The exchange contract in the Portuguese legal system and comparative law

O contrato de permuta no ordenamento jurídico português e o direito comparado

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Abstract: Despite the exchange contract being one of the oldest contracts, it is not currently regulated in the Portuguese Civil Code, as it is understood that it belongs to a primitive state of the economy. The Portuguese legislator intended to make the purchase and sale contract the prototype of other onerous agreements according to article 939.º of the Civil Code. However, this will raise problems for us between the frontier of buying and selling and that of exchange, for which our law does not give us direct answers.We found that other legal systems, such as the Spanish, French, Italian, or Ibero-American codes, consecrate in their Civil Codes, in a brief way, the exchange contract.
Keywords: Contracts Law, contract of exchange, purchase and sale.

Resumo: Apesar do contrato de permuta ser um dos contratos mais antigos, não vem hoje regulado no Código Civil Português, por se ter entendido que pertence a um estado primitivo da economia.A intenção do legislador foi tornar o contrato de compra e venda como o protótipo de outros contratos onerosos, por força do artigo 939.º do Código Civil. Mas isto vai levantar-nos problemas no que concerne à fronteira da compra e venda e da permuta, para a qual a nossa lei não nos dá respostas diretas. Deparámo-nos que outros ordenamentos jurídicos, como o espanhol, o francês, o italiano, ou códigos ibero-americanos, que consagram nos seus Códigos Civis, de uma forma breve, o contrato de permuta.
Palavras-chave: Direito dos Contratos, contrato de permuta, compra e venda.

I. Introduction

1. The exchange contract, despite being one of the oldest contracts, prior to the purchase and sale itself, is not currently regulated in the Portuguese Civil Code of 1966[1].

[1] This text was based on our study: *vide* S. M. Costa Machado, *Do Contrato de Permuta*, Almedina, Coimbra, 2021.

2. It may appear at first glance that the exchange contract is an outdated contract or in disuse. However, practice shows us the opposite. In this way, we intend to demonstrate the relevance that this contract has in current times.

3. It also happens that, today, it may seem that the exchange contract is a useless contract. However, we found the opposite, as it provides enormous utility in human relationships.

4. Due to the non-regulation of its regime in the Portuguese Civil Code, we are faced with doubts, the solution of which obliges us to resort to an adaptation of the rules of purchase and sale.

5. The intention of the Portuguese legislator was to make the purchase and sale contract the prototype of other onerous contracts, pursuant to article 939.º of the Civil Code[2]. But this will raise problems for us with regard to the frontier of buying and selling and exchange, to which our law does not give us direct answers.

6. Thus, given the advantages that the exchange contract presents in social relations, we intend to highlight the differences of this contract in relation to the purchase and sale contract.

II. Relevance of the Exchange Agreement in contemporary society

7. The exchange contract, also known as barter[3] or bargaining[4], is the oldest human contract[5], as it predates buying and selling[6]. This is because in primitive societies there was no organized economy, nor was there currency, so that a price could be set as a counterpart to exchange[7]. As Rogel Vide calls it, it is the "*Prince Contract*", the first in the evolution of peoples[8].

8. Primitive men's need was great; one did not look at the equal or approximate value of the things that were in exchange, as is done today, with reference to money[9]. Due to the needs, right in the beginnings of humanity, to exchange became essential to fill the needs of everyday life. A good example given by Cunha Gonçalves[10], of primitive economics, is the famous biblical passage of the exchange of Esau's birthright for a tasty dish of lentils, which Jacob had just cooked[11].

9. Although this is the oldest contract, it is not currently subject to regulation in the Portuguese Civil Code. However, the exchange contract was regulated in the Portuguese Civil Code of 1867, in articles 1592.º to 1594.º.

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[2] Article 939.º of the Civil Code provides: "The purchase and sale rules are applicable to other onerous contracts whereby goods are sold or charges are imposed on them, insofar as they are consistent with their nature and are not in contradiction with the respective legal provisions".

[3] P. Romano Martinez, *Direito das Obrigações (Parte Especial), Contratos, Compra e venda, Locação, Empreitada,* 3.ª reimpressão da 2.ª ed. de 2001, Almedina, Coimbra, 2007, p. 20.

[4] M. I. Carvalho De Mendonça, *Contratos no Direito Civil Brasileiro*, T. II, 4.ª ed., Edição Revista Forense, Rio de Janeiro, 1957, p. 7.

[5] L. D. Cunha Gonçalves, *Dos Contratos em Especial*, Ática, Lisboa, 1953, p. 293.

[6] Ernesto Eula, "Della Permuta", *Commentario Codice Civile*, Direção de D´Amelio e Enrico Finzi, Vol. II, G. Barbèra, Firenza, 1947, p. 142 and next.

[7] A. Santos Justo, "A Permuta no Direito Romano – Breve Referência a Alguns Direitos de Base Romanista", *in*: *Estudos em Homenagem a Miguel Galvão Teles*, Vol. II, Almedina, Coimbra, 2012, p. 541 and next.

[8] C. Rogel Vide, "Sobre La Permuta y su Utilidad", *Revista General de Legislación y Jurisprudencia*, 3, 2010, p. 532.

[9] In this regard, *vide* L. D. Cunha Gonçalves, *Tratado de Direito Civil em Comentário ao Código Civil Português*, Vol. VIII, Coimbra Editora, Coimbra, 1934, p. 627.

[10] *idem*, p. 627.

[11] Book of Genesis 25, 29-34, *Bíblia Sagrada*, 5.ª ed., Difusora Bíblica – Franciscanos Capuchinos, Lisboa/Fátima, 2012, p. 57.

10. In the elaboration of the project of the current Portuguese Civil Code, Galvão Telles was in charge of the matter concerning contracts. In presenting the Civil Contracts project, he does not provide an argument for exclusion from the exchange contract; it only emphasizes that the purchase and sale, due to its importance and richness of aspects, should be applied to other onerous alienating contracts, provided that it is in accordance with their nature. Therefore, it was deemed unnecessary to regulate the exchange autonomously[12].

11. However, we do not know for sure the reason for the non-regulation of the exchange contract in the Portuguese Civil Code, despite some authors, such as Pires De Lima and Antunes Varela, claim that the exchange contract is no longer regulated because it is useless[13]. This explanation seems to us to be a little out of step with practice, as the exchange contract, even today, provides us with enormous utility, as we will have the opportunity to demonstrate later.

12. Menezes Leitão[14] and Ferreira De Almeida[15] refer that the exchange contract was not subject to regulation because it was understood that it belongs to a primitive state of the economy, that is, it belongs to a rudimentary period.

13. We can then ask: is the exchange contract not used to justify its non-regulation? If so, we move from a system that privileged the exchange contract, the Portuguese Civil Code of 1867, to a system that considers the exchange contract useless, the Portuguese Civil Code of 1966. So, we ask: is it justified to move from the usefulness to the uselessness of the exchange contract?

14. It is certain that it was intended to make the purchase and sale contract a paradigm of onerous contracts of alienation[16], thus applying its norms pursuant to article 939.º of the Civil Code, which has an expansive nature[17]. This, however, raises problems in the application of some rules of buying and selling in exchange contracts, as we will have the opportunity to verify later on.

15. However, it is not understandable that the exchange contract was judged as an outdated and useless contract, not even being instituted in the current Portuguese Civil Code, when the same Civil Code in its article 1378.º, refers to the exchange of land[18]. However, article 1378.º of the Civil Code is

[12] I. Galvão Telles, "Contratos Civis (Projecto Completo de um Título do Futuro Código Civil Português e Respectiva Exposição e Motivos)", *Boletim do Ministério da Justiça*, 83, 1959, p. 140.

[13] Pires De Lima and Antunes Varela, *Código Civil Anotado*, Vol. II, 4.ª ed., Coimbra Editora, Coimbra, 1997, p. 236.

[14] L. M. T. D. Menezes Leitão, *Direito das Obrigações*, Vol. III, 14.ª ed., Almedina, Coimbra, 2022, p. 169.

[15] C. Ferreira De Almeida, *Contratos II*, 5.ª ed., Almedina, Coimbra, 2021, p. 125.

[16] In the words of J. M. Poughon, *Histoire Doctrinale de L´Échange*, T. CXCIV, LGDJ, Paris, 1987, p. 262 and 263, exchange, due to the emancipation of buying and selling, "*ends up representing a myth*", because "*exchange has become a contract synonymous of equality, justice, purity, opposed to sale, subjugated by money, demand and accumulation of profit. Stripped of this search for individual advantages, exchange appears close to stripping. The image of a society founded on exchanges, from which every selfish vision seems absent, seems, in truth, a chimera. However, this is not true. Indeed, we are heading towards the rediscovery of "happiness in gratuity" and we seek a "relative return to donation*"".

[17] R. Pinto Duarte, *Tipicidade e Atipicidade dos Contratos*, Almedina, Coimbra, 2000, p. 141.

[18] We consider it relevant to observe the judicial decision of Supremo Tribunal de Justiça de 24-03-2015, Processo 296/11.2TBAMR.G1.S1, Relator Gabriel Catarino, noting that: "the Civil Code in force does not include, in the nomenclature of the nominated contracts, the exchange or barter contract, giving it, however, a stage in other venues, such as, for example, with regard to the exchange of land, within the scope of reparcelling of rural buildings – cfr. article 1378.º of the Civil Code – considering, however, that in other norms of the legal system there are specific mentions to this contractual figure – cfr. Article 480.º of the Commercial Code. / This is not the case in foreign norms, which include in the nomenclature referring to contracts, specific norms that define and regulate the figure of the exchange contract. As can be seen from reading the precepts indicated below, exchange essentially consists of a conceptual-structural perspective, an obligation to give one thing in order to receive another (thing) in exchange. / Without conceptual rigour, a definition of exchange can be defined as the contract whose object is the reciprocal transfer of ownership of things or rights between the parties, excluding, in the formed agreement, the intervention of sums monetary measures", available at www.dgsi.pt. Note that before the judicial decision of Supremo Tribunal de Justiça de 08-05-1991, Processo n.º 80138, Relator Beça Pereira, *Boletim do Ministério da Justiça*, 407, 1991, p. 523 and next, noted the following: "I – In the purchase and sale contract, the price cannot be represented by anything other than money. II – In the Civil Code of 1966, exchange disappeared as a typical contract, with the exception made in articles 1378.º and 1379.º regarding the exchange of land. III – However, it is clear that

located in Book III (Law of Things), Title II (Property Law), Chapter III (Property of Real Estate), in Section VII (Fractionation and reparcelling of rustic buildings)[19], in particular in the so-called "reparcelling" section, with the aim of avoiding fractionation, namely in areas where it could lead to the formation of small plots of land without the necessary size for agricultural or forestry activity[20].

16. Article 1723.º, paragraph a) of the Civil Code, regarding the marriage regime with regard to the community property regime, determines the following: "they retain the quality of their own assets: subrogated assets in place of assets belonging to one of the spouses through direct exchange"[21], aiming to establish a balance of assets between the spouses[22].

17. Article 1723.º, paragraph a) of the Civil Code, establishes the exchange contract, in which one of the spouses alienates an asset belonging to the other spouse, to receive from the other another asset, other than money[23].

18. Thus, article 1723.º of the Civil Code contemplates situations of real subrogation[24], whether direct or indirect[25], with a view to safeguarding the joint assets of the spouses and allowing a fair balance of assets[26], so that there is a connection between an exit and entry into the spouses' patrimonial sphere[27], maintaining "*the composition of the patrimonial masses*"[28].

19. From the analysis of articles 1378.º and 1723.º, paragraph a) of the Civil Code, we find that the argument is not very convincing with regard to the fact that the exchange contract is considered obsolete and useless.

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exchanges or swaps are still possible and are even frequent in legal commerce, bearing in mind the principle of contractual freedom, "within the limits of the law" (article 405.º of the Civil Code). IV – In the (atypical) exchange contract there is no price, one thing is given for another, and here lies the main difference in relation to buying and selling".

[19] *vide* Pires De Lima and Antunes Varela, *Código Civil Anotado*, Vol. III, 2.ª ed., Coimbra Editora, Coimbra, 1987, p. 265; J. Oliveira Ascensão, *Direito Civil – Reais*, 5.ª ed., Coimbra Editora, Coimbra, 2012, p. 579; H. Sousa Antunes, *Direitos Reais*, Universidade Católica Editora, Lisboa, 2017, p. 166 and next; D. M. Lopes De Figueiredo, *Titulação de Negócios Jurídicos Sobre Imóveis*, 3.ª ed., Almedina, Coimbra, 2018, p. 297 and next; A. Agostinho Guedes, *Comentário ao Código Civil – Direito das Coisas*, coordination of H. Sousa Antunes, Universidade Católica Editora, Lisboa, 2021, p. 312 and next.

[20] R. Pinto Duarte, *Curso de Direitos Reais*, 4.ª ed., Principia, Cascais, 2020, p. 120 and next.

[21] In comment to this article, Pires De Lima and Antunes Varela, *Código Civil Anotado*, Vol. IV, 2.ª ed., Coimbra Editora, Coimbra, 1992, p. 425, consider and claim that in direct subrogation "*the direct exchange of one's own assets for other assets is applicable (bonds that, by legal provision, replaced the shares of the nationalized company, belonging to one of the spouses; assets that the spouse obtained, through exchange deal with others that exclusively belonged to it) and the replacement of its own assets by the price resulting from their disposal*".

[22] C. M. Araújo Dias, *Alteração do Estatuto Patrimonial dos Cônjuges e a Responsabilidade por Dívidas*, Almedina, Coimbra, 2012, p. 152 and next; R. Martingo Cruz, *União de Facto Versus Casamento – Questões Pessoais e Patrimoniais*, Gestelegal, Coimbra, 2019, p. 469 and next.

[23] R. Teixeira Pedro, *Código Civil Anotado*, Vol. II, 2.ª ed., coordination of Ana Prata, Almedina, Coimbra, 2019, p. 637.

[24] In the words of M. A. Domingues Andrade, *Teoria Geral da Relação Jurídica*, Vol. I, Almedina, Coimbra, 1997, p. 223 (note 1), real subrogation has the purpose of replacing something else in a given legal relationship, maintaining its causal connection, that is, an exchange for exchange. For further developments, *vide* I. Galvão Telles, *Das Universalidades – Estudo de Direito Privado*, Grandes Oficinas Gráficas «Minerva» de Gaspar Pinto de Sousa & Irmão, Lisboa, 1940, p. 188 and next; M. M. D. Silva Almeida, "Sub-rogação por Pagamento", *Revista da Ordem dos Advogados*, 14, 15 and 16, 1954-1956, p. 210; I. Galvão Telles, *Direito das Obrigações*, 7.ª ed., Coimbra Editora, Coimbra, 2010, p. 280 and next; M. J. D. Almeida Costa, *Direito das Obrigações*, 12.ª ed., Almedina, Coimbra, 2014, p. 821 (note 3); F. Pereira Coelho and Guilherme Oliveira, *Curso de Direito da Família*, Vol. I, Imprensa da Universidade de Coimbra, Coimbra, 2016, p. 606 and next; G. Oliveira, *Manual de Direito da Família*, 2.ª ed., Almedina, Coimbra, 2021, p. 255 and next; O. D. Carvalho, *Teoria Geral do Direito Civil*, 4.ª ed., Gestlegal, Coimbra, 2021, p. 188 and next.

[25] J. Duarte Pinheiro, *O Direito da Família Contemporâneo*, 7.ª ed., Gestlegal, Coimbra, 2020, p. 510.

[26] A. M. Ramos Paiva, *A Comunhão de Adquiridos – Das Insuficiências do Regime no Quadro da Regulação das Relações Patrimoniais Entre os Cônjuges*, Coimbra Editora, Coimbra, 2008, p. 160 and next.

[27] C. M. Araújo Dias, *Do Regime da Responsabilidade por Dívidas dos Cônjuges – Problemas, Críticas e Sugestões*, Coimbra Editora, Coimbra, 2009, p. 366.

[28] M. R. A. D. G. Lobo Xavier, *Limites à Autonomia Privada na Disciplina das Relações Patrimoniais Entre os Cônjuges*, Almedina, Coimbra, 2000, p. 392.

20. We can also, in accordance with the provisions of article 1547.º, n.º 1 of the Civil Code, consider that "the land easements may be constituted by contract, will, adverse possession or allocation by the head of the household". Similarly, article 1440.º of the Civil Code determines that "usufruct may be constituted by contract, will, adverse possession or provision of law". We deduce from these precepts that there may be constitution of property easements and usufruct through a contract, which may be an exchange contract[29].

21. In addition, the Portuguese Commercial Code enshrines, in article 480.º[30], the commercial exchange[31]. In the same way, the Portuguese Public Contracts Code also provides, in article 17.º, n.º 4, for public contracts without value[32]. And, today, due to international commercial transactions, new financial instruments appear, such as the "*swap*" (literally, exchange or barter), a figure that is foreseen in article 2.º, n.º 1, paragraph e), of the Portuguese Securities Market Code[33].

22. It should also be noted that exchange contracts occur with regard to *know-how* licenses[34], as well as the exchange of digital content or services for personal data[35].

23. It is not, therefore, an erased contract in our society. If we look at the jurisprudence of the Portuguese higher courts, there are countless points that deal with issues related to the exchange contract[36].

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[29] In this regard, *vide* A. Santos Justo, *Direitos Reais*, 7.ª ed., Quid Juris, Lisboa, 2020, p. 405 and 461 (notes 1903 e 2166).

[30] Article 480.º of the Portuguese Commercial Code regulates the following: "the barter or exchange will be mercantile in the same cases in which the purchase and sale is, and will be regulated by the same rules established for the latter, in all that are applicable the circumstances or conditions of that contract".

[31] About the trade exchange, *vide*, in the Portuguese legal system, L. D. Cunha Gonçalves, *Comentário ao Código Comercial Português*, vol. III, ed. José Bastos, Lisboa, 1918, p. 57; C. Ferreira De Almeida, "Contratos de Troca para Transmissão de Direitos", *in*: *Prof. Doutor Inocêncio Galvão Telles: 90 anos - Homenagem da Faculdade de Direito de Lisboa*, Almedina, Coimbra, 2007, p. 199 and next; J. A. Engrácia Antunes, *Direito dos Contratos Comerciais*, Almedina, Coimbra, 2009, p. 378; P. Pais De Vasconcelos and P. L. Pais De Vasconcelos, *Direito Comercial*, Vol. I, Almedina, Coimbra, 2020, p. 343 and next; A. Menezes Cordeiro, *Direito Comercial*, 5.ª ed., Almedina, Coimbra, 2022, p. 870 and 871.

[32] V. Eiró, "Os Contratos sem Valor no Código dos Contratos Públicos", *in*: *Estudos em Homenagem ao Professor Doutor Carlos Ferreira de Almeida*, Vol. II, Almedina, Coimbra, 2011, p. 267 and next; P. Matias Pereira and R. Mesquita Guimarães, "Os "Contratos sem Valor" No Código dos Contratos Públicos – Uma Abordagem Jurídico-Económica", *Boletim de Ciências Económicas*, Vol. LVII, T. III, 2014, p. 2661 and next.

[33] J. A. Engrácia Antunes, Os *Instrumentos Financeiros*, 3.ª ed., Almedina, Coimbra, 2017, p. 217 and next; M. Miranda Barbosa and J. L. Dias Gonçalves, *Instrumentos Financeiros*, Gestlegal, Coimbra, 2020, p. 242 and next.

[34] M. G. D. O. Figueiredo Dias, *A Assistência Técnica nos Contratos de Know-How*, Coimbra Editora, Coimbra, 1995, p. 40; F. Fezza and V. Ivone, *Somministrazione e Permuta*, Giuffrè, Milano, 2017, p. 33 and next; V. Verdicchio, *La Permuta*, Giuffrè, Milano, 2019, p. 134.

[35] *vide* J. Morais Carvalho, *Manual de Direito do Consumo*, 8.ª ed., Almedina, Coimbra, 2022, p. 94 and next. However, the rules on the protection of personal data must be observed: in this sense, T. Rendas, "O Segredo dos segredos de negócio: Breves reflexões acerca da justificação para a atribuição de proteção à luz da Diretiva (EU) 2016/943", *in*: *Os Segredos no Direito*, coordination of C. Amado Gomes, A. F. Neves and P. Lombra, AAFDL, Lisboa, 2019, p. 273 and next; J. T. D. S. Y López De Letona, "El Derecho civil de los datos", *Anuario de Derecho Civil*, 3, 2019, p. 825 and next; A. B. Menezes Cordeiro, *Direito da Proteção de Dados – À luz do RGPD e da Lei n.º 58/2019*, Almedina, Coimbra, 2020, p. 27 and next; M. I. Domínguez Yamasaki, "El tratamiento de datos personales como prestación contractual. Gratuidad de contenidos y servicios digitales a elección del usuario", *Revista de Derecho Privado*, 4, 2020, p. 93 and next; A. Mozo Seoane, *Los Límites de la Tecnología – Marco ético y regulación jurídica, Reus*, Madrid, 2021, p. 117 and next; A. Platero Alcón, *El Derecho al Olvido en Internet – La Responsabilidad Civil de Los Motores de Búsqueda y Las Redes Sociales: Estudio Doctrinal y Jurisprudencial*, Dykinson, Madrid, 2021, p. 37 and next.

[36] As an example of judgments of the Portuguese superior courts that show that they are constantly confronted with issues related to the exchange contract: judicial decision of do Supremo Tribunal de Justiça de 05-07-2007, Processo n.º 07B2009, Relator Santos Bernardino: in this Judgment, the breach of an exchange contract was raised, in which the parties had agreed to exchange a piece of land for some fractions to be built. It should be noted that most decisions concern the exchange of land for fractions to be built, for example, judicial decision of Tribunal da Relação do Porto de 10-10-2019, Processo n.º 2819/05.7TBAVR-B.P1, Relator Freitas Vieira; judicial decision of Tribunal da Relação de Coimbra de 03-12-2019, Processo n.º 801/14.2TBPBL-F.C1, Relator Emídio Santos; admitting the exchange promissory contract we find the judicial decision of Tribunal da Relação do Porto de 25-01-2021, Processo n.º 7391/17.2T8VNG.P1, Relator Mendes Coelho, all available at www.dgsi.pt. On the other hand, in the doctrine, F. D. Gravato Morais, *Manual do Contrato-Promessa*, Editora D´Ideias, Coimbra, 2022, p. 20 realizes that, in practice, promissory exchange contracts are concluded.

24. Moreover, to exchange is also common in international trade, which is reborn in so-called "compensation – *countertrade*" operations[37]. For example: an oil-producing country sells part of its production, and in return receives other goods[38].

25. Thus, compensation operations cover figures such as "*barter*" – which consists of a simple direct exchange of goods or services, without currency intervention – in addition to other contractual forms that are linked to the purchase and sale or the provision of services, approaching the exchange contract, such as: *compensation, counter purchase, buy-back, offset operations, tolling*[39].

26. It turns out that, at present, currency plays a key role in personal relationships, making it a general instrument of exchange[40], starting to represent the "*value gauge of goods*"[41]. In this way, with the implementation of money[42] and the evolution of commerce, currency came to favor commercial transactions, constituting an important instrument for the acquisition of goods, in addition to making it possible to compare the relative value of goods and build up savings[43].

27. In this way, the exchange contract lost its importance in favor of purchase and sale, being seen, in contemporary legal systems, as a contract derived from purchase and sale[44].

28. Historically, and given Roman law, exchange was a controversial contract, whose classification was discussed[45], due to the affinities between exchange and purchase and sale[46], with a dispute between Sabinians and Proculeians[47]. According to the Sabinians, exchange was just a form of buying

[37] P. H. Antonmattei and J. Raynard, *Contrats Spéciaux*, 3.ª ed., Litec, Paris, 2002, p. 225; J. M. Jacquet and P. Delebecque, *Droit du Commerce International*, 3.ª ed., Dalloz, Paris, 2002, p. 274; A. G. R. Costa Neves, *Dos Contratos de Contrapartidas no Comércio Internacional (Countertrade)*, Almedina, Coimbra, 2003, p. 19 and next; G. Bausilio, *Contratti Atipici*, 2.ª ed., Cedam, Milano, 2006, p. 57 and next.

[38] J. Huet, *Les Principaux Contrats Spéciaux*, 2.ª ed., LGDJ, Paris, 2001, p. 664.

[39] J. A. Vega Vega, *El Contrato de Permuta Comercial (Barter)*, Reus, Madrid, 2011, p. 36 and next.

[40] J. Engrácia Antunes, *A Moeda – Estudo Jurídico e Económico*, Almedina, Coimbra, 2021, p. 29 and next.

[41] A. Menezes Cordeiro, *Tratado de Direito Civil Português*, T. VI, 3.ª ed., Almedina, Coimbra, 2019, p. 712.

[42] Money is understood to be everything that, at a given time or place, is accepted as a form of payment: *vide* C. Laranjeiro, *Lições de Integração Monetária Europeia*, Almedina, Coimbra, 2009, p. 10 (note 1). This author gives as an example the periods of war or certain closed environments, such as prisons, where certain goods can be used as a means of payment. And, J. M. Coutinho De Abreu, *Curso de Direito Comercial*, Vol. II, 7.ª ed., Almedina, Coimbra, 2021, p. 261. On the legal nature of money, *vide* J. M. Vieira Gomes, *O Conceito de Enriquecimento, O Enriquecimento Forçado e os Vários Paradigmas do Enriquecimento sem Causa*, Universidade Católica Portuguesa, Porto, 1998, p. 615 and next.

[43] J. Renato Gonçalves, "A Desmaterialização da Moeda – (Nota sobre o Passado e o Futuro do Dinheiro)", *in*: *Estudos Jurídicos e Económicos em Homenagem ao Prof. Doutor António de Sousa Franco*, Vol. II, Coimbra Editora, Coimbra, 2006, p. 734 and next.

[44] J. L. Merino Hernandez, *El Contrato de Permuta*, Tecnos, Madrid, 1978, p. 37.

[45] M. Kaser, *Direito Romano*, Portuguese translation of Samuel Rodrigues and Ferdinand Hämmerle, 2.ª ed., Fundação Calouste Gulbenkian, Lisboa, 2011, p. 241 and 264.

[46] Álvaro D´Ors, *Derecho Privado Romano,* 10.ª ed., Eunsa, Pamplona, 2008, p. 590, note 4, defends, starting from the text of the Digesto 19.4, that the exchange contract (*permutatio*) is the exchange of one thing for another, without the intervention of money. Thus, for the Sabines, exchange was a form of buying and selling, since, as there was no intervention of money, it was not possible to distinguish who was the buyer and the seller. And he adds that, as it consists of a *datio*, in case of eviction of the delivered thing, there was not exactly a contract (Digesto 19,4,1,3), the consideration could be recovered by the *condictio* (Digesto 19,4,1,4), as an undue donation, or claiming non-compliance through a contractual action.

[47] B. Biondi, *Contrato e Stipulato*, Giuffrè, Milano, 1953, p. 85 and next; C. A. Maschi, *Il Diritto Romano – La Prospettiva Storica Della Giurisprudencia Classica*, Vol. I, 2.ª ed., Giuffrè, Milano, 1966, p. 572 and next; G. Baviera, *Le Due Scuela Dei Giureconsulti Romani*, "L´Erma" di Bretschneider, Roma, 1970, p. 86 and next; L. Lantella, *Il Lavoro Sistematico Nel Discorso Giuridico Romano (Reportorio di Strumenti per una Lettura Ideologica)*, Giappichelli, Torino, 1975, p. 137 and next; P. D. L. Rosa Diaz, *La Permuta (Desde Roma al Derecho Español Actual)*, Montecorvo, Madrid, 1976, p. 37 and next; G. Luigi Falchi, *Le Controversie Tra Sabiniani e Proculiani*, Giuffrè, Milano, 1981, p. 88 and next; C. Cascione, *Consensus – Problemi di Origine, Tutela Processuale, Prospettive Sistematiche*, Editoriale Scientifica, Napoli, 2003, p. 378 and next; M. Kaser, *Römisches Privatrecht*, 19 Auflage, fortgeführt von Rolf Knütel, Beck, München, 2008, p. 225 and next; E. Sciandrello, *Studi Sul Contratto Estimatorio e Sulla Permuta NelDiritto Romano*, Universitá DegliStudiDi Trento, Trento, 2011, p. 207 and next. On the two schools, that of the Proculeians and that of the Sabinians, as to their foundation and their characteristics *vide* V.

and selling; for the Proculeians, whose opinion prevailed, it was essential to underline the differences that opposed exchange to buying and selling[48].

29. As mentioned by Lete Del Río and Lete Achirica, the importance of the exchange contract arises in times of scarcity of goods and currency devaluation[49], as is the case, for example, in the period after the Second World War, when this institute awakened a great interest, especially with the exchange of land for fractions or buildings to be built[50].

30. Ferreira De Almeida points out that some exchange practices have suffered the erosion of time, giving the example of maquia as retribution in goods for the service provided at the mill or in the wine press, for the transformation of cereal into flour or olives into oil. However, others resisted monetization, such as: the exchange of buildable land for a part of a building to be built on that land[51].

31. The relevance of exchange, in today's society, is enormous, since this contract is not related or governed only by a rudimentary and primitive economy. As Rogel Vide points out, today there are several things that are exchanged, such as: stickers, stamps, comics, animals and their products, fruits, coins, tickets, cars, tractors, motorcycles, chairs, furniture, vinyl, films, music equipment, computers, computer programs, computer games, hard drives, raw materials and manufactured goods[52].

32. Alongside this, a plurality of consumer relations emerges, in which the exchange contract does not go unnoticed, that is, it is a very important contract in contemporary human relations. Consumption needs combined with new technologies bring the exchange contract to the forefront.

33. With the digital transformation that has taken place in recent years, there has been a paradigm shift in consumer relations. A new variant of exchange contracts signed through digital platforms appears.

34. In this way, we can enter into exchange contracts of the most varied nature via the Internet, such as, for example, animals, sports material, clothing and books. Consequently, specialty sites begin to emerge, whose purpose is the exchange contract[53].

Arangio-Ruiz, *Storia Del Diritto Romano*, 2.ª ed., Casa Editrice Dott. Eugenio Jovene, 1940, p. 271 and next; R. Ventura, *Manual de Direito Romano*, Vol. I, Coimbra Editora, Lisboa, 1964, p. 94 and next; S. Cruz, *Direito Romano (IUS ROMANUM) – I. Introdução. Fontes*, 4.ª ed., author´s edition, Coimbra, 1984, p. 387 and next; E. V. Cruz Pinto, *Introdução ao Estudo do Direito Romano – As questões fundamentais*, AAFDL, Lisboa, 2021, p. 362 and next.

[48] J. M. Poughon, *cit.*, p. 17 and next; A. Santos Justo, *Manual de Direito Privado Romano*, 3.ª ed., Petrony, Lisboa, 2021, p. 198 and next.

[49] J. M. Lete Del Rio and J. Lete Achirica, *Derecho de Obligaciones*, Vol. II, Aranzadi, Navarra, 2006, p. 271.

[50] A. Luminoso, *I Contratti Tipici e Atipici*, Giuffrè, Milano, 1995, p. 191.

[51] C. Ferreira De Almeida, *Contratos…*, *cit.,* p. 125. The current exchange has generated some controversy, with two opposing theses, as noted by G. Oberto, "Permuta", *Digesto delle Discipline Privatische*, Vol. XIII, UTET, Torino, 1995, p. 368: on the one hand, there is the doctrinal current, which is considered the traditional thesis, which says that today the use of exchange is occasional, with the function of exchange appearing as something largely foreign to the phenomenon of mass production and circulation in a modern economy. The opposite thesis argues that exchange spreads again due to the increase in the cost of money and its scarcity. The author adds that reality probably lies in the middle. The exchange contract does not correspond to an institute of primitive economies or serious crises, since today the exchange continues to produce its effects, and the author gives as an example the exchange of buildable area for a portion of the building to be built or the exchange between a used vehicle and a new one.

[52] C. Rogel Vide, "Sobre…", *cit.*, p. 536.

[53] C. D. C. Valdés Díaz, "Intercambio sen la Red, ¿ Contrato de Permuta?", *Contratación Electrónica y Protección de Los Consumidores – Una Visión Panorámica*, Coord. L. B. Pérez Gallardo, Reus, Madrid, 2017, p. 247 and next, the author presents us with a wide range of sites in spain where a variety of things can be exchanged. As an example, the websites are: http://www.trueques.com; http://www.cambia.es; http://www.depersonaapersona.es...

III. Exchange Concept

35. The Portuguese Civil Code does not regulate the exchange contract, unlike other European Codes close to our legal system. Thus, the exchange contract appears as a typical contract, for example, in the Civil Codes: Spanish, in articles 1538.º to 1541.º; French, articles 1702.º to 1707.º; and Italian, articles 1552.º to 1555.º.

3**6.** It also appears in the Allegemeine Bürgerliche Gesetzbuch (ABGB), in §§ 1045 to 1052[54]. Thus, German law merely mentions in § 480 Bürgerliches Gesetzbuch (BGB) that the provisions on sale apply with the necessary adaptations to exchange [55].

37. In the Ibero-American Civil Codes[56], we can find the exchange contract in the following Civil Codes: Uruguay, articles 1769.º to 1775.º; Peru, articles 1602.º and 1603.º; Bolivia, articles 651.º to 654.º; Venezuela, articles 1558.º to 1564.º; Cuba, articles 367.º to 370.º; Paraguay, articles 799.º to 802.º; Chile, articles 1897.º to 1900.º; Argentina, articles 1485.º to 1492.º and the eviction in the exchange articles 2128.º to 2131.º; Ecuador, articles 1864.º to 1867.º; Honduras, articles 1677.º to 1680.º; Nicaragua, articles 2748.º to 2756.º; Paraguay, articles 799.º to 802.º; Dominican Republic, articles 1702.º to 1707.º; Republic of Salvador, articles 1687.º to 1690.º; Costa Rica, article 1100.º only; and Brazil only refers to the exchange contract in article 533.º[57].

38. The Portuguese Civil Code of 1867 established, in articles 1592.º to 1594.º, the barter or exchange contract. In article 1592.º, a notion of barter or exchange was put forward that disposed like this: "barter or exchange is the contract, whereby one thing is given for another, or one type of currency for another type of it"; the only § added: "If money is given for something else, it will be sold or bartered, in accordance with the provisions of articles 1544.º and 1545.º"[58].

39. This notion aroused criticism by the doctrine, leading Cunha Gonçalves to state that "*it is a wrong definition, because exchange does not consist in giving one thing for another, which can be a mistake or misunderstanding. Thus, the fact that a person sells a table and delivers a bench is called an exchange. The most exact definition is this: it is the contract by which a person exchanges his own property for another, presumably of equal value, belonging to the other party*"[59].

40. The French Civil Code defines exchange, in Article 1702.º, as "a contract by which the parties give each other one thing for another thing". Influenced by the French Civil Code[60], the Spanish Civil Code moves forward with a very similar notion, in its article 1538.º, saying that "exchange is the contract by which each of the parties undertakes to give one thing in order to receive another".

41. The Italian Civil Code, on the other hand, distances itself and defines exchange in Article 1552.º as follows: "an exchange is a contract whose object is the reciprocal transfer of ownership of things or other rights, from one party to another".

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[54] P. Apathy, *Kurzkommenter zum ABGB*, 3 Auflage, Springer Wien New York, Lahnau, 2010, p. 1162 and next.

[55] H. Peter Westermann, *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4 Auflage, Beck, München, 2004, p. 541 and next.

[56] M. Beatriz Alvarez, "Digesto, Libro 18, Título 1, 1 Pr. y Su Recepción En Los Códigos Modernos", *in*: *O Sistema Contratual Romano: De Roma ao Direito Actual*, Coimbra Editora, Coimbra, 2010, p. 865 and next.

[57] S. D. Salvo Venosa, *Direito Civil – Contratos em Espécie*, 8.ª ed., Atlas, São Paulo, 2008, p. 85 and next.

[58] In commentary on the Portuguese Civil Code of 1867, J. Dias Ferreira, *Codigo Civil Portuguez Annotado*, Vol. IV, Imprensa Nacional, Lisboa, 1875, p. 5, points out that the essence of the exchange contract is to give one thing for another, other than money.

[59] L. D. Cunha Gonçalves, *Dos Contratos…*, *cit.*, p. 293 and next.

[60] G. Oberto, *cit.*, p. 368.

42. In the doctrine, we find several authors defining exchange, such as Ludwig Enneccerus and Heinrich Lehmann: "*in exchange, a thing or a right is promised in exchange for consideration, but this does not consist of money, but of something else or a right*" [61]. On the other hand, Manuel Albaladejo states that "*an exchange is a contract whereby each of the contracting parties undertakes to transmit to the other one thing (or right) in exchange for another (or) that the latter undertakes to transmit to him*"[62]. And Menezes Leitão tells us: "a contract whose object is the reciprocal transfer of ownership of things or other rights between the parties"[63].

IV. Qualifying Characteristics of the Exchange Agreement

43. The legislator preferred that the Portuguese Civil Code not regulate the exchange contract. In view of the non-existence of such regulations, he preferred to apply the rules of purchase and sale to the exchange contract, as provided for in article 939.º of the Civil Code, which orders it to be applied to all onerous contracts.

44. However, the Commercial Code provides in its article 480.º, the barter or exchange contract. Thus, we will qualify it as a nominated[64] and atypical[65] contract, as its regime is not regulated and refers to the rules of purchase and sale.

45. But the legal atypicality of the exchange contract may lead us to question its social typicality[66], the result of the current practice of its use and which results from the exercise of private autonomy[67]. Now, the exchange contract has, at present, a reiterated social practice. In this way, we are facing a socially typical contract[68].

46. It is a consensual contract, reaching perfection with the will of the parties, taking place with their mere consent. There is no need to hand over the thing here, as the tradition of the thing is not required for the contract to be fully constituted: on the contrary, both parties are obliged to deliver the exchanged things (article 879.º, paragraph b) of the Civil Code)[69].

47. It is also a signal contract[70], as obligations arise for both parties, with a reciprocity of obligations which implies a desirable simultaneous fulfillment[71]. Therefore, the contractual bond gives rise to

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[61] L. Enneccerus and H. Lehmann, *Derecho de Obligaciones*, spanish translation of Blas Perez Gonzalez and Jose Alguer, Vol. II, 15.ª ed., Boch, Barcelona, 1966, p. 188.

[62] Manuel Albaladejo, *Derecho de Obligaciones*, Vol. II, 10.ª ed., Bosch, Barcelona, 1997, p. 95.

[63] L. M. T. D. Menezes Leitão, *Direito…*, *cit.*, Vol. III, p. 169.

[64] In the opposite direction goes the judicial decision of Supremo Tribunal de Justiça de 09-10-2007, Processo n.º 07A2761, Relator Fonseca Ramos, where we can read in its summary: "an exchange contract, also called exchange or barter, is today an atypical, unnamed contract", available at www.dgsi.pt. Also the Opinion n.º 4/2002 da Procuradoria Geral da República, published in Diário da República, on 26-09-2002, II Série, n.º 223, p. 16316, understands that the exchange is an unnamed contract.

[65] In this regard, L. M. T. D. Menezes Leitão, *Direito…, cit.*, Vol. III, p. 170.

[66] L. M. T. D. Menezes Leitão, *Direito das Obrigações*, Vol. I, 16.ª ed., Almedina, Coimbra, 2022, p. 204. For M. Helena Brito, *O Contrato de Concessão Comercial*, Almedina, Coimbra, 1990, p. 169, "*as a consequence of the admissibility of social typicality, atypical contracts can only be spoken of in relation to absolutely new contracts, which do not correspond to either the legal types or any of the social types accepted in a given legal order*".

[67] A. Menezes Cordeiro, *Tratado de Direito Civil*, Vol. VII, Almedina, Coimbra, 2014, p. 191; M. Monterroso Rosas, "Autonomia privada e negócios para assistência na diminuição da capacidade: um caso concreto – Acórdão doTribunal da Relação do Porto (2.ª Secção) de 9.10.2018, Proc. 1644/16.4T8PVZ.P1", *Cadernos de Direito Privado*, 66, 2019, p. 44 and next.

[68] As said by M. Helena Brito, *cit.*, p. 219, the socially typical contracts "*are governed by the clauses stipulated by the parties, provided they are lawful, and by the discipline proper to the social type, that is, by those norms or criteria already based on negotiating practice, jurisprudence and doctrine to regulate the contractual type in cause*".

[69] *vide* T. Azevedo Ramalho, *Contratos*, Gestlegal, Coimbra, 2021, p. 312 and next.

[70] G. Gorla, *La Compravendita e La Permuta*, UTET, Torino, 1937, p. 346.

[71] J. C. Brandão Proença, *Lições de Cumprimento e Não Cumprimento das Obrigações*, 3.ª ed., Universidade Católica

the genetic signal, which translates the projection of reciprocity[72], as a functional signal, which operates throughout the life of the contract[73].

48. In this order of ideas, Menezes Leitão[74] understands that institutes that presuppose the contractual sign are applicable to exchange, such as the exception of non-compliance (article 428.º and following of the Civil Code)[75], the expiry of the contract due to the impossibility of one of the installments (article 795.º, n.º 1 of the Civil Code) and the resolution for non-compliance (article 801.º, n.º 2 of the Civil Code)[76].

49. It is an onerous contract, because it implies a patrimonial sacrifice for both parties[77].

50. It is a commutative contract[78], in the sense that both patrimonial attributions are presented as certain. However, it can be random, as in the exchange of goods that exist or are of uncertain ownership (article 881.º of the Civil Code).

51. It is a translative contract, or doubly translative, since there is a double transfer of rights over the things exchanged[79]. The parties undertake through the contract to transfer the ownership, or other real right, of the things that are the subject of exchange[80].

52. It is an obligatory contract, as it gives rise to the obligation of delivery for both parties (article 879.º, paragraph b) of the Civil Code); and real, since the ownership of the exchanged goods is transferred, by mere effect of the contract, the ownership of the goods exchanged (articles 879.º, a) and 408.º, n.º 1 of the Civil Code)[81].

53. By virtue of article 219.º of the Civil Code, we understand that the exchange contract is primarily a non-formal contract, because, taking into account the characteristics that we have already mentioned, we are facing a consensual and atypical contract which, in principle, is free in any way. Therefore, the form of atypical contracts raises questions[82].

Editora, Porto, 2019, p. 188; J. Ribeiro De Faria, *Direito das Obrigações*, Vol. I, 2.ª ed., updated and revised by M. Pestana de Vasconcelos and R. Teixeira Pedro, Almedina, Coimbra, 2020, p. 245 and next.

[72] A. Menezes Cordeiro, *Tratado…*, *cit.*, Vol. VII, p. 198.

[73] *idem*, p. 198.

[74] L. M. T. D. Menezes Leitão, *Direito…, cit.*, Vol. III, p. 170 and next.

[75] As mentioned J. M. Vieira Gomes, "Da Excepção de Não Cumprimento Parcial e da Sua Invocação de Acordo com a Boa Fé", *Cadernos de Direito Privado*, 25, 2009, p. 58 (note 10), ABGB predicts, in terms of exchange (§ 1052)*, "that the party demanding the performance of the other must demonstrate that it has performed its own."*. Also J. João Abrantes, *A Excepção de Não Cumprimento do Contrato*, 3.ª ed., Almedina, Coimbra, 2018, p. 26 and 151, mentions that the Napoleonic Code, not having formulated the non-execution exception in general terms, limits itself to reproducing the exception in some particular applications, such as exchange (article 1704.º of the French Civil Code). Also in the Spanish Civil Code the exception appears in the exchange (article 1539.º) *vide* B. Rodríguez-Rosado, *Resolución y sinalagma contractual*, Marcial Pons, Madrid, 2013, p. 83 and next.

[76] Also J. C. Brandão Proença, *A Resolução do Contrato do Direito Civil – Do Enquadramento e do Regime*, Coimbra Editora, Coimbra, 1996, p. 95, understands that article 801.º, n.º 2 of the Civil Code, is extended to the exchange contract.

[77] C.Lasarte, *Contratos III*, 12.ª ed., Marcial Pons, Madrid, 2009, p. 206.

[78] C. Rogel Vide, *Derecho de Obligaciones y Contratos*, Reus, Madrid, 2007, p. 198.

[79] F. Collart Dutilleul and Philippe Delebecque, *Contrats Civils et Commerciaux*, 8.ª ed., Dalloz, Paris, 2007, p. 460.

[80] For A. Cardoso Guedes, *O Exercício do Direito de Preferência*, Publicações da Universidade Católica, Porto, 2006, p. 368 and 386 and next, in the case of preferential legal rights, exchange is excluded from the preference. But it admits, in general theory, that the preference can be exercised in case of exchange. Thus, it understands that in the light of articles 418.º and 423.º of the Civil Code, preference can be agreed in relation to businesses where the promised consideration consists of a benefit in kind, provided that it is possible to maintain the provision of the same type and quality than the taxable person expected to receive.

[81] L. M. T. D. Menezes Leitão, *Direito…, cit.*, Vol. III, p. 170. Como sustenta N. Aureliano, *O Risco nos Contratos de Alienação – Contributo para o Estudo do Direito Privado Português*, Almedina, Coimbra, 2009, p. 385, "*the rules for transferring ownership of the thing(s) and the risk will necessarily coincide with the provisions of arts. 408.º, 409.º, 796.º and 797.º, identifying the patrimonial sacrifice of the consideration with the delivery of the thing due in exchange*".

[82] For P. Pais De Vasconcelos, *Contratos Atípicos*, 2.ª ed., Almedina, Coimbra, 2009, p. 461 "*the principle of freedom of form governs both typical and atypical contracts and there are no specific formal requirements in the law for atypical contracts*".

54. The distinction between consensual business and formal or solemn business, in the teaching of Manuel De Andrade, "*has as a criterion that the validity of the business is independent of any form, or on the contrary that it is subordinated to some requirement*"[83].

55. Thus, when the exchange of real estate is at stake, article 875.º of the Civil Code must be applied[84].

V. Distinction of the Purchase and Sale Exchange

56. The exchange contract, despite having some similarities with the purchase and sale, departs from and differs from it due to its essence and nature[85]. exchange is not a kind of purchase and sale, but a contract *in se* and *per se*, since buying and selling and exchange are autonomous and reciprocally independent species of a superior, broader concept, which comprises the two contracts, which is the exchange[86].

57. However, the exchange is underlying the exchange contract and the contract of purchase and sale. As Ferreira De Almeida teaches us, exchange, as a class of economic and social function common to a very wide range of contracts, is characterized by the intersection of two factors: the bilaterality of costs and benefits, which corresponds to sacrifices and advantages for both parts. It turns out that contracts with an exchange function can be distinguished into two asymmetrical groups: some due to the existence of a price, others due to direct exchange in which there is no price[87].

58. However, the Portuguese legislator opted to make the purchase and sale contract the archetype of other onerous contracts, whose regime extends to exchange. But, when we apply the rules of purchase and sale to the exchange contract, we encounter obstacles, many of which are difficult to adapt.

59. From the notion that we took from article 874.º of the Civil Code, "purchase and sale is the contract by which ownership of a thing, or other right, is transferred through a price". As such, with this notion, we are faced with the existence of two essential elements in the purchase and sale: on the one hand, the transfer of the property right or another right; on the other hand, the payment of the price[88].

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[83] M. A. Domingues De Andrade, *Teoria Geral da Relação Jurídica*, Vol. II, Almedina, Coimbra, 2003, p. 47.

[84] This idea is confirmed by: L. M. T. D. Menezes Leitão, *Direito…, cit.*, Vol. III, p. 170; A. Menezes Cordeiro, *Tratado de Direito Civil*, T. XIII, Almedina, Coimbra, 2022, p. 477; H. Ewald Hörster and E. S. Moreira Da Silva, *A Parte Geral do Código Civil Português – Teoria Geral do Direito Civil*, 2.ª ed., Almedina, Coimbra, 2019, p. 484; N. M. Pinto Oliveira, *Contrato de Compra e Venda: Noções Fundamentais*, Almedina, Coimbra, 2007, p. 29 and next. P. Pais De Vasconcelos, *Contratos…*, *cit.*, p. 462, stresses that "*all atypical contracts with real effectiveness that have immovable property as their object must be concluded by public deed*". And he adds: "*this is the first and most important restriction to the regime of freedom of form for atypical contracts*".

[85] L. D. Cunha Gonçalves, *Tratado…*, Vol. VIII, p. 329, highlights the distinction between buying and selling and exchange in terms of nomenclature. Thus, the author traces the differences between the two contracts to trace their nature and legal regime. As such, "*in buying and selling, the parties have unmistakable names and obligations, they are called buyer and seller; the former gives a sum of money designated as a price, and the latter gives a thing. In exchange, both parties are called interchangeants and each gives one thing; and, even when there is an additional amount in cash, this is not designated as price. In buying and selling, the value of the thing depends on its estimation in the market; in exchange, the value depends on the particular utility that the things have for each of the exchangers, sometimes without any attention to their pecuniary equivalence, that is, a thing of little value for one of the exchangers or for any other person can have great value. value for the other permutant. Such was the Biblical exchange made between Jacob and Esau*".

[86] F. Melon Infante, "El Contrato de Permuta en El Codigo Civil", *Revista de Derecho Privado*, T. XLV, 1961, p. 709.

[87] C. Ferreira De Almeida, *Contratos*, *cit.,* p. 121 and next.

[88] Pires De Lima and Antunes Varela, *Código…, cit.*, Vol. II, p. 160; P. D. Albuquerque, *Direito das Obrigações, Contratos em Especial,* Vol. I, T. I, Almedina, Coimbra, 2008, p. 72 and 73; N. M. Pinto Oliveira, *Contrato de Compra e Vanda – Introdução – Formação do Contrato*, Vol. I, Gestlegal, Coimbra, 2021, p. 26 and next. R. Ventura, Contrato de Compra e Venda no Código Civil – O Preço – Venda a Retro", *Revista da Ordem dos Advogados*, 40, 1980, p. 606 and 607, states that price is an essential element of buying and selling. Thus, "*if the parties stipulate for one of them…, an obligation whose object is a dare of something other than money or a facere, there may be another contract, typical or atypical, but there will be no*

60. Thus, as in the sale, the exchange is also a contract in which the transfer of property takes place, in this case a double transfer, since there are two things reciprocally transferred[89]. But an essential element of exchange, which clearly distinguishes it from buying and selling, is the non-existence of a price in money[90], because what is at the base and essence of the exchange contract is an exchange *in natura*[91], that is, a direct exchange of things or rights without the intervention of money[92].

61. Nowadays, it is very common to exchange land for a fraction or building that will be built[93] and the sale of motor vehicles with the repossession of the old used car[94]. In these two examples of exchange, the existence of a cash supplement can be called into question, to make the equivalence of the goods in exchange.

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purchase and sale". Now, as mentioned M. Baptista Lopes, *Do Contrato de Compra e Venda no Direito Civil, Comercial e Fiscal*, Almedina, Coimbra, 1971, p. 112, what characterizes the purchase and sale contract is the price.

[89] P. Malaurie, Laurent Aynès and P. Y. Gautier, *Les Contrats Spéciaux*, 9.ª ed., Defrénois, Paris, 2017, p. 492; A. Bugamelli and M. Giampieri, *Il Contratto di Riporto e la Permuta*, Key, Vicalvi, 2018, p. 74 and next.

[90] Portuguese superior courts have also highlighted the differences between exchange and purchase and sale. Thus, judicial decision of Tribunal da Relação de Lisboa de 18-05-2006, Processo n.º 3015/2006-6, Relator Ana Luísa Geraldes, where it can be read in the respective summary: "the legal institutes of purchase and sale and that of exchange are essentially different in terms of their nature, with the essence of the purchase being payment in cash for the thing sold, while the essence of the exchange, is , to give something other than money for something else". Judicial decision of Supremo Tribunal de Justiça de 25-03-2010, Processo n.º 2688/07.2TBVCT.G1.S1, Relator Oliveira Vasconcelos, from whose summary we extract: "The characteristic element of a barter or exchange contract is the absence of any monetary object that in the contract would perform the function of means of payment, that is, the absence of any object that can be qualified as price", both available at www.dgsi.pt.

[91] C. Giannattasio, *La Permuta, Il Contratto Estimatorio, La Somministrazione, Trattato di Diritto Civile e Commerciale,* of the work of Antonio Cicu and Francesco Messineo, Vol. XXIV, T. I, Giuffrè, Milano, 1960, p. 23; C. Massimo Bianca, *La Vendita e La Permuta, Trattato di Diritto Civile Italiano*, of the work of Filippo Vassalli, Vol. VII, T. I, 2.ª ed., UTET, Torino, 1993, p. 1136 and next.

[92] F. Melon Infante, *cit.*, p. 707.

[93] In practice, the contract for the exchange of land for an autonomous fraction is very common, in which the owner of a land negotiates the property against the delivery of a certain number of fractions to be built, and which our jurisprudence, mostly, has qualified as contract for the exchange of future goods. Therefore, judicial decision of Supremo Tribunal de Justiça de 19-03-2002, Processo n.º 512/02, Relator Azevedo Ramos, *Colectânea de Jurisprudência*, I, 2002, p. 139 and next; judicial decision of Tribunal da Relação do Porto de 07-09-2009, Processo n.º 2813/08.6TBPRD-A.P1, Relator Maria Adelaide Domingues; judicial decision of Tribunal da Relação de Guimarães de 17-11-2009, Processo n.º 484/05.0TBAVV.G, Relator Isabel Fonseca; judicial decision of Tribunal da Relação do Porto de 09-02-2010, processo n.º 4575/08.8TBMAI-A.P, Relator Guerra Banha; all available at www.dgsi.pt. Against this understanding judicial decision of Tribunal da Relação do Porto de 23-02-1989, Processo n.º 23592, Relator Fernandes Magalhães, *Colectânea de Jurisprudência*, I, 1989, p. 198 and next, which maintains that the deal by which the purchaser of land undertakes, without the transferor receiving the price, to assign him the ground floor of the building to be built, constitutes a unilateral promise contract for the sale of a future asset. We do not intend to expand too much on this issue, as several questions can be asked here. We just point out that this is not a peaceful issue, because there are very different opinions as to the qualification of the contract, when in question is the exchange of land for a fraction to be built. Thus, there are those who understand that we are dealing with an exchange contract (an exchange of a present thing for a future thing), an exchange of land with subordinated works, a work contract, a mixed contract (exchange and work), an atypical contract and a memorandum of association, these being the majority ways of qualifying this contractual operation. But also, in a minority line of thought, there are those who qualify it as a community to build, a contract of accounts in participation and a surface right. About the various qualifications, *vide* L. Ricca, *Contratto e Rapporto Nella Permuta Atípica*, Giuffrè, Milano, 1974, p. 310 and next; A. López Frías, *La Transmisión De La Propiedad En La Permuta De Solar Por Pisos,* Bosch, Barcelona, 1997, p. 14 and next; M. E. Lerdo De Tejada, *La permuta de suelo por edificación futura – Entrega y transmisión de la propriedade en el sistema del Código Civil*, Universidad de Sevilla, Sevilla, 2011, p. 25 and next; G. Guzzardi, *La Permuta Atipica – Tratti ricostruttivi e regole operazionali*, G. Giappichelli Editore, Torino, 2019, p. 46 and next. Here, too, the question arises of the moment of transmission of ownership, which, for example, the Italian doctrine has understood that, as in the purchase and sale (Article 1472.º of the Italian Civil Code), the right is only transferred when the thing arises or comes to be in the ownership of the grantee, *vide* P. Perlingieri, *I Negozi Su Beni Futuri, I – La Compravendita Di «Cosa Futura»*, Casa Editrice Dott. Eugenio Jovene, Napoli, 1962, p. 216; G. Cottino, *Del Riporto Della Permuta - Commentario Del Codice Civile - Art. 1548-1555,* of the work of Antonio Scialoja and Giuseppe Branca, IV, Nicola Zanichelli Editore - Soc. Ed. Del Foro Italiano, Bologna / Roma, 1970, p. 100; C. Massimo Bianca, *La Vendita...*, *cit.*, p. 1142 (note 3).

[94] L. Costa Rodal, *Tratado de Contratos*, Rodrigo Bercovitz Rodríguez-Cano (direction), Nieves Moralejo Imbernón, S. Quicios Molina (coordination), T. II, Tirant lo Blanch, Valencia, 2009, p. 2221.

62. These two examples undoubtedly demonstrate the vitality of exchange in our society. But, on the other hand, exchange raises questions and problems, due to the cash supplement that the parties put into the deal to bridge differences in the values of the goods in exchange.

63. As we saw above, the distinguishing feature of exchange is the absence of a cash price. Now, this leads us to question the boundary between exchange and buying and selling.

64. The Portuguese legislator, by not regulating the exchange contract, judging it to be an archaic and out-of-use contract, raised questions before us. For, in the two examples we have considered, the law is silent regarding the role that the cash price will play.

65. In this way, a question arises: in the examples mentioned are we dealing with a purchase and sale contract, an exchange contract or a mixed contract? This issue, obviously, is of immense practical interest, insofar as it is a problem that makes perfect sense to ask, in order to know which legal figure appears to us and to have greater legal certainty.

66. In addition, the parties, when entering into a contract, freely determine the content and effects of the legal transaction they enter into, since, with such an act, the principle of private autonomy of the parties is manifested, thus providing a space for freedom[95]. This is certainly relevant, since the principle of private autonomy is one of the basic and ordering principles of the civil law, the principle of contractual freedom being an objectivation of private autonomy as a principle of source[96].

67. The principle of private autonomy is a structuring principle of the contract law, as a result of which the contractual freedom provided for in article 405.º of the Civil Code emerges as its result, from which we derive the contractual programming: freedom of execution, with the parties being responsible for deciding on the realization of contracting or not contracting; the freedom of choice of the other party; and the freedom of stipulation, where the parties are free to fix the content of the contracts, to enter into contracts other than those provided for by law or to include, in those that are provided for, the clauses they see fit[97], provided that they use this freedom within the limits established by the law[98].

68. Private autonomy, in particular contractual freedom, is also subject to constitutional protection, being a fundamental guarantee that stems, for example, from the Constitution of the Portuguese Republic, from its articles 26.º, n.º 1, 46.º, 47. º, n.º 1, 56.º, n.º 4, 61.º, n.º 1 and 62.º[99].

69. Private autonomy can lead the contracting parties to freely set the content of the contractual clauses, as well as to enter into contracts other than those regulated by law. But this private autonomy, which has constitutional protection, must not allow the practice of acts that are offensive against the dignity of the human person; therefore, in the event of abusive situations, the intervention of the legislator is essential to protect the weaker parties against abusive situations[100].

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[95] N. M. Pinto Oliveira, *Princípios de Direito dos Contratos*, Coimbra Editora, Coimbra, 2011, p. 147 and next; C. Massimo Bianca, *Istituzioni di Diritto Privato*, with collaboration Mirzia Bianca, Giuffrè, Milano, 2014, p. 357 and next.

[96] J. D. M. Antunes Varela, *Das Obrigações em Geral*, Vol. I, 10.ª ed., Almedina, Coimbra, 2004, p. 230 and next.

[97] R. D. Alarcão, *Direito das Obrigações*, with collaboration of J. Sousa Ribeiro, J. Sinde Monteiro, Almeno de Sá e J. C. Proença, polychopied, Coimbra, 1983, p. 76 and next; M. J. D. Almeida Costa, *Direito…*, *cit.*, p. 228 and next.

[98] A. F. Morais Antunes, *A Causa do Negócio Jurídico no Direito Civil*, Universidade Católica Editora, Lisboa, 2016, p. 96 and next.

[99] *vide* P. Mota Pinto, "Autonomia Privada e Discriminação – Algumas Notas*", Direitos de Personalidade e Direitos Fundamentais – Estudos*, Gestlegal, Coimbra, 2018, p. 149 and next; J. C. Vieira De Andrade, *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, 6.ª ed., Almedina, Coimbra, 2019, p. 255 and next; F. Alves Correia, *Justiça Constitucional*, 2.ª ed., Almedina, Coimbra, 2019, p. 54 (note 70). For further developments *vide* A. Prata, *A Tutela Constitucional da Autonomia Privada*, Almedina, Coimbra, 2016, p. 9 and next.

[100] J. Miranda, *Direitos Fundamentais*, 3.ª ed., Almedina, Coimbra, 2020, p. 335 and next.

70. Legal atypicality[101] comes from article 405.º of the Civil Code. Consequently, the parties can enter into contracts other than those provided for by law, and they can also take advantage of traits or elements of one or some of these contracts, giving rise to mixed contracts.

71. Therefore, in the exchange contract, when a sum of money is involved as a means of consideration, the doubt arises as to the qualification of the contract. This is a question to which the Portuguese Civil Code does not provide an answer to.

72. In the Portuguese Civil Code of 1867, this problem was resolved in article 1545.º, which provided: "if the price of the thing consists partly of money and partly of something else, the contract will be for sale, when the cash portion is greater than the two; and it will be exchange or barter, when that part in cash is the one of lesser value", adding the only § that "when the values of the two parts are equal, it will be presumed that the contract is a sale"[102].

73. It should be noted that this issue of the border between purchase and sale and exchange, when it comes to the exchange of things against things and money[103], is the subject of discussion by Italian doctrine. There we find three different views, which are: the objectivist, the subjectivist and, finally, the one that defends that we are facing a mixed contract[104].

74. The objectivist view, shared by Gastone Cottino, argues that the contract will be one of exchange if the money has an adjustment function, that is, if it serves to bridge the difference in value between the things exchanged. That is: when the money is less than the value of the thing, there is an exchange contract; if the money exceeds the value of the thing, there is a purchase and sale[105].

75. The subjectivist view, defended by Carlo Ginnattasio, on the other hand, argues that the will of the parties must be met. This considering that there will be purchase and sale or exchange, according to the interests that the parties have intended.

76. For this author, money plays an accessory role, as it makes no difference whether the increase in money is greater or less than the value of the thing. And he adds that the approximate equivalence of the values and the things exchanged meets the nature of the exchange contract, given that the parties can give the things a value of convenience, which, for their own personal interest, can determine a perfect equivalence of the installments[106].

77. Finally, the third vision, followed by Massimo Bianca, considers that there is a mixed contract, where elements of exchange and purchase and sale are found. For this author, even though the pecuniary benefit assumes a marginal role in the economy of the contract, there are always elements of the purchase and sale and exchange contract[107].

78. In France, when there is a cash consideration in an exchange contract, we are dealing with a "*soulte*" contract[108]. Jérôme Huet observes that, when there is a payback, the boundary between ex-

[101] J. C. Brandão Proença, *Direito das Obrigações – Relatório Sobre o Programa, o Conteúdo e os Métodos de Ensino da Disciplina*, Publicações Universidade Católica, Porto, 2007, p. 152.

[102] Article 1592.º of the Civil Code of 1867, which gives us the notion of a exchange or barter contract, refers to articles 1544.º and 1545.º, in order to have a perception of the border between purchase and sale and the exchange.

[103] When there is a cash compensation, the Italian terminology is "*exchange with conguaglio*", which we translate as equivalence.

[104] A. Tencati, *Compravendita e Figure Collegate, Permuta, Somministrazione, Franchising, Contratto Estimatorio, Riporto*, organization by Paolo Cendon, UTET, Torino, 2007, p. 10 and next.

[105] G. Cottino, *cit.*, p. 95 and next.

[106] C. Giannattasio, *cit.*, p. 23 and next.

[107] C. Massimo Bianca, *La Vendita...*, *cit.*, p. 1141.

[108] It seems to us that the correct translation of "*soulte*" is turn. Thus, the contract takes the name of exchange with turns.

change and purchase and sale is very tenuous. Thus, if the payback is high, the contract tends to be reclassified as a purchase and sale[109].

79. The same orientation is followed by Sousi-Roubi[110], Daniel Mainguy[111], Philippe Malaurie, Laurent Aynés and Pierre-Yves Gautier[112], who consider that if the payback is a more important sum than the thing that accompanies it, the payback makes it the its the main object. The monetary aspect is an essential element and, therefore, the exchange becomes a purchase and sale by application of the "*accessorium sequitur principale"* rule.

80. In Spain, article 1446.º of the Spanish Civil Code provides: "if the transfer price consists partly of money and partly of something else, the contract will qualify in accordance with the manifested intention of the contracting parties; failing that, the contract will be one of exchange, if the value of the thing exceeds that of money or equivalent; and will be for sale otherwise"[113]. Puig Brutau, in view of this rule, stresses that the preference given to the manifested intention of the contracting parties will not allow the parties to change the nature of the contract, by adding an insignificant sum of money to the provision to disguise the purchase and sale of an exchange, or an object of little value for a real purchase and sale to pass through an exchange[114].

81. Johannes Wertenbruch informs us, in view of the German legal system, that money can play a delimitation criterion between the purchase and sale contract and the exchange contract, considering that, in this operation, mixed benefits may arise for both parties. But the intention of the parties in the qualification of the contract is not enough: it is necessary to take into account whether the value of the thing is greater than the value of money in order to be faced with a purchase and sale contract.

82. A different situation, and one that causes greater difficulties, is the one found in cases where the value of the thing and the value of money are on a more or less balanced level. In these cases, jurisprudence tends to qualify the contract as a mixed contract, relying on the combination theory[115].

83. Oliver Fehrenbacher emphasizes that, when money is involved in an exchange contract, the delimitation can be made based on the most dominant part of the contract, that is, the value of the good or the money can be considered and check which of the two is more relevant in the contract. This delimitation is based on the theory of absorption, which can be found in § 1055 of the ABGB, and, in case of doubt, this criterion is applied; however, and as an alternative, there is the possibility of considering the existence of a mixed contract, with elements of the exchange contract and the purchase and sale contract[116].

84. In the words of Dieter Medicus and Stephan Lorenz, the exchange contract is not defined in the BGB, only § 480. The authors mention that there may be contracts with a mixture of elements of a purchase and sale and exchange contract, emphasizing that this may be a mixed contract. To this end, they give the example of a couple who are a little advanced in age, whose children, left home, left it too big for the same couple. As a result, both decide to move, exchanging the old house for a new, smaller one, leaving room for cash compensation. Another example is the case of a certain trader, who receives,

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[109] J. Huet, *cit.*, p. 667.

[110] B. Sousi-Roubi, "Le Contrat D´Échange", *Revue Trimestrielle de Droit Civil*, LXXVI, 1978, p. 281 and 282.

[111] D. Mainguy, *Contrats Spéciaux*, 11.ª ed., Dalloz, Paris, 2018, p. 277 and next.

[112] P. Malaurie, L. Aynès and P. Y. Gautier, *cit.*, p. 492.

[113] *vide* C. D. C. Valdés Díaz, "Sobre La Autonomía De La Permuta. Especial Referencia A La Permuta De Bienes Con Diferente Valor Y Su Posible Confusión Com La Compraventa, *Revista General de Legislación y Jurisprudencia*, 1, 2022, p. 47 and next.

[114] J. Puig Brutau, *Compendio de Derecho Civil*, *Derecho de Obligaciones, Contratos y Cuasi Contratos, Obligaciones Derivadas de Actos Ilícitos,* updated and revised by Carles J. Maluquer de Motes I Bernet, Vol. II, 3.ª ed., Bosch, Barcelona, 1997, p. 355.

[115] J. Wertenbruch, *Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen (BGB)*, Band 6/2 - Schuldrecht4/2: §§454-480, 13 Auflage, W. Kohlhammer, Stuttgart, 2009, p. 353 and 354.

[116] O. Fehrenbacher, "Der Tausch", *Zeitschrift für Vergleichende Rechtswissenschaft*, 101, 2002, p. 100.

in return, an old car, against the delivery of a new one. For this trader it would be more advantageous to receive the money than the old car, because, at best, he has no interest in it[117].

85. In the Portuguese legal system, Ferreira De Almeida understands that, if there is, in the exchange contract, a provision of money and goods other than money, this same contract will be mixed[118]. The same orientation is followed by Menezes Leitão, when he states that the preferable position is the one that qualifies as a mixed contract of sale and exchange[119].

86. Bearing in mind that the goods to be exchanged do not necessarily have to be equal in value, not even materially equal in terms of objects or identity(ies) of rights, this may cause us doubts in determining the boundary between purchase and sale and exchange. This happens because the mutation of society and the economy tends to place a high value on the things or rights around us, due to the strong performance that money has in society.

87. However, money can play an accessory role in the exchange contract, as nowadays it is common to value everything that surrounds us, and money plays a key role in valuing it. We are also aware that parties may give subjective value.

88. Thus, we share the opinion of those who defend an objectivist view, because we believe it is the one that best establishes and delimits the border between buying and selling and exchange. For if money has a more important function than the thing that accompanies it, the payment of the price in money makes it its main object.

VII. Purchase and Sale Rules

89. As we have been analyzing, the exchange contract is not currently an erased contract or one without practical relevance; on the contrary, it has shown signs of vitality. It turns out that, in the Portuguese legal system, we do not find a specific regime, by option of the legislator.

90. Thus, we have to resort to the rules of purchase and sale, pursuant to article 939.º of the Civil Code. However, there are purchase and sale rules that require adaptation, while others cannot be applied to exchange; as an example, we leave a note of some rules in which there are doubts about the application to the exchange contract.

91. We are of the opinion that norms such as those contained in articles 883.º and 886.º of the Civil Code are not applicable to exchange, as these norms presuppose a price. Therefore, they go against the nature and essence of the exchange contract.

92. With regard to the provisions of article 884.º of the Civil Code, we conclude that the idea of a reduction presupposes a price, which raises doubts as to the direct application of this article to the exchange contract. The provisions of Article 884.º of the Civil Code have their counterpart in Article 1480.º of the Italian Civil Code[120].

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[117] D. Medicus and S. Lorenz, *Schuldrecht II*, 15 Auflage, Beck, München, 2010, p. 135.

[118] C. Ferreira De Almeida, *Contratos*, *cit.,* p. 125.

[119] L. M. T. D. Menezes Leitão, *Direito…, cit.*, Vol. III, p. 172. However, the judicial decision of Supremo Tribunal de Justiça de 7-05-1996, *Coletânea de Jurisprudência*, II, 1996, p. 50, as we can see in its summary, it states that "an agreement in which the parties express that intention is an exchange contract"; the opinion n.º 4/2002 da Procuradoria Geral da República, published in Diário da República in 26-09-2002, II Série, n.º 223, p. 16316, understands that the same is exchange when "to settle differences in value, there is a need for monetary compensation, unless the sum of money constitutes the main installment or the prominent element of the contract".

[120] Pires De Lima and Antunes Varela, *Código…, cit.*, Vol. II, p. 236.

93. In the Italian doctrine we find divergent positions regarding the application of the price reduction to the exchange contract. Gastone Cottino is of the opinion that in the exchange, it is not possible to reduce the price, because no price is paid by both parties; the rule could perhaps be applied, as formulated for the purchase and sale, if it was a question of services of homogeneous and fungible things[121].

94. Massimo Bianca understands that article 1480.º of the Italian Civil Code is compatible with the exchange, in order to preserve the contract; thus, like the reduction in price, the reduction in the exchange installment also requires the establishment of a percentage measure of the considerations. If the consideration is divisible, the reduction is made *in natura*; the difficulty arises when such consideration is indivisible. In the event that this reduction is impossible, the injured party must be compensated for the damages[122].

95. In the Portuguese legal system, Menezes Leitão understands that article 884.º of the Civil Code can be applied to exchange, with the necessary adaptations[123].

96. We understand that the rule in question cannot be applied directly to the exchange agreement, because in order to be applied, we have to adapt it. Thus, for there to be a reduction, it is essential that the business is divisible, so that it can be divided into two parts, "*the one that remains void and the one that is saved, under the guise of a valid business*"[124].

97. But the reduction cannot go against the autonomy of the parties, resulting in a result that the parties would not have wanted to celebrate[125]. Thus, the parties may opt for compensation to compensate for damages.

98. Article 885.º of the Civil Code needs to be adapted, as we understand that it cannot be applied to the exchange contract in the same way as for the purchase and sale. Menezes Leitão understands that this precept cannot be applied to the exchange contract, because it presupposes a pecuniary consideration[126].

99. We understand that, when this norm talks about price, it cannot be applied to the exchange contract, because there is no price here. But when you talk about delivery, it makes sense that it applies to the contract in question.

100. We are of the opinion that the moment of delivery makes sense, because we are dealing with a synallagmatic contract[127]. Therefore, the installments must be carried out simultaneously, since the transmission of a right or thing must coincide with the transmission in the opposite direction; it is only if the parties exclude this simultaneity that article 885.º of the Civil Code cannot be applied with regard to the moment of simultaneity.

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[121] G. Cottino, *cit.*, p. 114.

[122] C. Massimo Bianca, *La Vendita ...*, *cit.*, p. 1157 and next. In italian jurisprudence, *Corte di Cassazione*, 12-04-1979, n.º 2127, *in*: V. Tagliaferri, *Vendita, Permuta, Leasing – Percorsi Giurisprudenziali*, Giuffrè, Milano, 2010, p. 164, admits the reduction in the exchange contract.

[123] L. M. T. D. Menezes Leitão, *Direito..., cit.*, Vol. III, p. 171 and next, which is of the opinion that "*article 884.º may, with the necessary adaptations, be considered applicable to the exchange, establishing that, if it is limited to a part of its object, the consideration must be reduced, if it is divisible, or attributed to the part a cash claim has been impaired, as compensation for the reduction*".

[124] I. Galvão Telles, *Manual dos Contratos em Geral*, 4.ª ed., Coimbra Editora, Coimbra, 2002, p. 373.

[125] P. Pais De Vasconcelos and P. L. Pais De Vasconcelos, *Teoria do Direito Civil*, 9.ª ed., Almedina, Coimbra, 2019, p. 746.

[126] L. M. T. D. Menezes Leitão, *Direito..., cit.*, Vol. III, p. 171.

[127] As noted in article 885.º of the Civil Code Pires De Lima and Antunes Varela, *Código..., cit.*, Vol. II, p. 176, "*this obligation to pay the price at the time and place of delivery of the thing constitutes a clear outcrop of the signalagmatic character of the contract, at the time of execution of the sale*".

101. As for the place, it is doubtful whether this could apply to the exchange contract. This is because there may be an exchange of goods, property for property, to which article 885.º of the Civil Code cannot be directly applied.

102. It is also our opinion that the regime of sale by installments, laid down in articles 934.º to 936.º of the Civil Code, cannot be applied to exchange. This is because these rules presuppose a fractionation of the price and, as such, go against the nature of the exchange[128].

103. Article 878.º of the Civil Code provides that "in the absence of an agreement to the contrary, the costs of the contract and other ancillary costs shall be borne by the buyer". This rule immediately raises a problem by establishing that, in the absence of a stipulation between the parties regarding expenses and other charges, they are the responsibility of the buyer.

104. In the exchange contract, we have neither a seller nor a buyer. We have two exchangers, who are going to exchange two goods or rights. Therefore, we are left with the doubt by whom the charges run.

105. The norm says "in the absence of convention". Therefore, the parties can stipulate what they see fit. But if no agreement is stipulated, who bears the costs?

106. The norm of article 878.º of the Civil Code only intends to regulate the internal relations between the contracting parties and not the direct responsibility with notaries or other public entities[129]. In addition, this precept, "*it is a rule of interpretation of the will, based on usage, which therefore admits convention to the contrary*"[130].

107. It should be noted that this rule has its antecedent in article 1552.º of the Civil Code of 1867. Now, Cunha Gonçalves understood that this precept should not be applied to the exchange contract, since here there is no buyer or seller; and adds that, unless there is an agreement to the contrary, the costs of the contract must be divided in half[131].

108. A similar position is taken today by Menezes Leitão, who understands that article 878.º of the Civil Code should not apply to exchange. For this author, this article presupposes a pecuniary consideration for the alienation[132].

109. In turn, the doctrine has been unanimous in understanding that the expenses of the exchange contract must be shared by both exchangers, because the nature of the exchange contract so requires. For example, Melon Infante expressly states that the expenses must be borne by both exchangers, as he understands that this is the fairest solution[133].

110. In Italy, we find a specific rule regarding expenses in the exchange contract. Article 1554.º of the Italian Civil Code provides that "unless otherwise agreed, the costs of the exchange and other ancillary costs shall be borne by both contracting parties in equal parts". This norm resolved a problem that had been discussed in Italian doctrine for several decades, since the Italian Civil Code of 1865 did not have a specific norm as it does today in article 1554.º of the Italian Civil Code.

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[128] We are not dealing here with the retro sale regime (article 927.º and next of the Civil Code), *vide* L. M. Pestana De Vasconcelos, *Direito das Garantias*, 3.ª ed., Almedina, Coimbra, 2019, p. 501 and next. We just leave the note that the Italian doctrine has accepted the retro exchange, as it understands that the institute of the retro sale is compatible with the exchange: *vide* C. Ginnattasio, *cit.*, p. 59 and next; G. Cottino, *cit.*, p. 123.

[129] Pires De Lima and Antunes Varela, *cit.*, Vol. II, p. 167.

[130] J. F. Rodrigues Bastos, *Notas ao Código Civil – artigos 827.º a 1250.º*, Vol. IV, Rei dos Livros, Lisboa, 1995, p. 71.

[131] L. D. Cunha Gonçalves, *Tratado…*, Vol. VIII, p. 630.

[132] L. M. T. D. Menezes Leitão, *Direito…,* Vol. III, p. 171.

[133] F. Melon Infante, *cit.*, p. 719.

111. Thus, in the absence of a rule, it was imperative to apply the rules of purchase and sale. Article 1455.º of the Italian Civil Code of 1865 was then applied, which provided that: expenses and other incidental charges were to be borne by the buyer, unless otherwise agreed. This article corresponds today to article 1475.º of the Italian Civil Code[134], this article which in turn influenced article 878.º of the Portuguese Civil Code where it had its source[135].

112. Italian doctrine understood that article 1455.º of the Italian Civil Code of 1865 could not be applied to exchange, as it was incompatible with its nature. They observed then that the interest of the thing was reciprocal, therefore the expense of the contract and of the translative act of the law, as long as it did not interest only one party, it should be divided in half by the two contracting parties. The same happened if there was a settlement with money, given the unity of the contract, unless the prevalence of money - conguaglio - should not be considered a sales contract[136].

113. Nóbrega Pizarro and Mendes Calixto are of the opinion that "*the expenses and charges with the conclusion of the contract and those ancillaries should be shared by the exchangers*"[137].

114. It does not seem to us that this is the most correct solution, because the exchangers may be exchanging things or rights in which only one of the things in exchange lacks, for example, a public act, such as a public deed. Therefore, it seems that the fairest solution is for each of the exchangers to bear their own expenses, although naturally the parties can agree otherwise.

115. The Civil Code regulates in articles 892.º and following the sale of other people's property. Thus, contrary to commercial sales, in which it is possible to dispose of someone else's property (article 467.º, n.º 2 of the Portuguese Commercial Code), in civil law, the sale of other people's goods is null and void whenever the seller lacks legitimacy to to be carried out (Article 892.º of the Civil Code).

116. However, the sale of other people's property whose purpose is something in the future is not void (articles 893.º and 880.º of the Civil Code). As the sale of a generic thing that does not belong to the seller is not void, since, at the time of the conclusion of the contract, the seller does not lack the status of owner[138].

117. The exchange of other people's property is a legal figure that has been the subject of study by the doctrine[139]. This is perhaps due to the fact that legal systems such as the French and Spanish consecrate this figure.

118. Regarding the Spanish legal system, Merino Hernandez, says that the exchange of other people's assets is "*one of the most interesting figures, and one of the few that the Spanish Civil Code refers to in an express way*"[140]. Thus, article 1539.º of the Spanish Civil Code[141] provides for the exchange of other people's property; but the same Civil Code no longer regulates the purchase and sale of other

[134] Article 1475.º of the Italian Civil Code provides: "the costs of the sales contract and the other ancillary costs are borne by the buyer, unless otherwise agreed".

[135] Pires De Lima and Antunes Varela, *cit.*, Vol. II, p. 167.

[136] C. Giannattasio, *cit.*, p. 41.

[137] S. Nóbrega Pizarro and M. Mendes Calixto, *Contratos Financeiros – Leasing, Agência, Franchising, Factoring, Permuta, Mútuo*, Almedina, Coimbra, 1991, p. 159.

[138] L. M. T. D. Menezes Leitão, *Direito…,* Vol. III, p. 97.

[139] *vide* J. Lopes Pereira, "Abuso de Direito e Venda de Bens Alheios no Direito Português", *Cadernos de Direito Privado*, 3, 2017, p. 729 and next; Mónica Jardim, "A Venda de Coisa Alheia como Própria", *Estudos de Direitos Reais e Registo Predial*, Gestlegal, Coimbra, 2018, p. 97 and next.

[140] J. L. Merino Hernandez, *cit.*, p. 166.

[141] Article 1539.º of the Spanish Civil Code mentions the following: "if one of the contracting parties had received the things that was promised to him in exchange and proves that it was not the property of the person who gave it, he cannot be forced to deliver what he offered in exchange, and he will comply with returning what he received".

people's property, which has generated some doctrinal controversy regarding the regime applicable to the purchase and sale of someone else's property[142].

119. As with the sale of someone else's property, there is a strong controversy as to whether the exchange of someone else's property is null or valid. This is because article 1539.º of the Spanish Civil Code is silent on the applicable regime. Furthermore, there are no rules regarding the sale of other people's goods, which has generated different opinions[143].

120. Mostly the doctrine[144] has accepted the validity of the exchange of something alien, as well as the jurisprudence[145]. Unlike the Portuguese, French and Italian legal systems, the effects of purchase and sale and exchange in the Spanish legal system have mandatory effects; thus, both contracts are purely consensual, reaching their perfection by mere agreement of the parties; the transfer of ownership of the things sold or exchanged forms part, not in the perfection, but in the consummation of the contract[146].

121. What emerges from article 1539.º of the Spanish Civil Code is that the exchanger who received the thing and proves that it did not belong to the person who handed it over can exercise a right of option: continue with the exchange contract, ask the other party for its fulfillment or request the termination of the contract[147]. This article recognizes that one of the exchangers is released from its obligation. This is because it recognizes a faculty of terminating the contract to the exchanger who received the alien's thing[148].

122. A missing question is to know under what conditions the exchanger who received the alien thing can terminate the contract, since that exchanger can either be in good faith or in bad faith, a situation that Spanish law does not clarify.

123. Melon Infante in the face of the silence of the rule regarding good or bad faith, understands that good faith is a *condictio iuris* that article 1539.º of the Spanish Civil Code recognizes, thus the interchangeable *accipiens* that is in bad faith cannot resolve the contract, and these effects of good and bad faith must be considered to the exchanger *tradens*[149].

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[142] On the various doctrinal positions, among all, J. Castan Tobenãs, *Derecho Civil Español Comum y Foral, Derecho de Obligaciones – Las Particulares Relaciones Obligatorias*, T. IV, 15.ª ed., Reus, S. A., Madrid, 1993, p. 84 and next; thus, regarding the regime applicable to the sale of other people's goods, there are authors who understand that it is invalid, because the sale represents a transfer of rights, one cannot transmit what one does not have (Manresa); which is not radically null, but voidable (Mucius Scaevola; De Diego); it is void by mistake, whenever the buyer states that, even tacitly, the acquisition of ownership of the thing is an essential condition of the contract (Borrel); is valid, because it only creates obligations for the parties. In the event of non-compliance, it is up to the buyer to demand compensation from the seller (Trías; Menéndez; Gayoso; Pérez González and Alguer; Roca Sastre).

[143] In view of the controversy over the doctrinal interpretation of article 1539.º of the Spanish Civil Code *vide* P. D. L. Rosa Diaz, *cit.*, p. 355 and next; J. L. Merino Hernandez, *cit.*, p. 167 and next.

[144] Against the validity of the exchange J. L. Merino Hernandez, *cit.*, p. 167, understands that the exchange of other people's goods is null, due to the non-existence of the contract. J. Castan Tobenãs criticizes this position, *cit.*, p. 205: for this author, it is not a case of non-existence of the contract, but a simple case of termination. In turn, P. D. L. Rosa Diaz, *cit.*, p. 357, understands that "for reasons of material justice, it allows the exchanger who received the thing to "undo" or "resolve" the validly concluded transaction".

[145] As a note J. Fernández Costales, "De la Permuta – Artículos 1538 a 1541", *Comentarios al Código Civil*, coordination of R. B. Rodríguez-Cano, 2.ª ed., Thomson / Aranzadi, Cizur Menor (Navarra), 2006, p. 1827: "article 1539 regulates the exchange of alien property, stating its validity for the same reasons as the sale of alien property *(STS 13 Outubro 1984 [RJ 1984, 4479])*".

[146] J. L. Merino Hernandez, *cit.*, p. 169. As supports J. Castan Tobenãs, *cit.*, p. 205, there is a big difference between the sale of someone else's property and the exchange of someone else's property, thus "*the buyer who has a well-founded fear of being disturbed by a claim action may suspend payment of the price (art. 1502)*". In exchange, "*the exchanger who proves to be alien to the thing he received in exchange, has a more direct and radical solution, as he can terminate the contract, retaining his thing and returning what he received*".

[147] J. M. Lete Del Rio and J. Lete Achirica, *cit.*, p. 277 and 278.

[148] L. Costa Rodal, *cit.*, p. 2225.

[149] F. Melon Infante, *cit.*, p. 711.

124. Luis Díez-Picazo and Antonio Gullón understand that the power of resolution requires good faith. Thus, the exchanger who wants to exercise it has to be unaware that the thing belonged to a third party at the time of contract completion[150].

125. Article 1704.º of the French Civil Code regulates the exchange of other people's property[151]. From the perspective of Jacques Ghestin and Bernard Desché, what is contained in this article is the express application of the exception of non-fulfillment of the contract, or the non *adimpleti contractus* exception, which article 1653.º of the French Civil Code also gives to the buyer who is in the same situation[152].

126. By virtue of article 1707.º of the French Civil Code, article 1599.º of the French Civil Code applies to exchange, in which the exchange of other people's property is void[153]. The nullity attained by the exchange of someone else's property, contrary to the nullity of the sale of someone else's property, is a relative nullity. As for good faith or bad faith, the aforementioned article 1599.º of the French Civil Code does not mention them, leaving the burden of proof to the exchanger who received something alien in exchange. However, if the exchange parties, in the act of contracting, are aware of the defect of the thing, they cannot propose an action for nullity, being obliged to submit to the risks[154].

127. The Italian Civil Code enshrines the sale of third party property in Articles 1478.º and 1479.º[155]; however, it does not regulate the exchange of other people's goods, as Ernesto Eula clarifies, this regulation is useless, because the Italian Civil Code regulates in detail and expressly the regime for the purchase and sale of other people's goods[156]. For Carlo Ginnattasio, exchange, along with buying and selling, may have something alien as its object, because the provisions contained in articles 1478.º and 1479.º of the Italian Civil Code are not incompatible with the exchange contract[157]. The exchanger who is in good faith may terminate the contract for non-compliance[158].

128. Article 1555.º of the Civil Code of 1867 established the sale of other people's property. Commenting on the aforementioned Civil Code, Cunha Gonçalves accepted that the provisions of article 1555.º of the Civil Code of 1867 applied to exchange[159].

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[150] L. Díez-Picazo and Antonio Gullón, *Sistema de Derecho Civil, El contrato en general, La Relación Obligatoria, Contratos en Especial, Cuasi Contratos, Enriquecimento sin causa, Responsabilidad Extracontractual*, Vol. II, 9.ª ed., Tecnos, Madrid, 2005, p. 304.

[151] Regulates article 1704.º of the French Civil Code: "if one of the co-exchangers has already received the thing, and if he proves that the other party is not the owner of that thing, he cannot be forced to deliver the thing he promised, but only to return what he had received".

[152] J. Ghestin and Bernard Desché, *Traité des Contrats – La Vente*, LGDJ, Paris, 1990, p. 36. A. Sériaux, *Contrats Civils*, Presses Universitaires de France, Paris, 2001, p. 96, it also states that, in case there is a defect in the exchange, and if one of the parties has already obtained the delivery of the good, but has not yet proceeded with the counter-delivery, it is obliged to return the good unduly received. Article 1704.º of the French Civil Code, however, allows an exception of non-compliance: "*it cannot be forced to deliver (the thing) promised through counter exchange*"; therefore, it understands that the co-exchanger cannot exercise the right of retention.

[153] M. Planiol and G. Ripert, *Traité Pratique de Droit Civil Français - Contrats Civils*, by J. Hamel, F. Givord and A. Tunc, T. X, 2.ª ed., LGDJ, Paris, 1956, p. 511; M. Fournier, "Échange", *Répertoire de Droit* Civil, T. V, Dalloz, Paris, 1996, p. 4. Napoleon's Civil Code came to break a long tradition that considered the sale of other people's property to be valid, *vide* P. Olavo Cunha, "Venda de Coisa Alheia", *Revista da Ordem dos Advogados*, 47, 1987, p. 441 and next.

[154] M. Fournier, *cit.*, p. 4.

[155] Y. Miranda, "Venda de Coisa Alheia", *Themis*, 11, VI (2005), p. 128, when analyzing the sale of third party property in the Italian legal system, it states that "*by virtue of art. 1478.º, the sale of someone else's property is valid, notwithstanding the actual design of the purchase and sale contract. The alienation of a third party's right is merely mandatory, with the seller having the obligation to ensure that the buyer acquires the property right. This will become the owner at the time the seller acquires ownership of the righ*t".

[156] E. Eula, *cit.*, p. 149.

[157] C. Giannattasio, *cit.*, p. 22. In this sense, the jurisprudence, *Corte di Cassazione*, 28-09-1954, n.º 3147, *in*: V. Tagliaferri, *cit.*, p. 189.

[158] *Corte di Cassazione*, 26-07-2007, n.º 20191, *in*: V. Tagliaferri, *op. cit.*, p. 190.

[159] L. D. Cunha Gonçalves, *Tratado*..., Vol. VIII, p. 630, in an annotation he maintains that "*the exchange in which one of the things exchanged does not belong to the respective exchanger, or both belong to third parties will be null and void*".

129. In view of the regime for the sale of other people's property, established in articles 892.º and following of the Civil Code, we believe that, like the purchase and sale, the exchange of other people's property is null and void. But the content of the second part of article 892.º of the Civil Code raises doubts about its application to exchange.

130. The law starts from the premise that normally the buyer is in good faith and the seller is in bad faith and even acts intentionally. Thus, if both exchangers are in bad faith, the two transmissions in the opposite direction may both be invalid.

131. This is a complex situation to which the law does not give us an answer, regarding the fact that the exchangers are in bad faith. Well, article 892.º of the Civil Code assumes that the buyer can, as a rule, dispose of the money, but the seller may not have the power to dispose of the thing.

132. The problem that arises here is that there is bad faith on both exchangers, as the law does not provide any solution for this case. The question is whether we can treat each of the transmissions separately in light of what buying and selling suggests or whether we have to treat the two transmissions as a unit.

133. The second part of article 892.º of the Civil Code contains a double limitation to argue the nullity of the contract, since on the one hand, the seller cannot oppose the nullity to the buyer in good faith, on the other hand, the fraudulent buyer cannot oppose the nullity to the seller in good faith. In view of this, the law is silent in the event that the two parties are in bad faith.

134. Galvão Telles[160] and Raúl Ventura[161] understand that in the event of the two parties being in bad faith, both may request the nullity of the contract[162].

135. In the event of both parties being in bad faith, we understand that either of them can claim the nullity of the contract. However, we believe that the set of two transfers should be treated as a single unit, as we are facing a double transfer, in which both exchangers are in bad faith.

VII. Conclusion

136. We were concerned to demonstrate that the exchange contract is not an "*outdated*" contract. Quite the contrary. It is a contract that is of enormous importance in human relations in the contemporary world.

137. Demonstrating the vitality of this contract is the jurisprudence of the Portuguese Superior Courts, which are constantly faced with issues related to the exchange. Therefore, we are in the presence of an atypical contract, but socially typical, as this is accepted, repeatedly, in our society.

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[160] As noted by I. Galvão Telles, "Contratos...", p. 128, if "*the two parties act maliciously, both knowing that the property belonged to a third party, but acting as if it were not, neither deserves protection, and either of them can obtain a judicial declaration of the nullity of the contract, with the consequent refund of the price paid, because that is the interest of the legal order*".

[161] R. Ventura, "Contrato de Compra e Venda no Código Civil – Venda de Bens Alheios – Venda Com Expedição", *Revista da Ordem dos Advogados*, 40, 1980, p. 312 and 313, understands that the "*seller in bad faith and buyer in bad faith – nullity can be opposed by any to any*".

[162] In this regard D. Bártolo, "Venda de Bens Alheios", *Estudos em Homenagem ao Prof. Doutor Inocêncio Galvão Telles – Novos Estudos de Direito Privado*, Coimbra, Almedina, 2003, p. 401. P. Olavo Cunha, *cit.*, p. 452, is of the opinion that in the event of bad faith or willful misconduct on the part of both parties, the sale of third party property is subject to the general regime of nullity in article 286.º of the Civil Code. Against this understanding Y. Miranda, *cit.*, p. 120, understands that "*since the law is clear as to the scope of application of the rules for the sale of someone else's property, including the rule that establishes the invalidity of the transaction. Establishes article 904.º, in conjunction with 892.º, that the sale of someone else's property as one's own, and not the sale of someone else's property in general, is null and that the specificities of this nullity are applicable only when at least one of the parties acts in good faith*".

138. Besides, today there are many things that are exchanged. However, the exchange contract has a secondary role in society, due to the absence of a cash price, contrary to what happens with the purchase and sale contract, which has acquired a preponderant role in human relations.

139. It is, in fact, due to the relevance of buying and selling and the role of money that the difficulty arises in establishing the border between exchange and buying and selling.

140. Money nowadays plays a function of attribution in the appreciation of everything that surrounds us. As such, it may play an ancillary role in the exchange contract.

141. Thus, the exchangers may want to give the money a character of adjustment in relation to the things exchanged, this so that the goods or things in exchange have an approximate equivalence. But this character of adjustment and accessory of money can make the frontier of purchase and sale and exchange very tenuous.

142. However, if money has a more important function than the thing that goes with it, the payment of the cash price makes it its main object. Therefore, the objectivist view is the one that best delimits the border between the two contracts.

143. However, the importance gained by the exchange contract passes through new technological tools, for example, the Internet. It is undeniable that the Internet plays a fundamental role in people's lives today, being a mean of communication and a vehicle in commercial transactions, namely in electronic contracting, and the exchange contract has shown signs of its vitality and is the object of transactions of various things.

144. Electronic contracting aims at a huge projection, denoting that the exchange contract has an intervening role in the contractual relationship. At the same time, electronic contracting can be carried out on different websites or on social networks, where the most varied things can be traded in exchange.

145. However, we think that the Portuguese legislator of 1966 was not happy in not regulating the exchange contract in the Civil Code, as it happened in the Portuguese Civil Code of 1867. He even considered it a contract without social relevance, fallen into disuse, reporting it to the primitive state of humanity, which everyday practice contradicts, as has been demonstrated.

146. We do not understand this option of the legislator of the Civil Code of 1966, as we believe that he did not make the right choice.

147. However, in article 1378.º of the Civil Code, the exchange of land was foreseen and, in article 1723.º, paragraph a) of the Civil Code, the exchange contract was established, in which one of the spouses disposes of an asset own to the other spouse, to receive from him another good, different from money. Its legal consecration, referred to in the Civil Code, articles 1378.º and 1723.º, paragraph a), shows how fallacious is the understanding according to which the exchange contract is antiquated and archaic.

148. In this way, the purchase and sale contract became a model for all onerous contracts through which goods are disposed of. In this way, we have to resort to article 939.º of the Civil Code to apply the rules of purchase and sale to the exchange contract.**149.** However, as we have shown throughout this study, we are faced with difficulties in applying the rules of purchase and sale to the exchange contract, since they were designed only for contracts in which a price is established.

150. The Portuguese legislator, instead of opening doors to make life easier for citizens, preferred to close them, unlike other legal systems, such as the Spanish, French, Italian, or Ibero-American codes, which enshrine in their Civil Codes, in short, the exchange contract.

151. It is therefore necessary to regulate the exchange contract, in the Portuguese legal system, since in practice its usefulness is enormous. But it is necessary to tread new paths and draw attention to the importance that this contract plays in our society.