Constitutional vectors of intellectual property

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Abstract: This article provides an overview of the constitutional foundations underlying the legal concept of intellectual property. It is based on the premise of a delicate balance between the fair reward for intellectual effort – secured through exclusive protection – and the promotion of industrial and cultural development, which requires the temporariness of such protection to ensure subsequent access to the public domain. Within this framework, the analysis traces the historical development of intellectual property protection in Brazil, from the colonial period to the 1988 Federal Constitution, incorporates relevant doctrinal perspectives, and examines the interpretation given by the Federal Supreme Court in its judgment of Direct Action of Unconstitutionality 5,529, particularly regarding the social function of intellectual property and the principle of free competition.

Keywords: intellectual property; social function of property; free competition; economic development

The development of intellectual property, an expression that encompasses the institutes of industrial property and copyright, has led to an ever-increasing distance from its foundations, so that it is often difficult to establish the relationship between the categories of law created to meet new market realities and their constitutional vectors, which leads to the loss of the systematization necessary for the organization of this branch of legal science.

In fact, in the field of intellectual property, where the creation of new rights is fertile, there is passionate discussion about the tension between the need for adequate protection of intellectual creations and the obstacles that excessive protection could bring to the detriment of the vectors of technological, economic and social development that underpin them.

What is at stake is the delicate balance between the fair reward for human intellectual effort consisting of the granting of exclusive protection and the stimulus to industrial and cultural evolution, which makes it advisable to impose a term on this protection, after which the aforementioned intellectual creations pass into the public domain.

The creative act, called *magia* by Italians, is the primary source of these rights, recognized since the imperial Constitution of 1824, with the task of determining the form and extent of its exercise being reserved to the ordinary legislator, which must drive technological and economic development, taking into account the social interest of the country (art. 5, item XXIX, of the Federal Constitution of 1988).

In Brazil, the protection of industrial property dates back to the colonial period, as can be seen in the text of the Decree of April 28, 1809, issued by the Prince Regent of Portugal, Dom João:

> VI. It being very convenient that the inventors and introducers of some new machine, and invention in the arts, should enjoy the exclusive privilege, in addition to the right they may have to the pecuniary favor, which I am pleased to establish for the benefit of industry and the arts; I order that all persons in this case present the plan of their new invention to the Royal Board of Trade; and that the latter, recognizing the truth and foundation of it, grant them the exclusive privilege for fourteen years, being obliged to publish it thereafter, so that at the end of that period the entire nation may enjoy the fruit of that invention. I also order that an exact review be made of those that are currently granted, making it public in the manner determined above, and revoking all those who, by false allegation, or without well-founded reasons, obtained such concessions.

At the constitutional level, the protection of intellectual property dates back to 1824. The imperial Constitution established, in its art. 179, item XXVI, that:

> [...] inventors shall have ownership of their discoveries or their productions. The law shall assure them a temporary exclusive privilege or shall remunerate them in compensation for the loss they may suffer through popularization.

Expanding the scope of protection of the matter, our first republican Constitution of 1891, provided, in its art. 72, § 25, the following:

> [...] Industrial inventions will belong to their authors, to whom a temporary privilege will be guaranteed by law, or a reasonable reward will be granted by Congress when it is convenient to popularize the invention.

§ 26 of the same article further clarified that:

> [...] authors of literary and artistic works are guaranteed the exclusive right to reproduce them, by printing or by any other mechanical process. The heirs of the authors shall enjoy this right for the period determined by law.

And finally, in § 27, a initial but relevant reference to trademarks appears for the first time: "The law will also ensure the ownership of trademarks".

Walking through the history of Brazilian constitutions, it is worth highlighting that the 1934 constitution established, in its art. 113, number 18, that "industrial inventions will belong to their authors, to whom the law will guarantee a temporary privilege or grant a fair reward, when their popularization is convenient to the community".

Additionally, the protection granted to distinctive signs was expanded, with paragraph 19 of the same article stating that "[...] the ownership of industrial and commercial trademarks and the exclusive use of the commercial name are guaranteed". Paragraph 20 of this article completed the protection of intangible property, stating the following: "The authors of literary, artistic and scientific works are guaranteed the exclusive right to produce them. This right shall be transferred to their heirs for the period determined by law".

Contrary to previous constitutional movements, the Federal Constitution of 1937 granted the ordinary legislator broad autonomy to regulate the protection of intellectual property, since art. 122, number 14, established that:

> [...] the Constitution guarantees Brazilians and foreigners residing in the country the right to freedom, individual security and property, under the following terms:
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> [...]
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> 14. [...] the right to property, except for expropriation due to necessity or public utility, subject to prior compensation. Its content and limits will be those defined in the laws that regulate its exercise.

The Federal Constitution of 1946, considered by many to be the most beautiful work of the Brazilian constitutional legislator to date, dates back, in turn, to the Constitution of 1891, establishing, in its art. 141, §§ 17, 18 and 19, that:

> [...] industrial inventions belong to their authors, to whom the law shall guarantee temporary privilege or, if popularization is in the interests of the community, shall grant a fair reward. The ownership of industrial and commercial trademarks is assured, as is the exclusive use of the commercial name [...] [and] the authors of literary, artistic or scientific works shall have the exclusive right to reproduce them. The heirs of the authors shall enjoy this right for the period established by law.

Along the same lines, the Federal Constitution of 1967, in its art. 150, § 24, established that "[...] the law shall guarantee to the authors of industrial inventions a temporary privilege for their use and shall ensure the ownership of industrial and commercial brands, as well as the exclusivity of the commercial name", bringing together, in the same paragraph, patent and trademark protection.

Finally, the 1988 Federal Constitution proved to be especially rich in provisions concerning the intellectual property system, as can be seen in several paragraphs of Article 5:

> XXIII – the property will fulfill its social function;
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> [...]
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> XXVII – authors have the exclusive right to use, publish or reproduce their works, which may be transferred to heirs for the period established by law;
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> XXVIII – the following are guaranteed, under the terms of the law:
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> a) the protection of individual participation in collective works and the reproduction of human images and voices, including in sporting activities;
>
> b) the right to monitor the economic use of works created or in which they participate by creators, performers and their respective union and association representatives;
>
> XXIX – the law shall ensure to the authors of industrial inventions a temporary privilege for their use, as well as protection of industrial creations, ownership of brands, company names and other distinctive signs, taking into account the social interest and the technological and economic development of the country.

It should be noted that, although the guidance regarding the objective of achieving the social interest and technological and economic development of Brazil was present in some previous constitutions, the 1988 constitution is the first to expressly reflect it in the clauses concerning intellectual property.

For this reason, despite the passage of time and the notable development of the discipline of intellectual property in universities and courts, it should be emphasized that the constitutional provisions transcribed here maintain the subordination of the protection granted to the legal institutes included in this branch of law to the social interest and to the technological and economic development of Brazil.

It is, therefore, a matter with a purpose determined by the Constitution and which is not limited to individual rights, as it concerns the community and the development of the country.

In this regard, Newton Silveira teaches the following:

> Modern constitutions consider, alongside freedom of initiative, social utility, creating mechanisms to control economic activity coordinated with social purposes. This attitude is directly reflected in the protection of so-called intangible assets resulting from intellectual creation, limiting their duration in order to harmonize them with technical and cultural progress and the protection of the consumer, seeking to delimit such rights, especially in the industrial field. (Silveira, 1985, p. 18-23)

In the same vein, Denis Borges Barbosa highlights that:

> No less essential is to realize that art. 5, XXIX, of the Constitution establishes its objectives as a necessary and balanced triad: social interest, technological development and economic development must be equally satisfied. The ordinary or regulatory norm that, trying to focus on economic development by attracting foreign investments, ignores the technological development of the country, or the standard of living of its people, is outside the constitutional parameters. (Barbosa, 2002, p. 25)

Thus, the fundamental vectors, around which the set of normative provisions that govern the system of protection of human intellectual effort gravitates, are constituted, indisputably, by the social interest and by the technological and economic development of Brazil.

By the way, Tullio Ascarelli, in his *Teoría de la concurrencia y de los bienes inmateriales*, considers the general interest in cultural and technical progress and the interest of the consumer as the basis of industrial law.

Karin Grau- Kuntz notes that, although article 5, item XXIX, of the 1988 Constitution provides for an individual right, the greater scope of the norm is to increase social well-being, which occurs in two ways:

> a) by guaranteeing privilege (a competitive advantage), which acts as an incentive for inventors to assume the risks associated with investments in projects to develop new technologies (inventions);
>
> b) by increasing imitative competition at the end of the privilege, a factor that generates alternatives in the markets, better prices and qualities (temporary/economic adequacy of the duration of the privilege). (Kuntz, 2021, p. 156)

Taking the patent as an example, as it is one of the main institutions of this system, it should be clarified that it is an instrument to encourage innovation and technological development, as it allows inventors – that is, those who dedicated time and resources to create something new and useful to society as a whole – to appropriate the economic results of the invention, through the stipulation of legal instruments aimed at dissuasion and civil and criminal repression of imitation and undue exploitation by third parties.

In this way, the patent is an instrument that favors investment in research and development in the industrial sector, by enabling financial returns for those who assumed the risk of innovation.

It is worth repeating that Article 5, item XXIX, of the Federal Constitution of 1988 determines that the protection of industrial property must be guaranteed by law through a temporary privilege, in compliance with the social interest and the technological and economic development of the country.

Because it consists of an exclusivity for the exploration of a certain product or production process, the patent translates into a privilege, in addition to being an instrument for market reservation, and although it is relevant to remunerate and encourage innovation, it must necessarily be temporary, given its ability to block competition, to impose a single pricing policy and to considerably reduce consumers' ability to choose.

This was exactly the conclusion reached in the judgment of ADI 5,529 /DF, in which the Supreme Federal Court considered that the temporality provided for in the constitutional text must be interpreted in light of the scope of patent protection, which is not restricted to protecting the interests of patent inventors, also guaranteeing the enjoyment of the invention by the entire society, (i) based on clear rules and (ii) within a reasonable period of time.

It is worth remembering that the object of the aforementioned ADI involved the discussion on the

constitutionality of the sole paragraph of art. 40 of Law No. 9,279/1996 (Industrial Property Law), which allowed the extension of the term of patent protection proportionally to the time of processing of the administrative process at the Intellectual Property Institute (Inpi).

In this scenario, the Supreme Federal Court concluded that the competitive advantage granted to authors of inventions must have a determined and predictable term, so that not only the beneficiary but also other industry players can accurately determine the date on which the patent expires.

In this vein, Minister and Professor Eros Grau, when responding to a query formulated by the Brazilian Association of Fine Chemical, Biotechnology and Specialty Industries (Abifina) regarding the device questioned in ADI 5,529/DF, pointed out that:

> [...] Temporary privilege, in the context of the normative totality that the Brazilian Constitution comprises, is a privilege granted for a certain, predetermined period, known by the market. In a different way – more than different, adverse – a privilege for an indefinite period is one granted for an uncertain, undetermined period, not known by the market.
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> Article 5, XXIX, of the Brazilian Constitution, it should be repeated, grants a temporary privilege to use patents. Temporary, in the context of the precept, is that which lasts for a determined period, provisionally, transitorily. The constitutional precept, unlike what the sole paragraph of article 40 of Law No. 9,279/1996 provides, does not state that the law will guarantee the authors of industrial inventions a privilege for an indefinite period.
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> Therefore, it is quite clear that the sole paragraph of article 40 of Law 9,279/1996 violates the Constitution. [...]

Now, the temporary nature of patent protection cannot mean a mere limitation of the privilege in time, since there are individual and collective rights that arise from the extinction of the patent and that demand clear rules and legal certainty for their full satisfaction. Thus, a specific period is essential for compliance with the constitutional rule that imposes temporary exclusivity granted to the economic exploitation of inventions and utility models.

In addition to a determined and predictable term, the patent must be valid for a reasonable period. As Karin Grau-Kuntz points out, if, on the one hand, "a privilege granted for a short period would not be sufficient as an incentive for inventors to take the risks associated with the development of new technical solutions", on the other hand, "a privilege granted for a very long period has the effect of generating market power, i.e., a new market failure", which is why the author concludes that:

> [...] one of the main ingredients that makes up the recipe for success of the patent system is found in the ideal duration of the privilege. This, in turn, following the international standard (art. 33 of the TRIPS Agreement), is determined in art. 40 of the LPI: 20 years from the date of filing. (Kuntz, 2021, p. 156-157)

I would like to emphasize that the search for a balance between public and private interests underpins intellectual property and the TRIPS Agreement, as can be seen from the objectives and principles set out in articles 7 and 8 of the document:

> Art. 7
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> Objectives
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> The protection and enforcement of intellectual property rights protection standards should contribute to the promotion of technological innovation and the transfer and diffusion of technology, to the mutual benefit of producers and users of technological knowledge and in a manner conducive to social and economic well-being and a balance between rights and obligations.
>
> Art. 8

> Principles
>
> 1. Members, when formulating or amending their laws and regulations, may adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to their socioeconomic and technological development, provided that such measures are consistent with the provisions of this Agreement.
>
> 2. Provided that they are consistent with the provisions of this Agreement, appropriate measures may be necessary to prevent abuse of intellectual property rights by their owners or to prevent recourse to practices that unreasonably restrict trade or adversely affect the international transfer of technology.

In the case of ADI 5,529/DF, the term of extension of patent protection provided for in the sole paragraph of art. 40 of the Industrial Property Law, later revoked by the National Congress, also led to a violation of the social function of intellectual property.

In this sense, it must be reaffirmed that the immaterial nature of the assets that make up the basket of intellectual property rights does not make them immune to the constitutional imposition of observance of the social function of property (true social mortgage) and, as such, demands the harmonization of individual and collective interests, which is achieved, among other instruments provided for by the Industrial Property Law, by the provision for the extinction of the patent upon expiration of its term of validity or even by the imposition of a compulsory license, with the consequent release for the action of other competitors.

It is also important to mention free competition, which is set out in Article 170, paragraph IV, of the Federal Constitution as a principle of the economic order and concerns the freedom of economic agents to carry out their activities within a given market, without hindrance from the State and protected from abuse of economic power "aimed at dominating markets, eliminating competition and arbitrarily increasing profits" (Article 173, § 4, of the 1988 Federal Constitution).

In this regard, José Afonso da Silva teaches that:

> Free competition is established in art. 170, IV, as one of the principles of the economic order. It is a manifestation of freedom of initiative, and, to guarantee it, the Constitution establishes that the law will repress the abuse of economic power that aims to dominate markets, eliminate competition and arbitrarily increase profits (art. 173, § 4º). (Silva, 2009)

The two provisions complement each other with the same objective. They aim to protect the market system and, especially, to protect free competition against the monopolizing tendency of capitalist concentration. The Constitution recognizes the existence of economic power. This is not, therefore, condemned by the constitutional regime. It is not uncommon for this economic power to be exercised in an antisocial manner. It is therefore up to the State to intervene to prevent abuse (Silva, 2009, p. 795).

Although free competition does not allow for arbitrary interventions by the State, it is up to the State to act proactively to ensure that economic agents enjoy freedom on an equal footing, without abuse of economic power. In this sense, in the constitutional economic order, freedom is the rule and restriction is the exception.

Likewise, consumer protection is a principle of the economic order, according to article 170, item V, and is, in turn, closely linked to the idea of free competition.

This is because the Federal Constitution, by promoting an economic order in which there is competition between market agents on an equal basis, also seeks to guarantee consumers' freedom of choice, the exercise of which depends on the multiplicity of options. Therefore, without free

competition, there is no such thing as free choice of consumption.

By nature, the granting of a patent implies a breach of equality of conditions for industry players, since, for reasons of evolutionary merit, one or some of them is granted temporary exclusivity in the economic exploitation of a given invention and, consequently, the power to set prices and earn the corresponding profits free from pressure from competitors.

Obtaining a patent, however, is a constitutionally guaranteed and fully justifiable privilege that must be interpreted restrictively, given the role it plays in encouraging innovation and technological development, as already mentioned.

The Federal Constitution grants the privilege of protecting intellectual property but guarantees that, after a certain period of time, other agents in the traditional and cultural industry will be equal to the holder of the right in the possibility of exploiting the protected object, freeing it up to the competitive dynamics of the market.

The right to intellectual property, in order to be exercised, must be considered necessary and adequate for the purpose for which it is intended, without incurring aggression or abandonment of other applicable constitutional precepts, such as the principles that govern the economic order.

Invited to reflect on the quality of intellectual property protection that is desired for the country, also taking into account the objectives of the Federative Republic of Brazil to build a free, fair and supportive society, the Supreme Federal Court responded, in ADI 5,529/DF, that all constitutional vectors and principles must be equally observed by the State and by the holders of these rights.

Incidentally, Minister Rosa Weber's statement on the decline is emblematic:

> Article 5, XXIX, of the Constitution of the Republic states that "the law shall ensure to the authors of industrial inventions a temporary privilege for their use, as well as protection of industrial creations, ownership of brands, company names and other distinctive signs, taking into account the social interest and the technological and economic development of the country". The wording of the constitutional text makes clear the peculiar nature of this legal species: a privilege granted to an individual, with a view to achieving a social purpose. The enjoyment of this privilege by an individual, however, is only possible if the requirements set forth in the legislation are met.
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> [...]
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> As previously stated, Article 5, XXIX, of the Basic Law requires the legislator, when granting the temporary privilege to the author of an industrial invention, to take into account the social interest and technological and economic development.
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> [...]
>
> thus, subjects patent protection to the satisfaction of a purpose that justifies it. To be legitimate under the constitutional order, the temporary privilege granted to the author of an invention must comply with the purpose of promoting social interest and technological development.
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> [...]
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> The proper understanding of the intellectual property protection system, therefore, is one that does not divorce it from its constitutional purpose, which consists, in the express wording of art. 5, XXIX, in promoting "the social interest and the technological and economic development of the country". In the express and literal wording of the constitutional precept, the temporary privilege of exclusive use, to be granted to inventors through the patent system, is only legitimate when aimed at promoting the social interest and the technological and economic development of the country.
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> The legitimacy of normative designs produced in the field of patent law can absolutely be divorced from their historical conformation, from the principles inherent to them and, especially,

from the teleology inscribed in the constitutional clause that institutes them.

Fachin expressed no other understanding:

> It is known that the constitutionally recognized protection for industrial property is materialized through the granting of invention and utility model patents, the main objective of which is to reward the inventor for the work, time and expenses incurred to develop the product.
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> It is important to note that the constitutional norm also guarantees, within the scope of protection of the fundamental right expressly provided for in item XXIX of art. 5 of the constitutional text, attention to the following objectives: i) social interest of the country; ii) technological development of the country; and iii) economic development of the country.
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> Therefore, in addition to the temporary nature of the protection privilege, the constitutional norm and the system embedded therein guarantee all Brazilian citizens the possibility of taking advantage of industrial creation, after the term of validity of the exclusive exploitation.
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> [...]
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> The rights arising from intellectual property in general, and industrial property in particular, allow a natural or legal person to control the use of a specific portion of knowledge, by virtue of a monopoly that is generally granted by law.
>
> It is clear that, based on the evidence of the facts, some assets are more susceptible to appropriation than others. The original idea or invention can only be under the power of an individual or group of individuals as long as it is not shared with the other individuals in the community, since from the moment the idea or invention is disclosed it immediately becomes the domain of everyone. What is peculiar, in this context, is the fact that no one ceases to be the owner of an idea because others also possess it.
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> It is possible to affirm, therefore, that the exclusivity created by the patent institute is an artificial construction of the legislator or, in other words, a legislative artifice used so that the innovative idea, as an intangible asset, can occupy a place and have its value in the market.
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> Thus, the exclusivity rights arising from the patent regime fulfill the important function of encouraging the production of intangible goods, fulfilling the main and important objective of generating social well-being, based on a specific constitutional determination (art. 5, XXIX, final part, of the CRFB).
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> In fact, the subjects who are excluded from possession of the innovative idea, an intangible asset, at the moment in which the exclusive right to its exploitation is guaranteed, previously available to all, and artificially transformed by the legal system into an asset for exclusive economic exploitation, are transformed into subjects who benefit from the diffuse or collective intangible asset, in view of the progressive increase in general well-being provided by it, which ends up guaranteeing a stimulus to economic efficiency itself.
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> Thus, it can be said that knowledge, naturally, does not allow its private appropriation through economic mechanisms, so that in order to establish the patent regime, it becomes necessary to use the State's legal apparatus, in order to generate a particular form of monopoly that, if at first it excludes the broad use of the good, at an immediately subsequent moment it serves the purpose of increasing, in some aspect, life in society.
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> [...]
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> In this context, it is important to say that the exercise of industrial property rights cannot be transformed into abuse of power, assuming, therefore, that a competition regime is respected that leads to participation in the market economy through the strategic use of power, in order to guarantee competitiveness, renewal and development. (ADI 5,529/DF)

Minister Alexandre de Moraes clarifies, in this regard and firmly, that:

> [the] constitutional balance enshrined in art. 5, XXIX, of the Federal Constitution, of protection of property and collective interest, is tenuously balanced in the temporary nature of patents. The sole paragraph of art. 40 allows for an imbalance in this binomial, allowing this temporary nature

> to be extended ad aeternum or for an absolutely unjustified period. At the moment in which it becomes impossible to predict the duration of the patent, precisely in view of the fact that the initial term is absolutely discretionary, potestative to the Administration, it seems that we really have an unconstitutionality.
>
> Here it is reversed, it is as if the rule were the ad aeternum duration of the patent, which generates numerous problems, all detailed by the eminent minister Dias Toffoli, based on information presented in the records by the INPI on the actual state related to the processing of patent applications, such as the current stock of pending patent applications, the waiting time according to the technical division (technological sector), the average waiting time, also according to the sector, and the indication of how many patents would have been in force for more than 20 years, among other details.
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> From this point on, legal certainty, impartiality, efficiency and reasonable duration of the administrative procedure are being absolutely ignored.
>
> Furthermore, it also does not seem to me that the binomial that the Constitution directly enshrined in art. 5, XXIX, of the Federal Constitution, based on temporariness, continues to be respected. This possibility of extension ad infinitum simply mitigates the defined, fixed and reasonable deadlines, which find a parallel in the international legal system. In their abstract provision, they do not disrespect any international treaty to which Brazil is a signatory, since they are deadlines that respect the individual, property and the collective, after a certain period.
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> Thus, this unjustified and unjustifiable potestative condition, absolutely discretionary of the Public Power, leads to the problems that the eminent professor and former minister of this House, professor and minister Eros Grau, pointed out from a systematic point of view, in a written opinion presented in the records of the present direct action.
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> Unjustifiably extending the privilege of exclusive exploitation of industrial products and processes ends up creating a monopoly, because it harms those who eventually want to enter free competition after the term established by law. The uncertainty regarding the extent of the protection granted to the patent holder, which may go well beyond the original 20-year term, discourages other economic agents from investing in production processes with public domain technologies, which is of great social interest.
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> Free competition is therefore inhibited, since the extension of the patent limits access to technologies and markets, disproportionately benefiting the patent holder. It should be noted that the delay in the administrative process also inhibits potential competitors from submitting any other application, so as to compete in the same market on equal terms. And there is the possibility, on the part of the public administration, of delaying the analysis process, not only due to administrative and structural problems, but also due to preference problems, so to speak, breaking impartiality.
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> It seems to me that only this question would resolve the issue: what is the final term of validity of a patent in Brazil? No one can, before the granting of the patent, state with certainty what its final term is, in order to define from when it is possible to make an investment without violating third-party rights.
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> Now, this affects the binomial established by art. 5, XXIX, of the CF.
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> I insist again: as also highlighted by the reporting minister, it violates legal certainty, the efficiency of the Administration and, I would add, it violates impartiality and free competition, principles of the economic order.

Finally, Minister Gilmar Mendes considered that the legal solution of the rule is also not in accordance with the postulates of efficiency, economic freedom and consumer protection, presenting in his vote data that reveal that the extension of the validity period in relation to medicines, for example, causes additional costs of billions of reais.

Thus, when examining the paradigm case in the area of intellectual property, the Supreme Federal Court objectively found the need to revisit the constitutional vectors of the matter to verify whether

the precepts expressed therein were being respected.

The Court concluded that Brazil cannot continue to be the "paradise" of developed countries, maintaining monopolies for decades on products that have already fallen into the public domain in those jurisdictions, where they can be purchased at much more affordable prices than in Brazil.

The current model, which has been skillfully crafted by the National Congress, cannot lead to disproportionate burdens on the State and Brazilian citizens. Endless monopolies, in addition to being irrational, stifle competition and innovation, discouraging the entry of new entrepreneurs into monopolized niches.

All these conclusions were duly established in the winning vote that I cast – as rapporteur of ADI 5.529/DF – from which the understanding of the Supreme Federal Court was consolidated in the sense that the concern of the 1988 Constitution was not restricted to the fact that intellectual property rights must be granted and exercised with some limitations in favor of the common interest[1], but also that they should be drivers of the technological and economic development of Brazil, for which reason abuses[2] in the name of illegitimate interests are not tolerated[3] in the name of illegitimate interest of their holders.[4]

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1 For Miguel Reale, "The law, however, does not aim to order the relationships between individuals to satisfy only the individuals, but, on the contrary, to achieve an orderly coexistence, which is translated into the expression: 'common good'. The common good is not the sum of individual goods, nor the average of the good of all; the common good, strictly speaking, is the ordering of what each man can achieve without prejudice to the good of others, a harmonious composition of the good of each one with the good of all. Modernly, the common good has been seen – and this is, in essence, the teaching of the Italian legal philosopher Luigi Bagolini – as a social structure in which forms of participation and communication of all individuals and groups are possible". (Reale, 2001, p. 55)

2 For Pedro Marcos Nunes Barbosa, "[...] if the freedom of the patent owner exceeds the constitutional purposes of using the right to exclude, he 'disregards the fundamental right of each individual to independence from the arbitrariness that obliges others and abuses state power to assert his private arbitrariness [...] he is qualitatively indistinguishable from any despotism'. [...] And such a material slip becomes even more evident when one sees the patent holder as someone who receives legal power on the condition of promoting it within the constitutional goals" (Barbosa, 2016, p. 65-66).

3 André Giacchetta points out that "the exploitation of rights arising from industrial property cannot be subject solely to the discretion of its holder, which must adapt to the social and economic functions of the privilege developed. And it is in this context that the defense of competition will play an important role in delimiting healthy competitive practices within the economic order". And he continues: "industrial law is a tool for economic development and as such must also be subject to the economic order" (Giacchetta, 2004, p. 4). It also states that, on the one hand, "the exercise of industrial rights may occur naturally and legally or may derive from acts or conduct that aim solely to achieve individual interests, in disregard of collective interests" and "the economic and social factors of industrial property are, therefore, related to the manner in which the title granted to the individual is used by him, since it is granted with the sole purpose of supporting the economic and technological development of the country", on the other hand, there is "a need for State supervision of the exploitation of industrial rights, so that, on the one hand, fair competition is preserved and, on the other hand, the economic order is preserved, by maintaining the exploitation of industrial property within social and collective limits" (Giacchetta, 2004, p. 11).

4 Gama Cerqueira warns, in this sense, that "Industrial property laws can also be interpreted and applied taking into account public order, which is greatly interested in this matter, so that mere individual interests and, mainly, private agreements that may affect the interests of the community and circumvent the application of the law do not prevail over them. However, this concept should not be abused by invoking, without purpose or without purpose, the interests of public order or the community to restrict the exercise of industrial property rights and unfairly harm the interested classes" (Cerqueira, 1946, p. 78). See, also in this regard, the provisions of arts. 187 and 1,228 of the Civil Code.

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