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Presentation

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"Fascism whispered in our ears, 'you *are not strong enough to withstand the storm.*' Today we whisper in the ear of fascism, 'we *are the storm.*'"

On the last Sunday of October, one of the most important elections – if not the most important – in Brazilian history took place. After flirting and surrendering in the arms of neofascism, the majority of the Brazilian people reacted institutionally and decreed their desire for democracy. The majority of the Brazilian population exercised their democratic right aiming for social inclusion and positioning themselves against lying, intimidation and political violence. Not that the country is pacified; it will still take a long time to detoxify it from the hatred and intolerance that fascism carries. But the outcome of the elections means a resumption of democratic debates without the frightening specter of institutionalized authoritarianism and totalitarianism. However, recent history shows and proves that the strength and influence of neofascism cannot be minimized, especially in times of instant dissemination of fake news and post-truth times. It is necessary that the production of knowledge is itself a safe source of information and analysis, which offers society serious and well-founded studies on the phenomena of our time. In this sense, Revista Direito e Praxis intends not only to be a spectator of the world, but a producer of critical awareness, through the presentation and dissemination of outstanding works of remarkable quality.

In this edition, we present a general section of original articles, whose works presented take care of essential themes in a significant spectrum of fundamental rights, such as: access to justice, food sovereignty, education, gender equality and health. In



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addition, the articles bring studies on contemporary phenomena of the greatest relevance, such as: abusive constitutionalism, action of the Attorney General's Office, public and private relationship, sex trafficking, climate change and urban occupations. Institutional and historical analyses on the constitution, the judiciary in general and the Supreme Federal Court in particular are also present. All topics taken in critical perspective.

The Dossier of this issue brings an instigating analysis of what could be called different forms of constitutionalism or theories and discourses about the historical place of the constitutions, the role that they fulfill or should fulfill in society and, also, the way the constitutions are presented in the present time. It is a precious material, not only for those who study constitutional law, but for all who seek to better understand the contemporary world. We appreciate, at the outset, for the remarkable and overwhelming work of Professor Jane Reis (UERJ), guest editor who coordinated the Dossier and was responsible for the careful selection of the astonishing articles presented.

The session of translations and reviews establishes a fruitful dialogue with the Dossier of this issue, because it brings articles that fall within the scope of constitutionalism, democracy and sociology of law. To finish this presentation, as always, we deeply thank everyone who contributed to this edition of the Journal: authors, translators, guest publishers. Collaborative work is fundamental to the quality of the Journal! We remind that the editorial policies for the different sections of the Journal can be accessed on our page and that submissions are permanent and always welcome! We thank, as always, the authors, evaluators and collaborators for the trust placed in our publication.

Good Reading!

Direito e Práxis Team



Constitutionalisms

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According to the modern liberal tradition, the term *constitutionalism* designates the political and legal movement that advocates the adoption of constitutions as instruments that limit and organize the power of the State, establishing the separation of powers and enunciating individual rights. This formulation, linked to the ideas of democracy and human rights, was expanded from the liberal revolutions begun in the 17th century. Since then, the movement has expanded and began to cover, especially in the twentieth century, the idea that the constitution is an imperative and binding legal norm, invested with formal superiority and able to limit the action of the legislative power. In this context, judicial control of constitutionality became part of the central axes of understanding constitutionalism.

Throughout its process of historical affirmation, the traditional conceptions of constitution and constitutionalism have suffered the influx of two very distinct tendencies. On the one hand, these categories were rhetorically appropriated by autocratic regimes that, when using structures with constitutional features, sought to confer the appearance of legitimacy to the undemocratic and illiberal practices implemented. In this context, the concept of constitution is stressed by the fact that authoritarian projects adopt the vocabulary and forms of constitutionalism as simulacrum of legitimacy. On the other hand, and in the opposite direction to the previous one, the meaning of constitutionalism is now filled with other democratic perspectives, which give it greater density, while reformulating and strengthening its inclusive genealogy. The updating of the meaning of constitution, from this second angle, is a natural and necessary unfolding of the numerous social, cultural, economic and political transformations that complement and enter into tension with its first versions. The 18th century liberal constitutionalism goes through questions and revisions that claim protagonism for actors excluded from the original project, requiring adaptations of the concept as a consequence of the understanding of the constitution as a democratic



instrument situated in time and space.

These two trends reveal an apparent paradox that accompanies the debates on constitutionalism and the constitution. While they are categories in dispute and under constant demand for updating, there is an essential sense in them that deserves to be preserved, to avoid having their purposes subverted or that they are used as mere rhetorical devices. Thus, thinking of constitutionalism as a plural, multifaceted and continuously changing phenomenon involves the challenge of incorporating new meanings and agendas into the constitutionalist project and, simultaneously, dealing with the risk of misrepresentation and loss of meaning of the concept. Theorizing about constitutionalism, therefore, is an endeavor that involves both the need to incorporate demands, agendas and actors in the constitutional scenario, as well as to prevent the trivialization of the concept from promoting an emptying of its meaning.

With this concern in mind, this Dossier brings contributions that focus on various manifestations of constitutionalism and seek to give them theoretical substance. The papers analyze the variations in the understanding of the constitutional phenomenon in a consistent and original way, seeking to identify its main core and its relationship with the constitutionalist tradition. Thus, each of the *constitutionalisms* presented here discusses the role of the constitution in a critical and questioning way, without, however, giving up the protection of fundamental rights and the limitation of power as regulatory ideas.

The Dossier begins by questioning the very foundations of Brazilian constitutionalism and how French and North American influence overshadowed national processes and projects. Using the political experience of Palmares as an analytical model, Ana Flauzina and Thula Pires analyze the resistance of Black and Indigenous women to colonization and, adopting the theoretical framework of Africanness, propose a reinterpretation of the colonial period with a focus on the experiences and thought of Black and Indigenous resistance. Presenting Palmares as "an environment of racial, pluricultural, and pluriethnic fraternity," the authors demonstrate that "for more than a century, the experience of an anti-colonial Africanness freedom was lived in that body-territory," and their organization brings important contributions and reflections, such as questioning the "notion of the people without resorting to the notion of homogeneity." Based on this analysis, the idea of the Enmity Constitutionalism is developed, highlighting how constitutionalism (modern and contemporary) not only coexists but often



collaborates for the existence and reproduction of the logic that there is an enemy that must be fought.

Also following the questioning of the foundations of constitutionalism centered on European and North American models, Diego Werneck Arguelhes and Evandro Proença Sússekind discuss the notion of Transformative Constitutionalism in Latin America and the South African experience. Such a model would designate, in general terms, a project of social transformation through constitutional law. Its use, however, raises several discussions about the means, especially institutional ones, necessary for fulfilling its promises. The authors propose changing the focus of analysis from rights and courts, as constitutionalist tradition has done, to an institutional perspective, bringing "to the debate the reform of decision-making political processes and the creation of inclusive institutions, as ways of meeting the transformative project itself." In the end, they analyze the coherence of the model with the idea of democracy itself.

The possibility of expansion and new uses of constitutionalism is at the center of the study by Emilio Peluso Neder Meyer, who investigates the notion of *Illiberal Constitutionalism*. Starting from scenarios of democratic erosion and expansion of projects contrary to the purposes of liberalism, the author proposes an expansion of the "lenses of theoretical analysis of constitutionalism to include forms of illiberal governance". According to him, it would not only be possible, but necessary to "classify political regimes that lie between democracy and pure authoritarianism as regimes of illiberal constitutionalism", whose central point would be "the subversion of liberal legal institutions against themselves and for specific political purposes". With this, Meyer does not seek to legitimize or normalize illiberal political practices, but rather to pay attention to such practices, which are already consolidated, while not neglecting the normative provision that seeks to combat them.

Changes in the concept of constitutionalism occur not only from the aspect of the practices that the movement legitimizes, but also by the form of manifestation of the constitution. Estefânia Maria de Queiroz Barboza and André Demetrio explore the meanings of *Common Law Constitutionalism*, investigating the models of unwritten constitutionalism. For the authors, the lack of a written constitution is not an impediment to constitutionalism, in view of the very openness and abstraction embedded in the concept of human and fundamental rights and also that "codification is a mere starting point, but never final". Focusing on unwritten principles, Barboza and Demetrio analyze



"the importance and fundamentality of judicial precedents and understanding the law as integrity" and present "the possibility of defining the unwritten Constitution as a living and constantly evolving constitution for the promotion of new fundamental rights".

The limits and ambiguities of the notion of **Digital Constitutionalism** are explored by me and Clara Iglesias Keller. Our article seeks to analyze the extent to which the emergence of transnational powers and private powers that act outside the State make it feasible to incorporate the theoretical references of constitutionalism in these domains. Our analysis of Digital Constitutionalism is in conjunction with that of what we call the "theoretical matrix" of the concept – i.e., some of the theoretical formulations that promote this incorporation to explain the changes in the functioning of powers and normative systems that go beyond the nation-state. This includes the basics of constitutional pluralism, societal constitutionalism, global constitutionalism and multilevel constitutionalism. In this line, we investigate how the category digital constitutionalism has been claimed as a "framework for various theories on the positivization and operationalization of constitutional rights in digital environments", both in the transnational scenario and in digitized private environments. Analyzing the multiplicity of uses of the expression in the light of the traditional meanings and purposes of constitutionalism, we understand that digital constitutionalism is a "term epistemically impaired by the diversity of applications and the potential for legitimization of concentration of private powers". The concept, in the way that has been employed, is not only devoid of analytical consistency, but can be handled as a rhetorical resource that seeks to conceal asymmetries of power and legitimize practices contrary to the very meaning and purpose of constitutionalism.

The removal of the focus and protagonism that constitutionalism grants to the courts and the discussion on constitutionalism and authoritarianism are again analyzed in the Dossier by Juliana Cesário Alvim Gomes, which presents **Popular and Democratic Constitutionalism**. Gomes parts of an explanation of this movement, which seeks the popular appropriation of the constitution and its meaning, analyzes its theoretical path and investigates the extent to which the theory has applicability and relevance in contexts of authoritarian governments that receive the support of political majorities and advance their agendas through democratic pathways. Thus, one is guided by the following question: "would it make sense to defend the centrality of popular participation in the process of constitutional interpretation in a context in which political majorities support



undemocratic measures and in disrespect for fundamental rights?". As she seeks to demonstrate in her study, the idea of popular and democratic constitutionalism contradicts itself with authoritarian measures and, even if it proposes measures that reduce popular participation or elect representatives to speak on behalf of the people, requires that popular participation continue to exist to some extent and that there is pluralism and recognition of difference.

Resuming the decolonial perspective, Marcos Queiroz studies post-revolutionary ***Haitian Constitutionalism*** and its influence on the understanding of human rights. The revolution of 1804 culminated in Haiti's independence and sets a major milestone for modernity, as it resulted in the foundation of the "first and only state forged from a revolution of enslaved people". Queiroz explores the meanings of this event, which can be seen both as the first of the Latin American revolutions and as a pioneer of the wars of decolonization of Africa in the twentieth century, and its impacts on the construction of the notions of constitution, constitutionalism and its byproducts, which arose at that time. To this end, it investigates excerpts from the Constitutions of Haiti from the early 19th century and, correlating them with black thought, presents an alternative arrangement for fundamental rights and the modern constitutional order. Such an arrangement rejects the colonial legacy, proposes new content for rights and sees the revolution not as a point in the past that remains only in History, but as a process towards the future.

The influence of the transnational context is again analyzed in the Dossier, this time from the perspective of ***Global Constitutionalism***. Mattias Kumm analyzes the emergence of this movement and points out the lack of clarity about the meaning and correlation of its basic principles, especially its relation between national and international orders. The author investigates the contemporary challenges of the movement, which can be criticized both for having legitimized injustices and for being focused on a Western perspective, highlights the influence of political interests of powerful actors in its use and reflects whether constitutionalism will continue to be important in the future.

Finally, the debate returns to the questioning of the very bases of Brazilian constitutionalism and how the French and North American influence has overshadowed our own national processes and projects. Taking as an analysis model the political experience of Palmares, Ana Flauzina and Thula Pires analyze the resistance of black and



indigenous women to colonization and, adopting the theoretical framework of amefricanity, propose a rereading of the colonial period with centrality to the experiences and thought of black and indigenous resistances. Presenting Palmares as “an environment of racial, multicultural and pluriethnic fraternity”, the authors demonstrate that “for more than a century the experience of an Amefrican anticolonial freedom was experienced in that body-territory”, and its organization brings important contributions and reflections, such as questioning the “notion of people without resorting to the notion of homogeneity”. From this analysis, the idea of ***Constitutionalism of Enmity*** is developed, which highlights how constitutionalism (modern and contemporary) not only coexists, but often contributes to the existence and reproduction of the logic that there is an enemy that must be fought.

This Dossier is the result of the dedication and talent of researchers who have focused, with creativity and academic rigor, on challenging and current topics. I thank the authors, who produced the excellent studies gathered here, to the Direito e Práxis team, who work tirelessly to ensure the quality of their publications, and to all who participated, directly or indirectly, in the preparation of this Dossier.

Jane Reis Gonçalves Pereira



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