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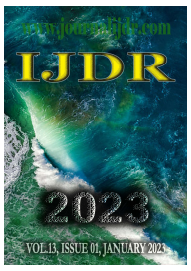

RESEARCH ARTICLE **OPEN ACCESS**

AN ANALYSIS OF (NEO) CONSTITUTIONALISM IN BRAZILIAN POST-MODERNITY: JUSTICE, DEMOCRACY AND NOTES ON JUDICIAL BEHAVIOR

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ABSTRACT

The text seeks to investigate the dimensions of *neoconstitutionalism* in post-modernity, based on the role of judges, on the rite of judgment, which, in the end, can be seen as a political act. Thus, it deals with the analysis of the potential for interpersonal differences based on the choices made by judges, demonstrating that the exercise of constitutional jurisdiction has been carried out in the way of legal argumentation (by the Judiciary), revealing a minimal-orienting character, capable of expand or reduce conceptual horizons in the field of Law.

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INTRODUCTION

The text seeks to investigate the dimensions of the new constitutionalism (*neoconstitutionalism)* in postmodernity, with the aim of analyzing the movement, whose efforts at conceptualization, historicity, and adjustability for the realization of justice are notorious. For the analysis, it is useful to revisit the debate on the conceptualization of fundamental rights in a Republic – especially regarding the issue of their effectiveness. What happens from the idea of an essential core of fundamental rights, to be defended by the legal-constitutional order. Based on the examination of the complexities of the very concept of constitutionalism, aspects derive from the construction of a judgment that formally represents political power and advances under the commands pertinent to fundamental rights. In this path, the role of judges, in charge of constitutional duties, requires studies and conceptual advances. This role, represented by social cognitions, can characterize, or materialize implicit or explicit biases, the first of which allow predicting certain types of behavior that will be expressed in the real world – which demands the implementation of relevant strategies. From this harvest, the ritualistic of the judgment emerges, which, being able to be - to some extent as will be seen later - seen as a political act, intends, in some dimension, to support the development of a legal material that is minimally perennial and materializes fundamental rights, especially in the constitutional (and *neoconstitutional*) context. The aspect of implementing democracy comes into play.

At this point, the text proposes to argue about: the incidence of implicit bias, perceptible in the ideas of the judges' political preferences, to claim the claim for rational deliberation and the interpretation of the consequences of the jurisdictional behavior of the idea of democracy. Thus, it deals with the analysis of the potential for interpersonal differences based on the choices made by the judges (with emphasis on the discussions about the various types of audiences). All to demonstrate that the exercise of constitutional jurisdiction has been carried out in the way of legal arguments sent by the Judiciary, revealing a minimal guiding character, capable of expanding (or reducing) conceptual horizons in Law.

DEVELOPMENT

To investigate the dimensions of *neoconstitutionalism* in the so-called postmodernity, the objective is to analyze the movement, based on the efforts for its conceptualization, its historicity and how it should adjust to the realization of justice. For the analysis, it is fundamental to revisit the systemic aspects of action at the constitutional level, having as scope the normative force and the resizing of the oscillations in the multiple experiences of the Rule of Law (FRANCISCO and MASCARO, 2012). From the examination of the complexities involved in the very and inaugural concept of constitutionalism, the idea of building an operational and broad judgment that reflects the matrices of political-legal experience of a society (and even of a State) tends to address the transformations that

took place in the structuring form of political power and commands relevant to fundamental rights (PULIDO, 2007). Here, it is important to highlight the points of connection between fundamental rights and democracy. It is in this vein that the issue of human rights is revealed because of revolutionary processes, accessible through historical procedures that are not always well delineated, so that:

> *A ciência social americana dos nossos dias, excluindo a ciência social católica romana, dedica-se à proposição segundo a qual todos os homens são dotados pelo processo evolucionário ou por um destino misterioso de muitos tipos de anseios e aspirações, mas não certamente de qualquer direito natural. Se os princípios são suficientemente justificados pelo facto de serem aceites por uma sociedade, os princípios do canibalismo são tão defensáveis ou tão válidos como os da vida civilizada. O problema colocado pelas necessidades conflituantes da sociedade não pode ser resolvido se não tivermos conhecimento do direito natural* (STRAUSS, 2009).

The conceptualization of fundamental rights in a Republic must be concerned with designating or defining the understanding of things and their functioning. No progress, this time, without addressing the adaptations between meaning and signifier, which marks a polysemy of the expression politeia (which is both the polis, in which the multitude governs seeking public utility - in its various manifestations such as the Republic, democracy, etc., as is a name commonly given to all political societies). There remains, therefore, the criticism of those who call democracy a purely republican organization, in perversion of the politeia-Republic relationship, because where the laws have no force there can be no Republic. In such a way, it takes care to distance democracy from the Republic. In thissense, the invocation of democracy was universalized to characterize the "*bom governo*", citingthe American "foundingfathers" whowanted a Republic, not a democracy (CUNHA, 2008). However, the association of virtues with pious naivety or sinister hypocrisy is not unknown – it is said, to define "rediscovered virtue", that virtue is the *conditio sine qua non* for Republics, as the essence of governments. So much so that, if virtue is ignored, democracy perishes. It is necessary to face the reciprocal duty towards the Republic and the latter towards the citizens. This is the context that supports the debates that will come to populate the *neoconstitutional* agenda (CARBONELL, 2007), especially in the field of achieving justice through fundamental rights.

The issue of the effectiveness of fundamental rights, based on Brazilian constitutional dogmatics, finds scope in the various facets of legal effectiveness to check the effectiveness (or, in other words, social effectiveness) of fundamental rights. It is that the restrictions imposed on fundamental rights must be studied with special focus on the limitation of such restrictions, or as already described, the "limits to the limits" (SARLET, 2009). Thus, from the perspective that every fundamental right has a scope of protection (which encompasses the various factual assumptions established by the legal norm) and that"*todo o direito fundamental, aomenosemprincípio, estásujeito a intervençõesnesteâmbito de proteção* "(SARLET, 2009), the analysis of restrictability, or the interpretation of the restriction imposed on fundamental rights, must go through the platforms of configuration, conformation, complementarity, all in order to densify such a wealth of rights. Indeed, limits can be established directly by the Constitution, either in terms of regulations or through the interpretation of what is found within the fundamental rights themselves, in an analogy to the idea of "matter and antimatter". Now, so much so that the reason for the interpretation derives from the very constitutional idea that there is no possibility of predicting and/or regulating all hypotheses of collisions of fundamental rights in positive law. In this vein, any limitations on fundamental rights can only be properly justified if they are compatible (formal and material) with the Constitution – its vehicle for establishing and positivizing it. To which arise arguments such as proportionality and reasonableness in the interpretative setting ofthelimitsoflimits. This is because reasonableness, which is intended to give weighting a rational and disciplined support (running away from a mere mathematical formula), finds in proportionality the exercise of a double function: prohibition of excessive protection and prohibition of insufficient protection. This is how the conciliatory content of the reforms makes the Constitution adaptable to reality, not requiring future generations to be eternally bound by certain principles and values (enshrined in each historical moment), but whose application may harm even the normative force of the constitutional text. To operationalize the concept of *neoconstitutionalism*, based on the inclusion of the particle 'neo', as a prefix, we start from the perspective of valuing the application of principles, overcoming the rules, which takes place from techniques weighting, with emphasis on the Constitution compared to the other legal instruments presented in the various legal systems (BARROSO, 2005).

This time, the idea of an essential core of fundamental rights is investigated, to be defended under penalty of wasting the entire legal-constitutional order. It is in this court that the barriers to the reforming constituent power are raised, to ward off suppressions and erosions, and to initiate a general and presumed clause of a protective nature of fundamental rights. From what the stony clauses are exemplified, an argument emerges in the sense that the revision process of constitutional texts must be carried out in compliance with the same formal and material limits foreseen for constitutional amendments. In order to establish the scope of the stony clauses regarding fundamental rights, it is argued that all fundamental rights established in the Constitution are, in some way, rights of individual ownership, even if they exercise collective expression - in such a way, to confer an interpretation restrictive with regard to the list of social rights, is to note that "*ospróprios direitos design adoscomo individuais, vinham send or econhecidoscomo 'cláusulaspétreas' no sistemaconstitucional anterior*" (SARLET, 2009), which did not have a democratic history as it currently stands. The ideals of the current of legal certainty led to the understanding of the prohibition of retrogression about fundamental rights - it is because the legal dimensions of the process spread (albeit implicitly) in the constitutional text to demand certain premises for the legal basis of the said prohibition, notably in terms of social rights. The affirmation of the position of the Constitution as a light of interpretation (source of guidance) ends up formatting a true "atmosphere" from which the other branches of law begin to conform, according to this novel thought (SARMENTO, 2009).

Certainly, this is not a phenomenon that has unanimous acceptance, even in countries where it was initially conceived, as the author exemplifies Spain, France, and Italy, in which discreet application prevails (SANCHÍS, 2005). In Brazil, the phenomenon is accompanied by nuances of what is conventionally called 'judicial activism'. It is important to point out that, in the development of the *neoconstitutional* functions (or even in their own application), which, by nature, spread throughout the legal order, emphasis emerges on fundamental rights (structuring, in the author's diction), especially due to the high "semantic openness" and "elasticity" that this modality of principles initiates in the search for adequate and fair solutions to the problems that arise (FRANCISCO, 2012). By conferring historicity to the analysis, through a synthesis of the time frame in which it is possible to understand the emergence, and even the formatting, of the ideology of the movement considered *neoconstitutionalist*, it is noted that the march "*de parte da doutrina e de magistradosem favor do fortalecimento da normatividade dos princípiosfundamentais e de mecanismos de ponderaçãobuscando da justiçaemcadacaso particular*" (FRANCISCO, 2012). It is believed that the movement can take as its origin the world scenario after World War II, driven by the need for systematic protection of human and fundamental rights. Hence, the useful function of the movement is revealed, especially in scenarios of a prolix Constitution that, on the one hand, speculate the normative inflation of the States - with a multiplicity of norms, including infra-constitutional ones, of various themes - as opposed to, on the other hand, the inexistence of regulations capable of satisfying the significant list of enmeshed fundamental rights. Indeed, the open-ended legal perspectives that characterize *neoconstitutionalism* share the same orientation matrix as the jurisprudence of values and the so-called "post-positivism". Having the positivized legal system as a fundamental reference, the exercise of the interpretative process

forwarded by the *neoconstitutionalist* constructions reflects the methodological pluralism capable of conferring validity to the system itself. From the attraction of *neoconstitutionalism*, one recalls the risk society approach, characterized by modern liquidity and the complexities that exist within the scope of socio-legal relations, in which volatility and lack of security – in different instances – demand new conceptions of constitutionalism. In this view, constitutional values cannot be fully secured without making basic changes to the structure of various institutions that operate on a large scale, such as political institutions that deal with majoritarian logic (FISS, 1979). Thus, the aim here is to examine/classify relevant concepts for the field of analysis between fundamental rights and democracies under the aegis of *neoconstitutionalism*. The idea is based on the analysis of general concepts of legal philosophy, particular concepts of legal theory and practice and on the degree of specialization and legal usefulness of the concepts.

From the examination of the general concepts of legal philosophy, the considerations on whether ordinary people share legal-philosophical intuitions about the nature of law stand out, in order to investigate whether there is "a unified popular concept of law (and, if so, if so, what its content involves). These are debates that permeate whether "principles of the inner morality of law are reliably supported by ordinary intuitions" (FISS, 1979). Aboutparticular concepts of legal theory and practice, it should be noted that the analysis takes place based on whether the legal concepts in question are modeled, hours away from common intuitions, so that, by way of example, the ideal emerges of application developed in another research:

> XJur may examine whether the concepts of legal experts and laypeople are congruent with the technical understanding of such concepts within the law. Such research is valuable for several reasons. First, legal values, such as clarity, consistency, and publicity, are better achieved when there is some compatibility between folk and legal concepts (…). Secondly, XJur research may identify the recurrent features of legal theory and practice (…). Finally, experimental research with legal experts may verify whether such experts are applying legal concepts correctly (…)(FISS, 1979).

Faced with this complex society, the training of judges who, as a rule, do not claim access to other knowledge in depth, ends up demanding from this actor an ingenious work of understanding the multifaceted issues that are presented to him - it is important to highlight that the strengthening of the judiciary schools that, formally, promote the renewal of magistrates' knowledge, but for which there is still ample room for development. Freedom of access to the judiciary in an environment of liquid modernity and low risk society based on stability and predictability of the production of law, a relationship that becomes even more complex due to the litigiousness of the Brazilian reality. Such claims aim to complement the project of modernity, thus satisfying the analyzes of law, morals, politics, and hermeneutics – for such a scenario, *neoconstitutionalism* proves to be adjusted to the dynamics of the environment and to the risks, especially insofar as the legislature has been shown to be incapable of to face volatilities and pluralisms. The opportunity for activism is increased (the author does not forget to note the approach of activism as a violation of the limits of the woodwork itself). The fact is that the debates find the depth of construction of collective identities as difficulties – especially when considering the political bond that is drawn within the scope of each democracy –, thus being marked by fragility, complexity, and uncertainty.

A neutral development proposal, it purportedly seeks answers to legal questions based on what is contained in the legislation and, (albeit in hard cases), the description of how judges think is accurate, and more, about how judges should think (POSNER, 2009). When someone names the judgment as a political act, there is no problem given to a customary right, based on decisions that prioritize the cost-benefit ratio in each case. What is intended is to support the development of a corpus of reasonably perennial legal material. Certainly, it is at this point that one can argue: the incidence of implicit (or ideologically explicit) bias, based on the ideology of political preferences, among judges, tends to point to the need for rational deliberation. The finding is that judges must be aware of reality, doing work (especially in the case of judicial review) – paying attention to the consequences that will be produced by their decisions for the parties and for the justice system. It is therefore necessary to write down a roadmap for controlling activism which, in the author's mind, was positioned as inherent to *neoconstitutional* thinking. It is a path that runs through respect for the competence criteria set by the normative command, the preference for the formulation of the solution for each concrete case, having as its central objective the realization of justice in democratic parameters, revealing constructions woven by controllable and transparent mechanisms, always striving for the coherence of the jurisdictional construction.

Much has already been argued about the consequences and consequences of the behavior of the Judiciary. There are many debates about the role of "implicit bias" in the various approaches to judicial decisions and in the work of jurists in general. The role of judges – above all in charge of constitutional tasks – is, at this point, worthy of studies and conceptual advances. The conventional wisdom is that social cognitions—represented by attitudes and stereotypes about certain social groups—characterize explicit biases, in the sense that they are consciously accessible through introspection and endorsed as appropriate by the person who develops them. About implicit prejudices, there is a term that we use to denote implicit attitudes and stereotypes. According to these measures, implicit bias is pervasive (widely accepted), but covert. Given their sheer magnitude (when compared to standardized measures of explicit bias), implicit biases make it possible to predict certain types of behavior in the real world – what policymakers are now eager to understand are the size and scope of these behavioral effects. and how to combat them – by changing one's implicit biases and implementing strategies to mitigate their effects. In thissense:

> Researchers at Harvard's Project Implicit developed the Implicit Association Test (IAT), which has become the gold standard for measuring implicit bias. The IAT measures the strength of subconscious associations by comparing the amount of time an individual takes to make them.28 Consider being asked to read two lists: one, comprised of a list of colors, each written in its namesake ink (for example, "blue" written in blue ink); the second, listing colors written in randomly colored inks (for example, "red" written in yellow ink). If you suspect that the first list might take less time for most people to read than the second, you are right— because individuals subconsciously associate colors with their names, being asked to perform a task incongruous with those associations takes more time. This latency is the exact gauge by which the IAT measures implicit bias (BIWER, 2019).

Therefore, it is important to deal with an examination focused on the step by step of how judgments work and what are the most common implications in the biases of decisions. Conditions emerge for the various concrete intervention strategies to combat implicit biases towards the main actors of the justice system, such as the judge and the jury, to be implemented. In fact, modern social sciences discuss the existence of implicit bias, however, many people still haven't heard about the concept or mistakenly confuse it with explicit bias. Said ignorance extends to the judiciary – "an institution that reveres Lady Justice" (BIWER, 2019). Many judges are unaware of the institute of implicit prejudices and unconsciously remain variable to it. Despite being free to proceed with their judgments, without actively seeking to understand or resolve their internal imperfections (which include implicit prejudice), it is urgent to remove the stigma associated with the implicit prejudice of judicial conduct, or, at least, its minimization. The serious effects of these prejudices can be perceived in peripheral circumstances. When circumstances seem ambiguous, an implicit bias can be magnified and suggest a quick answer that turns out to be biased. The analysis of the potential for interpersonal differences that exist in the bases for the choices made by the judges is a central point for the investigation woven into the

discussions about the various types of public (audiences), capable of emphasizing the differences between the judges. Perceptions of the human image and behavior differ from the implicit images in (dominant) models of judicial behavior, when the majority (of judges) depend on their social identities (which inevitably differ from one judge to another). Somuchsothat:

> This depiction of judges is unrealistic, in that few people are so removed from their social environment. If judges are like other people, they care about the regard in which they are held for its own sake. In turn, their interest in the esteem of others can be expected to influence their work as judges(LAWRENCE, 2006).

The relative power of groups within the legal field's power structure is related to the general position of the legal field within the broader field of power. This position, through the apparent "weight accorded to the 'rule of law' or government regulation, determines the limits of strictly legal power of action". Is that:

> Rather than resorting to theoretical treatises of pure law, they employ a set of professional tools developed in response to the requirements and the urgency of practice—form books, digests, dictionaries, and now legal databases. Judges, who directly participate in the administration of conflicts and who confront a ceaselessly renewed juridical exigency, preside over the adaptation to reality of a system which would risk closing itself into rigid rationalism if it were left to theorists alone (BOURDIEU, 1986).

Indeed, the interpretation of the law does not reveal itself as a solitary act of the judge, who acts in this way, concerned with providing a legal basis for a judicial decision that, at least originally, is disconnected from the law and reason. This is because, outside the courts, judges are offered opportunities to present to congressional audiences, in speeches, in articles and/or interviews. It remains to add that most judges make – in one way or another – some use of these platforms and forums (some more actively than others, but it tends to be a general culture). Not infrequently, judges spend hours establishing relationships with the community in which they are inserted. A notable example is the Superior Court judges who collectively engage in a significant volume of academic writing – some judges produce so much writing that they end up compiling it into books.

The various people with whom the individual interacts exert influences in different ways on their form of self-concept and even on the development of individual potentials. Thus, the role that such identifications play in individual behavior has been a longstanding interest in sociology and social psychology. In this area, the approach about “us” and “them” deserves to be highlighted, for which: “[a]n important element of social identity is the distinction between “us” and “them,” “between the individual's own group and the outgroups which are compared or contrasted with it” (LAWRENCE, 2006). What is certain is that judges are strategic actors who, when they realize that their ability to advance in positions depends on considering the preferences of other strategic actors, reveal themselves to be operators of choices that they expect others to make, always informed by the institutional context in which they operate. The case is asserted in the case of being a judge of the Federal Supreme Court – this one indeed – must make interdependent choices, which lead to the understanding of the preferences of (I) his fellow judges, (II) of the Executive or Legislative branches, and (III) the public, or the audience in general (EPSTEIN; KNIGHT, 1997). Thus, because of the incidence of implicit bias among judges, many researchers began to propose approaches to eradicate them, such as education, rational deliberation, time for decision, diversity of parts of the process and the judicial perspective, the general warning of being on the defensive etc. The discussion (followed by a discourse analytical approach to the study of ideology) is in the sense that people acquire and reproduce their ideologies mostly through conversation or – even – through the text, which is why the discourse-ideology interface composes the analysis, which begins with a congruent theoretical outline of the conceptualization (and praxis of) ideology (KAHAN, 2012). People want to be liked, loved, and respected by others, especially by those who occupy important positions in defining their social identities. It remains to interpret what they tend to do to gain popularity and respect as the basis of efforts to make favorable impressions – such efforts can be conceptualized as “self-presentation” or, alternatively, “management of personal impression. In the case of magistrates, the set of objectives underlying personal presentation assumes an instrumental nature – such a “goal” gives these officials strong incentives to engage in strategic self-presentation, so that their personal motives sometimes end up having little relevance.

In this sense, it is important to highlight that ideologies are not any kind of socially shared beliefs, such as “sociocultural knowledge or social attitudes, but more fundamental or axiomatic. They control and organize other socially shared beliefs” (VAN DIJK, 2006), one of their cognitive functions is to provide (ideological) coherence to the beliefs of a given group and thus facilitate their acquisition and use in everyday situations. With this, to enter the legal field, it is necessary to tacitly accept the fundamental law of the field: an “essential tautology that requires that, within the field, conflicts can only be legally resolved” – according to the rules and conventions woven from the field itself. In this way, entering the field can redefine the “common experience” and every situation that comes into play, in any dispute. In this context, after acting by suggesting the generalized effects of bias in decision-making, it is worth defending a realistic approach to behavior, recognizing human weaknesses, and initiating procedures to reduce the impact of prejudice in the courts. Ideologies are developed/acquired and (sometimes) changed throughout life or during a specific period of life. Thus, arguments are established in the sense that the use of language and the understanding of discourse depend on (and influence) the properties of the communicative act, representing the context of the discourse. The operability of the Courts is not emptied in the mere (re)production or subsumption of facts – usually supported or elucidated via evidence – to the law. It is in this context that it is asserted that legal argumentation, legitimately compulsory for the exercise of jurisdictional activity, borders the discussion with the relevant emphasis that the variation in the relevance of the public (exercised by the public) among judges tends to complicate any effort to analyze its impacts. It is clear, therefore, that the patterns of influence in the courts can be dispersed along several lines: mostly, the level of influence that different judges exert on their peers must be seen as truly relevant. Especially in the Supreme Court, with a significantly political inclination, the relations between judges and the public flirt with the dimensions of the fact that it is a court whose members were appointed to their positions and hold them for life. Therefore, although the social groups that make up the audience are quite different audiences, the most important thing is to understand that judges invest more of their time interacting with members of their profession and their groups than with the public. Likewise, its most prominent audiences tend to add to (or subtract from) their self-esteem. In the hypothesis, unveiled is the systemic role of the Judiciary in the construction of conceptual horizons.

CONCLUSIONS

From the perspective that every fundamental right presents (claims) a scope of protection, an argument was developed that the conceptualization of fundamental rights in a Republic permeates the understanding of things and their functioning. In this sense, the issue of the effectiveness of fundamental rights, with a focus on constitutional dogmatics, is justified in the search for legal effectiveness (effectiveness, or social effectiveness) of fundamental rights. It is from this movement that, under a neoconstitutional approach, it appears that the conciliatory content and the adaptability of the Constitution to reality are part of the normative force of the constitutional text. By way of conclusion, what is perceived is the validity of a mixed verdict between law and politics. No “average man” has pertinent doubts that ideology (thus defined as moral and political commitments of various kinds) can provide help in

understanding and explaining judicial votes (SUNSTEIN, 2007). In addition to conventional wisdom (those social cognitions - such as attitudes and stereotypes in certain social groups) it is urgent to remove the stigma that remains associated with the implicit prejudice of the judicial actor's conduct (at least its minimization), given the serious effects of these implicit prejudices.

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