“It is impossible to annihilate the impressions and modes of thought of the jurist now living—impossible to change completely the nature of existing legal relations; and on this twofold impossibility rests the indissoluble organic connection of generations and ages; between which, development only, not absolute end and absolute beginning is conceivable.”⁵

It is only through history that legality could be actively connected with the primitive conditions of the people, although “the loss of this connection must take away from every people the best part of its spiritual life”.⁶ Any non-

historical process, therefore, would make the law lose its own national consciousness. Hence, the primary object of the historic-jurisprudential method would be to trace the established system to its root, thus discovering the organic principle whereby the national life may be separated from that which is lifeless and only belongs to historical context.⁶

In 1814, a time in which Savigny worked as a tutor to the Prince Royal of Prussia, he issued *The Vocation of Our Age for Legislation and Legal Science*, which became extremely influential in Europe throughout the 19th century as a powerful critique of legal codification. Therein he claimed that a civil code should not be enacted for the whole of Germany as a means of unifying the nation.⁷ Napoleon’s Civil Code, wrote Savigny, “served him as a bond the more to fetter nations: and for that reason it would be an object of terror and abomination to us, even had it possessed all the intrinsic excellence which it wants”.⁸ He was determined to restore the natural evolution of German law by appealing to a ‘real, living jurisprudence’ which could not be founded upon any civil codes, even the newly proposed German Civil Code.⁹ According to Rahmatian:

“... codification of a legal system is an indicator of the decline of organic development of the living body of the law and its legal science in the course of history. The codification movement of Savigny’s time was, in his opinion, driven by artificial concepts of Reason that disregarded the existing laws, and it was detached from the people’s consciousness and history. Instead, a lawyer must first be able to understand the history which gave every age and legal institution ... their peculiar shape; and, secondly, to appreciate their place in the broader systematic context.”¹⁰

Although Savigny’s *Vocation* “is not always written in a lucid and concise style ... and appears in a few places as a text of almost mystic obscurity”,¹¹ the idea of *Volksgeist* contained in the book provided “a speculative and anti-rationalist theory of the evolution of law”.¹¹ Savigny looked at the concept of legal evolution in light of a holistic organic development which also embodied the culture, tradition, and character of the people.¹² In this context, the individual would become an atomized element subject to the organic body of society, just as each age of a nation constitutes the continuation and development of all past ages. History is hereby observed not in terms of the source of tradition and example, but rather as the ongoing path of evolution which leads to the “true knowledge of our own condition”.¹³

Savigny’s *magnum opus* is his eight-volume *History of Roman Law in the Middle Ages* (five published in 1840–1841 and the rest in 1847–1849). The work amplifies the views expressed in *The Vocation of Our Age for Legislation and Jurisprudence*. Thus Savigny explains in more details that the main objective of his historical school is not to “subject the present to the government of the past”, but instead to create a historical view of ‘legal science’ which

“... consists in the uniform recognition of the value and the independence of each age, and it merely ascribes the greatest weight to the recognition of the living connection which knits the present to the past, and without the recognition of which we recognise merely the external appearance, but do not grasp the inner nature, of the legal condition of the present.”¹⁴

In a laudatory article published in 1910 in the journal of the British Institute of International and Comparative Law, J.E.G. de Montmorency commented that Savigny’s contribution to “the history of evolution of law” placed him “among the great jurists of the world”¹⁵ Savigny is lauded as ‘the Darwin of the science of law’, because, according to its author, his achievements for ‘the science of law’ resembled the achievements of Charles Darwin for the ‘science of biology’.¹⁵ As Montmorency put it, Savigny interpreted the law as a living organism that is subject to natural history and obedient to a cosmic process that runs through the ages, so that law would have to grow organically together with “the evolution of races and kingdoms and tongues”.¹⁶ This attitude fuelled Savigny’s strong objection to the codification of laws, because if law is always the manifestation of any given society culture and tradition, then the codification of laws essentially stunts the naturalist process of organic evolution of the law. Further, such codification has the effect of imposing a universal set of rules upon a specific political area which would not, on the whole, reflect its individual legal history. Montmorency thus explained that Savigny believed that codification represented an abuse of power used for the sake of unification itself rather than to harmonize German laws.

German legal historicism and Hegelianism

In an article on such topic one must consider the philosophical influence of G.W.F. Hegel (1770–1831; figure 2) upon the formation of German legal historicist methodology. Hegelianism replaced the concept of universal law with the idea of law as the embodiment and expression of communal morality; a morality which transcends objective morality. In legal terms, therefore, Hegelianism can be described as a variant of positivism, which restricts jurisprudence to an expository of ‘scientific’ analysis of the historical development of society.¹⁷ Ultimately, the law is determined



Figure 2. G.W.F. Hegel (1770–1831) was a German philosopher who described the state as a perfect organic unity but its laws always relative, changing, and ultimately arbitrary. In absolutising the state, Hegelian philosophy led not only to narrow positivism but also to totalitarianism. The followers of Hegel, in absolutising the state, are the National Socialists and the Communists (that is, the radical Marxists).

by the political body of society, meaning, in other terms, that no higher law or standard of morality can be measured against the positive law of the State. Consequently, in *Philosophy of Law and Outlines of the State* (1821) Hegel defines the State as “the manifestation of the Divine on earth, and ... the march of God through the world”.¹⁸ The State is approached as a natural entity, based on a complex system of legal institutions. These institutions would pre-exist human individuals and direct them to exercise their will and personality in accordance with legal rules, which as such express the general will of the organic body of society.¹⁹ Accordingly, law is deemed always positive law, although such law is primarily found in the consciousness of the people as an inward necessity manifested by the historical development of the nation’s legal institutions.²⁰

German legal historicism opposed the idea that the State is a mere legal fiction, or formal legal person. Rather than a mere formal construct, the State was approached as an organic entity which grows through ‘legal agreements formed between distinct smaller corporations’.²¹ Although the *Volk* would incorporate the ‘Eternal Mind’, or the incarnation of God in time and space, the *Volk* ultimately is to be manifested in the State. The State thus reflects the broad organism of society which evolves from a greater number of legal agreements formed between smaller corporations.²¹ In developing the nation’s legal system, therefore, the State is able to reconcile the private morality of its individual members with the formal system of law, which has been developed on a system of social ethics, which is the final reach of the mind of the *Volk*.²² As a result, since the days of Savigny and his historicist legal school, the nineteenth century Dutch theologian and statesman Abraham Kuyper commented:

“... many Germans began to firmly believe that the state was the highest, the richest, the most perfect idea of the relation between man and man. Thus the state became a mystical conception. The state was considered as a mysterious being, with a hidden ego; with a state-consciousness, slowly developing; and with an increasing potent state-will, which by a slow process endeavored to blindly reach the highest state-aim. The people was not understood as the sum total of the individuals. It was ... seen that people is no aggregate, but an organic whole. This organism must

of necessity have its organic members. Slowly these organs arrived at their historic development. By these organs the will of the state operates, and everything must bow before this will. This sovereign state-will might reveal itself in a republic, in a monarchy, in an Asiatic despot, in a tyrant as Philip of Spain, or in a dictator like Napoleon. All these were but forms, in which the one state-idea incorporated itself; the stages of development in a never-ending process. But in whatever form this mystical being of the state revealed itself, the idea remained supreme: the state shortly asserted its sovereignty and for every member of the state it remained the touchstone of wisdom to give way to this state apotheosis.²³

The foremost figure among the second generation of German legal historicists, Otto von Gierke (1841–1921), borrowed from Hegelianism the concept that the State comprises a living organism of the highest order. He interpreted the State as a comprehensive manifestation of human associations, and the total sum of human groupings by which individual life must be incorporated and ultimately fulfilled. This organic constitution of the State also meant that the State should be treated very much like a real person, albeit a much more powerful and perfect person than any human being, hence endowed with the necessary conditions and capacities to control and regulate every aspect of society and individuals. “From this point of view”, Ernest Barker explained:

“Society and the State are themselves of that nature of biological structures, or organisms, in the sense that they are analogous to such structures that they must be interpreted in the same terms and by the same language It is a point of view which would make both law and political science indebted to biology for the conceptions which they use to interpret their material, and the language which they employ to express their conceptions.”²⁴

Gierke took a strong biological approach to social and legal analysis. In the nature of things, he argued, there are real social groups whose essence is akin to the people who are their individual members. The State was defined as a real group-being just as there is a real human being behind every individual legal person. This was a first step toward the ‘sovereign plenitude’ of the State and its ultimate elevation above all individuals and society. Hence Gierke declared, “The authority of the State is the highest right upon earth.”²⁵ Since the State engulfs human life and absorbs all possible individuality, in practice such an organicist theory ended in a theoretical justification of political absolutism.²⁶ As Barker points out:

“If we make groups real persons, we shall make the national State a real person. If we make the State a real person, with a real will, we make it indeed a

Leviathan—a Leviathan which is not an automaton, like the Leviathan of Hobbes, but a living reality. When its will collides with other wills, it may claim that, being the greatest, it must and shall carry the day; and its supreme will may thus become a supreme force. If and when that happens, not only may the State become the one real person and the one true group, which eliminates or assimilates others; it may also become a mere personal power which eliminates its own true nature as a specific purpose directed to Law or Right.”²⁷

German legal historicism and Marxism

Born in Trier in the Rhineland in 1818, Karl Marx (figure 3) was the son of a Jewish lawyer converted to Christianity. In his youth he received systematic university education, initially in Bonn and then in Berlin, between 1835 and 1841. Marx took his legal studies seriously and intended to become a lawyer like his father. As a law student in Berlin he attended the lectures of Savigny and was very impressed with his erudition and his power of argumentation. It is also patently clear from Marx’s letter to his father that he became quite familiar with the famous controversy between Savigny and the Hegelian law professor Eduard Gansy, over the relationship between possession and right.²⁸ In a letter to his father, dated 10 November 1836, Marx expressed great appreciation for Savigny’s *Right of Possession* (1803), a work in which Savigny argues that law is only part of history and not a branch of applied ethics.

In *Right of Possession* Savigny also claims that property is not a fundamental right of the individual, and that the great bulk of humanity has lived in societies in which land possession is communal and conditional. “By the possession of a thing”, wrote Savigny, “we always conceive the condition, in which not only one’s own dealing with the thing is physically possible, but every other person’s dealing with it is capable of being excluded”.²⁹ Savigny develops in his book a search for the historical forms of property as well as the historical determinations of property forms. For him, the ancient Romans did not own property but they had only a ‘protectable right’ to property. Savigny thus argues that possession is not a prior form of property, but a distinct legal form with its own unique separate history. Thus he traced Roman history and its development of property, to claim that private property was not a natural right but one which could be gained and lost.

Savigny applied the same assessment of property rights to the development of individual rights in general, concluding that these rights are nothing but a product of possession, a ‘trans-historic law’.³⁰ He claimed to have discovered the development of laws scientifically, tracing the evolution of law throughout history so as to conclude that legal principles could never be universal and applicable to all people at all

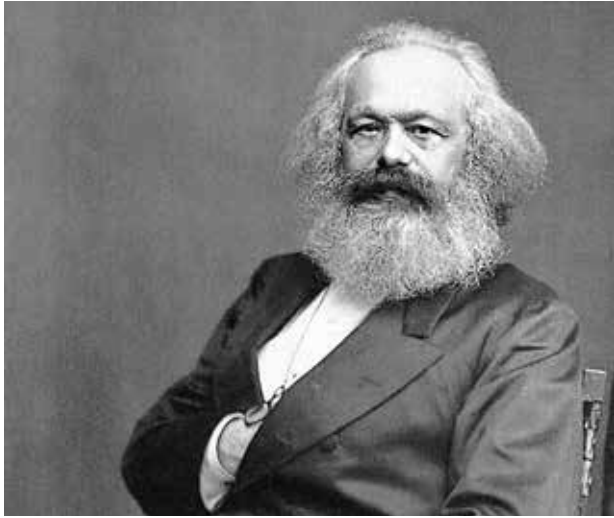


Figure 3. As a law student, Karl Marx (1818–1883) attended Savigny’s lectures on the Pandects and deeply appreciated Savigny’s *Right of Possession*. From this book he learned that law was part of history and not a branch of applied ethics. He also learned with Savigny that property is not a fundamental right but socially conditioned.

times, but that such principles are only a reflection of the historical context of any given society and its ‘common consciousness’.³¹ In sum, Savigny rejected the concept of natural law and natural rights as a mere product of bourgeois values and aspirations, asserting that “when we lose sight of our individual connection with great entirety of the world and its history, we necessarily see through our thought in a false light of universality”.³²

To support the conclusion that property is not a fundamental right of the individual, Savigny illustrated that a great bulk of the human race has spent time living in societies where possession of the land was communal and conditional on the desires and will of the ruling classes. Arguably, the underlying motive for Savigny’s argument against property rights for all was to protect the property interests of the ruling classes in Germany from the society they governed.³³ Whatever it might be, by classifying property rights as always conditional and a non-fundamental legal right, Savigny’s work enabled Karl Marx to contend that private ownership is the original cause of social inequality. It gave him a basic guideline to interpreting property forms through a historical relativistic approach.

Like Savigny, therefore, Marx looked to history to determine the reasons for social evolution. Marx agreed with Savigny that these were not to be found in metaphysics but in the material circumstances wherein people find themselves and how they respond to their predicament. In particular, Savigny’s attack on objective and universal standards for law and morality provided Marx with an indispensable basis for his work on historical materialism as well as his account of property relations. According to Marx, the concept of human right exists not due to human nature but the will of

the ruling classes, who not only creates such a ‘right’ but has the ultimate power to remove any feasible existing one. In sum, Marx thought that any possible human right is only a means for the ruling class to give the other classes the illusion of equality, thus enabling the former to continue to control and oppress them subtly.³⁴ Thus he concluded that in the final stage of socialist society individual rights will not be necessary and that private property will have to disappear because it represents the dominance of the material world over the ‘human element’, while communism would represent the triumph of the human element over the material world.³⁵

Historical materialism is the vehicle through which Marx’s view of law as an instrument of the ruling class is revealed. Both Marx and Savigny linked law as a product of history and both rejected the premise that the laws of a given society reflected universal normative truths. They held the view that a ‘society’s laws reflect its particular historical situation’.³⁶ Conversely, while Savigny contended that laws were a mere symptom of people’s customs subjected to particular spiritual and historical experiences, Marx theorized that laws are controlled by the dominant social class and not the nation’s people as a whole entity. Rather, Marx believed that law is a historical idea conditioned by the social circumstances of class struggle, and that all laws would cease to exist when the communist utopia finally was achieved.

In conclusion, the roots of Marx’s historical materialism are found in the sociological work of Savigny and its interpretation of legal rights, particularly the right to property. Savigny taught the young Marx that humanity would have spent most of its recorded history practising some sort of communal ownership. Arguably, Marx was deeply receptive to Savigny’s theory on the sociological nature of law and property, because he realized that only when history displaces the idea of natural or eternal law, it is then actually possible to “move from necessary stages of the history of production to the understanding that a mode of production was shaped totally by historical forces”.³⁷

German legal historicism and National Socialism

In the 1930s one of the most influential jurists in Germany was the Austrian-born Hans Kelsen (1881–1973; figure 4). Kelsen was a positivist who confined his legal analysis to a theory of positive law and to its interpretation. Kelsen was anxious to maintain the difference, even the contrast, between *just* and *legal*. And yet, Kelsen himself once admitted that such a separation of justice and legality actually did not exist in German-speaking countries until the rise of the German School of Historical Law. Before the rise of the German legal historicism, Kelsen commented, “the question of justice was considered its fundamental problem by juridical science”.³⁸

The German School of Historical Law opposed the idea of the political apparatus as a formal legal person or rational construct. Rather, German legal historicists related social organic growth with a more perfect embodiment of the *Zeitgeist*, or the ‘Spirit of the Time’. And yet, by emphasizing the sociological implications of the legal system, as well as the necessity of this legal system to ultimately respect particular social habits, legal historicism eventually became one of the driving forces in the promotion of the German racial myth.³⁹ Accordingly, entire nations and ethnicities were deemed evolving natural entities, with their particular laws said to possess historical determination and ultimately destined to be replaced over time by future generations.⁴⁰

Nazi legislation and case law shows a remarkable similarity with the *Volksggeist* doctrine of German legal historicism. There was an elusive romantic-mystic notion to the notion of *Volksggeist* which obviously attracted the Nazi leadership. A proper analysis would reveal that the historicist concept of *Volksggeist* was not attached to the real German people, because “a real people would not itself have any practical law-making power as an expression of its common consciousness, which was then indeed the case in Nazi Germany.”⁴¹ As for the Germany that came into being in 1933, the nation rapidly descended into a process of homogenization by which individuals and entire social groups were ‘assimilated’ into the organic dimension of the *Volksggeist*, although ultimately to be manifested by the organic body of the Nazi state.⁴²

In this sense, the historicist emphasis on the evolving legal order provided the Nazis with the kind of justification necessary to recreate legality in accordance with so-called ‘German soul and nature’.⁴² Thus Nazi jurist Hans Gerber commented on the new spirit of German law after 1933: “National Socialism insists that justice is not a system of abstract and autonomous values such as the various types of Natural Law systems. Each society has its own concept of justice.”⁴³ Indeed, the rejection by legal historicists of any objective or universal standards, and so of universal criteria for justice and legality, Richard Overly observes,

“... made law historically contingent, a product of its own time and place ... [L]aw was regarded not as set in stone but something that evolved and changed with altered historical circumstances. Historical reality,



Figure 4. Hans Kelsen (1881–1973) stands alongside H.L.A. Hart as one of the most influential legal positivists of the 20th century. He sought to create a ‘pure theory of law’ that was free from any extra-legal considerations. His theory is about law as it is and not as it ought to be, ‘without legitimising it as just, or disqualifying it as unjust’.

it was argued, dictated the nature of legal systems and governed their moral worth In the Third Reich the highest justice was the preservation of the life of the nation; the nation was the source of law; hence law was also just.”⁴⁴

German historicists used the word *Volk* to describe not just a group of people speaking the same language and sharing a common culture, but mainly an ‘organic community’ of individuals who share among themselves the same biological traits. Inspired by the ideal of the organic community, the Nazis introduced laws that were intended to unify the ‘social body’ so it could triumph against other allegedly inferior races in the struggle for existence. As such, the chief purpose of the Nazi legal system was to forge the unity of the German *Volk* as an ethnic or racial community. This implied a Hegelian conception of ‘liberty’ whereby the historical interests of the *Volk* takes precedence over the liberty of the individual.⁴⁵ “It is thus necessary”, declared Adolf Hitler in a speech on 7 October 1933,

“... that the individual should come to realize that his own ego is of no importance in comparison with the existence of his nation; that the position of the individual ego is conditioned solely by the interests of the nation as a whole ... that above all the unity of a nation’s spirit and will are worth far more than the freedom of the spirit and will of an individual.”⁴⁶

Conclusions

German legal historicists saw nations and ethnic groups as evolving natural units. They assumed that law is divorced from objective truth and destined to be replaced by future generations.⁴⁷ The final result is not only legal positivism but legal nihilism, because the only standards which remain in place are subjective in character and derived from the particular choices of society.⁴⁸ So it did not take too long for legal historicism to descend into moral relativism.⁴⁹

Ultimately, the call to the historical exploration of the law led not just to the honest desire for historical analysis, but to law being perceived as entirely contingent and unable to grasp anything that might be eternal and universal. Of course, ideas have consequences and the historicist premise that justice is entirely a convention of culture and circumstances implies that no legal value or principle can

possibly be based in human nature, which also means that laws have their own ground in subjective decisions reflecting temporal agreements which take place from time to time and over a certain period. The major problem with such historicist postulation, as Leo Strauss correctly explained,

“... is that all societies have their ideals, cannibal society no less than civilized ones. If principles are sufficiently justified by the fact that they are accepted by a society, the principles of cannibalism are as defensible or sound as those of civilized life. From this point of view, the former principles cannot be rejected as simply bad ... This problem cannot be solved in a rational manner if we do not have a standard with reference to which we can distinguish between genuine needs and fancied needs and discern the hierarchy of the various types of genuine need.”⁷⁵⁰

German legal historicism ignored the concept of God-given inalienable rights, treating every citizen not as an agent and creator of social facts, but instead as a mere ‘carrier’ or recipient of these facts. Ultimately, German legal historicism contributed to the development of several theories that were taken over by later Marxist and Fascist dictatorships in the past century. Together, these two ideologies were responsible for the killings of at least 150 million in the twentieth century alone.

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Augusto Zimmermann is a senior law lecturer at Murdoch University, Western Australia. He holds a Ph.D. from Monash University (Australia) as well as an L.L.B. and an L.L.M. cum laude from the Pontifical Catholic University of Rio de Janeiro.