CONSTITUTIONAL DEMOCRACY AND ITS CHALLENGES

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SUMÁRIO

BACKLASH EFFECT: BETWEEN DEMOCRACY AND CONSTITUCIONALISM

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In view of the scenario permeated by Contemporary Constitutionalism, it is notable that the contesting posture is increasingly adopted by society in the face of decisions made by the Supreme Federal Court. In this way, the problem regarding the reconciliation between democracy and constitutionalism becomes evident, in the sphere in which one tries to trace the limits of the other, with the institution and the people having decisive roles in the elaboration and adaptation of norms.

The debate that calls into question the legitimacy of the Court appears as the most recurrent example of the phenomenon considered as the central object of the present study, called the Backlash Effect, whose main current problem revolves around its characterization as a natural phenomenon inherent to constitutionalism or a driver of setback. Thus, the bibliographic research method is used in order to open a new space for discussion and reflection regarding the history, agents and evaluation of benefits and harms inherent to the effect, in addition to highlighting the possibility of dismemberment from backlash from of the ideological content of the acts rendered by government agencies in relation to that prevailing in the popular will.

Two hypotheses can be considered main when it comes to the subject addressed. The first one, the progressive and conservative features in the current historical context, demonstrated by hyper judicialization, combined with judicial activism. Both presupposes the attribution of a prominent position to the Judiciary in cases of alarming social impact, being in charge of carrying out a "last analysis" (MARMELSTEIN, 2016, p. 2). Considering the contemporary constitutional experience and the institutional positioning within the state arrangement, the new way of interpreting the law that gains prominence, that is, “activism”, creates too many risks to the legitimacy of judicial decisions (STRECK, 2014, p. 17).

At a second glance, we see the action of agents in the respective areas of activity. Fonteles (2019, p. 55) states that conflict is fundamentally the manifestation of the people in a dispute in the face of judges and Courts at the time of constitutional interpretation, stating that the backlash would be the result of the combination of democratic regime and Rule of Law.

So, issues that configure moral disagreements within society have an impact on the gradual and constant creation of a division between those who support and those who reject the content of

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the discussion. As one observes the outbreak of these previously veiled clashes, the popular reaction gains strength. However, it cannot act alone for a second chance to take effect; therefore, the requirements of the dissatisfied population are often enshrined in legislative instruments, especially if the bias adopted in the claims is consistent with the political interests prevailing in the historic moment (MARTINS; SALES, 2018, p. 13).

Therefore, the reactionary attitude that emanates from the Backlash Effect is not only natural, in view of an already divided society, but also a factor capable of providing normative review at constitutional and infra-constitutional levels, in order to adapt the legislative species to the conjuncture, to benefit the application and effectiveness of the Federal Constitution.

The theme of the Backlash Effect remains a divider of opinions since it can be seen through two opposing strands. First, Judicial Minimalism is analyzed, which perceives Backlash as a negative phenomenon, so it should be avoided. On the theory supported by Klarman (2011) and Sustein (1999), Fonteles (2019, p. 48) alludes to the ideal elaborated by the second of “one case at a time”, so that the whole process would be analyzed individually, based on exclusively in the specific case.

However, the theory developed by Sustein does not include the scope that permeates the Federal Constitution of 1988, in which the number of matters within the jurisdiction of the Supreme Court grew exponentially. Thus, Minimalism is not compatible with the number of demands proposed before the summit, which increased from 119,000 in 2007 (VIEIRA, 2008, p. 447). Thus, it is even dangerous to implement the constitutionally protected right of access to justice, once that procedural logistics inevitably ends up being compromised by the analysis of countless factual situations, so that the right mainly of minorities ends up being systematically neglected.

Alternatively, Democratic Constitutionalism brings a more positive view of Backlash, seeing the resulting debate as a promising aspect in the construction of Law, since the people must recognize the Constitution as theirs, enabling frequent communication between the institutions and the public, in order to observe popular wills and guarantee the legitimacy of its institutions.

Given the above, there is a need to deepen the doctrine in relation to the causes and consequences of the effect in national territory, in order to cover the ideological nuances responsible for its structuring, since political changes directly affect the constitution of the Supreme Federal Court (STF).

Still, it is necessary to analyze the possibility of assuming a more proactive stance of the other Powers before the Judiciary, mainly the Legislative, so that the courts are not responsible for filling normative gaps frequently, in order to rebuild a greater balance between state institutions. Furthermore, prudence is required both in the interpretation and in the application of constitutional

norms and principles, not to provoke radical reactions on the part of the population, in order to legitimize its Constitution.

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DEMOCRACY FOR REAL HAS TO MAKE WOMEN´S RIGHTS EFFECTIVE: AN ANALYSIS OF FEMALE POLITICAL UNDER-REPRESENTATION

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The purpose of this abstract is to analyze female political representation from the perspective of Law n. 9.504/1997, amended by the electoral minirreform, with Law n. 12.034/2009. The title is an inspiration in the slogan of the “Lipstick Lobby” campaign, “Constituent for real has to have the word of a woman”, since it is addressed here that the affirmation of rights is not enough, but is essential that Brazilian democracy makes women´s rights effective.

The issue is: "Is there democracy for Brazilian women?" in other words, "Is there democracy for a politically under-represented group?” The text was prepared using the deductive method. It starts from the general analysis of Brazilian democracy, under the aegis of the Federal Constitution for the specific analysis of women's representation in politics, based on the Quotas Law and the “Lipstick Lobby”. The methodology was carried out by the deductive method approach, based on the general analysis of democracy from the perspective of patriarchy to the specific one of the Quotas Law.

The justification is based on the low political participation of women, according to the Federal Senate (2015) constitute only ten percent of the total of the House of Representatives and 16% in the Senate, despite being a majority of the Brazilian electorate. In addition, 11 of the 28 parties that elected congressmen to the House of Representatives do not have any women among their representatives, and in the Federal Senate, 16 states have no female representation.

In contrast to this situation, it is remarkably interesting to recall the National Constituent Assembly, a moment of re-democratization. Happened the “Lipstick Lobby”, a result of the autonomous feminist movement and the National Women's Rights Council, with the campaign "Constituent for real has to have a woman's word", presented through the Women's Charter to the Constituent Assembly. It represented a break with the traditional parameters of representation since it consisted of articulation without political intermediaries. (SIQUEIRA, 2013) This achievement is unforgettable, since approximately 80% of the proposals were incorporated into the constitutional

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text, while others brought significant changes in infra-constitutional laws. (BERTOLIN; ANDRADE; MACHADO, 2018)

It is understood that women´s struggle for human rights has come a long way for recognition. However, many of the rights incorporated are not verified in reality. That is, formal gender equality, but not material equality. Can be inferred that representative democracy has instilled racist, sexist and classist values in Brazilian society, perpetuating a hegemonic power with a masculine, white and heterosexual face. It creates numerous barriers to the occupation of women in positions of power and politicians, maintaining that they have any potential to act as political subjects. While generally women invested with mandates reproduce the exclusionary, hegemonic practices in the political making and coming from structural patriarchy. (SIQUEIRA, 2013)

At this juncture, Mary Wollstonecraft, in response to the French Constitution of 1791, which did not include women in the category of citizens, denounced the losses brought about by women's enclaves in domestic life and the prohibition of access to basic rights, such as education and politics, can be related to the tiny participation of Brazilian women in politics, and the exhaustive double working day in which they are still inserted, thus verifying that the scenario presented in this work is still very current.

The Law of Quotas for women's candidacy, n. 9.504/1997, which established that parties can only run if they meet the minimum quota of 30% for women's participation, proved insufficient to overcome the real blockade faced by women in their quest to occupy spaces for participation in the political world, since, compared with its Latin American neighbors, for example, Brazil has the penultimate worst situation, with a percentage of women in parliament ahead of Haiti, and is ranked 158th among the 188 countries by the Inter-Parliamentary Union research (SENADO FEDERAL, 2015).

It is understood that the only way to truly represent women and guarantee their fundamental rights is an inclusive political reform, through a radical democracy by way of the spread of ideas of equality and freedom to the largest number of people, aiming at the construction of a pluralist political identity and finally the constitution of a new understanding of "us". Specifically, with regard to women, it is essential to enhance female values, which has been diminished for centuries, in favor of men, through patriarchy. (MOUFFE, 1992, apud SIQUEIRA, 2013)

Thus, it can be seen that the Quotas Law is not enough to increase women's occupation of seats in politics, and it is necessary to train, create support programs, and carry out incentive campaigns in order to create effective conditions for them to participate in the country's decision-making processes, besides giving them access to financial resources for their campaigns, open

spaces in political parties for women's action, create parties entirely composed of women, and ensure in law punishment to parties that do not comply with what affirmative action's determine, among other measures. It is essential that political representation be compatible with women's position in society, both in demographic terms and in terms of their productive and social economic participation in the country.

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MODERNITY AND ITS FRACTURED ONTOLOGY FROM KELSEN AND SCHMITT'S LENS

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Modernity and advanced capitalism brought some sort of a new perception of the world. This is what the German historian, Reinhart Koselleck, claims: by means of the concept of *progress*, post-French Revolution (1789) modern age culture separated itself from previous *Ancien Régime*, opening a new world time. Despite its opposition to the old form of time, this progress-based time didn't solve the structural inequalities problems that arose or were intensified in the beginning of modern times. Problems such as colonial exploitation and gender and race domination have only been metamorphosed into different skins without their resolution. This is the problem that mobilizes the theorizations of this paper, that is, the structural contemporary difference of two forms of time that are, also, two forms of life: the somehow concretely explored form of life and the abstractive nihilist form of life.

I defend the hypothesis according to which there is a contemporary ontological fracture, which emerge from modernity and capitalism dynamics and that extends itself to the whole world. Also, I defend, in this brief paper, that this hypothesis can be deducted from Hans Kelsen and Carl Schmitt's theorizations on the modern State. Giorgio Agamben, in his *Opus Dei*, states that, since the end of the XVIIIth century one can perceive a duplication of the traditional naturalistic ontology. Opposed to the classical ontology of *Being*, rises the ontology of *Ought*. This ontology, which is supported by the Kantian detachment between noumenon and phenomaena, inscribes Being into the phenomenical ground of positivist moral and juridical law, accepting the noumenical kernel as the impossibility of immediate apprehension of nature. I understand that this ontological division, which rises the problem concerning the relation between noumenon and phenomena, can be translated in juridical terms as the difference between Being and Ought, and that this problem, that is concealed in all dogmatic comprehension of contemporary law, is the *fundamental juridical problem*[2]. And, as mentioned above, two very well-known theorists of law can help us to identify this problem: Hans Kelsen and Carl Schmitt.

Kelsen and Schmitt's theoretical conceptions are contemporary to the political and economical world problems in which they're inscribed. Far from being two already overcome

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authors, their juridical approach points to problems that we are facing nowadays, as the overlapping of classical State sovereignty by new economic agendas. The detachment between the modern State and the dynamics of post-World War II global economics might be well enough seen by the conceptions of both authors.

In his works, Kelsen aims to expose the hypostatical feature of many juridical constructions that are supposed to logically explain the system of Law. This is the whole background of the *Pure Theory of Law*. Contrary to what the recurrent misreadings of Kelsen's work try to demonstrate, he was not a traditional positivist author, but a critic of the naturalistic misconceptions inscribed in positivist theories of Law. All his efforts are directed to uncover those misconceptions and to exhibit their hypostatic element, this is, to show how, for instance, the idea that State, Constitution or People produces and owns the power to manage Law are only possible if they are accompanied by the presupposition of an *ought*, and by the sublimation of one of those figures as an excessive element.

Kelsen's pure theory isn't simply an acceptance of law and a dogmatic and legalistic imposition of norm. His main accomplishment was to establish that in the bottom of legal order there is always, regardless the normative hierarchy, a presupposed *ought* which functions as a basic norm (*Groundnorm*), but that cannot be taken as a positive norm, since it would still remain a normative ought presupposition sustaining law functioning.

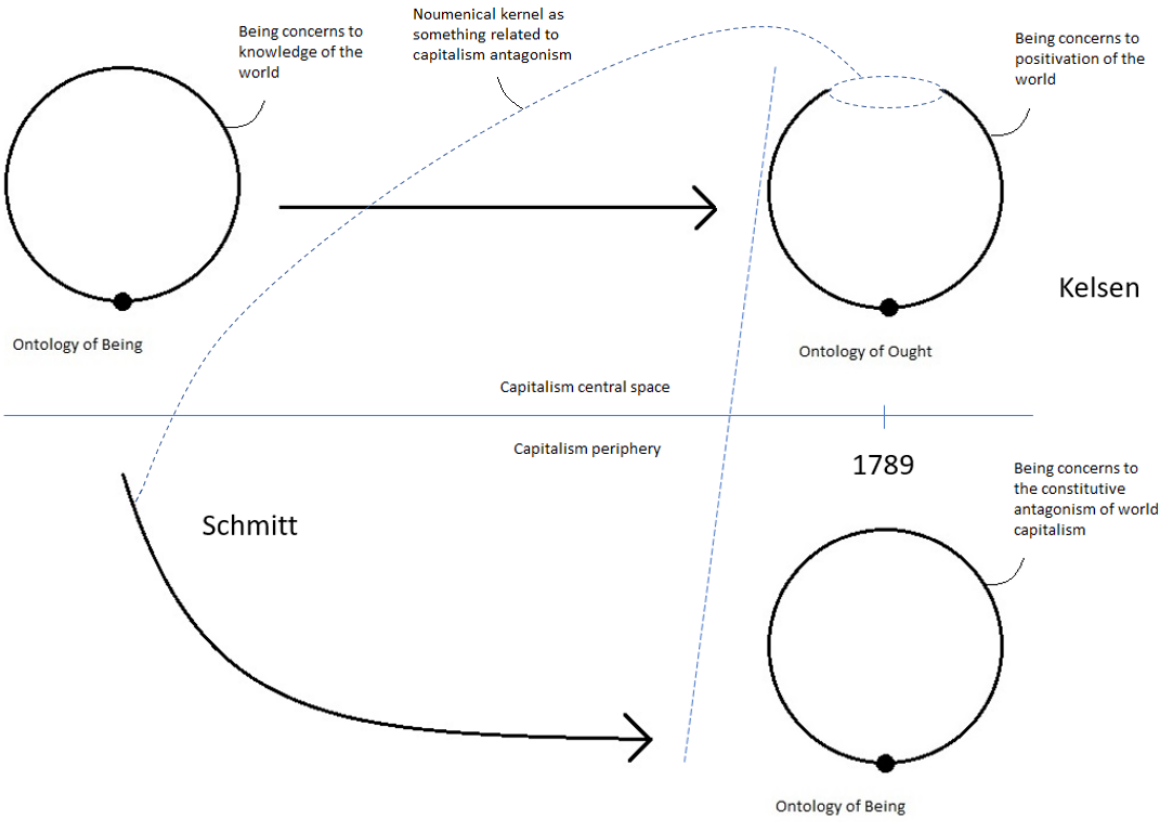
Carl Schmitt, on the other hand, intends to demonstrate the emergence of the modern State and the *ontonomic* character of law. Modern Law and modern State rise in the context of global discovery and expansion of the world. The constitution of a group of European States, of a *jus publicum europaeum*, was only possible because of the large colonial space of exception which European States were able to exploit, extending their political and economic networks with brutal violence and domination.

Law is ultimately found, according to Schmitt, in land appropriation (*Landnahme*). This means that law lies upon a concrete and spatial fundament. The problem is that, from the end of the XVIIIth century on, a process of gradual abstraction of law starts to take place, and the traditional natural-based ontology is gradually replaced by a positive-based ontology. In other words, ontology splits itself into one ontology of being (*Sein*) and one ontology of ought (*Sollen*). But, as long as both ontologies cohabit in the contemporary world, this was a clearly problematic replacement.

While, from the XIXth century on, constitutionalism and positive law coordinate the expanding capitalist transactions in European and North American soles, exception and violence coordinate their obverse in colonial sole. From that point of view, it can be said that, if the "new" ontology of ought prevails in the North-Atlantic countries, a sort of "old" ontology of being remains

in the colonized spaces, circumscribing the bodies and the lands with no observance of any sort of "rule of law". Capitalism central space and capitalism periphery represent this sort of constitutive ontological fracture, which means that both ontologies are not absolutely separated from one another, but that, from a capitalist background, they can be taken as a difference concerning the same unidimensional world time. The figure below systematizes the problem of the ontological fracture from a capitalist point of view.

Figure 1 – Schematization of the Ontological Fracture



Source: Author's authorship.

In conclusion, this ontological fracture rests on the very structural difference between colonial space and State in modernity, and its reflection on world capitalism systematics. But one cannot conclude from this that since XXth century globalization and decolonization we are able to restore a harmonical world, reducing both ontologies to one unique cosmopolitan human ontology. Those different structured spaces – on the one hand, the "winners" of History, on the other hand, the explored and dominated – sediment two diverse kinds of perception of world.

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SUPREMOCRACY: THE ILLNESS OF BRAZILIAN DEMOCRACY

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THEME

The following research has as object of study the analysis of the influence by the Brazilian Supreme Court (STF) in Brazilian democracy of the 21st century, proposing the criticism that the STF is composed of only 11 members, with a complex language to understand, and these members are not directly elected by Brazilians. Despite these attributes, this judiciary institution continues to have competence and power, even though their appointment comes from the President and approved by the Federal Senate, according to article 84, XIV, of the Federal Constitution (FC).

The phenomenon that illustrates the abuse of authority by the "great court" is called Supremocracy, which means that the Brazilian Federal Supreme Court is governing, instead of prosecuting and judging, according to article 101 of the Federal Constitution. Furthermore, the concept refers to the Supreme sovereignty in relation to other instances of the Judiciary and the expansion of STF's power in detriment of Legislative and Executive power. Therefore, Supremocracy violates democratic principles, such as Article 1º of FC, which watches over a country ruled by the people. Thus, this problem of Brazilian democracy must be analyzed, elucidated and questioned in details, in order to be eradicated.

RESEARCH PROBLEM

The phenomenon of Supremocracy is developing and spreading due to several constitutional, media, political and economic elements, in such a way that the arbitrary expansion of the Supreme Court's power causes the detriment of the Legislative and Executive power. The first prominent factor is the fragility of the representative powers, which do not exercise their functions effectively and, consequently, do not recognize and ensure the individual fundamental rights. Therefore, the STF becomes the guardian of such guarantees and rights (VIEIRA, 2008, p.3).

The second cause of Supremocracy is social bias and it's called "life judicialization", which means that several controversial issues in society began, starting with FC/88, to be discussed and elucidated in the STF, such as issues related to free pass for the disabled in public transport, *habeas corpus*, stem cells, imprisonment for debts, demarcation of indigenous lands, abortion

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(BARROSO, 2012, p.21-26). These are linked to society, since these are issues influenced by the population's moral, cultural and ethical values. Consequently, the popular interest in court discussions fosters the STF's role. Furthermore, the media, through social networks and TV Justice (TV Justiça), is a fundamental mechanism for individuals to inform themselves and question about judicial decisions.

The third foundation of the phenomenon discussed concerns the political relevance of the market system. Investors consider that the STF has the potential to ensure greater legal certainty in detriment of representative powers and, therefore, the courts guarantee express predictability and economic stability (VIEIRA, 2008, p.2). Finally, the fourth pillar that structures the ill of democracy is the formulation of the Federal Constitution of 1988. This, seeking to guarantee fundamental rights and ensure the control of constitutionality, allowed superlative powers to the STF – constitutional courts, specialized judicial forums and appeals courts of last resort – which provided judicial monopoly.

HYPOTHESES

To prove how the Federal Constitution (1988) favored the phenomenon of Supremocracy, Oscar Vieira points out the growth in the numbers of cases over the years. In 1970, there were 6.376 cases in the STF; in 1988, with the new Constitution, 18.564 cases. Nineteen years late, in 2007, there were 119.324 cases (VIEIRA, 2008, p.7). Therefore, there was an increase of 542.77% of cases since the promulgation of FC/88. In this scenario, it's ratified that the promulgation of a rigid constitution and the expansion of Supremocracy was not a mere coincidence, since it seeks to legislate on all areas of society and, therefore, the numbers of cases destined to the Supreme Court intensifies.

Another critical point that favors the Supremocracy is the form of occupation of the court. To become Justice of STF it is necessary the recommendation by the President of the Republic, in a traditional way that is not mandatory and neither is the law required, the approval of the Federal Senate by absolute majority, and finally the appointment by the President of the Republic. Thus, a member of Judiciary, such as court judges, appellate judges and justices, are not public agents elected by people and, therefore, contradicts art. 14 of FC/88, which ratifies popular sovereignty through "universal suffrage and by direct and secret vote" (BARROSO, 2012, p.10). Therefore, it is contradictory that the "greatest position of the Executive Power", the Republic President, is elected by direct vote at polls, and the "greatest position of the Judiciary Power" is elected by the Federal Senate and approved by the Republic President. Although this election is legitimate and constitutionalized, it does not mean that it reflects popular expectations, which it is fair and in

accordance with the democratic principle of direct voting.

THEORICAL ANALYSIS OF THE METHOD

The basis of the theoretical research approach is based on the doctrinal analysis proposed, mostly, by Oscar V. Vieira, in addition to the study carried out in relation to the Federal Constitution, which legitimizes and constitutionalized the phenomenon of the Supremocracy since 1988. For the formulation of theoretical qualitative research, the deductive method was used, based on a study of contemporary constitutional legislation, doctrine, academic articles and other bibliographic references.

CONCLUSION

Political, social, economic, media and constitutional aspects encourage the expansion of the Supremocracy. It is worth highlighting FC/88, a key element in STF's role, as it provides too many competencies to the Supreme Court, facilitates voting for the occupation of positions in the high court and seeks to legislate on social relations and, consequently, individual freedom became smaller and the sanctions and processes carried out by the STF expanded. Therefore, this problem of Brazilian democracy must be analyzed, questioned and resolved by the legal system itself.

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THE BRAZILIAN SUPREME COURT AND THE JUDICIAL ACTIVISM ON THE USE OF THE UNCONSTITUCIONAL STATE OF AFFAIRS TECHNIQUE

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This abstract intends to answer the following research problem: did the Brazilian Supreme Court (STF) act in an activist way, empowering judicialization of politics and harming the principle of separation of the Republic Powers, set in article 60, § 4º, III, of the Federal Constitution — an unamendable clause—, when it used the unconstitutional state of affairs technique on the judgement of the injunction request in the ADPF 347?

The unconstitutional state of affairs (USA) is the recognition, by the Constitutional Court, of a frequent and permanent violation of fundamental rights caused by omission or inability of the Executive or Legislative Powers to intervene and solve the problem. The technique was created and recognized for the first time by the Colombian Constitutional Court (CCC) on the "*Sentencia de Unificación (SU) 559"* (COLOMBIA, 1997).

In Brazil, the USA technique is not established by the Federal Constitution – or any other provision, for that matter. So, the Brazilian Supreme Court cannot use it, as it did when it judged the injuction request in the ADPF 347 (BRASIL, 2015, online).

The Brazilian Supreme Court stated that the unconstitutional state of affairs creates an "structural litigation" that affects an undetermined number of people. The Court says that this situation requires non-conventional solutions ("structural remedies"), to compel the Executive and Legislative Powers to formulate and enforce public policies to overcome the omission or inabilities that violates fundamental rights. To distinguish this type of decision from other activist and interventionist decisions, CAMPOS created the term "structural judicial activism" or "dialogical-structural activism" (2014, p. 314).

Even though the brazilian provisions set the Direct Action for Unconstitutional Omissions (ADO) on article 103, § 2º, of the Federal Constitution and the Federal Law 12.063/09, this remedie is used only for declaration of existence of omission and notification of the omitter Power to create the provision (art. 12-H). the Court activity, in these cases, is limited on declaring and notifying. It is not supposed to act on the omission, or dialogue or mediate the other Powers actions, as it did on the USA case.

Some may say that the USA technique could be compared to the injuntion mandamus

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(“mandado de injunção”), a technique that allows the STF to supply an omission caused by the lack of a provision that makes it impossible for someone to excercise his or hers constitucional rights and freedoms and the prerrogatives inherent to nationality and sovereignty. It is set in the art. 5°, LXXI, of the Federal Constitution and regulated by the Law 13.300/16, and it’s decision does not confounds with the USA decision, so it cannot be used to justify the STF legitimacy to import the USA technique.

The injuction mandamus decision recognizes the legislative gap and, according to the art. 8°, it can (I) set a reasonable deadline for the ommited Power to create the lacking provision, or (II) institute provisory conditions to the exercise of the constitucional right or the promotion of a judicial action if the lacking provision is not created by the ommited Power within the deadeline, with a limited effectiveness to the author of the injunction mandamus, until the lacking provision is created.

The injunction mandamus intervention is limited to the concrete case, and its effects are temporary, lasting until the lacking provision is created by the omitted Power. Its decision ceases to exist in the moment the lacking provision is created (art. 11), as a way to respect the legitimacy of each Power. It is not supposed to act on the omission, with general effects, or to dialogue or mediate the other Powers actions, as it did on the USA case.

VALLE (2016) highlights that the Judicial Power is not prepared to mediate this type of conflicts, once it has no technical expertise to decide or material means to endure the decision made. The author also brings up the lack of legitimacy of the Brazilian Supreme Court to make structural decisions and the democratic risks that may be caused by the judicial activism, creating a “*juristocracy”* (HIRSCHL, 2007) or “*supremocracy”* (VIEIRA, 2008), with the invasion of Executive’s and Legislative’s Powers assignments.

The absorption of a foreign juridical technique and constitutional experiences from comparative law without the due scientific analysis, as it was made by the Brazilian Supreme Court on the judgement of the injuction request in the ADPF 347 is widely criticyzed by ACKERMAN (1997) and MAGALHÃES (2019, p. 32)[2].

Analyzing the origins of the USA technique, its groundings and the way it was absorbed by the Brazilian Supreme Court, it is possible to conclude that: 1. The USA technique was absorbed by the Brazilian Supreme Court for its own use; 2. The USA technique has no constitutional or legal grounds in Brazilian provisions; 3. The USA technique does not confounds with other intervention

2 “The jurisprudential incorporation of underdeveloped or misleading theories (institutional dialogues, institutional capacities, pedagogical role of the Courts, public interests litigation, etcetera) shows confusion between the role of the Law science and its practice, mainly when the Brazilian Supreme Court uses a "theory" created to explain a foreign constitutional reality to justify decisions that seem to extrapolate its constitutional jurisdiction.” (free translation).

techniques foreseen and allowed by the Federal Constitution, as the ADO decision. 4. The USA technique is a direct and long-lasting intervention from the Constitutional Court on the Executive and Legislative Powers.

Although some may say that the USA technique may create a joint performance from all the Republic Powers, this technique may also increase the judicialization of politics and expand the Judicial Power by giving it assignments that were not given to it by the Federal Constitution.

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THE DENIAL OF PLURALISM AND THE RISE OF ANTI-DEMOCRATIC REQUESTS

Mirelle Neme BUZALAF

With perplexity, we have been watching the rise of anti-democratic movements all over the world, especially in European and American democratic countries. Perhaps we have taken democracy for granted; as Chantal Mouffe and Hannah Arendt think we can't take the civilization evolution as a fact. We must stay aware of its volatile nature. Many theoreticians have insinuated that some countries, like Austria, have an unresolved past with Nazism being a cause for these movements. This can be applied to Brazil concerning the dictatorship in recent history; however, the problem, itself, seems a bit more complex. The assumed rational consensus about a fair political community and principles of justice has been criticized in order to demonstrate that it can lead societies to antagonist situations that emerge in violent forms of expressions, including hate speech against minorities. The critic of the so-called *postmodern approach* will be discussed using the thoughts of the two thinkers in order to detect common points between the current situation and the one that preceded the World War II. This paper aims to discuss the democratic crisis through Mouffe's theory about the political in comparison with Hannah Arendt's thoughts, in order to analyze the context that preceded the rise of totalitarianism and the collapse of the tradition, which was supposed to teach how to use the past and its learnings to build a future.

Is there denial of a substantial pluralism, caused by the migration of diversity to a private sector, and the conflicting dimension of political factors that influenced the rise of anti-democratic movements which threaten democratic institution?

Mouffe points to the consensus assumption in liberal democratic theory and the enthusiasm about a consensual form of democracy as one of the causes of the recent antagonisms rising in democratic states. The denial of the political, as a dissensus space where a variety of claims coexist without excluding themselves, in constant tension and the impossibility of forming collective identification, since liberal democracy is constructed based on individualism, would be causes of these new antagonisms. Arendt, on the other hand, assumed anger, isolation and the negation of plurality as causes that led the world to the rupture of this tradition, shattering the moral values and the truths of the 20th century. By applying the thoughts of these two thinkers to the current democratic crisis, it is possible to affirm that anger, isolation, individualism, disregarded claims and the negation of pluralism are on the verge of causing a new rupture where political institutions become incapable of dealing with diversity due to supposing consensus. Thus, democracy without diversity does not exist.

Chantal Mouffe understands the political as a public sphere where a plurality of claims coexists with no solution. This variety is based on the diversity of ways of life, values, social and economic contexts. The denial of the conflicting nature of the political, according to Mouffe, causes the transformation of a debate that was supposed to occur between political adversaries into a conflict between right and wrong, friends and enemies, us and them. In other words, the conflict migrates to a moral sphere and the emotional dimensions that must have happened in the construction of collective identities are mobilized to create violent forms of identification through nationalisms, xenophobic phenomena and fascist ideals (MOUFFE, 2020). Mouffe points out those liberal democratic systems have been studied in Political Philosophy without politics, which means that the understanding of democracy as basis for rational consensus is an incomplete and fictional way of understanding the pluralism of modern societies (MOUFFE, 2005). In Brazil, reality is even harder to understand in terms of consensual basis.

Jairo N. Lima and Fernando Brito (2018) indicate that even if substantial rational consensus was possible in egalitarian contexts in unequal societies finding impossible obstacles, since it is based on a dialogue between assumed free and equal individuals.

According to Hannah Arendt (1998), the totalitarian movement was preceded to a denial of the plurality, isolation and the public contempt to diversity. The denial of pluralism in society, a consensus about how people should be, racially and culturally, led to a depersonalization of some who became to be considered the *waste of the land* . Their voices were not heard, their own existence was denied and their invisibility has generated one of the most horrendous episodes in history. The consensus in totalitarian regimes was not about the law, lifestyle or principles of justice, but involves a superior form of “legitimacy” based on nature and history of the willingness to sacrifice a part for the whole (ARENDT, 1958).

The denial of plurality and the denial of the right to belong to humanity led to collapse of moral tradition and millions of deaths.

By comparing the rise of recent events that have threatened democracies with one of the worst chapters in history, it is possible to assert that the denial of social plurality, its consideration as a private matter and the conflicting nature of society, can cause catastrophic events, if it manages a supposed consensus and as a consequence establishes a superiority in its claims and lifestyles leading to any divergent claims being unseen and unheard.

Democracy and its inherent plurality of claims and lifestyles, in this way, is not a concluded process and can’t be taken for granted. The denial of the political as a space for dissensus and conflict makes the differences turn into antagonistic forms with no possibility of turn into agonism (with the recognition of the legitimacy of different claims). It means that the relation

between different vindications occurs between enemies and not legitimate adversaries. In these terms, the denial of pluralism in society and its political nature have been threatening democracy.

By assuming the political and its pluralism as an inherent feature of modern societies, democracy can be strengthened and able to deal with differences in a proper way. As these differences are considered and the perennial and inevitable conflicts are accepted as a part of society, antagonisms can turn into agonisms and democracy can be protected from these regrettable events. The main goal of democratic institutions is, exactly, to accommodate differences while recognizing their legitimacy.

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THE GLOBAL INFLUENCE ON THE DATA PROTECTION LAWS

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THEME

The globalized world and the dynamism of relations among nations can, many times, represent a challenge when it comes to the execution of constituional democracy, since legislative processes, different from the quick appearence of new relations and risks to rights and fundamentals guarantees, is very slow. In this regard, the actual essay intends to analyze the global wave of personal data protection laws that, with fear of undeniable negative economic reflexes, drove nations to legislate about this theme.

RESEARCH PROBLEM

Due to technological progress, the business and commercial world have been reinventing themselves, having in mind the modification of competitive edges among companies, since the purchasing and selling market is more disputed and crowded. However, companies have been choosing qualified professionals to represent them internationally and, consequently, sell their respective products or services.

Therefore, with consumer relations resulting from technological advances, countries saw the need of having something that could legally regulate relations and protect personal data from people involved, such as the consumer and also the provider.

In Argentina, for example, the Law nº 25.326, called Personal Data Protection Law, protects and regulates the public and private data, whom let them be used for the purposes that they were obtained for, in a way that the treatment is linked to the data holder consent, which should be open, express and reasoned. The referred authorization is not mandatory in the following cases: in case of public basis when it comes to the execution of a legal obligation, in the exercise of the State's functions and when informations are limited only to the name, identity, occupation, date of birth and address.

HYPOTHESES

Among countries that, following the global tendency, have adopted a regulation that treats

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about personal data protection, countries from European Union deserves a highlight.

Known as General Data Protection Regulation ("GDPR"), the European Union regulations came into force on May 25th, 2018 and created significant reflexes on the global economy, including Brazil, which above all on account of its economical interests, saw the imminence of regulating about the subject in order to maintain its international relations with the countries of the EU, because it is now essential for countries to be able to maintain a constant communication, through which occurs the data transmission in a secure manner, ensuring the individual rights of each citizen, and maintaining the market and international cooperation.

In this sense, from its article 101 to the article 115, the GDPR says how the datas transfer with third countries, outside the European Union can be established. Only countries with compatible regulations, at the same level as the GDPR will have express permission to do the portability of personal data. The responsible for analyzing and defining whether the laws of a particular country fit the forecasts of the European Law is the European Comission. It is important to mention that, when the mentioned law entered into force, only 12 countries were suitable for such a requirement.

THEORETICAL ANALYSIS

In view of the need to adapt to the global standards, on August 14, 2018, the legislative process, in view of the Lei Geral de Proteção de Dados Pessoais (“LGPD”) creation, began in Brazil. The mentioned law only came into force two years later, on September 18, 2020.

Similar to the GDPR, the Brazilian regulation is guided by 10 basic principles, which are: adequacy, necessity, free acess, data quality, transparency, security, prevention, non-discrimination, accountability and rendering of accounts.

CONCLUSION

By the foregoing reasons, it is concluded that, due to the strengthening of international relations and the emergence of new basic needs which, taking into account the current social patterns, are classified as minimal and must be guaranteed as fundamental right, the Constitutions and democracy live under a constant need to broaden their scope, especially regarding to the creation of new regulations.

An example of this was the LGPD´s creation in the Brazilian legal system since, if it was not created and were in harmony with the levels listed by the data protection regulations of the European Union, Brazil could suffer a significant harm on its economy.

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THE LIMITS OF DEMOCRACY IN SIEYÈS

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The French Revolution is a historical mark with its epithet *liberte, egalité* and *fraternité*. This episode that contributes to the consolidation of Liberal Democracy, also corroborates for the imposition of limits on the people. This is, because, Sieyès, known as “the soul of the legal Revolution” (LEFEVBRE, 2019, p. 88), sistematizes what he calls *povouir constitutant* and *povouir constituée*. In his theory can be perceived a democratic force in the midst of questions: “What is the Third State?”, "What has he been?" and "What does he ask for?" (SIEYÈS, 2001, p. LI). His answers are punctual and illustrate the demand for expanding social participation in political power. For him, the Third State was everything and it had been nothing in the political order, demanding that it be. Sieyès intention was to overtrow the “secular system of tripartite distribution of society and voting by order” (VIALA, 2014, p. 83)

Even in the face of de idealization of a limited constituted power, Sieyès did not restrict the *povouir constitutant* to the past, because for him it “remains untouched even in the presence of a constitution, which can be changed at any time through a manifestation of the sovereign nation” (COSTA, 2011, p. 210), that is, it is not exhausted “with his work done” (FERREIRA FILHO, 2014, p. 33) remaining “active throughout the political development of a sovereign people” (COSTA, 2011, p. 217). In his view, the *nation* is not limited to the High Law, because the will’s *nation* “is independent of any positive formalization, it is enough that its will appears for all political rights to stop” (SIEYÈS, 2001, p. 51).

However, Sieyès’s proposition is not as democratic as it first appears. Strongly influenced by Adam Smith’s work, with the book The Wealth of Nations (1996), the Abbot seeks to apply the idea of division of work in the political domain territory. With this, each one would have his role in Society, with some having the role of governing and others being governed. In this sense, his idea of *nation* has a fundamental role to justify this brake on democracy. Firstly, according to Sieyès, the people are simply a conglomerate of individuals, while the *nation* would be more than that, it would be “the incarnation of a Community in its permanence, in its constant interests, that eventually do not get confused or reduced to the interests of the individuals that compose it at a given moment” (FERREIRA FILHO, 2014, p. 43). Thus, “the physical people disappeared due to the concept of nation”, and it is precisely the nation that would be the holder of sovereignty (ROUSSEAU, 2018,

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p. 233).

This pragmatic view, which seeks to systematize a way of assessing the nation's will, ends up contributing to the rise of a very specific group of the Third State, the bourgeoisie. This can be seen in the studies of Tocqueville (2017, p. 83) when he reports that "[...] the assembly is made up solely of bourgeois and practically does not receive more artisans". The displacement of the division of labor to politics allowed voting to be seen as a function and not a right authorizing limitation of this achievement, such as the imposition of the property votes (FERREIRA FILHO, 2014, p. 45). This limitation was accepted by the Assembly, precisely because it was understood that wealth would be able to demonstrate intelligence and the Independence supposedly necessary for the exercise of the rights of man and the citizen (LEFEVBRE, 2019, p. 251). Thus, the idea of active and passive citizens was made possible with some destined to the government and others to be governed.

It is at this point that Tocqueville's criticism develops, stating that "the democratic revolution that destroyed so many institutions of de Old Regime" ended up moving towards a centralization that "found its place naturally in the society formed by the Revolution" (2017, p. 94). With the idea of identity between the will of the *nation* and the will manifested by the representatives, "[...] Sieyès's initial formulation was an attempt to make popular sovereignty delegable (COSTA, 2011, p. 209) and thus legitimize a process of creating a legal order conducted by only part of the society. This is because the limits imposed on social participation, based on the idea of Sieyès, "attenuated what the system could have as a democratic system and allowed the bourgeoisie to impose itself on peasants" (LEFEBVRE, 2019, p. 84). In the view of this, it can be said that the French Revolution was projected "in a way that was nor break with the Old Regime, but a mere 'modernization' of the nation's political system of representation" (ROUSSEAU, 2018, p. 232).

Therefore, On the one hand, Sieyes's theory presents a ground for the expansion of social participation in political power, on the other hand, he also contributed to its limitation. In this way, it can be said that representation behaves like a filter to democracy.

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THE UNIVERSALITY OF HUMAN RIGHTS AS A DEFENSE MECHANISM TO THE CULTURAL DIVERSITY

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THEME

The present paper aims to discuss about Human Rights, focusing on the current discussion that involves the relation about the universality principle and the cultural diversity. Over the years, the Human Rights were treated as law from a revolution that defended bourgeois ideals, becoming an oppressor speech in some contexts. From this point, there are people who believe that the universality principle of Human Rights is a way to exclude social minorities. However, it is undeniable that Human Rights brought, and still bring, uncountable benefits to the society, mostly talking about and acting in the human dignity defense. Thus, it is know that nowadays it is completely impossible to establish a cultural dialogue in order to get rid of this dominant culture and, then, reach an increasingly extensive protection of these fundamental rights so as that the individual develops a worthy life.

RESEARCH PROBLEM

Historically, Human Rights were a result of a lot of struggle and represent a huge achievement in the face of a world who didn't care about all the population. So, one of the most important event to achieve this victory was the French Revolution, in which provided all these rights once for all. Nevertheless, it is very important to emphasize that the Revolution was made by the bourgeois, who were looking for their own benefits, in other words, it happened in a high level group, which prevented that had the necessary effects to the low and harmed groups.

As a result, a very pertinent questioning arises about the universality of human rights and how it contributes for a minority silencing. The universality is one of human rights principles, in which defends that the rights can be applied in an equal and universal way, aiming and respecting the dignity of the human being. Nonetheless, there is a huge critic who says that only west beliefs and customs are taken into account and end up being forced as universals, ignoring other cultures who are not the dominants, promoting a kind of "cultural cannibalism" (PIOVESAN, p. 74).

Besides, as the human rights achievements happened in an excluding context, in which the image of the rights holder person was associated only to the man, white and rich standard, it is

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necessary a lot of prudence in order to avoid that this principle become one more mechanism of oppression to the social minority. For this reason, it is extremely necessary to change this image of an universal character, who has nothing from universal, to promote a society who respects and defend the cultural diversity.

HYPOTHESES

In fact, it is undeniable that Human Rights, for a long time, carried a speech of the power nations and power people, as result of the way it emerged. This historic context end up creating a distrust about the real intention and application of those rights. However, even facing this situation , there is no doubt that the actuation field of the Human Rights was strongly expanded and on the current days it is no longer stuck in the image of the “bourgeois man”, bringing a huge contribution to a diverse society and to human protection (SALLET, 2019, p.8).

One practical example of the importance of the human rights universality occurred at South Africa, during the Apartheid. That time, the white minority controlled the black majority. Due to the persistence of this regime, other countries considered necessary to interfere at the chaotic scenery. Consequently, it was imposed sanctions organized by ONU in order to let South Africa in a bad situation to the world while treating black people in an unequal way.

At this point, it is clear that Human Rights already proved that they are truly benefits and necessary to the social welfare. In order to potentialize its benefits at the society, it is necessary to establish a cultural dialogue, joining the different cultures and “celebrating the human rights culture, inspired by the observance of the “irreducible ethical minimum”” (PIOVESAN, p. 76) in order to effect a protection to the human rights each time more extense. This way, the universality principle of Human Rights, previously criticized for letting the minorities beliefs under the majorities, now can be a defense mechanism of cultural diversity, because beyond the personal truth, there is a moral and absolute principle: “the respect to other people” (NOBBIO, 1992, p.191).

THEORICAL ANALYSIS OF THE METHOD

In order to the elaboration of this research, it was used the deductive method, starting from a general theme from the Human Rights to the specific theme of the relation between the universality principle and the cultural diversity. To get to the goal, the main tool used as base was the bibliographic research about the subject.

CONCLUSION

Based on the above considerations, it is possible to understand that although the Human Rights have started inside of an oppressor context, nowadays they are a very important defense mechanism of the human and individual's dignity. Hence, the critic that the universality of the Human Rights end up silencing the social minorities and excluding their cultures it is not valuable. Actually, its actuation field got really expanded. Besides, it has been established a cultural dialogue, stepping away the west sovereignty, previously dominant. Therefore, there are no doubts that at the current society the Human Rights are a strong defense mechanism of cultural diversity.

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THE USE OF MEDIA BY THE BRAZILLIAN SUPREME COURT: LEGITIMACY AND TRUST

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In this contemporary moment, media are tools that are in a crucial position, as it is through these technologies that mediation of social relations is exercised - within a globalized scenario of politics and economics - as well as efficient information, with the media imbued with a cultural character that cannot be ignored, since “the clearest way to see a culture is to pay attention to its communication tools.” (POSTMAN, 1985, p.8). It does not differ from the powers and institutions present within a democratic constitutional regime, where transparency and facilitate access to society are key points, especially for the Judiciary, as it has no coercive or economic means to reinforce the legitimacy of its acts. (STATON, 2010). When it comes to Brazil, in particular, where, by virtue of the Constituent Assembly, the Federal Constitution was designed in such a way as to cover the maximum guarantees and rights, still, in contrast to the past, fear and mistrust were key elements into the design of the Constitution, which has given the Supreme Federal Court broad powers for the effective custody of the Constitution.

As a consequence of the expanse of constitutionalization of rights phenomenom and the accumulation of powers conceived to the Supreme Court, it moves to the center of the political arena, receiving media visibility, since the court is not rarely in the position to sustain the last word in questions of diverse content; economic, moral, social and political (VIEIRA, 2019). Given the media visibility, in 2002, while occupying the position of interim President, Justice Marco Aurélio sanctioned *Lei 10.461/2002* that yielded the creation of *TV Justiça*, a television channel administered by the Supreme Federal Court in order to report to the society the decisions of the court, at the same time that it would bring the Judiciary closer to the people, producing transparency and legitimacy, since the commercial channels had the possibility to report some mistakes related to the legal content when reporting matters associated with the Supreme Court. Also, with the popularization of the Internet and digital media, in 2005 the Supreme Federal Court *YouTube* channel was created, with the same intention as the television channel.

Thus, the use of the media by the Judiciary in Brazil has the capacity to generate different sources of public support (diffuse and specific), which help in the production and maintenance of institutional adherence. Diffuse sources of public support mean the legitimacy of the court, that is, the Supreme Court's appreciative perception and its institutional commitment (GIBSON;

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CALDEIRA; BAIRD, 1998) throughout its history, this form of public support, is builted over time and resides in the historical memory of society. Trust, on the other hand, is conceptualized as the social perception of performance and behavior (GIBSON; CALDEIRA; BAIRD, 1998) of the court collectively as well as individually of the Justices that integrate it, and the fulfillment of the social demands brought to the court; These characteristics that conceptualize institutional trust are understood as specific support.

Therefore, it is understood that there is a positive correlation between "trust" and "legitimacy" (GIBSON; CALDEIRA; BAIRD, 1998), because the better the performance of the court and its members, the greater the quality of the reasoning of its decisions, - since it is an unappealable instance - the greater the valuation perception attributed to the institution, thus, with a solid base of diffuse support (legitimacy), the court is able to act against decisions of eventual political majorities, which have the potential to harm rights that harm minority groups.

Thereby, it is concluded that both digital and analog media play the important role as a bridge, making the connection between democratic institutions and society, while when used by the Supreme Federal Court, they are able to produce a constant form of trust (specific support) which becomes legitimacy (diffuse support) over time and makes it possible for the court to defend and maintain rights and guarantees, while enabling the protection of minority groups from the action of eventual political majorities.

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