

THE ROLE OF THE JUDICIARY IN DEMOCRACY

O PAPEL DO JUDICIÁRIO NA DEMOCRACIA ATUAL

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ABSTRACT:

The essay takes up and discusses the different meanings of the term democracy, analyzes the concept of "interpretance" and reflects on the political neutrality of the judiciary. The introduction of external requirements transforms the way of looking at the Constitution, implying a shift from the Constituent Power to the Constituted Power. The conclusion is that democracy seems to seek its legitimacy no longer through the political constitution and its guardians, but through the potential communicative means that are grouped around society's different means of communication.

Keywords: Judiciary, politics, democracy, neutrality.

RESUMO:

O ensaio retoma e discute as diversas acepções do termo democracia, analisa o conceito de "interpretância" e reflete sobre a neutralidade política do poder judiciário. A introdução de exigências externas transforma o modo de encarar a Constituição, implicando num deslizamento do Poder Constituinte para o Poder Constituído. A conclusão é que a democracia parece buscar sua legitimação não mais por meio da constituição política e seus guardiões, mas através dos potenciais meios comunicativos que se agrupam em torno dos novos e diferentes meios de comunicação da sociedade.

Palavras-Chave: Poder judiciário, política, democracia, neutralidade.

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Democracy is one of the most important commonplaces in the political rhetoric of our era. In its elementary features, the democratic ideal, configured since the Enlightenment thinkers of the 18th century, shows a process of dealing with inclusion and exclusion relations, whether people or groups, classes, genders, races, countries, regions.

Democracy, in this sense, contains in its etym the notion of people, demos, populus, plebs. A little heritage from the French Revolution, it is customary to assume the people constituted in the nation as an indissoluble unit, hence the link of those who exercise power with the whole of the nation and not with the individuals grouped in it.

The expression, however, does not and did not have, at the time, a semantic stability. What led Jaucourt in the Encyclopaedie to say “people (peuple), a collective name that is difficult to define, as it has different ideas in different places, at different times, depending on the nature of governments”.

In 1789 the ambiguity appeared, and the Declaration of August 26 was signed (as proposed by Mirabeau), “by the representatives of the French people”, although in its art. 3rd was said: “The principle of sovereignty resides essentially in the Nation”.

In the fashion of the American Revolution, the people, as a real people, was already supposed to consist of its active citizens, who act in groups. In 1787, Charles Pickney would say: the American people are divided into three classes, the liberal professionals, the merchants and the landowners and, “although different in terms of their activities, they are individually equal on the political scale and can be easily proved that they have only one interest”.

Due to this semantic and pragmatic imprecision, it can be understood that, in its elementary features, the democratic ideal, configured since the Enlightenment thinkers of the 18th century, shows a process of how to deal with relations of inclusion and exclusion, inclusion of the previously excluded, whether people or groups, classes, sexes, races, countries, regions, inclusion that generated, however, new exclusions and asked for new inclusions. For example: the aforementioned Charles Pickney, representative of South Carolina, when the Senate was created, did not include slaves. Robespierre, with the Jacobins, demanded that the people's sovereignty be spoken of again, in a strong allusion to the plebs and excluding the nobles, clerics and bourgeois.

This generated disputes over the univocal meaning of popular sovereignty (the seat of consensus) and the way to deal with the relations between majorities and minorities.

In its elementary features, the democratic ideal, configured since the 18th century, was thus supported by two pillars: the idea of representation of those governed by the rulers and the idea of identity or communion between them. Over the years, representation has meant mediated and institutionalized participation through known political instruments, such as elections, popular

mandates, party pluralism, freedom of expression, etc. Identity or communion meant identifying a collectivity in terms of symbolic participation, authentic community of beliefs and lifestyles, politicization of both rulers and ruled around bases and objectives, in short, feeling of aggregation based on common, capable symbols to express a common will, to unite rulers and ruled indistinctly. Hence the success of the expression nation.

Kelsen (2018 [1920]) sees in this interweaving the basic issue of defining the democratic principle. "Democracy", he says, "means the identity of ruler and ruled, of subject and object of domination, it means domination of the people over the people". Thus, if representativeness deals with differences, majority/minority relationships, communion or identity involves, rather, the theme of consensus.

Although the two pillars were understood as constituting a solidary set, the so-called representative democracy, in practice, imposed a difficult game.

It implied, after all, a difficulty in expressing a reasonable balance, between managing to prevail interests that transcend the interests of individuals, submitting them to objective rules of the social game and safeguarding the particular interests of each one.

Bobbio happily summarizes this game: "by a democratic regime, it is primarily understood that there is a set of rules of procedure for the formation of collective decisions, in which the greatest possible participation of interested parties is foreseen and facilitated". Hence one of its fundamental rules: "no majority decision can limit the rights of minorities, especially the right to become a majority on equal terms (...)" (BOBBIO, 1981).

Obviously, these rules of the game would not, by themselves, support a democracy. This would imply, since the 19th century, defining an order as democratic through the assertion that all rules and all decisions endowed with empire belong to the space of law - the majority will - to the exclusion of any other when it intends to override it, but also making the normative production go back, in the last analysis, to a hegemonic source of the consensus of all.

In other words, in a socially complex world, characterized by increasing qualitative multiplicities and quantitative pluralities, in a democratic regime, first of all, one would have to be able to deal with the need and scarcity of consensus.

The 1789 *Declaration of Human and Citizen's Right*² this difficulty clearly manifests. In it, the conservation of "natural and imprescriptible rights of man" is considered the "end of all political association" (No. 2). Freedom, as "the power to do everything that does not harm others" (nº 4) will allow us to understand the "common utility" and, simultaneously, the "social distinctions" (nº 1).

² <http://www.direitoshumanos.usp.br> Consulta em 27/08/2021.

Human rights thus constituted a principle of unity and integration in a world of diversity and atomization.

A politically democratic model would thus imply a way of dealing with the different social circles (the temple, the palace, the house, the street, the village, the countryside), marked by their differential relations, ensuring them, simultaneously, their differentiated expansion and its unitary significance.

Hence, democratically governing a society would imply mechanisms capable of establishing a legitimate coexistence between the need to make decisions in the name of the collectivity and the inevitable disappointments it causes.

In other words, the strength of democracy lies in this peculiar attitude towards consensus, in the sense that, in a democratic regime, representativeness becomes authentic not because of the result, but rather because of the consensual guarantee of the manifestation of dissent.

In these terms, a democracy shows itself as a regime that legitimizes itself because it makes it possible to live with the contradictory change of structures: by the representative will of parliaments, what is valid today may no longer be valid tomorrow and may come back later, but without the variability disturbs the imperative imposition of order. For order does not exclude, but it does not depend either on circumstantial policies of party agreements, or on governmental knowledge and feeling, but on a unity that keeps them intact in their diversity. Hence the function of the tripartition of powers. Through it, power is divided and controlled, *check and balance*.

Its strength, however, would not lie solely in its ability to maintain the distinctions between circles and their ramifications in an atmosphere of a continuum: the private and the public, the family incident and social order, social disorder and political order, the political disorder and economic order, economic disorder and financial order. At the same time, it would be necessary to allow the jump from one circle to the other, so that new circles sprout and the old ones are fed back, in order to overcome the system's own entropy.

For this, a democracy could not be limited to this task of organizing political power in distinct and concentric circles: one legislates, another executes, another judges. It was necessary to contain the tragic regime of infinite doubt: the sentence refers to the regulation, the regulation refers to the law, the law refers to the constitution, the constitution refers to itself. In this redundant process, the constitution would seek its ultimate legitimacy in democratic politics (an elected constituency: popular sovereignty) and, conversely, politics would seek legitimacy in the sovereignty of the constitution (the constitution as a set of norms, emanating from a political decision of the people).

But for this reciprocal foundation to work, to the political axis that links legislation to execution and refers to judgment, a paradigmatic axis was added, the axis of interpretation, a kind of secondary mechanism at the service of the regime of *check and balance*.

INTERPRETATION

This required a secondary mechanism at the service of the tripartite with its regime of *check and balance*.

This is the mechanism of interpretation: as interpretation is a redundant continuum, after all it is useless to try to go beyond interpretation, as it extends to infinity and nothing is found to interpret that is not another interpretation, it would be necessary to submit the interpretation to a point where it did not return a new signifier and a new interpretation: the best, the heaviest, the most radical, a kind of significant silence.

Or, in terms of legislation, to its ultimate and indisputable meaning, which paradoxically reveals itself in the shadow of a denial: this, that, is not law. To the political axis that links legislation to execution and refers the decree to the law, a paradigmatic axis is added, the axis of interpretation, in which the law carves for itself a conforming meaning, a meaning that does not cease to provide another meaning, a species of signifier that recharges and reproduces itself continuously.

It is understood, therefore, that for the democratic structure to work, the configuration of an ultimate interpretive instance was required. In this model, its stability also resulted from a functionally essential limiting premise: an interpretive power, instantially ultimate, whose discretion would be controlled by a self-restraint rule: its decisions would be programmed and not programmed, the rule of the negative legislator. As seen in the distinction between constituent power and constituted power (SIÈYES, [1789]) or in the notion of Paramount law of the American revolutionaries.

It is undeniable that this model, from a historical point of view, became such a resounding success that, despite possible difficulties, until the end of the 20th century, the so-called constitutional democracy was also widespread in all fields of the rule of law. . Not only in the constitution of the State, in the procedural guarantees of the Rule of Law, in the division of tasks between the Legislative, the Executive and the Judiciary, the production of law was coherently attributed to politics: parliamentary democracy. Under the technical-legal aspect, this was made possible through fictions to some extent plausible: through the broad state normative hierarchy, which even received contractual norms and internal norms of associations, through the delegation of the power to create the right to individuals and through reception and control by the State of social norms.

It is understood, therefore, that the democratic structure required the configuration of a politically neutral State Power and for its neutralization, an ultimate, *sui generis* instance, which controls everything through a supreme power of veto: the supreme normative power must to be politically castrated; is the negative legislator.

THE ROLE OF THE JUDICIARY

Conceived in this way, the Judiciary Branch constituted the cornerstone of the legitimacy of democratic regimes, as only through it the effects of normative imposition can reconcile the partial fulfillment of immediate needs (an expressive function of law enforcement), and also satisfy distant purposes, not immediate, such as the realization of justice, welfare and social peace (instrumental function of legislation)³. The Judiciary makes possible the congruence between the two functions (expressive and instrumental).

However, to exercise this function it was necessary that this Power be politically neutral. That is, the key to democratic legitimacy, the cornerstone of democratic legitimacy, is peculiarly guaranteed by the role of the judiciary, configured by neutralizing rules of its activity (impartiality, independence, permanent mandate) and organized in the form of an instantaneous hierarchy.

The political neutralization of the Judiciary is not, properly speaking, a type of generic indifference, a kind of political alienation. Neutralizing, therefore, did not mean to become generically indifferent, but to generate a controlled indifference, that is, to establish a relationship of indifference, guaranteed against the expectation of influence. Neutralization, in this sense, does not make the Judiciary immune, in fact, to political pressures. Its neutralization does not happen in the face of facts, but in the face of institutionalized expectations: although in fact there are political pressures, these institutionally do not count. The independence of the judge requires that belief in it be deeply rooted in the population. For only in this way political pressure, as a fact, is discarded as an ethical version.

This is the role of the Judiciary in traditionally conceived democracy. What has changed?

This structure and this structural role of the Judiciary Power functioned reasonably until the mid-twentieth century, when it began to lose its functionality.

The advent of a technologically mass society (internet, social networks) thus seems to develop new requirements, starting with a political deneutralization of the judge himself, who is then called upon to exercise a sociotherapeutic function, freeing himself from the tight conditioning of strict legality and the exclusively retrospective responsibility it imposes (judging facts, judging

³ Sobre essas funções ver Luhmann, 1983, p. 315 ss.

the past in the name of the given law), obliging itself to a prospective responsibility, concerned with the achievement of political purposes (judging in the sense of providing for the future).

Thus, from the internal angle, a kind of disorientation in legal dogmatics arises that culminates in the so-called consequentialism to justify the so-called judicial activism through legal instruments (hence the resumption of natural law in the acceptance of the direct incidence of principles), which, however, exposes the political paradox: how to explain the democratic meaning of programming decisions, taken by judges who are not elected by popular vote?

From the external angle, then, between the formal proclamation of rights and the real political status of individuals and groups, with their differences, the extension of a vast space occupied by old and new forms of social tension can be observed. if in the form of entirely new challenges.

Political issues remain open to political decision. The idea of imposing limits on political exercise remains a basic concept. But the link between the private and the public in terms of a State – democratic – of Law seems to suffer a kind of erosion.

As if the traditional concepts of consensus and representation were subverted, through an uncontrollable explosion of dissent manifestations. Which, of course, has important consequences for the democratic rule of law and for the legitimizing role of the Judiciary.

With this, the traditional idea that the political constitution would give the collective energy of a national society the way in which it constitutes itself as a nation is renounced. On the contrary, the society of modernity ends up characterized precisely by the fact that the collective potential is no longer available as a unit. And when the law itself places social subsectors (media, social networks, blogs) in place of politics, the legitimizing quality of the Judiciary is necessarily also modified. So, democracy seems to seek its legitimacy, in the first place, no longer through the political constitution and its guardians, but through the communicative potentials that are grouped around different specialized means of communication in society.

On the one hand, it is as if the representative political power (based on representation and consensus) was migrating from political institutions, to manifest itself in virtualized movements, in the multitude that hosts and orchestrates different movements, such as protests by NGOs, minorities, singular segments of organisms that escape the traditional categorization of society, found within and outside the structures of representative democracy.

On the other hand, there is a kind of migration of the traditional derived constituent power, so that the derived constituent power is no longer identified with the national demos, but with fragmented (incidental) or concentrated jurisdictional processes.

It is clear that there is no longer any comprehensive constitutional dynamic (people's will) that encompasses the entire national society, but that these are extremely heterogeneous

constitutionalization processes, sometimes directly through ostensibly programmatic decisions, sometimes through a game of affirmation and counter-assertion, in which the Legislative seeks to constitutionalize what was declared unconstitutional or legalize what was considered illegal, now dispersing itself in a multiplicity of potential agents, energies and social forces.

It is observed, then, the emergence of a new democratic trend, which gains its peculiar strength in the accent placed on the notion of people in the expression: popular sovereignty. In it, power is no longer perceived exclusively as a *res* of the State, something that one has, holds, transmits, and needs to be intensely and extensively limited by legislation (constitutional and infra-constitutional), to be taken as a form of social relationship of domination (in the Weberian sense of domination), in which sovereignty is no longer restricted to a power of empire as a power qualitatively capable of impositions against particular wills and, therefore, state (state imperative: prohibitions and obligations), to become if regulation, that is, capacity to make the will to be conformed before being exercised by the law. Which, consequently, makes imperativeness (power of empire) less of a centripetal power, more of a centrifugal power.

This question affects the State in its main configurations, whether the State is perceived as a source of political organization (phenomenon of decentralization of sources) or the State as a public sphere (phenomenon of organic differentiation and the privatization of administration), whether the State as the monopoly of the empire (phenomenon of redistribution of the prerogatives of judgment) or the nation-state (the phenomenon of internationalization).

This obviously has intense repercussions on the way in which democracy is conceived today and, in it, the role played by the Judiciary.

What can be seen, then, is that this ends up leading to an exhaustion of reciprocal legitimacy, whether on the side of political legitimacy (people's will) or legal legitimacy (negatively programming interpretation). Hence the disintegrating effects of the [ultra]politicization of law and the [ultra]judicialization of politics.

It is undeniable that a transformation is currently being experienced in the way of looking at the Constitution, with a perceptible shift from the Constituent Power to the Constituted Power.

All of this ends up being reflected in the judgments, whose decisions seem to revolve around themselves. Instead of judgments based on a centrifugal validity basis (tops of the hierarchy, hence the primacy of the Constitution, the Law), they seem rather political positions, which are stabilized by mutual and occasional links, hence this feeling of the Constitution's collapse in the face of power to interpret it.

That is to say, the legal decision gains a special prominence, as it effectively frees itself from a pre-constituted whole. Instead of the power to decide, it appears as a decision of power (not

a decision because I can, but a I can because I decide), which is registered in an acentric and heteroarchival order, enabling the opening to the new, to the unknown.

But, in this way, the linking of the private to the public in terms of a State – democratic – of Law seems, then, to suffer a kind of erosion. As if the (traditional) concepts of consensus and representation were subverted, through an apparently uncontrollable explosion of disconnected manifestations without a perceptible axis.

In other words, the typically representative Executive and Legislative powers are now demanding, with great intensity, an expression of communion and nationality, which puts them in constant confrontation for a legitimizing hegemony. From the Judiciary, classically, a power not based on representation, but in the solidary sense of national communion, some form of representation is now required, a demand that is hardly met and which ends up shaking its foundations.

In consequence, Democracy seems, then, to seek its legitimacy no longer through the political constitution and its guardians, but through the potential communicative means that are grouped around the new and different means of communication in society; that is, by placing social subsectors (media, social networks, blogs) in place of politics through the tripartition of powers.

And this is certainly a challenge that is before the eyes of those who are willing to rescue democracy in today's world.

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