Bureaucracy as the guardian of the Constitution: democracy and separation of powers in the administrative State*

A burocracia como guardiã da Constituição: democracia e separação de poderes no Estado administrativo

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ABSTRACT

This article starts from the following problem: to what extent does the traditional view about the separation of powers allow us to understand the role of bureaucracy in defending the Constitution? The hypothesis is that the premise that opposes an impartial Judiciary to a plebiscitary Executive frustrates the understanding of the bureaucratic function in constitutional defense. The general objective is to understand how the role of bureaucracy as guardian of the Constitution is underestimated by the traditional view. The specific objectives are to analyze how the traditional view describes the

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branches, the criticisms made by contemporary literature and the limits of a juriscentric perspective. The methodology is exploratory bibliographic. The paper concludes that the traditional perspective is founded on wrong premises, resulting in the disregard of the bureaucracy's role as guardian of the Constitution.

KEYWORDS

Executive Branch — Judiciary — bureaucracy — Constitution defense — democracy

RESUMO

O presente artigo parte do seguinte problema: em que medida a visão tradicional sobre os Poderes permite compreender o papel da burocracia na defesa da Constituição? A hipótese é a de que a premissa que opõe um Judiciário imparcial ha um Executivo plebiscitário frustra a compreensão da função burocrática na preservação constitucional. O objetivo geral da pesquisa é avaliar como o papel da burocracia como guardiã da Constituição é subestimado pela visão tradicional. Os objetivos específicos são analisar como a visão tradicional descreve os Poderes, as críticas feitas pela literatura contemporânea e os limites de uma perspectiva juriscêntrica. A metodologia é bibliográfica exploratória. Concluiu-se que a perspectiva tradicional parte de premissas equivocadas, tendo por resultado a desconsideração da burocracia como guardiã da Constituição.

PALAVRAS-CHAVE

Executivo — Judiciário – burocracia — defesa da Constituição — democracia

Introduction

"The Constitution seeks especially to give the President of the Reich possibilities to engage directly with the political will of the German people and to act as protector and guardian of the constitutional unity and integrity

of the nation."[1]

With this argument, Carl Schmitt addressed the controversial question of who should be the guardian of the Weimar Constitution. The debate, which has become one of the most famous in public law of the 20th century, revolved around art. 48 of the aforementioned Constitution, and who should have the last word on questions relating to the suspension of the constitutional text in exceptional circumstances.[2]

On the other side was Hans Kelsen,[3] who defended with particular zeal the idea that the guardian of the Constitution should be the Judiciary, by means of a body formed purely for that purpose—a Constitutional Court. According to Kelsen, the need to create a responsible Court for protecting the Constitution would be a logical corollary of the need for a third party, uninterested in political-constitutional disputes.[4] " [...] [W] if an institution should be created to ensure conformity to the Constitution of certain acts of the State [...], such control must not be entrusted to one of the bodies whose acts are to be controlled."[5]

This debate, culminating in the judicial decision in 1931, lost its importance with the rise of Nazism and, more immediately, ended with the victory of Schmitt, who became the most celebrated jurist of the Third Reich. With the defeat of the Axis, however, the position of Kelsen became central to constitutional law, laying much groundwork for institutional arrangements[6] enshrined in the second and third waves of democracy — which occurred after the Second World War and the re-democratization of Eastern Europe and Latin America, respectively.

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1 SCHMITT, Carl. La defensa de la Constitución. Madri: Tecnos, 1998. p. 251.

2 For a preliminary analysis of the debate, cf. PAULSON, Stanley. Hans Kelsen and Carl Schmitt: growing discord, culminating in the "guardian" controversy of 1931. In: MEIERHENRICH, Jess; SIMONS, Oliver (Org.). The Oxford handbook of Carl Schmitt. Oxford: Oxford University Press, 2016. p. 510-546; for development of the case and the main arguments, cf. CALDWELL, Peter. Popular sovereignity and the crisis of german constitutional law: the theory and practive of Weimar Constitution. Duke University Press, 1997. p. 40-62, 85-119.

3 It is important to emphasize that we do not endorse any perspective that confuses Kelsen with a mechanistic view of the role of interpreter of the Judiciary. When we speak of impartiality here, we are referring to a supposed third-party position occupied by the Judiciary in relation to acts subject to constitutionality control; for this debate cf. LEAL, Fernando. O formalista expiatório: leituras impuras de Kelsen no Brasil. Revista Direito GV, v. 10, p. 245-268, 2014.

4 Summarized in VINX, Lars. The guardian of the Constitution: Hans Kelsen and Carl Schmitt on the limits of constitutional law. Cambridge: Cambridge University Press, 2015. p. 15

5 KELSEN, Hans. Jurisdição constitucional. São Paulo: Martins Fontes, 2007. p. 240.

6 BRANDÃO, Rodrigo. Supremacia judicial versus diálogos constitucionais: a quem cabe a última palavra sobre os sentidos da Constituição? Rio de Janeiro: Lumen Juris, 2012. p. 56.

The Kelsenian idea that the Judiciary would be responsible for protecting, as a third party, the conflicts involving the constitutional text generated a double displacement. In the foreground, there is an institutional dimension, to do with a progressive concentration of powers in the hands of the Judiciary. It is in this space that numerous reflections arise, on the judicialization of politics, judicial activism and juristocracy.

In the background, in a less studied dimension, there is an epistemological mindset displacement. Law is here confused with an eminently jurisdictional activity, and the standard by which it is possible to evaluate its application belongs to judges.[7] In this sense, it is possible to understand how a typically judicial instrument of conflict resolution such as the theory of principles filtered into all public activity.[8]

In short, legal discussions are often shifted towards the possibility of judicial intervention and, thus, a judicial means of confronting reality. This discussion, now famous in constitutional law, was seen as an important lesson to support the spread of constitutional jurisdiction around the world and is central to public law, in particular, administrative law. Indeed, the apparent victory of constitutional jurisdiction and the judicial model of constitutional protection had a direct effect on how the performance of the other powers is viewed, above all, the executive branch.

In the shadow of the constitutional courts and their principled rhetoric, a strong administrative state prospered, with expanded functions and essential action for the consolidation of fundamental rights. In fact, Kelsen's victory was perhaps a Pyrrhic victory, much celebrated, but perhaps less powerful than imagined. On the threshold of judicial ascension, the executive guardianship of the Constitution endured and gained strength.[9]

In the construction of democratic constitutionalism, the debate was absorbed as a simple opposition. On the one hand, an impartial judiciary, guardian of democracy and fundamental rights. On the other hand, a plebiscitary Executive led by a president respectful of institutions, willing to impose its will by force.[10]

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7 BARROSO, Luís Roberto. O direito constitucional e efetividade de suas normas: limites e possi bilidades da Constituição brasileira. 7. ed. Rio de Janeiro: Renovar, 2003. p. 87.

8 Gustavo Binenbojm chega ao ponto de falar de um "Estado de Ponderação"; cf. BINENBOJM, Gustavo. Uma teoria do direito administrativo: direitos fundamentais, democracia e constitucionalização. Rio de Janeiro: Renovar, 2014.

9 On the new issues of the debate, cf. BASSOK, Or. The Schmitelsen Court: The Question of Legitimacy. German Law Journal (no prelo).

10 Something Guillermo O'Donnell called "delegative democracy"; cf. O'DONNELL, Guillermo. Democracia delegativa? Revista Novos Estudos, n. 31, v. 1, p. 25-40, 1991

In Latin America, in particular, the literature of the so-called "*transitology*", concerned with democratic recovery in countries with an authoritarian past, extremely critical of the Executive and, above all, presidentialism, considered categories ranging from Nino's "hyper-presidentialism" to the idea of an authoritarian "engine room", re. Gargarella. What these categories have in common is a critique of the authoritarian nature of the Executive and a certain confusion of this Power with the figure of the President of the Republic.

This confusion is the starting point of the topic researched here, that is, the role of bureaucracy in defending the Constitution and its underestimation through the traditional perspective of the judiciary and the Executive. The problem may be put as follows: to what extent does the traditional view of the Powers allow us to understand the role of bureaucracy in defending the Constitution? But first, the hypothesis tested is that the premise that opposes an impartial Judiciary and a plebiscitary Executive frustrates the understanding of the bureaucratic role in constitutional preservation.

Our general objective is to understand how the role of bureaucracy as guardian of the Constitution is underestimated by the traditional view of the roles of the Judiciary and the Executive in defence of the constitutional text. We will analyze how the traditional view explains the role of the Powers, the criticisms that can be made from contemporary literature and the limits of a *juris centric* perspective. The methodology used is bibliographical, using exploratory graphics, starting primarily from an analysis of the literature on the topic.

1. Between an "impartial" Judiciary and a "plebiscitary" Executive

1.1 In search of lost impartiality: the Judiciary and its relationship with politics

"[It] is neither unusual nor surprising that the judiciary, in certain contexts, is a better interpreter of the majority sentiment."[11] Thus, Minister of the Federal Supreme Court (STF) Luís Roberto Barroso summarizes a set of new perceptions about the role of judges in a constitutional democracy. In short,

[11] BARROSO, Luís Roberto. A razão sem voto: o Supremo Tribunal Federal e o governo da maioria. In: VIEIRA, Oscar Vilhena; GLEZER, Rubens (Org.). A razão e o voto: diálogos consti tucionais com Luís Roberto Barroso. Rio de Janeiro: FGV Editora, 2017. p. 55.

the defence is that of the possibility of an "argumentative representation" of society by the Judiciary.

Supporting this is a complex view of the democratic phenomenon, not reduced solely to the notion that, through the ballot box, there is a complete transfer of the will of the people to their representatives. This is because the democratic process includes a deliberative dimension,[12] according to which the arguments used to make a decision are also important. The Judiciary, through its decision-making method, is therefore able to absorb the popular will and represent it argumentatively.[13]

As might be expected, this idea is not immune to criticism, encountering arguments that are empirical and purely normative.[14] However, our purpose here is not to discuss the validity of this premise. What is more significant is the perception, of an empirical nature, that the Judiciary is not politically aseptic and is capable of absorbing influxes from different social spheres. This finding, which seems to flow easily from defenders of a representative court, reveals, therefore, that the ideal of a judiciary placed as a disinterested third party in political and social disputes has strong limitations. More than that, it assumes it is possible that, in some circumstances, the judiciary is more representative than elected officials. How, then, to sustain the idea of a plebiscitary executive in the face of an impartial judiciary? How plebiscitary is the Executive if the popular will can be better represented by the arguments of the Judiciary?

The realization that the Judiciary is subject to the vicissitudes of social and political life can be understood in terms of arguments of different orders. The first type concerns the interaction of the Judiciary with the other Powers and with society. In this regard, some theories try to observe a dynamic in the relationship between the Powers and society that will determine the actual capabilities of the courts in a constitutional democracy. To illustrate, we may consider three theories that deal with these interactions.

The first is insurance theory, developed by Tom Ginsburg, which defends

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[12] ELSTER, Jon. Introducción. In: ELSTER, Jon (Org.). La democracia deliberativa. Barcelona: Gedisa, 2001. p. 21

[13] "An adequate concept of democracy must, however, include not only the decision but also the argument. The inclusion of argument in the concept of democracy makes democracy deliberative. […] For this reason, the connection between the people and parliament must not only be determined by the decisions expressed in elections and votes, but also by argument." ALEXY, Robert. Balancing, constitucional review, and representation. I-CON, v. 3, n. 4, p. 579, 2005.

[14] Cf. PEREIRA, Jane Reis Gonçalves. Representação democrática do Judiciário: reflexões preliminares sobre riscos e dilemas de uma ideia em ascensão. Revista Juris Poesis, n. 14, v. 1, p. 343-359, 2014; Id. Interpretação constitucional e direitos fundamentais. Rio de Janeiro: Renovar, 2006. p. 61.

the idea that the degree of power of the courts in a newly installed democracy is directly related to the degree of insecurity as to the future of existing parties at the time of transition. The greater the insecurity of the parties with regard to their future, the greater the likelihood the judiciary have expanded powers to ensure that no one is "kicked out of" the democratic game.[15]

The second example is the theory regarding institutional crises in Latin America developed by Gretchen Helmke. According to this theory, there is a tendency that Executive crises, in which there is a risk of a president being removed from power, lead to judicial crises. This is because, due to the role of the courts in interpreting the constitution, there is an incentive for the president to try to manipulate them whenever their mandate is at risk.[16]

A third and final example is the theory of "diffuse support" and "specific support",[17] which tries to understand the impact of social support on the functioning of the courts. According to this theory, in matters of decisions that go against the majority will, the constitutional courts and supreme courts have a limited stock of options. In this regard, the degree of obedience and compliance with court decisions is directly related to its ability to generate and sustain widespread support for its existence as an institution.

Thus, for all that the Judiciary makes occasionally unpopular decisions, which do not enjoy "specific support", obedience to its determinations and its very existence is related to "diffuse support", an element without which the courts would not be able to exist.[18] "Therefore, the production of counter-majoritarian decisions in cases of general repercussion is a resource to be used sparingly. And respect for such decisions depends, in part, on the credibility and trust gained by a Constitutional Court through its history".[19]

In general, what all these theories demonstrate is that, in some measure, when acting, the courts are conditioned by factors external to the pure application of law. This is related to the powers given to them, assigned from the moment of their creation to respect for decisions and the preservation of their existence. Even though they have incentives to shield themselves from

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15 GINSBURG, Tom. Judicial review in new democracies: constitutional courts in Asian cases. Cambridge: Cambridge University Press, 2003. p. 25.

16 HELMKE, Gretchen. Institution on the edge: the origins and the consequences of inter-branch crises in Latin America. Cambridge: Cambridge University Press, 2017. p. 126-150.

17 On this distinction, cf. EASTON, David. A re-assessment of the concept of political support. British Journal of Political Science, v. 5, n. 4, p. 435-457, 1975.

18 FRIEDMAN, Barry. Mediated popular constitutionalism. Michigan Law Review, v. 101, n. 1, p. 2595-2632, 2004.

19 PERRONE, Patrícia. Nos bastidores do STF. Rio de Janeiro: Forense, 2015. p. 378.

aspects of the political process — vis-a-vis selection, institutional and personal guarantees — magistrates are not immune to this type of influence.

Paradoxically, in order to exercise their functions of protecting democracy and guaranteeing rights, the courts are obliged to make at least strategic considerations. To exercise a constitutional function, therefore, the courts must guard against unnecessary conflict — exercising, consequently, the famous "passive virtues", coined by Alexander Bickel.[20] Interestingly, the so-called "separation of powers model" tries to explain, through equations and graphs, the limit within which courts can act to enforce their decisions, without suffering restrictions.[21]

The second type of argument that calls into question the impartiality of the courts concerns an internal perspective, of politicization of its members. Judges, like any other actors with political power, are influenced by extra-legal factors. In line with this type of argument, we can cite two theoretical formulations.[22]

The first is the attitudinal theory, which explains judges' decisions by factors that transcend the mere application of the law, placing greater emphasis on their ideological preferences. This model "defends that judges decide cases in light of their sincere ideological values juxtaposed against the factual stimuli presented by the case".[23]

Accordingly, judges are influenced by elements of three different orders. In the foreground, there are the objectives, related to the result the interpreters of the law intend to achieve with the judgment. In the background, there are the rules, the interpretative possibilities offered by law. Finally, there are situations, which are the facts of the case.[24] All these elements, in some way, condition the decisions made by judges beyond the pure application of law.

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[20] Cf. BICKEL, Alexander. The least dangerous branch: the Supreme Court at bar of politics. New Haven: Yale University Press, 1968.

[21] Cf. BRANDÃO, Rodrigo. O limitado estoque de decisões contramajoritárias na jurisdição constitucional. In: VIEIRA, Oscar Vilhena; GLEZER, Rubens (Org.). A razão e o voto: diálogos constitucionais com Luís Roberto Barroso. Rio de Janeiro: FGV Editora, 2017. p. 420-438.

[22] For a recent study on judicial behavior in the US, cf. EPSTEIN, Lee; LANDES, William M.; POSNER, Richard A. The behavior of federal judges: a theoretical and empirical study of rational choice. Princeton: Princenton University Press, 2012. No Brasil, cf. Patrícia Perrone, Nos bastidores do STF, op. cit.

[23] SEGAL, Jeffrey A. Judicial behavior. In: WHITTINGTON, Keith E.; KELEMEN, R. Daniel; CALDEIRA, Gregory A. (Org.). The Oxford handbook of law and politics. Oxford: Oxford University Press, 2008. p. 24.

[24] SEGAL, Jeffrey A.; SPAETH, Harold J. The Supreme Court and the attitudinal model revisited. Cambridge: Cambridge University Press, 2002. p. 92-100.

A second theory that attempts to explain judges' decisions based on personal preferences is that of the audiences. It starts from three premises: (i) people want to be liked and respected by others who are important to them; (ii) the desire to be liked and respected affects people's behavior; (iii) judges are people.[25]

Based on this, a theoretical model is developed according to which, in producing their decisions, judges are attentive to the reactions of different audiences, for example, their peers, the other Powers, the public, other lawyers or the media. When taking into account the reactions of external agents, consequently, judges may relativize their position of impartiality. For this reason, for example, it is possible to explain the changes in the deliberation in the STF, with the televising of its sessions.[26]

The purpose of summarizing these various theories, which may even be contradictory to each other, is not to assert their correctness in relation to other explanations of judicial behavior. The aim is to demonstrate several fields of study about this behavior, from a subjective perspective or an institutional perspective, including other factors other than the mere application of law in the calculation.

In brief, it is about problematizing the idea that the Judiciary enjoy a special immunity to political pressures or preferences. Indeed, even authors who trust heavily in courts and their ability to apply the law tend towards a more representative understanding, which by itself relativizes supposed impartiality.

Perhaps courts have other relevant institutional capacities[27] that justify their role as guardians of the Constitution. However, the idea of strong impartiality, which would make them third parties in political and social disputes, does not apparently sustain the current debate.

1.2 Not altogether plebiscitary: the Executive and the Presidency of the Republic

Traditionally, the executive branch, especially in presidential systems,

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[25] BAUM, Lawrence. Judges and their audiences: a perspective on judicial behavior. Princeton: Princeton University Press, 2008. p. 25.

[26] FONTE, Felipe de Melo. Jurisdição constitucional e participação popular: o Supremo Tribunal Federal na era da TV Justiça. Rio de Janeiro: Lumen Juris, 2016. p. 119-176.

[27] SUNSTEIN, Cass; VERMEULE, Adrian. Interpretation and institutions. Michigan Law Review, v. 101, n. 4, p. 885-951, 2003; ARGUELHES, Diego Werneck; LEAL, Fernando. O argumento das "capacidades institucionais" entre a banalidade, a redundância e o absurdo. Direito, Estado e Sociedade, n. 38, p. 6-50, 2011.

is regarded as the power with the greatest authoritarian and plebiscitary potential. Running in an election whose electoral college includes the entire country, the president is necessarily the politician with the highest number of votes, capable of claiming a strong degree of popular legitimacy – to such an extent that Juan Linz states that "[the] basic characteristic of presidentialism is the President's total claim to democratic legitimacy".[28]

According to Linz, characteristics of this system of government are the existence of an executive branch headed by a president, directly elected by the people, with full control over the members of the ministry and the public administration, for a fixed period of time and independent of parliament's vote of confidence. All these elements, taken together, tend towards the problems of rigidity and dual legitimacy.[29]

The first problem, rigidity, is related to the difficulty to remove the president from office, even if where they lack the confidence of the Parliament. According to the author, even in situations in which the president does not enjoy the support of his party, the use of impediment is an "extreme measure",[30] rarely used by the political system. The question of dual legitimacy, in turn, is related to the fact that the president and the legislature are directly and independently elected by the people, so that both can claim popular legitimacy for themselves.

Making the cost of consensus between different parties and social agents prohibitive, this set

of factors has the power to transform presidential democracies into crisis-prone regimes, risking democratic breakdown.[31] Moreover, from the point of view of political culture, a "personality cult" may grow around the plebiscitary figure of the president. Therefore, "it is no surprise, then, that the ultimate winner of the election […] is tempted to understand the mandate in personalistic terms: the people elected the President and the political party simply serves as a projection vehicle […]".[32]

This perception, that the president enjoys a special status, results in what,

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[28] LINZ, Juan. Presidential or parliamentary democracy: does it make difference? In: LINZ, Juan; VALENZUELA, Arturo. The failure of presidential democracy: comparative perspectives. Baltimore: The John Hopkins University Press, 1994. p. 6.

[29] Ibid., p. 6-14.

[30] Ibid., p. 10.

[31] NINO, Carlos Santiago. "Hyperpresidentialism and constitutional reform in Argentina". In: LIJPHART, Arend; WAISMAN, Carlos H. Institutional design in new democracies: Eastern Europe and Latin America. Colorado: West View Press, 1996. p. 168-169.

[32] ACKERMAN, Bruce. A Nova Separação de Poderes. Rio de Janeiro: Lumen Juris, 2013. p. 31.

critically, Guillermo O'Donnell called "delegative democracy", whose basic premise is that the head of the Executive has the ability to act as the supreme leader. In this model, "[the] president is the incarnation of the nation, the main guarantor of the national interest, which it is up to them to define".[33] This type of regime, although not necessarily a return to authoritarianism, may constitute a barrier to democratic stabilization.

From an institutional point of view, therefore, "[the] transformation of Presidency into a plebiscitary office is not a minor detail. It is a dominant fact of constitutional life."[34] For this reason, in a democracy, it is necessary to build solid barriers to prevent uncontrolled authority — such as a strong judicial review model or limitations on presidential re-election.[35]

It is through this figure, the plebiscitary president, that it becomes easier to transfer the role of guardian of the Constitution to the Judiciary, which will assume the garb of impartiality and keep the institutions functioning. This vision, however, encounters strong limitations in the descriptions about the operation of presidential regimes, especially in the Brazilian scenario.

The limits of this perspective can be classified into two orders. In the foreground, there are the limits imposed by the dynamics of the relationship between the Powers that compromise the idea of a highly powerful Executive. In the background, there are limitations arising from the internal dynamics of this Power. Contrary to what is claimed, despite innumerable administrative competences, the presidential strength finds numerous limits within public administration.

With regard to the relationship between the Powers, we can mention, based on the Brazilian situation, two questions that show the limitation of the plebiscitary mandate of a president: the presidentialism of coalition and the functioning of the *impeachment* processes.

Coalition presidentialism was a concept created by Sergio Abranches,[36] in 1988, to explain the working dynamics of the relationship between the Executive and Legislative powers in Brazil. Basically, it involves two circumstances of the functioning of the Brazilian political system.[37] On the one

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33 Guillermo O'Donnell, Democracia delegativa? op. cit., p. 2

34 ACKERMAN, Bruce. The failure of the founding fathers: Jefferson, Marshall and the rise of presidential democracy. Cambridge: Harvard University Press, 2007. p. 246.

35 Id., A nova separação de poderes, op. cit., p. 33.

36 ABRANCHES, Sergio. Presidencialismo de coalizão: o dilema institucional brasileiro. Dados, v. 31, n. 1, p. 5-34, 1988.

37 For a complete history of the operation of this system since the third republic, cf. ABRANCHES,

hand, we have a presidential model, with all the difficulties pointed out. On the other, there is an extremely fragmented multi-party system, which makes it virtually impossible for the president to govern with party support alone.[38]

To gain party support and broaden the power base, the president relies on three key instruments: (i) positions in government and public administration; (ii) release of parliamentary amendments; and finally (iii) concessions on matters of public policy.[39] Regardless of how we evaluate each of these means, they all show that to govern, necessarily, the president needs to give up some of preferences in terms of political positions and even choices about the direction of the state.

In the Brazilian case, the problem is more serious in view of the fact that the 1988 Constitution deals with numerous issues related to public policy. Consequently, the President of the Republic must obtain a minimum majority of 3/5 of the parliamentarians in both houses, to approve measures.[40] This scenario clearly reveals the limits a supposedly plebiscitary president has to contend with.

In the background, another important element concerns the possibility of opening impeachment proceedings against presidents without popular support. Contrary to what anti-presidential literature has shown, in the Latin American case, impeachment is not such a rare measure and it does not necessarily result in irremediable institutional ruptures.

In a book published in 2007, Aníbal Perez-Liñan demonstrated that impeachments were becoming more and more common in presidentialism in Latin America and showed how it was possible without a rupture of the regime.[41] The author points out that "[p]residents who wield virtually unrestricted power in contexts of high popularity, tend to be easy targets when their approval ratings sink and mass protests consume their political capital".[42]

Despite the negative consequences of this phenomenon[43] and its

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Sérgio. Presidencialismo de coalizão: raízes e evolução do modelo político brasileiro. São Paulo: Companhia das Letras, 2018. p. 39-340.

38 SANTOS, Fabiano. Governos de coalizão no sistema presidencial: o caso do Brasil sob a égide da Constituição de 1988. In: AVRITZER, Leonardo; ANASTASIA, Fátima. Reforma política no Brasil. Belo Horizonte: Editora UFMG, 2007. p. 225;

39 MELO, Marcus André; PEREIRA, Carlos. Making Brazil work: checking the president in a multiparty system. Hampshire: Palgrave Macmillan, 2013. p. 51-68.

40 ARANTES, Rogério; COUTO, Cláudio. 1988-2018: trinta anos de constitucionalização permanente. In: MENEZES FILHO, Naercio; SOUZA, André Portela. A Carta: para entender a Constituição brasileira. São Paulo: Todavia, 2019. p. 37.

41 PEREZ-LIÑAN, Aníbal. Presidential impeachment and the new political instability in Latin America. Cambridge: Cambridge University Press, 2007. p. 176-202.

42 Ibid., p. 213.

43 For a critique of the misuse of the impeachment process, cf. SANTOS, Wanderley Guilherme dos. A democracia impedida: o Brasil no século XXI. Rio de Janeiro: FGV Editora, 2017, p. 89-

limitations, noted by the author himself, when he states that these are politicized and spasmodic episodes, the existence of impeachments does not necessarily result in a breakdown of institutions. Paradoxically, in line with his observations, presidents who assume a plebiscite narrative tend to be its greatest victims in circumstances of low popularity.

The second order of perspectives that limit the plebiscitary guise of the president concerns the relationship with the public administration. Contrary to what traditional narratives point out, in a contemporary state, it is very difficult for the chief executive to effectively gain absolute control over the bureaucratic machine.[44] These limitations concern the complexity of the State and the independence of the bureaucracy.

Along these lines, the first finding concerns the existence of an administrative state[45] that is too complex to be mastered by a single political agent or movement. Gradually, the expansion of the number of activities carried out by the government resulted in an unparalleled expansion of the administrative structure. This growth increased the complexity of the numerous activities carried out by the administration. The concept of the administrative state tries to account, therefore, for a process typical of the 20th century, of concentration of competences in the Executive Power and an enlarged bureaucracy.

Faced with this gigantic bureaucratic structure, which exercises various functions, with different levels of complexity, it would be impossible to assume that, in fact, the president is able to control all the bureaucracy. Although there are instruments to direct it, power is limited by supervening structures. In addition, the existence of overlapping control mechanisms and the possibility of diffuse judicialization of what happens in administration make the machine excessively complex to be controlled with precision by the government.

A second observation concerns the independence of the bureaucracy vis-a-vis the president. The phenomenon can be associated with the

159; Sérgio Abranches, Presidencialismo de coalizão, op. cit., p. 349-356.

44 For an overview of the concept of administrative state and its relationship with democracy and the rule of law, cf. WARREN, Kenneth F. Has democratic governante and the rule of law compromised by the continued growth of the administrative State. Journal of Chinese Governance, p. 15-133, 2018.

45 The discussion on the administrative state comes from the US debate on the expansion of public administration during the New Deal period and the empowerment of the bureaucracy. See MASHAW, Jerry L. Creating the administrative constitution: the lost one hundred years of the American administrative law. New Haven: Yale University Press, 2012; SUNSTEIN, Cass. Constitutionalism After the New Deal. Harvard Law Review, v. 421, n. 1, p. 421-510, 1988.

category, elaborated by Gustavo Binenbojm, of a polycentric public administration. This process is associated by the author with the emergence of regulatory agencies in the Brazilian institutional scenario.[46] Such agencies, supposedly, would break the traditional paradigm of a bureaucracy subject to the chief executive, by having directors appointed for one term, with no possibility of dismissal for political incompatibility with the president.

This is certainly an important example of the limits of presidential power. It is possible, however, to think about this category in an expanded way. The very professionalization of bureaucracy reflected in its method of selection, the public tender, and its guarantees in the face of political oscillations is an important instrument of limiting presidential power. Tom Ginsburg and Aziz Huq, in a recent book on crisis of democracy, state that: "[we] believe that an independent and professional bureaucracy, aimed at implementing public policies defined by law is both inherently valuable and especially important to avoid democratic erosion".[47]

This reality, which becomes profoundly evident in scenarios of potential authoritarianism, is equally important in a situation of democratic normality. The existence of a professionalized, independent bureaucracy, as is the case of the Brazilian, is an important brake on any plebiscitary claim of the Chief Executive.[48]

In this way, both due to the dynamics of its interaction with the other Powers as well as its internal structure, the Executive cannot be considered, in such an intuitive way, a truly plebiscitary Power. This is because, as has been seen, the president is not over-powerful in relation to the other powers or internally, with regard to the attendant administration.

2. The external effect: ignoring the role of the Executive

We can speak of at least two respects in which the presumption the

[46] Gustavo Binenbojm, Uma teoria do direito administrativo, op. cit., p. 257-322.

[47] GINSBURG, Tom; HUQ, Aziz. How to save constitutional democracy. Chicago: The University of Chicago Press, 2018. p. 224.

[48] For the current discussion of presidential control of the US bureaucracy, cf. WATTS, Kathryn. Controlling presidential control. Michigan Law Review, v. 114, n. 5, p. 683-745, 2016. O ensaio clássico sobre o tema é de KAGAN, Elena. Presidential administration. Harvard Law Review, v. 114, n. 1, p. 2245-2385, 2010.

Executive has an eminently plebiscitary nature impinge on its role as guardian of the Constitution, as compared with the supposedly impartial Judiciary. The first is the dimension of the institutional relationship related to the so-called process of judicialization of politics — and its effects on the broader Executive-Judiciary relationships in lower instances. The second concerns a masking of possibilities and concrete experiences of constitutional action.

These two consequences of the external effect of the perception of the Executive as plebiscitary and the impartial Judiciary do not exhaust the topic. Furthermore, we do not believe that they are necessarily the most important. The concern here is less ambitious: Based on these criticisms, we intend to demonstrate that there are consequences of various orders in the relationship between Powers. In itself, this is sufficient for a research agenda.

The term "judicialization of politics" has been the subject of studies by several authors, vis-a-vis different fields of knowledge. From the semantic point of view, we will use Luís Roberto Barroso's definition, according to which the Judicialization "means that issues relevant from a political, social or moral perspective are decided, in a final character, by the Judiciary". The main consequence of this phenomenon is the "transfer of powers to judicial institutions to the detriment of traditional political practices, of the Legislative and the Executive".[49] The causes of the judicialization process are complex and cannot be attributed to a single determining factor. As stated earlier, the topic is challenging, susceptible to varied fields of enquiry, which connect the rise of the Judiciary in politics with factors such as how a country established itself as a democracy, the time and degree of democratic stabilization, historical development of institutions, arrangement of the relationship between the powers and the size and openness of the constitutional text.[50]

In the Brazilian case, some authors see elements that make the issue of judicialization even more pressing, aggravating the theoretical and practical aspects of this process. At the STF level, Oscar Vilhena Vieira sees the rise of a supremacy with harmful effects for democracy and governance.[51] Diego

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[49] BARROSO, Luís Roberto. O novo direito constitucional brasileiro: contribuições para a construção teórica e prática da jurisdição constitucional no Brasil. Belo Horizonte: Fórum, 2011. p. 241.

[50] BRANDÃO, Rodrigo. A judicialização da política: teorias, condições e o caso brasileiro. Revista de Direito Administrativo, Rio de Janeiro, v. 263, p. 175-220, 2013.

[51] VIEIRA, Oscar Vilhena. Supremocracia. Revista Direito GV, v. 4, n. 2, p. 441-464, 2008.

Werneck Arguelhes and Leandro Molhano Ribeiro, in turn, observe the role of ministries, in which individual ministers become extremely powerful, with negative consequences not only for democracy but for the deliberation of the Courts.[52]

At other judicial levels, this process implies an emptying of public administration competences, generating not only a democratic deficit in the functioning of decision-making processes, but also a technical deficit. For example, a simple preliminary decision by a judge in the first instance can prevent or interrupt a public tender, a serious qualitative interference in public policies — no matter what the degree of technical and democratic relevance.

With specific regard to the issue of this article, there are two main aspects of the impartiality/plebiscite dichotomy in strengthening the judicialization of politics. The first is legitimizing the very process. If judges are impartial and the Executive becomes potentially authoritarian, judicialization seems not only desirable but, even necessary. A priori, this is not a problem if the dichotomy is true or unquestionable. However, from the moment there is a question about its existence or validity, it becomes a false premise that mistakenly legitimizes the process of judicial expansion.

The second effect, intrinsically linked with the first, concerns the enhancement of judicial action. In this respect, judges may feel comfortable to meddle even more in the political process and, often inconsequentially. In other words, in addition to legitimizing the existing degree of judicialization, the dichotomy can enhance it and aggravate the negative consequences associated with the problem — beyond what any theory considers optimal.

As stated, several times, maintaining the dichotomous premise is not solely or primarily behind this process, but it cannot be considered irrelevant. Thus, it does not seem exaggerated to claim that problematizing the dichotomy results in a need to rethink the levels of judicialization and even its desirability.

The second aspect, arising from the plebiscite model, concerns masking the potentialities and concrete experiences of the Executive Power in defense of fundamental rights of minorities and the functioning of democracy. Here, the result is difficulty in seeing the situations in which the Executive can be an

[52] ARGUELHES, Diego Werneck; RIBEIRO, Leandro Molhano. Ministrocracia: o Supremo Tribunal individual e o processo democrático brasileiro. Novos Estudos CEBRAP, v. 37, n. 1, p. 13-32, 2018; ARGUELHES, Diego Werneck; RIBEIRO, Leandro Molhano. Criatura e/ou criador: transformações do Supremo Tribunal Federal sob a Constituição de 1988. Revista Direito GV, v. 12, n. 2, p. 405-440, 2016; ARGUELHES, Diego Werneck; RIBEIRO, Leandro Molhano. O Supremo individual: mecanismos de atuação direta dos ministros sobre o processo político. Direito, Estado e Sociedade, n. 46, p. 121-155, 2015.

important instrument for the protection and promotion of constitutionalism and, consequently, the spaces in which it is possible to promote this action.

For this reason, contrary to what the traditional narrative allows, frequently, the executive branch is an important guarantor of constitutional rights. In this regard, some authors have spoken about an "administrative constitutionalism". In an attempt to delimit the common content of the various existing theories, Gillian Metzger argues that in all there will be a defence of the constitutional potential of ordinary legislation (read, infra-constitutional) and the implementation of laws.[53] In other words, the study of administrative constitutionalism is intrinsically linked to the potential of public administration to compete with and change the meanings of the Constitution, when interpreting and applying laws.[54]

Other authors, in turn, advocate a more restrictive view of the phenomenon. One current identifies constitutionalism exclusively in terms of judgments, based on constitutional values, implemented by the bureaucracy in its task of applying the legislation that delegates power to them. Synthesizing this view, Ross states that "[t]he constitutional value judgments made by agencies, in the process of legal interpretation, are what I define as 'administrative constitutionalism'".[55]

In both forms, administrative constitutionalism seeks to understand how the answers given by regulatory agencies in the interpretation of laws enacted by the Legislative Power are linked to the new meanings of the constitutional text, whether through their work, or the impact interpretations produced by the administration generate in the other powers.

On the comprehensive attempt to seek a common ground between different forms of administrative constitutionalism, Gillian Metzger[56] proposes a division between four different perspectives: (i) historical, focused on the ways in which administrative law and the state bureaucracy acted in the development of the doctrines of constitutional law; (ii) constitutional, aimed

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53 Making a state-of-the-art analysis of the different conceptions of administrative constitutionalism. METZGER, Gillian E. Administrative constitutionalism. Texas Law Review, v. 91, p. 1896, 2103. Available at: http://ssrn.com/abstract=2269773. Accessed on: 24 Sep. 2015.

54 LEE, Sophia Z. Race, sex, and rulemaking: administrative constitutionalism and the workplace, 1960 to the presente. Virginia Law Review, v. 96, p. 799, 2010; University of Pennsilvania Law School, Public Law Research Paper No. 10-27. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstractid=1651483. Accessed on: 25 Sep. 2015.

55 ROSS, Bertrall L. Embracing administrative constitutionalism. Boston University Law Review, v. 95, p. 529, 2015.

56 Gillian E. Metzger, Administrative constitutionalism, op. cit., p. 1897-1904.

at understanding the ways by which the laws and their implementation, by the public authority, supplement the written Constitution; (iii) administrative, focused on building the administrative state through the administrative practice, judicial decisions and legislation, in other words, what is conventionally called an administrative constitution; and (iv) judiciary, whose objective is to observe the constitutional relevance the courts give to mechanisms and decision-making processes within the public administration.

The development of the idea of administrative constitutionalism, therefore, seems contradictory to the idea of an Executive commanding by through an authoritarian president who seeks to incarnate in himself all the popular legitimacy. Often the executive branch is the most important—if not the unique — guarantor of the constitutional text. By maintaining the dichotomy and its presumptions, it becomes much more difficult to perceive this, to evaluate it and create institutional guidelines so that it becomes more frequent and better implemented.

3. The internal effect: confusing the Executive with the president

In one of his last published works, Guillermo O'Donnell examined the complex relationship between democracies, state and the power of agency of citizens. He proposes the idea that the State has four basic dimensions. The first is the (i) dimension of effectiveness, related to the existence, to a greater or lesser extent, of a bureaucracy legally imbued with the duty to pursue objectives in the common good. The second dimension is (ii) effectiveness, associated with a legal system, made up of a set of sanctioned norms that penetrate and co-determine various social relations. The third is that of (iii) credibility, associated with the formation of a notion of common identity among the various citizens. Finally, the fourth dimension is (iv) filtering, which allows the State to select how open its borders are and the markets, populations and territories under its responsibility.[57]

As can be seen, the last three aspects depend heavily on the first. The existence of an organized bureaucracy is an essential element for the State to transform its legal provisions, so that it can produce a sense of shared citizenship

[57] O'DONNELL, Guillermo. Democracy, agency and State: theory with comparative intent. Oxford: Oxford University Press, 2010. p. 51-72.

and can accommodate the people and territories under its control. Obviously, this bureaucracy cannot be confused exclusively with the Executive Branch. All Powers have public officials responsible for exercising the last three functions, even if the Executive, through administrative bureaucracy, has a fundamental role in this process. Despite this, the Judiciary is often considered to have a monopoly in the function of transforming law into reality.

This, however, is a mistaken view of the bureaucratic phenomenon and the role of the Judiciary. The fact that judges are people with a required legal education and status does not give them a monopoly or control of the law. On the contrary, as a rule, access to the Judiciary is related, precisely, to some type of failure or non-compliance in the exercise of legal duties. Judges, therefore, are an exceptional instrument with regard the law.

By confusing public administration with the president, the dichotomy makes it impossible to think about the fundamental role of bureaucracy as guardian of the constitutional text.[58] The idea that the president has control over the public administration has a harmful effect on the internal vision of the performance of the Executive Branch, masking one of its most important elements: the bureaucracy.

The importance of the normative production role, whether legal or constitutional, of administrative bureaucracy can be sustained on three different levels. The first is epistemic, related to what the specialized literature calls "institutional capacities" – its own perspective on dealing with problems and your broader view of the State's needs and shortcomings.

The second level is territorial, concerning the degree of coverage of administrative bureaucracy within the territory of the State. As is known, in a welfare state, the administrative bureaucracy has functions to provide public services in the most diverse areas of the country, while at the same time exercising policing and security measures, military activities on borders and even scientific research at universities and large academic centers. Unlike the judiciary and the legislature, the presence of administrative bureaucracy in the life of ordinary citizens is high. The quality of a person's life depends, to some degree, on the stamp of an administrative bureaucrat.

The final level is technical, related to the main method of selecting administrative bureaucrats with a variety of professional profiles. Administrative officials prove their ability to exercise public functions is

[58] OLSEN, Johan. Maybe it is time to rediscover bureaucracy. Journal of Public Administration Research and Theory, v. 16, n. 1, p. 3, 2005.

the verification of their technical capacity, in different spheres of operation. Doctors, economists, agronomists, architects, engineers, among many others, perform functions for the State. The range of professional profiles means normative possibilities are analyzed with greater attention to the concrete and effective needs of each area of society.

One of the main elements of the constitutional text requires greater attention and care, at the institutional and academic level. Bureaucracy is one of the guardians of the Constitution, fundamental, above all, in the moments when it enjoys greater autonomy from the president. Framing it through lens means rethinking many of the normative premises that support current academic debate. In itself, this is already a valuable point, but, in addition, a whole research agenda has opened up focused on the extent to which this activity is carried out and perceptions about how the law impacts this function.

Conclusion

The objective of summarizing the discussion about the impartiality of the Judiciary and the plebiscitary rhetoric of the Executive was to demonstrate that both premises can be relativized by the terms of the contemporary debate. In other words, judges and courts are not immune to the political conflict that surrounds them and the Executive, in turn, cannot be customized in the figure of an all-powerful president.

Based on this relativization, we may inquire: to what extent does the traditional view of the Powers allow us to understand the role of bureaucracy in defending the Constitution? To answer it and test the proposed hypothesis, we have proposed the existence of two negative effects of maintenance of a watertight division between an impartial judiciary and a plebiscitary executive. The first effect was called "external", referring to the relationship between the executive and the judiciary. Due to the external effect, often, the executive role as guardian of the Constitution is ignored or diminished, to the detriment of the more intense role of the Judiciary.

The second effect, "internal", is related to the confusion between the Executive Power and the figure of the President of the Republic. Assuming the Executive Power is plebiscitary, as it is headed by the President, the current debate tends to overlook the complexity of the bureaucratic structure that composes it, whose legitimation has little or nothing to do with the so called *batismo das urnas* (authority of the voting booth). For this reason, the role of

bureaucracy of implementing fundamental rights and protecting democracy is often overlooked.

From the description of these two effects and their consequences, we can see how the role of bureaucracy as guardian of the Constitution is underestimated by the traditional view of role of the Judiciary and the Executive in defending the constitutional text. In addition, we observed how the traditional view describes the role of the Powers, the criticisms that can be made of contemporary literature and the limits of a *juris centric* position.

The conceptual reframing of this debate and its construction on new terms are fundamental for us to begin to theorize and understand with more precision the role of bureaucracy in the realization of fundamental rights. The aim here was to establish some points of criticism, from which it is possible to see this more clearly. However, as is evident, the debate does not end here. In practice, as demonstrated, the bureaucracy is also the guarantor of the Constitution and this demands that we go deeper, reflecting on the institutional designs and the theoretical constructions that facilitate or hinder its function.

In terms of future research, this rearrangement of terms may yield paradoxical scenarios, in light of the classical perspective. For example, can we think of hypothetical cases in which a hypothetical court acted in a plebiscitary manner, responding directly to social concerns? Or, on the other hand, are there hypotheses where an independent and autonomous bureaucracy makes impartial decisions about the protection of fundamental rights and the maintenance of democracy?

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