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BETWEEN CONSENSUS AND DISSENSUS: INSTITUTIONAL DIALOGUE BEYOND THE DICHOTOMY DELIBERATION VS. AGONISM

ENTRE CONSENSO E DISSENSO: DIÁLOGO INSTITUCIONAL ALÉM DA DICOTOMIA DELIBERAÇÃO VS. AGONISMO

ENTRE EL CONSENSO Y EL DISENSO: EL DIÁLOGO INSTITUCIONAL DESPUÉS DE LA DICOTOMIA DELIBERACIÓN VS. AGONISMO

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SUMMARY:

ABSTRACT:

Currently, the tension between constitutionalism and democracy has been directed to critiques related to supremacy of judicial review. These approaches indicate that the democratic fragility of Constitutional Courts in comparison to Parliaments requires more popular participation in issues involving Constitutional content and, therefore, constitutional interpretation must be opened to institutional dialogue instead of judicial monopoly. However, for this dialogue to happen it is necessary the possibility of dissensus externalization. In the contemporary democratic theory, two main traditions analyze the role

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of consensus and dissensus. Habermasian deliberative theory evidences rational consensus between subjects through a communicative action. Nevertheless, the overvaluation of consensus is considered an obstacle to the emergence of institutional mechanisms of dissensus. Conversely, Chantal Mouffe's agonism seeks to reinforce the constitutive role of dissensus in societies. However, her approach is limited to the presentation of an agonistic principle without answering the issues related to the creation of institutional spaces. In the face of these irreconcilable approaches, this paper argues the possibility of a establishment of democratic decisions, which involves institutional dialogue, such as the proposals of the critics of judicial review, in a panorama which consensus and dissensus are in opposite sides. It demonstrates that a rereading of habermasian model of the Democratic State of Law and the presentation of normative proposals to the agonistic approach put consensus and dissensus beyond a dichotomist and confrontational dispute perspective as they are commonly treated. In this sense, it presents arguments showing that an adequate interpretation of Habermas' thought includes consensus in procedures and dissensus in content. On the other hand, it exposes that aversive conception of democracy goes beyond the deliberative model deconstruction presented by Mouffe and connects poststructuralist ontology with the creation of discussion's spaces. In conclusion, these reformulations and advances inside deliberative and agonistic theories indicate that the role of consensus and dissensus in contemporary societies cannot be reduced to the dispute of the prevalence of one over the other. Beyond this dichotomy, it is necessary to put these two essentials elements in both traditions in order to promote the dialogue between institutions to overcome the dispute among powers, under which they were constructed, and exert their democratic function.

RESUMO:

Atualmente, a tensão entre constitucionalismo e democracia se direcionou para as críticas em relação à supremacia do judicial review. Tais abordagens indicam que a fragilidade democrática das Cortes Constitucionais em comparação com os Parlamentos exige mais participação popular nas questão que envolvem o conteúdo da constituição e, por essa razão, a interpretação constitucional deve estar aberta para o diálogo ins-

titucional ao invés do monopólio judicial. Demonstra-se que as reformulação e avanços nas teorias deliberativas e agonistas indicam que o papel do consenso e do dissenso nas sociedades contemporâneas não pode ser reduzido a uma disputa pela prevalência de um sobre o outro.

RESUMEN:

En la actualidad, la tensión entre el constitucionalismo y la democracia se dirige a la crítica de la supremacía de la revisión judicial. Estos enfoques indican que la fragilidad democrática de los tribunales constitucionales en comparación con los Parlamentos requiere la participación popular en el asunto relacionado con el contenido de la Constitución y, por lo tanto, la interpretación constitucional debe estar abierto al diálogo institucional y no al monopólio judicial. Se muestra que la reformulación y los avances en las teorías de deliberación y agonistas indican que el papel de consenso y disenso en las sociedades contemporáneas no puede reducirse a una disputa sobre la prevalencia de uno sobre el otro.

KEYWORDS:
Institutional dialogue; Deliberation; agonism.

PALAVRAS-CHAVE:
Diálogo institucional; deliberação; agonismo

PALABRAS CLAVE:
Diálogo institucional; deliberación; agonismo

I.INSTITUTIONAL DIALOGUE FROM THE JUDICIAL REVIEWCRITICISM

The judicial review has established itself as one of the most important legacies from the constitutionalism of the United States. The possibility that each judge could analyze the compatibility between the law and the Constitution and set away its appliance in case of unconstitutionality has become a very broaden mechanism used in contemporary democracies.

On the other hand, its success has always been followed by the distrust on the democratic deficit it represents, as it would have as result setting aside the decisions made through the representative democratic

process.

It is undeniable that the results from the judicial review practice around the world were important to the consolidation of rights, mostly to the minorities, as the protection of these groups is threatened when the decision making over rights is exclusively in the hands of the majorities.

However, in a contemporary manner, the democratic requirements have been considerably increased. The achievement of the right to vote, as an example, becomes only the first step to deepen democracy even further.

Besides that, the representative democracy gives signals of fragility and detachment from public will. As a consequence, the increasing on popular participation becomes an essential mechanism in the democratic life.

In face of this scenario, the criticism towards judicial review renews and questions itself on how this institute may serve to protect the Constitution within an environment with growing democratic demands. This perspective is developed by authors like Jeremy Waldron, Mark Tushnet, and Larry Kramer, for example.

The first one intended to point out the democratic fragilities that involve the judicial review, when compared to the deliberation that occurs in the parliaments. Jeremy Waldron starts in the existence of disagreements and the need of a decision making process that establishes a common opinion. In this context, he identifies that the parliament gives answers to this plurality of opinions in a way that respects the individuals by the power of influence they may have in an assembly. To the author, this dynamic must be valued so the debate around the judicial review does not remain damaged by the little attention given to the parliament dignity.

Regarding Jeremy Waldron's view in indicating the prominence of a parliament supremacy model, we shall mention that his opposition does not indistinctly comprise the ways of judicial participation in the constitutional control of the law, as there are many practices in the world that are grouped under the judicial review title, and his criticisms are related to the United States model, which has to him a strong extent.

Mark Tushnet (2006, p. 02) presents the differentiation between the weak and the strong judicial review. The first one occurs when the judicial decisions around the meaning of Constitution are explicitly open to a legislative revision in a short term. Regarding the strong-form one, it

does not mean that the binding effect of judicial review to all the departments' branches is definitive, as there is the possibility for a Constitutional amendment and also by the process for justices succession that may be chosen with the purpose of altering the previous understanding. What really defines this judicial review as being strong is in the constitutional interpretation that cannot be altered in a short term.

Lastly, Kramer is skeptical regarding the role of the Supreme Court in the U.S. as the unique institution able to stipulate the meaning of the Constitution – judicial supremacy. From a popular constitutionalism perspective, the author claims the primacy of popular authority to review the decisions taken by the Constitutional Court, as the maximum authority on constitutional law belongs to the people, and not to the Supreme Court.

The important point in this critical discussion on the judicial review is in the highlight given to the needed equalization of the debate scale around the final Constitution interpreter, with a window that makes possible to other political actors to participate in the decision regarding the meaning of constitutional rules.

The dialogue is the possibility for a judicial decision striking down a law under the Constitution to be followed by some action by the competent legislative body (HOGG; BUSHELL, 1997, p. 82). The basic idea around the constitutional dialogue is in promoting interactions between the institutions regarding the several political decisions. Such interactions have the latent power to overcome the limits of the dispute between departments on who has the last word about the Constitution for a model that has the motivation for the political cooperation (GARGARELLA, 2013, p. 15).

The exercise of dialogue has the ability of demystifying the idea that judicial review is a synonym for judicial supremacy. The possibility of verifying the validity for the laws under the Constitution does not merge with the enforcement for the remaining departments and social actors in adopting the judicial interpretation as a limit to its future action.

Lastly, the perspective of a judicial review, which is open to dialogue, foresees the possibility for the externalization of dissensus, because the dialogue does not exist at all if the constitutional interpretations cannot endure a reasonable disagreement.

However, we shall take into consideration that in the last years the theorist-political sphere has been dedicating a greater value to the consensus, which is the result of the deliberation. Due to this fact, the discussion around the institutional dialogue requires the analysis of the consensus and dissensus role in the contemporary political decisions.

II. DELIBERATION AND AGONISM: THE OPPOSITION BETWEEN CONSENSUS AND DISSENSUS

One of the main philosophical traditions that value consensus may be found in the conception of deliberative democracy by Jürgen Habermas.

When it is confirmed that the vote is not sufficient to legitimate the democratic government, Habermas takes to himself a procedure that might rationally ground the rules for democracy. Therefore, he offers a discourse theory that, in its operationalization, demands the institutionalization for the deliberation and decision making procedures. Such procedures operate as legitimate tools for the democratic process in two ways: in the democratic will constituted in institutional spaces and in the informal opinion built on extra institutional spaces (HABERMAS, 2011, p. 18-33).

Besides other essential features in this model, it is possible to highlight the search for rational consensus between the individuals through the communicative path.

The consensus is inherent to political activity, as it is the means that make the conclusion of decisions possible. However, it is possible to identify that the overvaluation of consensus has the latent power of masking the opposing minority voices that are in the margin of the political community. Also, concerning the judicial review issue herein approached, we may affirm that dissensus by institutional dialogue finds difficulties in becoming solid facing the idea that consensus is the final goal of political decisions.

As a contraposition to this perspective, Chantal Mouffe reinforces the constitutive role that the antagonism has on societies, aiming to conciliate it with the democratic pluralism. Such antagonism has its basis on the legitimate existence acknowledgment of the opponent, with whom it is shared the constitutive ethical-political principles of demo-

cracy, but disagrees regarding the content of these principles. Therefore, it is a conflicting consensus under the several possible interpretations for these principles. The legitimate opponent does not confuse itself with the designation of an unbeatable enemy, even less with a personal animosity, because we disagree with the ideas of these people, not with their right of defending them.

The author understand that the impossibility in eradicating the antagonism does not mean that the opponents cannot cease disagreeing, as the agreements are part of the political process but with the exceptional feature of an ongoing confrontation. Therefore, the agreements do not prove the extinction of conflict.

To the author, democracy only exists as an asset when it cannot be achieved, since the conflict and the antagonism are conditions for possibility and impossibility of its fulfillment (MOUFFE, 1996, p. 17 and 19). The illusion of its full establishment keeps away the existence of a democratic contestation through dissensus. In the author's perspective, the privilege to consensus damages democracy as it silences the dissident voices (MOUFFE, 2003, p. 19). Then, we cannot expect that disagreement will be eliminated.

It is possible to notice that the Chantal Mouffe thinking is directed to the opposite way regarding Jürgen Habermas, as she intends to demonstrate that dissensus constitutes society and cannot be eradicated in the name of the search for a consensus.

Even though agonistic perspective has the potential to serve the statement of dialogue on judicial review between institutions, as it understands there is a higher democratic potentiality in the externalization of dissensus than in the search for consensus, there is a certain unfinished character in the model before the announcement of agonistic principles, with no alternate normative proposals to the deliberative model.

In the light of this brief view, a question remains: how is it possible the establishment of democratic decisions in the judicial review that involve an institutional dialogue in a scenario where the consensus and dissensus are on opposite sides?

III. THE INSTITUTIONAL DIALOGUE BEYOND DICHOTOMY

In order to address the issue, it is intended to demonstrate that the rereading of the habermasian normative model of the Democratic State of Law, as well as the normative proposals to the agonistic model, put the consensus and dissensus beyond the dichotomy and the dispute for the preponderance of these elements.

Regarding the consensual ambition of the habermasian Democratic State of Law, Marcelo Neves understands that the deliberative procedures offer an intermediation of dissensus regarding moral content before working for the construction of consensus. "According to this rereading, the modernity, when facing group and individual diversity around moral values and contents, implies the functional and normative demand of the absortion of content dissensus by procedural consensus" (NEVES, 2001, p. 126).

Marcelo Neves grounds his idea in the finding that the social complexity of modern life makes impossible for "a rational reconstruction of the life-world from the communicative action in the strict sense of an action directed towards the intersubjective understanding. The consensus happens within interaction in an eventual manner" (2001, p. 128).

In this vision, consensus is related to the continuity of intersubjective interactions and also regarding to disagreements. Due to this fact, it serves as an insurance to the expression of dissensus.

Therefore, the political and legal dissensus on values is supported by the consensus regarding procedures; in other words, the opening to several different opinions and arguments with latent power to even transform the content of legal-political order shall be performed within the agreed/consented rules. Consequently, only the results that may stop the continuity of the pluralist public expectation are not accepted (NEVES, 2001, p. 144).

For the mentioned author, the legitimation for the Democratic State of Law occurs not only when the procedures systematically absorb dissensus, but also while promoting its emergency state in the public sphere (NEVES, 2001, p. 148).

The rereading presented by Marcelo Neves can be used to demonstrate that it is possible for the dissensus to perform a relevant role even

within the perspective from the habermasian deliberative democracy. Therefore, the criticisms made towards the supremacy given to the consensus are relativized.

Regarding the agonistic perspective, even though it is an approach that aims to redeem the role of dissensus in the constitution of societies, it is fragile when only states the agonistic principle and does not proposes normative standards that replace the deliberative tradition criticized by it.

When sharing the same poststructuralist theory tradition of Chantal Mouffe, Aletta Norval aims to give a normative direction to this debate by conciliating poststructuralist ontology with normative elements, practically absent in Chantal Mouffe and so valued in the deliberative tradition.

The Aletta Norval proposal is called aversive democracy. The aversion relates to the conformism with the contemporary democratic practices and theories. The author aims for renewing the theorist focus by combing tradition and originality, with no ambition of being revolutionary.

Its starting point is found in the relevance given to the identification of the democratic individual, and such identification is important to own constitution of this individual, as it represents a movement for claiming equality to be part in the decision making process (MENDONÇA, 2012, p. 205).

Through the discussion about exemplarity issues, democratic imagination and perfectionism, Norval enunciates a perspective that does not have the ideal features the democratic obligations should have for reference, but it bets on the democratic ethos as a starting point.

The normative progress from Norval regarding the agonistic principle of Mouffe can be expressed as follows: "the identification with an identity in search for equality, the contestation and displacement of existent structures, the possibility for inclusion through new spaces of contestation and discussion of real issues, and that such spaces and solutions may enlighten/change aspects, turning them into examples for other experiences, combined with the idea of perfectionism and democracy to come, transform the aversive model from Norval into an interesting post-structuralist theoretical proposal for democracy" (MENDONÇA, 2012, p. 211).

CONCLUSION

By this brief exhibit of the rereading from the habermasian concep-

tion and the proposal from Aletta Norval, we may say that consensus and dissensus cannot be considered irreconcilable practices, as both of them are forms of decision making.

Marcelo Neves pointed out the possibility for the existence of a dissensus regarding the contents of rights in the perspective of deliberative democracy from Habermas, and Aletta Norval considers that the post--structuralist tradition must give attention to the institutionalization of democratic agreements.

The perspectives from these authors give margin to demonstrate that dissensus and consensus may not be seen through a dichotomy, in which there is no relation between such elements.

In this way, the implementation of a weak judicial review, in which there is a possibility for an institutional dialogue, is able to coexist with mechanisms of consensus and dissensus. For example: a decision making activity directed towards the achievement of consensus inside the Court and, externally, institutional mechanisms that make the dissensus possible within the dialogue between the institutions after the decision is made.

The overvaluation of only one of these elements weakens the latent power that lies when applying them together.

Therefore, the reformulations and progresses inside both the deliberative and agonist theories indicate the role of consensus and dissensus in contemporary societies cannot be minimized as a dispute for predominance of a model over the other. It was demonstrated that is possible to both elements to coexist on both traditions. This means that the statement of the institutional dialogue may take into consideration the relevance of both dissensus and consensus in its institutionalization.

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Notes

1 The antagonism is better understood when it is reformulated to agonism, which represents the struggle between opponents, not enemies (MOUFFE, 2005, p. 21).