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## II Congresso Internacional de Direito Constitucional & Filosofia Política

# O Futuro do Constitucionalismo

## A Construção da Democracia Constitucional

*Caderno de Resumos*

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# ON THE SUPRACONSTITUTIONAL CHARACTER OF THE BRAZILIAN NATIONAL FINANCIAL SYSTEM:

## A FINANCIAL AND HISTORICAL APPROACH, IN VIEW OF THE CAPITAL ASSET PRICING MODEL

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Throughout History, the dissociation between the economic reality of a country and its legal system comes from Ancient times. Indeed, maximum interest rate limits were established as early as about 1.800 B.C. by legal systems such as the Code of Hammurabi, though illegally high interest rates are reported to be a common practice ever since. On the dawn of Western Civilization, both the Greeks and the Romans began their legal systems driven by the need of drastic reforms to deal with economic crises, resulting mainly from excessive debt. The laws of Solon regulated credit in Athens, mostly by forbidding slavery for debt and eliminating any limit on interest rates. In Ancient Rome, the useless attempts to regulate the financial system date back to the Twelve Tables, with credit laws that looked much alike the Hammurabi Code. Later on, *Lex Licínia Sextia* from 387 B.C. aimed to abolish compound interests, which, however, remained a common usage throughout the millennia.

This very ancient law became part of the Brazilian legal system by the *Ordenações Filipinas* from 1595. Brazilian law repeatedly banished compound interest rates several times, most notably in the Commercial Code of 1850 and in the Usury Law of 1933. Nevertheless, regardless of the explicit prohibition, the society never abandoned the actual usage of compound interests at all, neither in financial operations, including those made in banks, nor in commercial transactions. Similarly, legally established maximum interest rates have been set many times, most recently in the Constitution of 1988 itself. Yet, in practice, those limits were never effective, to the point that even the Brazilian Central Bank solemnly ignored them all along.

In modern times, a solid scientific and philosophical foundation

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was laid down to financial theory, consolidating the standards financial operations must follow, due to a series of mathematical and economic reasons, regardless of any legal regulations and constraints. For instance, the theory of differential equations proves that the usage of compound interests is the only way to accrue interests proportional to debt size, while economic equilibrium shows that this is the proper way to proceed. Empirical evidence confirms that, whenever compound interests are not legal, the market automatically adjusts itself to enforce them. Financial market equilibrium between credit supply and demand also determines the interest rates, no matter what the law prescribes.

Jurisdiction is increasingly aware of economic and financial reality and, therefore, a growing number of judicial decisions take consequentialist arguments and extralegal considerations of Finance and Economy into account. As a matter of fact, the Brazilian Constitutional Court simply ruled out the Constitutional limit on interest rates, as if it never existed. The Constitution was later amended to conform to reality. The Court also legitimated and consolidated the unrestricted usage of compound interest rates, despite the lack of any laws regulating it until 2000; quite on the contrary, there were many legal devices prohibiting it, all of them ignored by the Court.

The financial markets despise for legal restrictions and constraints, however, is not limited to interest rates practices. For instance, the Capital Asset Pricing Model (CAPM) is the cornerstone of several western countries' financial systems, and Brazil is no exception, as the Brazilian National Financial System was designed to fit CAPM standards. Most curiously and not only in Brazil, that was done entirely without consent or even knowledge of legislators!

For sure, CAPM is a major landmark of modern finance in the 20$^{th}$ century, a breakthrough model for understanding interest rate structure. William Sharpe created CAPM in 1964 and received a well deserved Nobel Prize in Economics for it, as still today it is the main model of financial markets. Nevertheless, it was never presented or discussed in the National Congress, nor sanctioned by any President. Even though the Brazilian National Financial System is actually one of the world's most advanced and pragmatic financial systems, the Brazilian legal system, most notably the Constitution from 1988, completely ignores the underlying financial theory.

In this work, we make a brief introduction to CAPM with its both theoretical and practical implications, showing how the financial and economic reality is brutally overshadowing several legal instru-

ments, including many constitutional principles and dispositions. We also study how several Brazilian institutions, specially the judicial system, are dealing with or ignoring conflicts resulting from this supraconstitutional financial system.