Education and deconstruction: deconstruction method and critical legal theory

Educação e desconstrução: método de desconstrução e teoria jurídica crítica

DOI: 10.55905/oelv21n11-012

Recebimento dos originais: 22/09/2023
Aceitação para publicação: 23/10/2023

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ABSTRACT
This paper aims to investigate the thoughts of the post-colonial theorist Gayatri Chakravorty Spivak, specifically presenting her ideas as a theorist belonging to Subaltern Studies and, in the end, analyzing how her ideas can be applied in an analysis within the field of law. The methodology used was bibliographic research.

Keywords: deconstruction, education, law.
RESUMO
Este artigo visa investigar os pensamentos do teórico pós-colonial Gayatri Chakravorty Spivak, apresentando especificamente suas ideias como uma teórica pertencente aos Estudos Subalternos e, no final, analisando como suas ideias podem ser aplicadas em uma análise dentro do campo da lei. A metodologia utilizada foi a pesquisa bibliográfica.

Palavras-chave: desconstrução, educação, direito.

1 INTRODUCTION
The following text aims to present the thoughts of the post-colonial theorist Gayatri Chakravorty Spivak, specifically her theoretical ideas within Subaltern Studies, seeking to demonstrate how to apply them in legal analyses.

In order to enhance the reader’s understanding of the subject matter addressed here, it is deemed essential, before introducing G. C. Spivak’s thought, to provide a brief genealogy of post-colonial thought in the first instance.

In a second instance, Spivak's thought will be contextualized within Subaltern Studies, explaining the deconstruction method and its focus on education. Subsequently, the ways of using the author's thoughts within legal theory are discussed. This is a bibliographic research on the deconstructive method.

2 THE POST-COLONIAL
The term post-colonial encompasses the temporal idea of the decolonization process (from the second half of the 20th century onwards). This idea is linked to the understanding of the need for independence and emancipation of societies that are understood as exploited by imperialism and neocolonialism (especially on the Asian and African continents) (Ballestrin, 2013). Thus, post-colonialism analyzes the effects (political, philosophical, cultural) left by the culture of colonialism, which, from the 1980s onwards, was evidenced by theoretical studies (mainly literary and cultural) in universities in the United States and England.

Post-colonial thinkers initiate their analyses based on the assumption that colonialism leaves legacies in all aspects of the lives of colonized peoples, such as gender,
race, and ethnicity. It also emerges as a condition offered by post-structuralist, deconstructivist, and post-modern studies, primarily identified as an antagonistic and binary relationship of identities (colonizer/colonized, barbarian/civilized, and so on) (Ballestrin, 2013).

In this regard, within the realm of post-colonial studies, Walter Mignolo (2003) is the author who identifies the term “colonial difference.” Franz Fanon (2010) is responsible for expressing the realization in 1961 that the presence of the other prevents me from being entirely myself, considering the impossibility of forming complete identities in the face of the colonial relationship as an antagonistic relationship (Ballestrin, 2013).

It is important to note that post-colonial thinkers can be found even before the understanding of the term “post-colonialism” as a current of thought. Authors like Edward Said, Albert Memmi, Gayatri C. Spivak, and Hommi Bhabha played a significant role in breaking away from the binary identification of identities.

Ballestrin (2013) highlights that the postcolonial argument, despite its complexity and diversity in approach, recognizes and advocates for the interests of the colonized. It aims to overcome the relationships of colonization and colonialism, serving as a tool committed to eliminating these dynamics. It is crucial to understand that this argument is not exclusive to diasporic authors or peripheral universities, challenging the notion that only specific groups have legitimacy to work with it.

Fundamentally, four authors are responsible for the epistemological basis in Social Sciences: Aimé Césaire, Albert Memmi, Franz Fanon and Edward Said. However, at the same time, it is important to consider an epistemic, intellectual and political movement in the 1970s, called the Subaltern Studies Group, led by Ranajit Guha, which contributed to the reinforcement of post-colonial thought (Ballestrin, 2013).

In the 1980s, the post-colonial debate was disseminated in the field of literary criticism and cultural studies in England and the United States, with the most well-known authors in Brazil being Homi Bhabha, Stuart Hall, and Paul Gilroy (Ballestrin, 2013). In the 1990s, Latin America became involved in post-colonial debates, founding the Latin
American Subaltern Studies Group in 1993 and publishing the group’s manifesto¹, in Spanish in 1998. Castro-Gomez and Mendieta (1998, p. 16) explain that the Inaugural Manifesto of the Latin American Subaltern Studies Group incorporates ideas from Ranajit Guha, aiming for a reconstruction of Latin American history as an alternative to the Cultural Studies project. The group emphasizes political categories such as “class,” “nation,” and “gender,” in contrast to Cultural Studies which, in their view, prioritized descriptive concepts like “hybridity” and placed excessive value on the influence of media and new technologies in the collective imagination.

In the Latin American Group of Subaltern Studies, Walter Mignolo proposes an analysis with dense criticism, denouncing the failure to adequately break away from Eurocentric authors. Essentially, he recognizes that the experiences of subaltern Latinos should not be directly compared to the Indian response to colonialism. This is because Latin America’s history of domination and resistance remained largely overlooked in the discussion. These theoretical divergences led to the disintegration of the Latino Group, and in 1998, they would later form the Modernity/Coloniality Group. It is important to note that, later, the Modernity/Coloniality Group ends up generating discussions around concepts such as decolonial² and decolonial turn³. Such concepts do not communicate

¹ *The Founding Statement* was originally published in 1993 in Boundary 2 Magazine, but it was only in 1998 that Santiago Castro-Gómez translated it into Spanish, called *Manifesto Inaugural del Grupo Latino-amerикано de Estudos Subalternos* (Ballestrin, 2013).

² The idea of Decoloniality was already present in Dussel and Quijano. Ballestrin (2013) explains that the removal of the letter “s” marks the distinction of the decolonial project from the Modernity/Coloniality group in relation to the historical idea of decolonization, which involved national liberation during the Cold War. Furthermore, this idea is embedded in a different lineage of thought, being a distinctive component of M/C, as claimed by Mignolo. The decolonial project also differs from postcolonialism, which has its roots in European critical theory (Foucault, Lacan, and Derrida) and the experiences of intellectual elites in former English colonies in Asia and North Africa. Decolonization, in turn, encompasses various dimensions related to the coloniality of being, knowledge, and power but is not widely accepted by the mainstream of postcolonialism. Despite being influenced by postcolonialism, the Modernity/Coloniality Group rejects association with this trend, as well as other influences that contributed to the group’s development. However, what is original in decolonial studies seems to be more related to the application of new perspectives to old Latin American issues than the issues themselves.

³ Ballestrin (2013) explains that the “decolonial turn” is a term introduced by Nelson Maldonado-Torres in 2005, signifying a theoretical and practical movement of political and epistemological resistance against the logic of Modernity/Coloniality. Decoloniality is seen as the third element of Modernity/Coloniality. According to Mignolo (2008), the very conceptualization of coloniality as a constituent part of modernity is already a decolonial thought in action. However, Mignolo also suggests that the roots of decolonial thinking are older, emerging as a response since the early days of Modernity/Coloniality.
with post-colonial studies, as they are forged by authors who came out of the Latin American Group of Subaltern Studies who sought precisely a complete break with Eurocentric authors (Ballestrin, 2013).

It is also worth noting that most Latin American subalterns did not join the Modernity/Coloniality Group, where Mignolo was one of the founders.

In this context, Grosfoguel (2008) criticizes Latin American scholars for favoring Western thinkers such as Foucault, Derrida, Gramsci, and Guha, among whom three are Eurocentric, with only Guha representing a global Southern perspective. He argues that by doing so, they betrayed the purpose of subaltern studies. Grosfoguel also points out that the disintegration of the Latin American Subaltern Studies Group was partly due to a divergence between those who viewed subalternity as a postmodern critique (a Eurocentric criticism of Eurocentrism) and those who understood it as a decolonial critique (a criticism of Eurocentrism by silenced and subaltern knowledge). For Grosfoguel, the dialogue with the Latin American Subaltern Studies Group underscored the need to epistemologically transcend and decolonize Western epistemology and canon.

As a result of this rupture, much of the confusion between studies understood as post-colonial and decolonial arises. In summary, post-colonial studies assume that these contexts of colonization are already overcome (where challenges related to their legacies carry a negative burden). At the same time, decolonial authors understand that coloniality is a page that still needs to be turned and goes beyond the visible, material, and immaterial manifestations of domination. For decolonial authors, it is not about addressing the effects and legacies but understanding that we still live in a process of colonization, whether it is in terms of power or thoughts. In other words, Latin America is still in a situation of colonization. In general terms, decolonial thought has a key concept that is not part of the post-colonial, which is the concept of coloniality⁴ - of power, knowledge, and being - as proposed by Aníbal Quijano (2008).

⁴ Ballestrin (2013) discusses the concept of the Coloniality of Power, originally developed by Aníbal Quijano in 1989. This concept points to the persistence of colonial relations, both economically and politically, even after the end of colonialism. It highlights the continuity of colonial forms of domination rooted in the cultures and structures of the modern/colonial capitalist world-system. Moreover, the Coloniality of Power provides a contemporary explanation by demonstrating how processes presumed to have been overcome by modernity are still present and influencing social and political dynamics.
However, not all post-colonial thinkers will start from a Marxist perspective, but most of them do. The subaltern group comprises Indian thinkers, and Gayatri C. Spivak is one of those authors. She intends to challenge the structures of the very group she belongs to, drawing from literary analysis, philosophy, psychoanalysis, and various other fields, primarily in education.

2.1 LOCATING SPIVAK’S THOUGHT - SUBALTERN STUDIES

In the 1980s, Subaltern Studies gained international recognition outside of India, thanks to authors like Partha Chatterjee, Dipesh Chakrabarty, and Gayatri C. Spivak. The term “subaltern,” borrowed from Antonio Gramsci, was interpreted as a fragmented and episodic class or group with a historical tendency toward temporary unification through the suppression of dominant classes, as noted by Ballestrin (2013).

After the Second World War in Europe, it was understood that interpreting a text depended on both the temporal context (contextual and theoretical time) and the theoretical framework. This realization led to a dual movement that would ultimately transform Western philosophy. Firstly, the ability to explain the production of meaning emerged since the structuralist era. Secondly, the most influential authors of the time concluded that by delving deeply into the latent possibilities of structures, reason and the subject would cease to exist. Consequently, thinkers like Foucault, Derrida, Barthes, Deleuze, and other renowned figures of the time initiated a movement known as deconstructionism, as highlighted by Rocha (2013).

Spivak is regarded as one of the key authors who translated Jacques Derrida, and the Subaltern Studies were criticized for the excessive introduction of Deleuze and Derrida’s deconstructive ideas, as pointed out by Ballestrin (2013).

Spivak’s analysis does not ignore the fact that her subjects are subalternized by colonial practice, primarily by countries self-designated as Western, with a specific characteristic of domination relating to the entwining of violence originating from processes of servitude and political control.

According to Spivak (1999, p. 423), the term “deconstruction” was originally coined by Derrida, and she seeks to interpret deconstruction by providing practical
principles for philosophers who identify as deconstructive. This stance is explained in “A Critique of Postcolonial Reason.” Derrida used the term “destruction,” which was based on Heidegger’s works, particularly in the second part of “Kant and the Problem of Metaphysics” (1929).

So, the change of the term “destruction” to “deconstruction” will symbolize a modification made (by Derrida) of a Heideggerian program. Because, in Derrida’s first texts, gestures were found that involved distinguishing each element from everything that it was not, he sought to demonstrate through rhetorical maneuvers the elaboration of a definition as a subject or as an argument, and that this was a deviation from antonyms (Spivak, 1999, p. 423).

With this, we notice what Spivak (1999, p. 424) calls traces of the first differance - Différence is the inevitability of differentiation (distinction) and deferral (separation) of the trace or mark of everything that is not what is being postulated. That is considered a useful formula for deconstruction since, when given a name, différance was already subject to its law. Moreover, this work of tracing différance ends up placing similarity in a relationship of différance with what can only be “named” radical alterity.

In “A Critique of Postcolonial Reason,” Spivak (1999, p. 425) demonstrates the connection of Derrida with other philosophers and indicates that in Derrida’s essays, there is an incorporation of criticisms by authors about other authors to subject the author’s argument to a kind of dismantling. That constitutes a sign of affirmative deconstruction. Spivak (1999, p. 425) refers to this act as “critical intimacy,” which she considers different from regular criticism.

In the same work, specific works of Derrida are highlighted to explain how the work of deconstruction occurs in each of them. "The Ends of Man" (1968) is the work in which Spivak comprehends that, for the first time, the distinction between Derrida’s project and Heidegger's project was made. In a 1982 conference, based on the radical alterity of différance, Derrida announced a movement that emphasized the relationship

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5 As an example cited: Violence and metaphysics: an essay on the thought of Emmanuel Levinas, in which Derrida incorporates criticisms that Levinas makes to Heidegger (Spivak, 1999).
between ethics and politics, considered by Spivak (1999, p. 425-426) as a sharp turn towards the other, moving away from mere philosophical correctness.

Spivak (1999, p. 424-426) also argues that in “Declarations of Independence” (1976), Derrida adopts the terminology from Austin’s Theory to discuss the constitutional subject. This text clarifies Derrida’s various engagements with the issue of philosophical nationalism and acts of constitution. In “Signature Event Context” (1977), Derrida comments on J. Austin’s Speech Act Theory and observes that truth is a pre-formative convention that produces effects extending beyond the transmission of semantic content (where each situation modifies the reiterated truth).

Therefore, placing Derrida's works into context, Spivak (1999, p. 426) asserts that deconstruction occurs in two phases. The first phase involves understanding *differâncce* which means recognizing that all institutions of origin conceal the separation of something different from the origin to establish the origin itself. In her view, any response can be given to “original” questions when it’s understood that original thought is something assumed and supposedly distinct from what it differentiates.

The second phase of deconstruction is more “affirmative” (a term coined in the mid-1970s), which understands it as a call to the other directed towards what could be prior (which is the trace) of the other (when comparing the origin of the one instituting someone or the origin itself). This establishes a new metaphor-concept of “the experience of the impossible” (Spivak, 1999, p. 426). In other words, there is a preconceived radical alterity that is erased when named and perceived only as a category of its effects; it is presented as an “experience.” In this context, questions like justice and ethics can be perceived as the “experience of the impossible” (experiences of radical alterity).

Furthermore, in “A Critique of Postcolonial Reason,” Spivak (1999, p. 427), mentions that in the second phase of deconstruction, formalizations can be seen as a house in the middle of the road with an open door inviting people to work (in this case, the author refers to graduate students).
Another text by Derrida highlighted by the author is “Force of Law” (1989), which contains a central statement of Derrida's ethical turn. In this text, it becomes evident that justice does not convert into law (and this path is an aporia); justice reveals itself in law along with its own erasure. Similarly, within this “deconstructive embrace,” ethics is found as the “experience of the impossible,” and politics as the calculation of action (Spivak, 1999, p. 428).

For Spivak (1999, p. 429), Derrida’s work of deconstruction can be interesting for many marginalized cultural systems as a development from within the “aftermath of the Kantian Enlightenment,” which were so compromised (gender point of view) and stagnant (including what Heidegger noticed in Kant's own line). They are related connections (with Derrida’s deconstruction) but with different ways of operating, as they remain trapped in descriptive practices and/or formalized in academic or disciplinary calculation. Then, there is a change in deconstructive philosophy, as it is combined with discourses accessible to academic disciplines related to it (such as literature, architecture, theology, or feminism). Spivak (1999) understands that there is a restriction on debates despite being useful.

Regarding Derrida's ethical shift and its relationship with Heidegger, as well as in the context of post-colonialism and deconstruction, in the rare cases where they risk beginning to work by breaking their own structure, they are still not identical to the beginning of deconstruction outside the specific formalized calculation of the academic institution (Spivak, 1999).

Spivak (2012) also presents an issue related to information in the era of globalization, which ends up harming the humanities and social sciences. That is because the legacy of the European Enlightenment is questionable. After all, our world is currently marked by hope (or lack thereof) and sentimental nationalism (or post-national sentimental globalism). Thus, she uses the process of deconstruction as a proposal to productively dispense with the legacy of the European Enlightenment, which is aesthetics

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6 Derrida constantly uses rhetorical dimensions of language to interact with the reader, according to Spivak (1999, p. 427): “Law is not justice, [although] it is just that there be law,” says “Force of Law” (notice that the connective has to be supplied; Derrida philosophizes interactively—the reader provides connections in order to make the text work—because he uses the rhetorical dimension of language).”
(productive dispensing has the idea of aesthetic education). This act of undoing aesthetics is proposed as an alternative means for society, which cultivates what Spivak calls the mantra of hope. It is done by observing the fault lines of the act (without accusation and without excuse for using it).

The proposal of productive undoing will be focused on the academic sphere because globalization has affected all aspects of our lives, and only aesthetic education will allow us to continue to prepare for these changes, which represent an unequal contemporaneity, seemingly accessible and incapable of being interpreted within the framework of polarity (modern/tradition, colonial/post-colonial). The nature of aesthetic education is described by Spivak (2012, p. 2) as “sabotaging Schiller.”

The idea of "sabotaging Schiller" is based on Derrida because he understands that the modern university, everywhere, is a variation of the medieval European education model. Knowledge management attempts to undo the double bond in these bases of change, which she calls the practice of sustainability, which involves doing the least of one thing to achieve the most of another, and this is a shift from Schiller's transformation of Kant’s critical philosophy (Spivak, 2012).

That necessitates a reorganization of desires in the global contemporaneity. This reorganization occurs in two waves: the first reinforces what she calls the mantra of hope, and the second is the reformulation of hope because it recognizes that the humanities and social sciences are “peripheral at the top,” so hope would signify the end of the subaltern (Spivak, 2012, p. 4). “Can the Subaltern Speak?” is regarded as one of the cornerstones of postcolonialism. It critiques Western intellectuals Deleuze and Foucault, despite their post-structuralist and deconstructionist affiliations, and engages in self-critique within Subaltern Studies. This is achieved through a reflection on the discursive practice of the postcolonial intellectual, as aptly pointed out by Ballestrin (2013).

Almeida (2010) explains that Spivak understands the subaltern as someone who lacks a voice to be heard, implying that no act of resistance can occur on behalf of the subaltern without becoming entangled in hegemonic discourse. The subaltern is silenced and reduced to an “other,” an essentialist classification that fails to incorporate the notions of differance or hybridity. According to the author, not only can the subaltern not speak,
but the postcolonial intellectual cannot speak for them either, as emphasized by Ballestrin (2013).

The term subaltern is brought from Marxist thought by Gramsci, and its use relates to the processes of subalternization inherited from colonialism, which rendered the subaltern incapable of being considered historical agents within the framework of hegemonic narratives. The subaltern is someone who, from the outset, carries the stereotype of a historical agent who has been done a favor, reinforced by the myth that the colonization process is necessary because it carries a civilizing and salvational notion articulated in various dimensions. It is as if a mirror in front of the subaltern reflects a preconceived image, and they must continually attend to this reflected image. That affects knowledge production because colonial domination processes impose models that are not produced from the local reality of subjects who have undergone a violent process of political and cultural domination (Góes, 2018).

In “Can the Subaltern Speak?” Spivak (2010) explores dichotomies (such as barbarism - savage, civilized - good, right - wrong, beautiful - ugly, knowledge - ignorance, truth - lie, development - decline, literature - enlightenment, and so on) that elevate the colonizing culture to a position of superiority at the expense of those that were colonized. Her critical point lies in identifying the vulnerabilities within the colonizing discourse and aiming to deconstruct it based on these weaknesses.

Thus, in general terms, the subaltern studies group bequeaths the mission of rewriting the trajectory of India, of rewriting literature, of re-territorialization, and offering other narratives that are different from those addressed by the colonizers. Questions are asked about the subaltern, such as: can he produce narratives? What are the narratives produced by him? Who can speak for the subordinate? In these so-called emancipation processes brought about by the liberal foundation of rights, who spoke for the humans? What degree of rupture and emancipation do these speeches bring? Are they for all humans, including subordinates? The processes end up generating myths around the colonized, and the colonizer, the subaltern, ends up being educated to be a foreigner in their own land. When we take the mirror analogy presented by Spivak (2010), we realize that the subaltern did not have the chance to see and recognize himself as he is to
produce narratives about himself. These are narratives produced by categories (mainly European), making it possible to feel the limits of this discourse in practice.

It is important to note that in post-colonial thought, the subaltern differs from the oppressed. The processes of colonial domination produce a differentiated effect on colonized peoples, leading to a position of subalternity, the potential to make the subject subaltern. The colonial discourse that subalternizes the subject does not start from this condition. The author discusses the mechanisms that will govern domination processes and, consequently, the dichotomous processes mentioned earlier. No place is offered for the subaltern; if it is, it must be within the framework of reproducing Eurocentric thought. Spivak (2010) problematizes this issue, using the figure of the Indian woman, who is far from the model of someone who can proclaim knowledge, to criticize Eurocentric reason. She understands that a forged awareness is not necessarily the one that fits.

The author brings this reflection about the subaltern, but within the reality in India, recognizing the processes of domination and the consequences they bring and proposing an awareness so that there is justice in producing fair history. It proposes matrices that seek to break with the legacy left by the colonizer's production of knowledge (Spivak, 2010).

So, seeking a proposal through the aesthetics of education, Spivak (2012, p. 6) explains how she will develop this work, which will be through the recognition of a "hierarchical series that will consist of messages." Because the discourse through which people are trained to think fails when it comes to topics such as nationalism and religion. As a result, aesthetics short-circuits the task of shaking habits (to solve problems) or even stops examining them. Thus, there is a need to stop considering the literary source as a substantive element of reasonable thought. Otherwise, the task of aesthetic education that Spivak (2012, p. 7) proposes will fail: to introduce another person's text based on Gramsci, using the instrumentalization of the “new intellectual,” the subaltern. It is understood, therefore, that education projects bring a need to establish a distinction of homogeneous “animality.” The premises of an argument must be “rediscovered” and “reexaminable” by the man of the masses, as he is educated to be a citizen. She
understands that people learn how to teach from the historical-cultural text in which a particular group of students is placed.

However, the proposal of Aesthetic Education intends to teach the humanities in a way that makes it clear that all discussions are, in a certain way, “contaminated.” Spivak (2012, p. 10) still uses Gramsci to say that the intellectual's way of being can no longer consist of elegance but of active participation in practical life. And that the training of aesthetic imagination must teach the subject to play and discover (theoretically and practically) the premises of the habit that forces us to transcend religion and the nation. They are also an essential point for the issue of the focus of Aesthetic Education proposed by Spivak, tertiary and postgraduate education, as it is understood that it is at these levels that the reproduction of citizens and teachers is concentrated, and that is where the legacy is used of the Enlightenment.

3 IDEAS FOR USING SPIVAK IN LAW

The fundamental question to consider is how Subaltern Studies could contribute to Brazil's critical theory of law. How to use Derrida’s idea of deconstruction, used by Spivak, within the Brazilian problematic? Thinking within the context of education, of law teaching at universities, the great Eurocentric influence of thinkers as an alternative for resolving Brazilian conflicts is noticeable. In this text, the focus of the discussion will be on legal culture in the tradition of possession law in Brazil.

In the legal reality of Brazil, there is the imposition of private property in the face of an entire land diversity. The logic of private property is the paradigm reflected in the mirror, and other forms of property must adapt to it.

Regarding the understanding of possession and property in Brazil, in the second half of the 19th century, legal culture began to shape itself more distinctively as a result of the new phase of legal courses that were inaugurated in Brazil, the political situation and the economic situation in an era of “modernity” of law.

In the cultural context of Brazil during the second half of the 19th century, there were significant developments indicating a shift in Brazilian law and legal culture, despite many continuities. A new generation of national jurists and professors emerged, no longer
trained in Coimbra but in Brazilian legal academies. During this period, there was a legislative framework in place (such as the Imperial Constitution of 1824, the Criminal Code of 1830, the Commercial Code of 1850, and the Land Law of 1850), and commentators began to emerge to discuss this body of laws. Additionally, there was an increase in doctrinal production (books and manuals) authored by Brazilian jurists (Staut Júnior, 2009).

A mix of traditions in Brazilian law is quite pronounced, especially in the realm of possession theory and the formation of the 1916 Civil Code, which can be described as a patchwork quilt. From the second half of the 19th century until the publication of the 1916 Civil Code, it is evident that national authors who developed possession theory were divided into two groups based on their conception of possession: the subjective conception, championed by Savigny, and the objective conception, attributed to Ihering.

In matters involving rights in rem, much of it was based on common law. From reading the works developed by the doctrine, the criticism of the legislation in force at the time and the defense for the systematization of civil law were visible, with mentions of the German Pandectistic school and French exegesis referencing the need for modernization of law. On the other hand, at the beginning of the 20th century, doctrines that preceded the Civil Code of 1916 criticized the application of Roman law. Therefore, it is clear that a large part of the possessory doctrine was divided regarding the sources that should be used in Brazilian law (Staut Júnior, 2009).

When the Civil Code of 1916 was published, it was mainly influenced by the French Civil Code (1804), the Portuguese Civil Code (1867) and the German Civil Code (1900). It also subsidiarily covered reflections of the Prussian Civil Codes (1794); from Bavaria (1756); from Sardinia; of the Two Sicilies; from Lusiana; from the Duchy of Baden; from the Cantons of Vaud; from Freiburg; from the Austrian (1811), from the Canton of Berne (1831); from Holland (1838) and Chile (1856) (Staut Júnior, 2009).

All these processes aimed at building a legislative apparatus that was sufficient to meet the relational demands at the time; however, it is clear that there was never a genuine
intention to analyze the needs of land conflicts that emerged from the bottom up, mainly because the Brazilian elite had a clear interest in the creation of the 1916 Civil Code.

Notably, the search for the “modern” concept of ownership was based on Napoleon's Code. Thus, we end up creating a mixed legal model that is solidified in the false idea of "better" and "more evolved," and that generates consequences, the main one being the problem created by the Brazilian land chaos, in which territorial guarantees for the traditional population were only received in the creation of the Federal Constitution of 1988, rights that are constantly threatened and question legal security. As pointed out by Grossi (2006), thanks to the openings created by ethnologists and sociologists into Asian, African, and American civilizations, there is a vibrant proliferation of attention to cultures belonging to diverse legal realms. In these contexts, it's not so much the land belonging to humans, but rather humans belonging to the land.

According to Grossi (2006), it should be clear that this commonly used but improper term does not evoke the image of non-individual ownership (such as traditional condominiums), nor that of property owned by a legal entity, even a public one, nor even that of the State (which would always be individual, even if not linked to a physically existing individual). Instead, it represents a pole that is antithetical to what we in the Western world typically understand as property—a framework for organizing the relationship between humans and land characterized by fundamental choices entirely inverted in comparison to the apparent underlying thread of our history.

Thus, we can see the highly elitist and Eurocentric culture tied to the customs still existing in colonial times and incapable of responding to current demands. That is not even based on the fact that the norm is insufficient, but rather the lack of political interest (often to even enforce the norm).

Given this, how can Spivak’s contributions be used? Analyzing the problem highlighted above and starting from Spivak’s deconstruction method, we have firsthand the element of educational practice in law teaching. Starting from this point, the deconstructive and more comprehensive teaching method brings forms and categories

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7 Not only for these populations, but for all businesses that make up the chain of the supposed protected asset.
present in the current problem and even new (old) ways of thinking about law from the point of view of legislators and judges, ways that would more encompass the cultural diversity present in Brazil.

Obviously, as an example, the teaching of the right to possession/property carried out in universities could be more comprehensive, bringing other conceptions of land occupation/use that are old and centuries-old conceptions already used by specific traditional communities (riverside, quilombolas, indigenous people). The very conception of pro-undivided title (collective property), as stated in Article 68 of the Transitional Constitutional Provisions Act of the Brazilian Federal Constitution of 1988, is “borrowed” from the conception of collective title provided for in Italian legislation. So, why not start from the paradigms, deconstruct them constructively (program cited by Spivak), and apply them concerning Brazilian problems, listening to the population’s desires?

In constitutional matters, progress can be seen when analyzing the judgment of Direct Action of Unconstitutionality (ADI) No. 32398 and Special Appeal (RE) no. 4946019. These are problems that the Brazilian Judiciary faced that concern characteristics specific to the nation and that were thought from the perspectives of the people who participate in it.

In this regard, Rodriguez (2019) remarks that there is no room here to delve into the regime of private property under the auspices of social function. For our purposes, it suffices to say that liberal legal institutions were transformed through parliamentary action by the working class. To illustrate, the employment contract ceases to conceal labor exploitation and instead operates as a means of protecting the worker. Similarly, private property no longer remains sacred and individualistic but takes on collective dimensions: its content and function become contested and defined based on the interests of society as a whole. This transformative process makes it evident that the status quo is not immutable and can be challenged through formal institutions.

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8 Which aimed to declare the decree that regularizes quilombola territories unconstitutional. It was dismissed as unfounded, recognizing the constitutionality of Decree 4887/2003.
9 Which ended up declaring constitutional the law in Rio Grande do Sul that allows the sacrifice of animals in religious rituals.
In the case of RE No. 494601, recognizing religious practices at a constitutional level that are rooted in the knowledge of the people practicing them, rather than criminalizing, represents a form of acknowledging rights based on the language of assertion. It serves as a way to demonstrate to the population that certain discussions are already imbued with ideas of what is right and wrong. To paraphrase Spivak, cultivating an aesthetic imagination in this matter involves teaching individuals the premises of the habit that compels transcendentalization. As Rodriguez (2019) aptly points out, the teaching of African history seeks to valorize black culture in an attempt to dispel the stigmas weighing on black Brazilians. In the context of Afro-Brazilian religions, considering the terreiro as a space for subjectivity and the construction of resistance against attacks from specific religious groups, we can also view them as an alternative form of social regulation in opposition to the criminalizing hegemony.

In other words, there are categories and elements that are included in the notion of the good life that are imported, and, therefore, the question arises: how will the law deal with this? How has it been facing this? How will he face these categories that do not serve him? Does it reflect something that matches the practical reality of people? Or do you even wonder where agroecology debates fit in, given the burden that agribusiness carries?

Rodriguez (2019) argues that there is an evident tension between law as meaning and law as power. In the case of indigenous issues, it is possible to structure the law to recognize the legal nature of the norms created by the various communities living in Brazil.

Therefore, using the program pointed out by Spivak in the area of law education could be one of the starting points for thinking about current problems (which are old) more comprehensively and inclusively. Including the use of a national bibliography to construct thinking on specific issues. For example, starting from the perspective of
territory and territoriality, the law proved to be more open to understanding these concepts.\footnote{This can be seen from the analysis of authors mentioned in the votes of ADI No. 3239, such as: Alfredo Wagner, Carlos Frederico Marés, José Afonso da Silva, Maria Cristina Vidotte, Liana Amim. Beatriz Nascimento and Antônio Sérgio Guimarães could still be added to this list.}

The objective here is to demonstrate that Brazil has an extensive bibliography on specific topics that are little explored and should be better used. Certain analyses could be carried out with greater success if they started from the bottom up, from the factual reality of the individual involved in the case in question. However, using the deconstruction method in the way proposed by Spivak would be an interesting idea to rethink the bases and take advantage of them in a more comprehensive, inclusive way and focused on the country’s own realities in the face of the plurality of existing norms, rights and cultures.

4 CONCLUSION

Spivak is considered one of the most important authors who translated Jaques Derrida, a member of the deconstructivist movement. The author deepens Derrida’s vision and encompasses Gramsci’s ideas, forging analysis about the subaltern in India. She took advantage of some ideas from the authors who inspired her that came from the Enlightenment, and others were (and are) used within the method of deconstruction or productive undoing.

It is considered that a large part of Spivak’s analysis contributed to an investigation into subaltern thinking within the Social Sciences. However, in Law, it has not yet been used. It is believed that the program about the deconstruction method (productive undoing) can be of great value for analysis in the legal sphere, including as a hypothesis for analysis in the face of the fragmentation of law (and can be better used between law and politics as well). Furthermore, it is a form of unification between knowledge or reflections to be carried out in the current historical time, in which democracy is in crisis due to insufficient responses to current problems, which feed the authoritarian practices of political agents.
Analyzing the exemplary problem presented, what is understood today as civil law in matters of possession and property was developed uncritically, oblivious to the problems faced by the vast majority of the population. Despite an attempt to modernize, it is still possible to perceive (unconsciously or not) the old mentality stuck in a limited and fractional interpretation of the law to the extent that formal equality and freedom are at odds with real (concrete) law in the concentration and distribution of land.

Therefore, it is clear that the reading of the various codes that have been carried out over the centuries is an ingenious artifice that often does not translate what practical needs represent or that focuses on solving the practical needs of elitist groups and (of a certain way) minorities. Legislative legislation is often created to resolve a conflict (often with individual interests), and when created to resolve interests of a collective nature, they are beyond “convenient” discretion for application.
REFERÊNCIAS


