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Democracy, technocracy, and the question of judicial (im)partiality*

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Abstract: Contemporary societies are faced with a double relationship between the judiciary and politics: in the normative scope, impartiality appears as an assumption; in the descriptive scope, impartiality is not configured. This article analyzes this gap between the normative and descriptive scopes of the relationship between the judiciary and politics in three moments: firstly, it presents the distinction between political judgments and judicial judgments elaborated by Nadia Urbinati; secondly, based on the work of Jeremy Waldron, it questions the thesis of judicial impartiality and presents his defense of a weak-form judicial review model; thirdly, also based on Waldron's work, it shows how the political performance of the judiciary affects the ideal of the rule of law.

Keywords: democracy, technocracy, judicial impartiality, separation of powers, rule of law, Waldron.

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1. Introduction

In a text written in 1789 entitled *Ideas on despotism*, Condorcet made a distinction that still seems very important today for thinking about the relationships between law and politics, the judiciary power, and democracy—namely, the distinction between direct and indirect despotism.

According to Condorcet, "direct despotism occurs in every country where the people's representatives do not enjoy the full right of veto and they do not have enough power to reform laws they find contrary to reason and justice", while indirect despotism "occurs when, despite the requirements of the law, representation is neither equal nor real, or when people are compelled to submit to an authority with no basis in law." (CONDORCET, 2012, p. 164) In analyzing the two kinds of despotism, he warns that it "is easier to free a nation from direct despotism than from indirect despotism; it can see the first, but it suffers unknowingly from the second, often seeing those who exercise it as its protectors." (CONDORCET, 2012, p. 165)

Condorcet considered that many institutions can exercise an indirect despotic power, such as, for example, the legislative, the executive, the army, or the judiciary power. Regarding the indirect despotism that judicial courts may exercise, he stresses that the "despotism of courts is one of the most odious of all because, in order to maintain and exercise it, courts use the law, the most respected weapon of all." (CONDORCET, 2012, p. 168) The French philosopher gives a final warning by claiming that this kind of despotism "is still more inevitable if these courts have some role [to play] in the legislature, if they form a small group, if its members are tried by other members of that same small group." (CONDORCER, 2012, p. 168)

Condorcet's reflections draw attention to a very important point when it comes to the relationship between powers and the role of the judiciary. This institution, ever since it began to assume great relevance in modern political theory, appears to be attached to the ideal of impartiality and technical, not political, judgment. This is why in *Federalist* nº 78, in the heated debate over the sanctioning of the US Constitution of 1787, Hamilton tries to reassure his opponents by stating that the judiciary is the weakest of the three powers, since he has neither *force* (proper to the executive, which controls the military power) nor *will* (proper to the legislative, which controls the economy and creates the laws), but only *judgment*, whose enactment depends even on the executive branch. Hamilton's purpose was to claim to his interlocutors that the judiciary would not act politically (cf. HAMILTON, JAY, MADISON, 1987, p. 437). Thus, already in modernity, the detour of the judiciary from a technical performance is even taken to be a form of despotism.

With the above considerations based on the work of those modern thinkers, it is possible to conceive that contemporary societies find themselves before a double relationship between the judiciary power and politics: *normatively* (i.e., in the realm of theory and of what ought to be), impartiality appears as a presupposition; *practically*, however, impartiality does not take place. It is necessary to analyze and clarify this confusion between the normative and descriptive aspects precisely because the ideal of impartiality often helps legitimize decisions that in practice are neither impartial nor technical, but rather political.

Taking this confusion between the normative and descriptive scopes of judicial action as a starting point, this article has three objectives: *first*, I draw on political theorist Nadia Urbinati's recent work and present arguments that make the distinction between political and judicial judgments as an example of a normative approach to judicial action; *secondly*, based on the work of the legal philosopher Jeremy Waldron, I put into question the thesis of the impartiality of judicial judgments and present the author's proposal regarding the institutional design that would best suited to face problems related to a judiciary power that decides politically; *thirdly*, and also based on Waldron's reflections, I intend to show how the judiciary power, by acting politically, impacts the ideal of the rule of law.

2. Political and judicial judgments

In her discussion on the contemporary problems of democracy, Nadia Urbinati considers that addressing democracy in an epistemic or apolitical form is one of the main democratic disfiguration. According to her, epistemic or apolitical democracy is defined by theoretical propositions (but which have implications for democratic practices) based on two chief claims, namely: the extension of the domain in which decisions are taken in a non-partisan way, and the defense that legitimate democratic authority comes from the quality of the outcomes and not simply from procedures. The apolitical character of these propositions arises precisely from the refusal of elements frequently associated with democracy, such as dispute, disagreement, deliberation, and the exposure of majoritarian decisions to modifications (cf. URBINATI, 2014, p. 81). Thus, the rejection of disagreement, dissent, and the emphasis on the outcomes of political decisions affect the procedural nature of representative democracy.

According to Urbinati, democratic proceduralism stresses that "the spine of political legitimacy is the fact that it makes the process happen in the way it is supposed to, not that it delivers some substantive (or desirable) outcomes" (URBINATI, 2014, p. 81). In this sense, let us take some controversial issues as an example, e.g., the legalization of abortion or same-sex marriage. In the procedural perspective, any outcome would be considered legitimate as long as the formal requirements for the approval of a given norm are respected; while in an epistemic or apolitical perspective, the outcome itself, regardless of its procedural adequacy, can be called into question. Such a proposition tends to encourage views that delegitimize and discredit both the voters and representatives who have been elected to make relevant decisions, as it emphasizes that their judgments are based on strategical reasons rather than on higher, *a priori* values and goods, such as truth and morality.

As a consequence, political actors, institutions, and technical agencies—such as economic and financial technocrats, judges, and experts in several areas—are all discredited.[1] According to Urbinati (2014, p. 86), "the epistemic paradigm locates the criterion for judging what is good or correct outside the political process, which plays one might say an auxiliary function, not authoritative." Thus, despite the acknowledgment of the relevance of democratic decision-making procedures, the emphasis is on their adequacy to the extent that they manage to produce the desired outcome (truth or morality). In this way, by ascribing the need to express truth or morality to politics, institutions that are considered technical, such as de judiciary, come to assume relevance and receive credibility in the political arena.

In Urbinati's definition, judicial judgment is normatively characterized by *impartiality* in the evaluation of the facts and data involved. Judges are not parties; they are external to the case under analysis and have the legal duty to argue and act on behalf of the institutions, and they should set aside their values and individual preferences. Furthermore, judges do not need to be political representatives; on the contrary, they should act apolitically precisely because they should represent only the will embodied in law. The power that the judicial act contains is negative, i.e., a controlling and overseeing power because it depends on the sovereign's will (the law) and not on the sovereign's opinion (cf. URBINATI, 2014, p. 123f).

Again, in Urbinati's definition, on the other hand, political judgments characterize themselves by *generality*, not by impartiality; its defining characteristic is the general interest of the political community. Generality is a presumption that political power is equally distributed in society. Both the voters and the representatives, in this case, are not external like judges, and precisely for that reason, there is no requirement for impartiality. Although there is no such requirement, political actors are expected to act legitimately and responsibly, taking into consideration the public interest and not only private interests.

[1] When analyzing the technocratic discursive production and its effects on democracy, Pinzani (2013, p. 152ff) points to similar problems.

Political judgment occurs in the context of plural opinions and thus produces valid laws, not true laws. The expectation that the actions of political agents (citizens and representatives) are accountable rests on elements such as moral and constitutional principles, prudent reasoning, ethics of participation, political culture, and political calculus (calculation of the consequences of adopting a particular position). Urbinati points out that political judgments take shape within a pragmatic context, not outside or against such context. In other words, in a context of political disagreement, each of the dissenting parties has reasons to defend their position, and it is not a question of holding a position based on its truth value, which could then supposedly produce a single outcome (cf. URBINATI, 2014, p. 123ff).

3. Impartiality and political disagreements[2]

Waldron is a philosopher and jurist who adheres to radical democracy, for he admits that everything should be open to public debate, i.e., he is not concerned about removing from the debate a series of rights (the fundamental ones) that are usually submitted to qualified voting quorums to be modified or are even considered stony clauses. In his theory, all rights should be susceptible to modification by a simple majority in legislative voting (cf. WALDRON, 1999). In his theory, all rights should be susceptible to modification by a simple majority in legislative voting. (cf. WALDRON, 1999)

Specifically, he proposes to shift the focus of philosophy and legal theory from a judicial interpretation to the elaboration of laws within the legislative power. The legislation assumes a central place in his theory. For him, laws "are *essentially*—not just accidentally—the product of large and polyphonous assemblies. And this feature should be made key to our understanding of how to deal with them—how to interpret them and how to integrate them into the broader body of the law." (WALDRON, 1999, p. 10)

An important concept that Waldron brought to the analysis of the relation between law and politics is that of "circumstances of politics". As an adaptation of John Rawls' concept of "circumstances of justice"[3], the circumstances of politics are constituted by the existence of political or moral disagreements and the need for politically authoritative decisions to regulate the disagreement.

Disagreements are inherent in contemporary societies, which are plural in terms of conceptions of what constitutes justice and a good life. However, the existence of disagreements should not, according to Waldron, be understood as a sign of crisis in law, because it is natural for law, in face of the circumstances of politics, "to make claims that are at odds with the sense of justice of some or many of those who are under its authority." (WALDRON, 1999, p. 7) Notwithstanding the naturalness of disagreements in plural societies, the author maintains that is necessary for a theory of law, and especially for a theory of authority, to point out what are the adequate democratic and constitutional procedures in case of disagreement among competing theories of justice (cf. WALDRON, 1999, p. 7). That is because, in his understanding, the main distinguishing feature of law in societies characterized by the circumstances of politics is "to enable us to act *in the face of disagreement*" (WALDRON, 1999, p. 7).

Disagreement that is both unavoidable and compatible with politics, however, seems to have a normative content. On this point, Waldron shares with deliberative democracy theorists that the disagreement that is viable for democratic practices is the so-called *reasonable or good-faith disagreement*. To argue in good faith, he explains, "is to present reasons that (one thinks) the other should accept, and for two or more

[2] I have already addressed some aspects of Waldron's work elsewhere (cf. CONSANI, 2014; CONSANI, 2015a; CONSANI, 2015b; CONSANI, 2016), which I now return to in order to analyze the problems related to the (im)partiality of the judiciary.

[3] See RAWLS, 1999, p. 109ff for an exhaustive analysis of this concept.

people to persist in argument is for them to notice and pursue the possibility that in the end the same considerations will convince them all." (WALDRON, 1999, p. 91)

According to Waldron, controversial matters about dissenting rights should then be decided by the people or their representatives. Removing these rights from political debate to protect them undermines the ideal of democracy and self-government. Thus, democracy has to take on disagreements. The author accepts that "'everything *is* up for grabs in a democracy, including the rights associated with democracy itself'. Or, certainly, everything is up for grabs which is the subject of good-faith disagreement." (WALDRON, 1999, p. 303) He does not even accept that these rights enter public debate while protected by the requirement of a special quorum or qualified majority decision. In his view, the difficulty of reaching the required majority in a qualified quorum only reinforces the restrictive character attributed to the rights thus protected.

In the wake of this conception, democracy cannot be assessed only by its results. According to Waldron, it is necessary to make a distinction between "a decision *about democracy* and a decision *made by democratic means*." (WALDRON, 1999, p. 292) This argument moves the discussion to a consideration of the responsibilities of citizens, legislatures, and courts. A decision evaluated on the basis of outcome assumes that if a law passed by the legislature infringes on rights required for democracy, then that law should be considered undemocratic, and therefore democracy benefits when a constitutional court prevents such legislation from being enforced. In Waldron's understanding,

> If a question comes up for political decision in a community, a member of the community might reasonably ask to participate in it on equal terms with his fellow citizens. Now there may be all sorts of reasons for denying his request, but it would surely be absurd to deny it on the ground that the question was one about democracy. That would be absurd because it would fail to address his concern that a question about democracy, as much as any political question, should be settled by democratic means. (WALDRON, 1999, p. 293)

Therefore, disagreeing rights should be decided by the people or their representatives. For this reason, Waldron understands that there is a loss for democracy when the elected legislature of society is subjected to judicial power.

Waldron confronts the problem of judicial activism in several texts, but in a 2006 essay entitled *The Core of the Case Against Judicial Review*[4] he presents an institutional design that seeks to avoid the political agency of constitutional courts. In this text, he makes a clear distinction between *strong judicial review* (which he rejects) and *weak judicial review* (which he accepts).

Strong judicial review is defined by the following elements: a) courts have the authority to not apply a statute to a particular case or to modify it (in its implementation) so as to make it conform to fundamental rights; b) courts have the authority to apply a statute at all; c) or again, courts have the authority to strike down laws in whole or in part. (WALDRON, 2006, p. 1354)

Waldron holds that the case for judicial review in the strong sense cannot be made based on historical manifestations and effects that such decisions produce. Contrary to Dworkin's claim in *Law's Empire* according to which the "United States is a more just society than it would have been had its constitutional rights been left to the conscience of majoritarian institutions" (DWORKIN, 1986, p. 356), Waldron thinks there is no (necessary) relation between judicial review and justice. According to him, this is an ill-posed question. The extension to which the judicial review can make a more just society is hard to verify, since if, on the one hand, decisions such as *Brown vs. Board of Education*[5] were capable to promote racial justice

[4] This text was included in *Political Political Theory*, published in 2016.

[5] 1954 US Supreme Court decision that declared unconstitutional state laws establishing racial segregation in public schools.

and tackle segregation, on the other hand, during the *Lochner Era*[6] US federal and state courts struck down approximately 150 pieces of legislation that protected labor relations and working conditions such as minimum wage, prohibition of child labor, and others (WALDRON, 1999, p. 288). Thus, both examples of justice and injustice can be easily found in the jurisprudence of constitutional courts. For this reason, the case for judicial review cannot be made exclusively on justice-based arguments. According to Waldron, it is necessary to verify the actual relationship between judicial review and democracy, or rather, the compatibility between the two.

From this perspective, strong judicial review is considered to be vulnerable on two points: first, it is not the proper means for a society to evaluate rights about which there is disagreement; secondly, it is politically illegitimate, because it is a decision reached by a small group of non-elected officials, therefore it infringes on the principle of representation and political equality. (cf. WALDRON, 2006, p. 1351) Waldron claims that while judicial interpretation and review are necessary, one cannot infer from this that other institutions cannot also have the capacity to review official understandings of rights. The author believes it to be a great mistake to consider that rights interpreted and reviewed by judges would thus be put beyond the reach of democratic reinterpretation and review. In this understanding, the question is best framed as follows: either a society assumes the necessity of constitutional amendments or it does not, and once deemed necessary, amendments must be made by democratic representative institutions (cf. WALDRON, 1993, p. 42).

Finally, objecting to the defense of judicial activism based on democratic imperfections, Waldron sheds light on the confusion between the normative and descriptive scopes in the analysis of the relationship between democracy, rights, and judiciary power. According to him, by giving courts a more prominent role than citizens and their representatives in the interpretation of disputed rights, one seeks to take away the power of ordinary citizens over issues of the highest moral and political importance. So instead of speaking about counter-majoritarian difficulties, one should distinguish between courts deciding by majority vote and ordinary citizens deciding by majority vote, because in the end, this is also how controversial cases are decided within constitutional courts. Then the question becomes *who* gets to participate, and not *how* a decision is reached when there is disagreement, for the answer to the latter is always the majority vote. (cf. WALDRON, 1993, p. 45).

Waldron considers that it would be more appropriate for constitutional democracies to have an institutional design in which the activity of judicial interpretation over disputed rights is based on the practice of what he calls *weak judicial review*, which would occur as follows: the courts can inspect legislation concerning its conformity with fundamental rights, but judges cannot exempt themselves from enacting it nor moderate its implementation simply because rights would otherwise be violated. This model provides judges with little authority. A classic example is the United Kingdom, where the courts can review the legislation and declare its incompatibility with fundamental rights, but cannot render it invalid (cf. WALDRON, 2006, p. 1355).

In Waldron's understanding, weak judicial review is the model that allows the ideal of protection of fundamental rights to be reconciled with the ideal of popular sovereignty. The model would be adequate for societies in which the following conditions were present: a) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal suffrage; b) a set of judicial institutions in good working order chosen in a non-representative way to hear individual claims and ensure the rule of law; c) the commitment of most members of society and its officials to

[6] The term names a period in American legal history, between the late 19th and early 20th centuries, in which the judiciary declared unconstitutional several laws protecting social rights.

individual and minority rights; d) a substantial, good-faith, and persistent disagreement about rights. (cf. WALDRON, 2006, p. 1355).

According to Waldron, strong judicial review prevents disagreements over rights from being directly confronted, because it is always posed as a matter of interpretation of the law and thrown into the constitutional courts. Furthermore, treating judicial authority as the main basis for constitutional reinforcement deprives external control over the constitutionality of the judiciary itself. Connected to this is the danger that judicial review may easily become a form of lawmaking by the judiciary (cf. WALDRON, 2009, p. 278). Analyzed in this way, judicial review in a strong sense is incompatible with democracy.

Thus, according to the criteria we used before to analyze democracy, namely, decisions *about democracy* and decisions *made by democratic means*, Waldron holds that even if decisions made by judicial courts are successful in their outcomes (which still depends on variable criteria), they impair the democratic ideal, because, in his view, they are not *made democratically*. For him, refusing judicial review in the strong sense is a way to emphasize the "dignity of legislation". Our respect for legislation, he claims, "is in part the tribute we should pay to the achievement of concerted, co-operative, coordinated, or collective action in the circumstances of modern life." (WALDRON, 1999, p. 101)

Thus, one of the most important points that Waldron raises to think about the relationship between law and politics, judiciary power and democracy, consists precisely in the argument that, in the context of the circumstances of politics, any institution legitimated to act politically will not be technical nor impartial, but a political one. This argument, which is also a normatively important clarification on the role of the judiciary power, allows contemporary societies to analyze with less naivety and perhaps less passion the decisions of their judges and courts, such as those made by the Brazilian judiciary that has caused as much astonishment and discomfort to citizens as harm to individual rights and democracy.[7]

There is yet another argument Waldron presents that we can explore based on these reflections, namely, the argument that strong judicial review infringes on the separation of power principle and, consequently, violates the ideal of the rule of law. We analyze this argument below.

4. Judicial activism, separation of powers, and rule of law

When focusing on the theoretical tradition of the separation of powers, Waldron considers that there is a great confusion between three principles, namely: separation of powers, division of powers, and checks and balances. In the article *Separation of Powers in Thought and Practice?*, he proposes to isolate and elucidate the concept of separation of powers, defending the relevance of this principle to contemporary political and constitutional practice and theory.

In the task of isolating and comprehending the importance of the concept of separation of powers, Waldron assumes as his starting point the division of government into its three main functions: legislative, executive, and judiciary. According to him, this division has two important aspects: *first*, exercising power is not simple; *secondly*, each function is important and raises distinct institutional issues. Here emerges the argument concerning the importance of articulation in government, which, in turn, implies an intertwined relationship between the principle of separation of powers and the rule of law.

The idea of articulated government is related to the separation of powers, but not to their complete independence. This idea implies a connection between the different functions which occurs through stages and competencies, i.e., through what falls to each of governmental functions at a given moment.

[7] The actions and decisions emanating from Operation *Lava Jato* can be taken as an example of this consideration.

The articulated government requires, for example, that for state power to affect the individual there must be a series of steps and procedures that must precede its activity: the enactment of a law prohibiting a given action has to precede any prosecution, in the same way that any punishment has to be preceded by a judicial decision that includes the possibility of defense, and so on.

This is a typical description of what is encompassed by the idea of the rule of law, i.e., a State in which everyone, including the government itself in its activity, submits to previously established norms. But Waldron stresses the idea of the rule of law implies also the fulfillment of steps, i.e., "the requirement that government action must, by and large, be conducted under the auspices of law, which means that, unless there is very good reason to the contrary, law should be created to authorize the actions that government is going to have to perform" (WALDRON, 2013, p. 457).

All the above-mentioned steps should ensure the requirements of the rule of law, such as the principles of clarity, enactment, integrity of expectations, due process, and so on, as well as having a duty to incorporate elements such as freedom, dignity, respect, and the openness of the process for citizen participation. According to Waldron, "there is a serious failure of the rule of law when any of these various steps is omitted, or when any two or more of them are blurred and treated as undivided" (WALDRON, 2013, p. 458).

Articulated government, however, is not necessarily a form of limitation or restriction on political action. Although Waldron acknowledges that it can make political action itself more difficult, as it requires the coordination of actions of various functions, he considers that the main role performed by the articulated government is to channel action rather than restrict it. By channeling political action, the decision-making process opens up for the parties involved to access it, whether concerning the drafting of laws or the exercise of the right of defense in legal proceedings, for example.

The refutation of the notion of restriction or limitation, which had already appeared earlier in Waldron's theory to argue for a more democratic way of relating the concept of the Constitution to democratic practices[8], now also appears as a relevant element to comprehend the principle of separation of powers. Likewise, when we replace, in the principle of separation of powers, the idea of "restriction" or "limit" with that of "channeling" political action, there seems to be a more favorable argument for democracy precisely because it admits the disclosure of institutions to the parties that will eventually be affected by the (legal) actions of the government.

Thus, the unique approach suggested by Waldron to understanding the principle of separation of powers is relevant to the realization of articulated government. According to him,

> The Separation of Powers requires not just that the legislature and the judiciary and the executive concur in the use of power against some particular person, X. Instead the legislature should do its kind of work—*legislative* work—in this matter, which really means not addressing X's situation specifically at all. The judiciary should do *its* kind of adjudicative work in regard to X and X's relation to the law that the legislature has enacted. And the executive should do *its* work of administration, not only the prosecution of X and the enforcement of any order made against him, but also the development of broad strategies of implementation of the legislation that the legislature has enacted. (WALDRON, 2013, pp. 459-60)

[8] In a 2009 text called *Constitutionalism—A Skeptical View*, Waldron makes a harsh criticism of modern constitutionalism (and the contemporary one stemming from it) by considering that constitutional theories create a severe conflict between the ideals of fundamental rights protection and popular sovereignty. In this text, he refuses the association of the concept of Constitution with "restriction" or "limitation". According to his understanding, if the concept of Constitution is defined by the idea of restriction and limitation there may be a tension or contradiction between the ideal of Constitution and that of popular sovereignty, since the Constitution is represented as something that limits and restricts popular sovereignty in order to safeguard fundamental rights. Cf. WALDRON, 2009, p. 267-282.

The notion of articulated government points to the connection between rule of law and the principle of the separation of powers. To be ruled by law, Waldron claims, means to be ruled "by a process that answers to the institutional articulation required by Separation of Powers—there must be law-making before there is adjudication or administration, there must be adjudication, and the due process which that entails, before there is the enforcement of any order" (WALDRON, 2013, p. 459). The rule of law requires that all government functions and authorities be exercised through institutional forms and procedures regulated by law, and are in this sense articulated. Although each of the powers—legislative, executive, and judiciary—has something to say before the law exerts an impact on individuals, each must "say something" separately. Waldron considers that the principle of the separation of powers requires that government functions

> [...] have, each of them, an integrity of their own, which is contaminated when executive or judicial considerations affect the way in which legislation is carried out, which is contaminated when legislative and executive considerations affect the way the judicial function is performed, and which is contaminated when the tasks specific to the executive are tangled up with the tasks of law-making and adjudication. (WALDRON, 2013, p. 460)

By "contamination" he is not referring to the system of checks and balances that promotes mutual control among the functions of government. Rather, it is a reference to an exercise of a certain function that goes beyond its specific purposes and addresses these functions in a way that does not distinguish them or that skips steps.

Thus, the main characteristic of the performance of the legislative power, for example, is the elaboration of general norms. The legislative function would be contaminated, therefore, if the legislative power started to approve specific norms destined for an individual or group. This would infringe upon its integrity, as it is not the function of the legislative power to approve particular norms, but rather general norms, endowed with normative generality and general justification. By creating particular norms, contamination would occur either because the same governmental brunch concentrates two functions—the creation of general and particular norms—or because society would not have the benefit of the legislature performing its distinctive and important work. The role of the principle of separation of powers, in this case, is precisely to make it more difficult to subvert the creation of general norms in the name of specific interests. This would be a way for the legislative power itself to contaminate its integrity (cf. WALDRON, 2013, p. 560/561).

Concerning the judiciary, the contamination of its integrity seems to be more delicate and complex, since by using the power to interpret already existing norms judges end up creating new ones. Waldron emphasizes that the current familiarity with the legislative activity of the judiciary "should not blind us to the difficulties it poses from a separation-of-powers point of view" (WALDRON, 2013, p. 462). Among these difficulties, he points out the juridical insecurity generated by the situation in which, when applying a norm to a specific case, the judge is at the same time creating and retroactively applying the law. In this case, there is not only an indistinction between legislative and judicial functions, but one also skips one step of the process of articulated government, because the law is thus created at the moment of its application. In the author's opinion, such "difficulties are neither avoidable nor insuperable, but they are the kind of difficulties that arise when the logic of one kind of governance function is contaminated with another" (WALDRON, 2013, p. 463).

In other texts, precisely to avoid this type of problem, Waldron has maintained, in line with juridical positivism, that judiciary interpretative activity should stick to the letter of the law, i.e., without reference to moral and political considerations nor to the legislator's intentions, since only the text approved by the legislative power has authority. According to his understanding, this is a way to preserve fidelity to the legislator's democratic authority and inhibit indistinction between governmental functions (cf. WALDRON, 1999, p. 119-146). Waldron's criticism of a strong judicial review and his defense of a model

of weak judicial review, presented in the previous section, also call attention to the need to think about an institutional design capable of holding to the idea of articulated government.

5. Concluding remarks

The purpose of this paper was to resume, mainly from the work of Jeremy Waldron, the literature that has been produced to question the thesis of the superiority of the judiciary as a forum for discussion and deliberation regarding principles and rights in disagreement.

Since the late 1990s, Waldron has been one of the voices that have stood up and questioned the differential treatment given to legislative and judiciary institutions, which considers the legislature as a site for exchanging favors, bargaining, corruption, and the predominance of private interest over public interest, while the judiciary is seen as a locus distant from the interests and passions of the majority, as well as a forum for making technical, reasoned, and public interest-oriented decisions. This treatment often finds support in the methodological confusion mentioned in the first pages of the present text, i.e. while the judiciary is assessed according to normative criteria (as it ought to be), the legislative is addressed according to descriptive criteria (as it is).

As Waldron shows, existing disagreements in plural societies, which are found in the *circumstances of politics*, means that disputes over the meaning of constitutional principles and rights in disagreement cannot be considered merely as technical disagreements, i.e. disagreements over which is the best interpretation of constitutionally guaranteed rights. Themes such as same-sex marriage, social and racial quotas, abortion, protection of privacy, freedom of speech, the right to come and go, among others, provoke deep disagreements among citizens and, for this reason, when these disagreements are interpreted and decided, whether within the legislature or the judiciary, the results will not be merely technical, but political.

The unveiling of the impartiality or technicality of judicial decisions promoted by theories such as Waldron's is important to clarify what is at stake and how the game is being played. In the context of contemporary democratic societies, and especially in Brazil, the defense of the judiciary as the best forum for decisions on principles is no longer restricted to academic theses but has reached the general public. Thus, the argument of judicial impartiality—that the decision taken by a magistrate is technical and not political—easily turns into an argument in favor of the truth of one political position to the detriment of the other. As Urbinati warned when considering epistemic or apolitical democracy as a disfiguration of democracy, the search for truth or morality within politics tends to repress conflicts and stifle the disagreements that are inherent to pluralistic societies.

By acknowledging the inevitability of the political aspect in decisions about rights in disagreement, Waldron's theory draws attention to some remedies that may be proposed, namely, the attempt to avoid judicial interpretations that stray too far from the legal text, an institutional design in which the judiciary, and especially the constitutional courts, do not have the possibility of declaring the nullity of a rule approved by the legislative branch, and, finally, the defense of the thesis that for the rule of law ideal to be taken seriously, it is necessary to put into practice the proposal of an articulated government, in which the principle of separation of powers implies that the stages of production and application of the law should be respected, precisely to assure citizens the predictability inherent to the idea of the rule of law. This proposal is compromised when a court, under the argument of interpretation of abstract constitutional norms (such as fundamental rights) creates the law and at the same time enforces it. In this sense, it would be possible to affirm, with Condorcet, that we would be facing a kind of *indirect despotism*, since the judiciary, with its participation in the legislative function, uses the most respectable weapon—the law—in a way that generates insecurity and disrupts the predictability of the law.

Waldron's theses, however, do not seem to depend on the proper functioning of the (democratically elected) legislative and executive powers, because in the absence of the possibility of the judiciary to strike down norms that violate rights, the other institutions, and even the citizens, must be mature enough to carry out this kind of control through other channels (even if it is the channel of periodic elections, through which it is possible to avoid the election of representatives who threaten rights, freedom, and democracy itself).

In his 2012 book, *The harm in the hate speech*, Waldron compares the democratic environment to the natural environment. According to him, it is the role of law and institutions to prevent the democratic environment from being polluted by a culture of intolerance or hate, in the same way that laws prohibit environmental pollution, since, after pollution, the damage may be irreversible. In this way, his theory seems to conceive of ways to maintain a virtuous circle in democratic societies. However, the question that remains open—and this seems to me to be our question at this point—is how to act when the democratic environment has already been polluted. In other words, it is a question of thinking about ways to break the vicious circle.

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