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Neighbors: an Investigation on the
Place of Law and its Limits in the
Context of the Brazilian Private Law
Movement Escola do Direito Civil-
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Good Fences Make Good Neighbors: an Investigation on the Place of Law and its Limits in the Context of the Brazilian Private Law Movement Escola do Direito Civil-Constitucional

Abstract: In this paper, an analysis of Robert Frost's poem Mending Wall³ is presented as a hermeneutical key to investigate and criticize two examples of the oblivion of the reasonable distinction and the reasonable relationship between ethics and law proposed by a new Brazilian private law movement called Escola do Direito Civil-Constitucional (The Private-Constitutional School of Thought). Those examples of unreasonable relationship between ethics and law are: 1) the right to be loved and 2) the right to get a private education without paying for it.

Keywords: Mending wall, Robert Frost, Ethics and law, The Brazilian Private-Constitutional School of Thought

Introduction

As Martha Nussbaum (1995) observes, the literary imagination is a part of public rationality. It is not the whole of public rationality. But as a part, it plays a fundamental role. It is an ingredient of an ethical ground that sustains the universe of rules and formal decision procedures (the universe of the law). The impoverishment of this ground necessarily implies in a correlate impoverishment on the field of law. Law cannot be separated from ethics. Notwithstanding, today, there is a movement on Brazilian private law towards a mischaracterization of some important institutes of private law in the name of some not well understood constitutional ethical principles. This movement is known as Escola do Direito Civil-Constitucional (The Private-Constitutional School of Thought). It is as if the law should carry the responsibility of being the source of every ethical (and theological) virtue. It is, of course, a movement in which both ethics and law are misunderstood. One thing is to know that law cannot be separated from ethics. This is right. A different thing is to think that law must command every ethical or theological virtue. This is a mistake. And even worse, it is a mistake that signifies a threat both to ethics and law. In this paper, we will use an analysis of Robert Frost's poem *Mending Wall* as a key to investigate and criticize two examples of the oblivion of the right distinction and the right relationship between ethics and law proposed by this new Brazilian private law movement.

Mending Wall is a long one-stanza poem published in 1914. It is written in blank verse and contains a narrative-like style. It opens with an intriguing verse: “Something there is that doesn’t love a wall” (this same verse will appear once more in line 35). At this point, by the reading of the next nine verses, it seems to be that it is nature that doesn’t love a wall. The narrator observes that there are gaps made by hunters and his dogs. But he also observes that there are gaps in the wall that were not made by men. Those gaps seem to have been made by nature. That same verse appears again in line 35. But at that point, considering the previous verses, in which the narrator expresses his doubts about the reasons for the very existence of walls and relates his dialogue with his neighbor, it seems now that it is the narrator himself who doesn’t love a wall. It seems that the narrator does not love the wall and wants it down, although his neighbor insists that “good fences make good neighbors”. The statement “good fences make good neighbors” appears two times as well. In both occasions, it is the neighbor’s statement. In fact, it is all the neighbor says. It appears for the first time in line 27, and a second time in the last line of the poem. Its first appearance is just an expression of an old proverb. That casualness fades away when it appears in the closing of the poem. At that point, the narrator is already conscious about the power of violence that is, at the same time, encapsulated and frozen in the fence. So, although it seems that the theme of the poem is a simple criticism of the existence of walls, a deeper interpretation may show that it is not. What does not love a wall is love. Love does not accept fences. As Diotima once taught to Socrates, love wants union. The lover wants to be one with her/his beloved. But if it is true that love does not love a wall, it is also true that the destruction of a wall does not create love. Put in a different way: bad fences (or no fences at all) do not make good lovers, but certainly bad fences (or no fences at all) make bad neighbors.

So, in the world of human affairs, it must be a place for law (represented by walls) as a condition for the virtue of justice, and it must be a place for love, as a complete different virtue. Although today, in Brazil, the Escola do Direito Civil-Constitucional (The Private-Constitutional School of Thought) concentrates its efforts in trying to make us believe that the law must be a condition not for the virtue of justice, but for the virtue of love. It is as if love could be commanded by law. If the narrator of Frost’s poem, in a narrow view, may be pictured trying to put the wall down in order to create a kind of a new society in which love would be the only virtue and the only law, the Escola do Direito Civil-Constitucional (The Private-Constitutional School of Thought), in a more audacious project, goes a different way: it wants to create a love society by law. This paper will present two examples of this project.

The first example will be called “the right to be loved”. This expression here is not a metaphorical expression. The Escola do Direito Civil-Constitucional (The Private-Constitutional School of Thought) thinks that a person has a right of being loved and, as a logical consequence, thinks that some other person has a correspondent duty of loving. If the person who has the duty of loving fails in performing his/her legal obligation, he/she can be condemned to pay a monetary compensation to the one who has been left without his/her due love. This absolute nonsense is what has been contemporarily defended in various fields on the Family Law by the Escola do Direito Civil-Constitucional (The Private-Constitutional School of Thought). Its roots are easy to trace. Once love (taking in modernity not as a virtue but as a person sentiment of affection) is established as the sole basis for the family institution, since it is possible to detect this feeling, it is possible to detect the constitution of a family. Institutions such as marriage, for instance, are in a process of losing its formal elements (the effects of this loss of formal elements is paradoxical: today, in Brazil, getting a divorce is quite an easier task for formally married couples than for those who have chosen not to marry formally). So, if it is possible to state that love bonds are important in the institution of family, it is not correct to conclude that there should be a legal duty to love. But this is just the conclusion put forth by the Escola do Direito Civil-Constitucional (The Private-Constitutional School of Thought). In the relationship between parents and children, the duty of loving was added to the traditional duties of respect and mutual assistance. Parents must, then, provide not only for material and traditional moral needs of education for their offspring, they are also obliged to provide love. The Escola do Direito Civil-Constitucional (The Private-Constitutional School of Thought) talks about “affection/love desertion”, which is thought as a cause for a monetary compensation. It is not said how a monetary compensation (and how much) can be a proper compensation for the alleged lack of parental love but it seems not to be a problem. For the Escola do Direito Civil-Constitucional (The Private-Constitutional School of Thought) what matters is the institutionalization of love by law.

The second example will be called “going to a private school without paying for it”. One of the main theses proposed by Escola do Direito Civil-Constitucional (The Private-Constitutional School of Thought) is that the contract, instead of a manifestation of the person’s autonomy, must be understood as an instrument to achieve solidarity (another kind of love) in society. So, a contract that is not a manifestation of solidarity has its obligatory power threatened. This way of reasoning has achieved the status of a federal statute in Brazilian law. The practical effects can be seen in various places. It can be seen in the

contracts between private educational institutions and its students. A student who stops paying his monthly fees has the right of attending classes and performing all educational activities until the end of the class period. The argument behind this right is that such a thing as education cannot be subordinated to such a thing as honoring contracts. As it is understood by the Escola do Direito Civil-Constitucional (The Private-Constitutional School of Thought), the individualistic economics interests of the private schools must not be allowed to overcome the right of a person to be educated in a private school without paying for it. The quite paradoxical outcome of this statute is that, as recent researches shows, for a default percentage of 30.3, there is an increase of 15% on the value of the school monthly fees. As it is easily observed, the project of transforming contracts in an instrument for solidarity has achieved the goal of transforming good payers in compulsory helpers for bad payers. At the end, it is not solidarity. Its proper name is exploitation.

The right to be loved

In the 90's, the conception that the affect should be the basis of family institution was spreaded in Brazilian civil law. Connected with this new conception, a new right arose: the right to be loved. Now, the parents have – besides its traditional duties – the duty to love their offspring, and the offspring has the right to be loved. In order to justify this new duty and this new right, Pereira (2008) affirms that: “man shall not live by bread alone”. Pereira sustains that, by not accomplishing its new duty of love, parents are responsible for “emotional abandonment” of their offspring and should be monetarily punished by this “emotional abandonment”. According to Pereira, the reason why parents should be monetarily punished is simply because “you cannot force anyone to love” (2009). Let Pereira explains his thesis with his own words:

[...] this inattention and this disaffection must be punished by a rival penalty, under the possibility that we could have a thoughtless, empty and unenforceable Law. If a father or a mother does not want to provide attention, care and affection to those who they have brought the world, nobody can force them, but the society has the role of solidarity to say, somehow, that this is not right and this kind attitude may affect the formation and character of those who are emotionally stranded.

After all, they are responsible for their children and this is a duty of the parents and a right of the children. The failure of these obligations means violation of the child's right. If parents do not act well, they must pay for it. This is the response that the society must give to the relinquish parents, using the law. Would be the affection measured by money? No way. The size of the award is

symbolic and has only a punitive function. More than that: an educational function. After all, there is no money in the world that can afford the damage and the consequences that a moral violation can cause on the development of personality.

After all, suffering is part of life and adults are responsible for their charms and broken love. But parents are responsible for the education of their children, yes, and it is assumed there, give affection, moral support and attention. The damage is not caused by suffering, but by the violation of law. Which law? The wrong exercise of the family power is harmful to the child's personality rights, to insist; When a child is abandoned and rejected, she/he has his/her rights violated. Minors have not only the right to be named son but also the right of the STATE OF SON.

Every legal rule must match a penalty, under penalty of becoming mere moral rule. One of the reasons why the law is exactly the legal force is to impose limits for the ones who do not have them. The legal law, external to the individual, is for those who do not have it internally, that means, for someone who fails in conforming his/her own and internalized ethical and moral precepts by its own spirit. If everyone acted with rectitude, there was no legal need for law. The law only exists because there is a crooked. (Del Vecchio).

Finally, the affect is a legal principle and also an assumption of the authority and the paternal functions. As it is not possible to force anyone to give affection, the only possible sanction is the remedial one. The failure to establish this kind of sanction would mean rewarding irresponsibility and paternal abandonment. (PEREIRA, 2008)

Although this theoretical conception has not achieved a leading position in Brazilian Courts of Law, there are judicial decisions condemning the parents to pay a monetary compensation for “emotional abandonment”.

Indeed, in the district of Capão da Canoa, Rio Grande do Sul, a father was condemned for moral and emotional abandonment of its nine-year-old daughter to the payment of compensation at the rate of two hundred minimum wages. The verdict, delivered in August 2003 became final, with no appeal by the father who also was in default in this suit.

In São Paulo, a trial of the 31st. Civil Court of the Central Forum of São Paulo sentenced a father to compensate his daughter, arguing that “the paternity duties are not only related to material assistance, and that beyond the guard, so regardless of it, the father has the obligation to keep his child in his company.”

Finally, the 19th Civil Court of the district of Belo Horizonte, Minas Gerais, dismissed a compensation action in which the child claimed that he/she would be entitled to punitive damages owned by the omission of her/his father's duties to assist mental, moral and affective, understanding, therefore, that there would deliberate indifference to characterize paternal

abandonment. On appeal, the Court of Minas Gerais provided the action brought by the son/daughter, condemning the father to pay a pecuniary compensation in the amount of R \$ 44,000.00, arguing that it has been configured both the damage suffered by the author in his dignity and the unlawful father's conduct, failing to fulfill his duty to family living with the child and creating bonds of fatherhood with him/her:

INDEMNIFICATION. MORAL. PARENTAL RELATIONSHIP - HUMAN DIGNITY PRINCIPLE - THE PRINCIPLE OF AFFECTION. The pain suffered by the child, because of the paternal abandonment, which deprived him/her from the right to association under the affective, moral and psychological terms, must be indemnified, with focus on the principle of human dignity.

Considering this case, the Superior Court (the court responsible for harmonizing the decisions of state courts and fit them to infra-constitutional legislation), in the trial occurred on November 29, 2005 (757.411/MG RESP), reversed the decision and again rejected the request as damages claim, stating that "as outside the agency of the judiciary to force someone to love, or to maintain an affective relationship, no positive purpose would be achieved with the compensation being claimed":

LIABILITY. MORAL ABANDONMENT. REPAIR. MORAL DAMAGES. FAILURE. 1. The moral damages presupposes the commission of an unlawful act, not earning opportunity to the applicability of the standard in the art. 159 of the Civil Code of 1916, the affective abandonment, unable to monetary compensation.

Finally, the matter was taken to the Supreme Court, in charge of analyzing the decisions' constitutionality preferred by other courts, the Supreme Court has reaffirmed the decision of the Superior Court, asserting the court to dismiss the RE 567164-0, August 18 , 2009, which there were no offense to the Constitution to justify its intervention in that process.

The justified reluctance of the Superior Court of Justice to impose a duty to compensate the cases of emotional distance brought the matter to the Brazilian Congress. In the House, the Bill presented in 2008 by Mr. Carlos Bezerra has been examined, which want to include a paragraph to art. 1632 Civil Code, as follows: "the emotional distance subject parents to pay compensation for moral damage. And the same project intends to amend the Statute of the Elderly, adding a second paragraph to its art. 3., stating that "the emotional distance subject children to pay compensation for moral damage". Deputy alleges that:

Family involvement can no longer be ruled by just one parameter-patrimonial individualistic. It should also cover the ethical issues that inhabit, or at least should live, the conscious and unconscious of every human being.

Among the obligations between parents and children, there is not only the provision of material assistance, but also the need for moral support, namely the provision of support, minimum and indispensable affection and attention adequate to the development of the children's personality or proper respect for full aged people. In the case of minor children, the emotional trauma caused by parental neglect implies deep marks on child's behavior. Waiting for someone who never calls – even in the most important dates – the feeling of rejection and anger caused by the indifference of others cause deep damages in the child's personality.

Among the elderly, the neglect generates a feeling of sadness and loneliness, which is reflected primarily in functional failure and aggravation of a situation of social isolation more common in this phase of life. The lack of shared intimacy and poverty of affect and communication tend to change social interaction stimuli of the elderly and their interest with their lives.

In turn, it is clear that it is not possible to force children and parents to love each other. It is recommended at least to allow the injured to receive compensation for the damages caused.

In the Senate clears a very similar project, which aims to characterize the emotional distance as a civil and criminal unlawful. In the art. 4. of the Child and Adolescent Statute would be added 2. and 3. paragraphs with the following wording:

§ 2. It is up to parents, in addition to protecting the rights mentioned in art. 3 of this Statute, to provide moral support to their children, whether by living together, whether by visiting regularly, to allow monitoring of psychological development, moral and social development of the person.

§ 3. For purposes of this Statute, it is understood moral assistance due to children under eighteen years:

I - guidance on the key choices and career opportunities, educational and cultural rights;

II – the solidarity and support in times of intense pain and trouble;

III - the physical presence voluntarily requested by the child or adolescent which can be possibly answered.

In other numerous passages, the project strengthens the parents' moral duty to assist, coming not only to consider “illegal conduct, subject to damages, without prejudice to other sanctions, the act or omission which offends the fundamental right of children or adolescents , including cases of moral abandonment” as yet, provides a possible penalty of imprisonment of one to six months, the father who “fail, without good excuse, to provide moral assistance to

the child under the age of eighteen, damaging his/her psychological and social development”. Senator Marcelo Crivella justified his project by arguing that:

Nobody is able to doubt that the parents’ emotional distance produces serious and indelible impact on the social and psychological development of children.

Love and affection are not imposed by law! Our initiative has not this pretension. We want merely to clarify, once and for all, that parents have a duty to direct the education of their children and to guide them in the most important moments. Parents also have to provide their children solidarity and support in situations of suffering and make themselves presents when the child spontaneously requires their company.

As mentioned, it is not said how a monetary compensation (and how much) can be a proper compensation for the alleged lack of parental love. But it seems not to be a problem for the Escola do Direito Civil-Constitucional (The Private-Constitutional School of Thought). For them, what matters is the institutionalization of love by law.

Going to a private school without paying for it

The Private-Constitutional School of Thought also argues that contracts should be guided by love, since the conduct of the parties should be “inspired by overcoming inequalities in one dimension of solidarity, placing a contract with a view to cooperation in search for a common purpose, based on good faith ” (PASQUALOTTO, 2002, p. 97).

For theorists of Private-Constitutional School of Thought, “the individualistic character and obligational traditional patrimonial law” would have been supplanted by a new structure, “based on axiological board imposed by the Magna Charta [sic] of 1988, from the ideal of distributive justice and substantive equality, as well as the binomial human dignity and social solidarity”. After all, “the contemporary society is open, plural, porous, multifaceted, globalized, bringing uncontroversial humanism, aiming to protect the most relevant social interests, requiring, of course, new legal position”. (ROSENVALD, 2010. p. 75).

It defends solidarity in the individual autonomy in opposition to individualism, “understood as condoning the senseless personal interest” because “the freedom of each one is exercised in an orderly manner to the common good as expressed in the social contract, assuming the internal right of freedom (to contract) conforming with the particular relevance to the common good. (COSTA, 2006, p. 248).

Moreover, this school of legal thought claims the balance between freedom and solidarity, in order to become complementary: to regulate freedom for the sake of social solidarity, i.e. the relationship of each one, with the common interest, which reducing inequality, allows the free personal development of each member of the community” (MORAES, 2000, p. 55).

Summarizing, the Private-Constitutional School of Thought denies traditional civil rights such as the property right and the right to contract, unless the exercise of these rights is directed to the satisfaction of social interests. Thus the contract would not be synonymous of an agreement between opposing wills, as the interest of the individual necessity would coincide with social interests. The will of the contracting parties would be essentially the same. The solidarity and respect for human dignity would be the basis of dealings, according to values allegedly taken from the Constitution.

The Brazilian jurisprudence has been affected by the reflections of the Private-Constitutional School of Thought’s ideas and the judicial decisions, away from the law, granting rights to unforeseen ground that one of the contracting parties could not deny to the other rights related to existential meaning, because of the principle of solidarity and the need to protect human dignity. This means that in order to preserve human dignity, the individual is compelled to act in favor of the other contractor, because of an alleged duty of solidarity.

The private education in Brazil has been fertile field for such decisions with this kind of reasons, in a way that some schools in metropolitan region of Sao Paulo would afford 30.3% of the average default (TAKAHASHI, 2007). The legal provision that deprives the private educational institutions of the *exceptio non adimpleti contractus* and the jurisprudential understanding that requires those institutions to enroll students in default – right that even the special law denies to students in default – making it almost impossible to exercise such activity. The sentences’ grounds, however, is essentially the same: being the education a fundamental right, the individual cannot deny students the right to have access to this service. Here, in addition to human dignity (which enforces the supremacy of the existential interests) and solidarity (leading educational institutions to put the student's interest above self-interest), another relevant theme to the Private-Constitutional School of Thought appears to be above all: The immediate effectiveness of fundamental rights in private relations, which has been accepted without further questioning. After all, “the fundamental rights constitute universal constitutional guarantees. This is the reason why no one can claim them dammed only in the relations of public law. Besides this kind of interpretational mistake

would wrongly characterize civil law as a branch of legal science, oddly, not connected to the incidence of the constitutional law” (ROSENVALD, p. 30).

As noted from the decision below, the Court of Rio Grande do Sul, in the trial of Civil Appell 70004769899, held on April 16, 2003, has denied to a private university the right to refuse to renew the registration of a students in default, even with legal rule that would allow such practice, arguing that:

Private Education. Non payment of two monthly and renewal of Registration. Intelligence of Art. 6 of Law 9.870/99. The impediment to renewal of registration can be accomplished only if the student has at least three payments in arrears. The resolution depends on judicial intervention, and cannot be carried privately. Application of the sole paragraph of art. 1092 Civil Code. Appeal dismissed.

It stands out from the decision, the reasons which led the court to deny such right to the educational institution, recognizing, moreover, that it acted with abuse of rights:

a) the default does not allow the interruption of the service provision and should be used by the provider the appropriate legal ways to recover, in observance of due process; b) the abuse of rights is characterized, within the doctrinal view of the Law 8078/90, because the default cannot subject the student to leave the school; c) the Brazilian legal system requires judicial intervention to the legal contractual resolution, adopting the French system.

The legal permission, which provided to the university the right to not renew the contract, has been rounded establishing criteria not provided by law, arguing, essentially, that the breach - real estate question - could not lead to deprivation of access to services education – existential question

As seen, the imposition of solidarity in obligatory headquarters, rather than favoring the spirit’s elevation, presents a great opportunity to lead to the spoliation.

Conclusion

As Frost’s Mending Wall helps us to see, if it is true that there is something that doesn’t love a wall, it is also true that good fences make good neighbors. And still, it is important to understand that it is simply impossible expecting that law could be responsible for the implementation of the realm of love and solidarity in this world. The purpose of law is quite more modest: its purpose is to make possible the existence of good neighbors.

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³ Something there is that doesn't love a wall,
That sends the frozen-ground-swell under it,
And spills the upper boulders in the sun,
And makes gaps even two can pass abreast.
The work of hunters is another thing:
I have come after them and made repair
Where they have left not one stone on a stone,
But they would have the rabbit out of hiding,
To please the yelping dogs. The gaps I mean,
No one has seen them made or heard them made,
But at spring mending-time we find them there.
I let my neighbor know beyond the hill;
And on a day we meet to walk the line
And set the wall between us once again.
We keep the wall between us as we go.
To each the boulders that have fallen to each.
And some are loaves and some so nearly balls
We have to use a spell to make them balance:
'Stay where you are until our backs are turned!'
We wear our fingers rough with handling them.
Oh, just another kind of out-door game,
One on a side. It comes to little more:
There where it is we do not need the wall:
He is all pine and I am apple orchard.
My apple trees will never get across
And eat the cones under his pines, I tell him.
He only says, 'Good fences make good neighbors'.
Spring is the mischief in me, and I wonder
If I could put a notion in his head:
'Why do they make good neighbors? Isn't it
Where there are cows?
But here there are no cows.
Before I built a wall I'd ask to know
What I was walling in or walling out,
And to whom I was like to give offence.
Something there is that doesn't love a wall,
That wants it down.' I could say 'Elves' to him,
But it's not elves exactly, and I'd rather
He said it for himself. I see him there
Bringing a stone grasped firmly by the top
In each hand, like an old-stone savage armed.
He moves in darkness as it seems to me
Not of woods only and the shade of trees.
He will not go behind his father's saying,
And he likes having thought of it so well
He says again, "Good fences make good neighbors."