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The Representative Role of the Judiciary in a Constitutional Democracy*[1]

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Abstract: In a recent paper, Luís Roberto Barroso, a Brazilian Supreme Court Justice, sustained the exercise of a representative role by the judicial branch (precisely by constitutional courts), as a way to give voice to a majority will not captured by positive legal rules due to the distortions of the institutional mechanisms based on voting (elections and legislative process). This paper aims to investigate whether this claim is compatible with the notion of a constitutional democracy, taking into consideration both the possibility of gauging the empirical will of the majority apart from the institutional mechanisms based on voting and the role of the judicial branch in this kind of society. Finally, it suggests the possibility of acknowledging a representative role to the judiciary based on what can be argued to be the interest of the citizens of a constitutional democracy as such.

Keywords: constitutional democracy; Judiciary; majoritarian principle; representation; separation of powers; judicial populism

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I intend to address the judicialization of politics and the politicization of justice from the viewpoint that the judiciary may have, at least in one sense, a representative role within the institutional framework of a constitutional democracy. In a brief and tentative characterization, I call a constitutional democracy the sovereign political society that satisfactorily fulfills the following characteristics[2]:

1. The possibility of participation of all adult men and women in the elaboration of the legal rules of the community, either directly or through elected representatives, whereby each person counts as one vote;

2. The protection of fundamental rights and freedoms that allow this participation to be enlightened and open to new claims, and that safeguard a private autonomy domain for the individual to develop his or her personality;

3. The acts of the authorities conform to general, public, non-retroactive, unambiguous, enforceable, stable, and consistent rules (FULLER, 1969, p. 33-94), insofar as the open texture of law allows (HART, 2007, p. 124-136);

4. The observance of the due process of law as the most reliable and equitable method to definitively decide a particular conflict, constituting *res judicata*;

5. The absence of people living in material misery;

6. And last but not least, "no citizen should be rich enough to be able to buy another, and none poor enough to be forced to sell himself". (ROUSSEAU, 2002, p. 189)

I begin the analysis by quoting passages from an article by the justice of the Brazilian Supreme Court and professor of Constitutional Law Luís Roberto Barroso (BARROSO, 2015). These passages illustrate unequivocally that the self-understanding of the judiciary about its task within the system of political representation inevitably leads to both the judicialization of politics and the politicization of justice. Barroso's paper comes to light about two decades after the first observations of these processes in the operation of Brazilian constitutional democracy[3]; therefore, it seeks more to understand the rationale of something historically given than to found a new judicial practice. Perhaps for this very reason, it may be even more revealing. Until today, the effort to justify the representative role of the judiciary in the Brazilian institutional framework had not been undertaken so clearly by the justices themselves, except in a few sparse considerations in some votes, which are not enough to have a clear view of the whole.

The title of Barroso's paper alone announces the key elements of this self-understanding. *Reason without vote: The representative and majoritarian function of constitutional courts* [*A razão sem voto: A função representativa e majoritária das cortes constitucionais*] indicates his commitment to the two following theses: (1) it is possible that unelected court members, such as those sitting in the Brazilian Supreme Court, are responsible for the judicial review of the acts of elected representatives in the executive and legislative powers, whereby they perform a representative function through the rational justification of their decisions based on the constitution; (2) it is possible that the same authorities perform this function on behalf of the majority.

Although I do believe that it is possible to find some meaning for the first thesis within the previously sketched conception of a constitutional democracy, I would like to make it clear why the second claim—

[2] The Brazilian Constitution of 1988 is certainly aimed at fulfilling these requirements, although its effectiveness is far from being a reality.

[3] See, for example: ARANTES and KERCHE, 1999.

namely, that the Supreme Court represents the yearnings of the majority—collides with that conception. I understand that all this seemed quite obvious a few years ago, but interpreting certain controversial cases involving the Supreme Court and the Judiciary more generally against the background of Barroso's paper demonstrates that certain notions were less settled than supposed or even that some fundamental rules concerning the way our institutions should process our political disagreements have themselves, paradoxically, the characteristics of essentially contestable concepts (GALLIE, 1956), so that its contestation may take place in practice to a greater degree than democratic stability seems to allow.

Let us return to Barroso's paper. The thesis regarding the representative character of constitutional courts appears after the presentation of a brief diagnosis of the worldwide crisis of representation, which would relativize the presumption that there is a connection between voting and representation. About this tendency in Brazil, he writes:

> In countries with mandatory voting, such as Brazil, a very low percentage of voters can remember whom they voted for in the last parliamentary elections. Dysfunctionality, corruption, and capture by private interests are subjects globally associated with political activity. And yet, in any democratic state, politics is a genre of first necessity. But the shortcomings of representative democracy, at present, are too obvious to be ignored. (BARROSO, 2015, p. 38)

As further support for his analysis of the Brazilian situation, he quotes an opinion piece published in the newspaper *O Globo* by Marco Antonio Villa during the 2014 election period:

> The electoral process reinforces this picture of hostility to politics. The mere holding of elections—which is important—does not arouse much interest. There is a notorious popular feeling of tiredness, boredom, of identifying the vote as a useless act that changes nothing; that every election is always the same, filled with personal attacks and absurd alliances; of the absence of programmatic discussions; of promises that are broken in the first days of government; of politicians who are known to be corrupt and who remain as candidates forever—and many of them are elected and reelected; of the transformation of elections into a very profitable business, where there is no politics in the classical sense. Besides the unbearable television propaganda, with its jingles, the false joy of the voters and the candidates talking about what they don't know. (quoted in BARROSO, 2015, p. 38)

Therefore, according to him, the executive and legislative branches' representative functions are hopelessly compromised, from which he concludes that the unavoidable consequence "is the difficulty for the representative system to effectively express the majority will of the population" (BARROSO, 2015, p. 38). What about the role of the judiciary? One of Barroso's argumentative lines is quite conventional and, as I shall clarify below, I do not see much problem in it: in a constitutional democracy the courts would have the function of protecting the rights of minorities that have not been duly taken into account by the will of the majority. In this sense, they would be a sort of a counter-majoritarian representation channel (BARROSO, 2015, p. 36-38).

However, Barroso's expectations regarding the representative function of the judiciary are greater. He goes on to argue that in "recent years [...], there has been an expansion of the judiciary and, notably, of the Supreme Court. In a curious paradox, the fact is that in many situations judges and courts became more representative of social yearnings and demands than the traditional political instances. It is strange, but we live in a time when society identifies more with its judges than with its lawmakers." (BARROSO, 2015, p. 39) After enumerating the reasons why "it is neither unusual nor surprising that the judiciary, in given contexts, is a better interpreter of the majority sentiment" (BARROSO, 2015, p. 40), he argues that the composition of the judiciary is more representative of society because the means of access to the career by competitive examination is more democratic than elections (sic!), since it represents an opportunity open to all capable people who have systematically studied Brazilian law, thus not depending on the resources spent on an electoral campaign. Even if this were true[4], what would be the weight of this

[4] What we observe, instead, is a very elitist system of recruitment with the proliferation of paid preparatory courses and the increased need for time available for study, which would put those who need to work to support themselves

plurality in a power in which the overwhelming majority of decisions are made by only one person or small groups? To what extent would the admission to the career be more decisive than the fact that it is lifelong and that its members' salaries easily rank among the richest 1% of the population? Barroso even mentions the guarantee of life tenure as one of the advantages of the exercise of the representative function by judges, who would not be "subject to the short-term circumstances of electoral politics, nor, at least in principle, to populist temptations" (BARROSO, 2015, p. 40). Regardless of the answer to these questions, the mere claim of political representation in these terms seems to subvert the separation dynamics of the branches of power in a constitutional democracy, as I shall argue later on.

The pinnacle of his reasoning is reached with the assertion that "in addition to the purely representative role, supreme courts occasionally play the role of an enlightenment vanguard responsible for pushing history when it stalls." (BARROSO, 2015, p. 42) I believe that we should not dwell on the analysis of this particular point, since it carries with it extremely questionable assumptions—such as that history has a direction and that constitutional courts, knowing it in a privileged way, should use the means at their disposal to correct the current course of events—which, if taken seriously, would serve to justify any decision regardless its content.[5]

In the following, I aim to oppose the way Barroso conceives the representative function of the judiciary in a constitutional democracy. Accordingly, I will argue in favor of five theses:

1. The will of the majority cannot be represented without an institutional mechanism that ascertains this will through voting;

2. None of these mechanisms for ascertaining the will of the majority can be considered to be more representative than others, for representation is not an archetypical concept;

3. The separation of powers model was thought of in the 18th century with the judiciary exercising the role of the mouth that pronounces the words of the law in the concrete case;

4. The judiciary's defense of the fundamental rights and freedoms inherent to the notion of a constitutional democracy is incompatible with the role of "law's mouthpiece" of that model of separation of powers;

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at a severe disadvantage.

[5] In a more recent article that resumes and develops this idea, Barroso provides as example a selection of historically important cases decided by the Supreme Court in the US and by its counterpart in Brazil in which judicial review was exercised to protect fundamental rights that were being violated by lower-ranking legal norms, such as Brown v. Board of Education (1954 Supreme Court decision against racial segregation in schools), Loving v. Virginia (1967 decision by the same body that ruled that a law banning marriages between white and black people was unconstitutional), Roe v. Wade (1973 decision on the unconstitutionality of penalizing abortion), Lawrence v. Texas (2003 decision on the unconstitutionality of criminalizing consensual sexual relations between adult same-sex persons), and Obergefell v. Hodges (2015 decision determining the mandatory recognition of same-sex marriage) (BARROSO, 2018, pp. 2209-2213). It remains unclear in his texts—nor is there any argumentative effort on the part of the author—how this enlightenment role would be distinguished from the traditional counter-majoritarian function, which would correspond to the role of constitutional courts as guarantors of the permanence of the clauses of the constitutional pact with some institutional independence from the vicissitudes of the political game, to protect fundamental rights. The distinction remains obscure to the extent that he defines his notion of "enlightenment reason" as "that of pluralism and tolerance, that which is imposed only to defeat superstitions and prejudices, so as to ensure human dignity and the good life for all", emphasizing that the "humanitarian interventions that the enlightenment role of the courts allows is not to impose values, but to ensure that each person can live his or her own, can profess his or her convictions, having as a limit the respect for the convictions of others." (BARROSO, 2018, p. 2208)

5. If the judiciary is to play a role in defending the rights inherent in the notion of a constitutional democracy that goes beyond its role as the "law's mouthpiece", it cannot be based on its members' convictions about justice, nor by invoking a supposed empirical will of the people to be represented by it, but rather on representing what may be inferred as the interest of all citizens in a constitutional democracy.

FIRST THESIS: The will of the majority cannot be represented without an institutional mechanism that ascertains this will through voting.

One assumption of Barroso's argument is that there would be a majority will which institutional mechanisms cannot always capture, for they are subject to all sorts of distortions.[6] This presupposes that the will of the majority, its very existence, is independent of such mechanisms. I will resort to two argumentative lines to counter this idea: (1) there is no people—therefore, no will of the majority of the people—if not as institutional representation; (2) the content of majority will is always related to the institutional mechanism responsible for measuring it—i.e., its content can be modified depending on the procedures adopted.

As to the first point, Hobbes states in Chapter XVI of *Leviathan* that "it is the *unity* of the representer, not the *unity* of the represented, that maketh the person *one*. And it is the representer that beareth the person, and but one person: and *unity*, cannot otherwise be understood in multitude" (HOBBES, 1998, p. 109). In Chapter XI he had already stressed the importance of distinguishing between a single action of many men—such as the action of all the senators of Rome in killing Cataline—and many actions of a crowd—such as those of the senators who killed Caesar. The first action can be ascertained to Roman Senate even though the decision to punish Cataline with death has not been unanimous, while the assassination of Caesar would no be an action performed by the Roman Senate even if all the senators had participated in it (HOBBES, 1998, p. 69). Therefore, without institutional mediation there would only be the action of individuals in a crowd, and it would never be possible to speak of the existence of a will or interest of a collective body which could be represented.

However, there are many difficulties concerning the deployment of majority rule that Hobbes did not address, which leads us to the second point. Condorcet in the 18th century and Kenneth Arrow in the 20th century showed that in decisions involving more than two voters and more than two options, the procedure by which the will of the majority is ascertained can lead to different results, even when the individuals keep their order of preferences fixed (ARROW, 1963). Even without going into the complicating factors such as the strategic vote, actually nothing in reality could claim to be the majority will except with respect to the voting method chosen. In other words, the will of the majority is constructed through institutional processes, it is not something that exists in pure form independently of them and could thus be captured in a distorted way.

SECOND THESIS: None of these mechanisms for ascertaining the will of the majority can be considered to be more representative than others, for representation is not an archetypical concept.

There is no archetype of a representative system in the same way there are archetypes such as triangles and circles. We know the mathematical properties of perfect circles and triangles, but we will never find

[6] Barroso's examples resort to opinion polls (sampling done by private institutes without a public process that would allow for some debate and explanation and that would impose a timeline to order the maturation of the choice) or even to a presumed popular will (BARROSO, 2018, p. 2204-2206, 2213).

geometrical figures in reality containing exactly the same properties. What could correspond to a perfect model of representation?

This seems to be an ill-posed question. What do exist are better or worse representative models with respect to some particular moral value, be it the equitable treatment of all citizens, the promotion of pluralism, the stability of the political community, governability, the accountability of rulers, or some other. We can also assess representative mechanisms according to their ability to realize these values in a given context. What seems to be empty rhetoric, however, is to claim without further qualification that a model is more representative than others, as if the concept of representation had properties such as those of circles and triangles, of which the actual representative systems would approximate to a greater or lesser degree.

THIRD THESIS: The separation of powers model was thought of in the 18th century with the judiciary exercising the role of the mouth that pronounces the words of the law in the concrete case.

Here I draw mainly on the work of Chilean legal philosopher Fernando Atria *The form of right* [*La forma del derecho*] (ATRIA, 2016). In this work, the author reconstructs the logic behind the principle of separation of powers we have inherited primarily from Montesquieu.

Among the commonplaces of this principle—which also comes from the ideal of constitutional democracy—we find: (1) the power with the capacity to introduce and modify juridical rules in a legal system cannot be the same one that decides particular conflicts, so that casuistry and the undue influence of interests and passions on judgments are avoided; (2) the power that decides particular controversies must do so based on the application of preexisting rules and in accordance with the due process of law in the name of the equality of all before the law and of legal certainty. When the provisions of the law constitute the sole parameter of judgment for citizens, the predictability of judicial decisions is guaranteed (they are traceable to the legal text), and so is their non-arbitrary character (they are not the result of the judge's will, but follow the same parameter to decide all cases that fit the terms that describe the operative facts of the rule).[7]

To ensure the impartial application of the law according to this model, it is necessary to protect the independence of the judiciary under a double aspect: (1) respecting the sovereignty of its decisions, being, as a rule, irrevocable *res judicata*; (2) not conceiving its activity as the exercise of a mandate, contrasting it with that of the representatives in the Executive and Legislative branches, which depend on the popular vote, or with those subordinate to those who hold the popular mandate, such as members of the public administration (ATRIA, 2016, p. 193-218).

If it is possible to discuss the representative function of the judiciary in this arrangement, it would be as the mouth that pronounces the words of the law: judges could in no way be representatives of any popular will other than that crystallized in the letter of the legal provisions. While the members of the legislature would somehow reproduce in parliament the different interests and political convictions existing in society, the members of the judiciary would only be responsible for applying the existing laws understood as the result of the institutional processing of political disagreement. In this sense, the judiciary would be a neutral power: not because the law it applies is politically neutral—on the contrary, it expresses only one among many conceptions of political morality in dispute in parliament—but because what was once controversial reaches it in a manner already defined by the legislative process (ATRIA, 2016, p. 214-215). In the view of the classical theory of separation of powers, it would indeed be appalling to conceive of a power without a mandate (and therefore accountable to no one) vested with the power to give the last

[7] These parameters are worked out by several authors. I am thinking here especially of MACCORMICK, 2005.

word concerning particular issues having, at the same time, the possibility of defining in some relevant way the very criteria it uses for its decisions. Nevertheless, as we shall see below, this is exactly the situation of the judiciary in countries like Brazil.

FOURTH THESIS: The judiciary's defense of the fundamental rights and freedoms inherent to the notion of a constitutional democracy is incompatible with the role of "law's mouthpiece" of that model of separation of powers.

Montesquieu was already aware of the problems that the literal application of the law to the concrete case could bring (ATRIA, 2016, p. 111-115). Traditionally, these problems have been grouped into two types. First, the irremediably imprecise nature of the law, which may generate doubts about its applicability to the concrete case. Second, the occurrence of cases that would fit the terms of the operative facts of a rule but for which the application of the normative consequences abstractly provided does not seem appropriate in contrast to what happens in normal cases (these are considered exceptional cases). These problems require overcoming the formalist strategy of separation of powers by granting some space for the judicial creation of legal rules. Delimiting this space, as well as distinguishing the way judges can create legal rules from the way legislators do, are among the main tasks of contemporary theories of legal argumentation.

Such problems, however, culminate in the judiciary's protection of fundamental rights such as life, equality, privacy, freedom of expression, etc. We are not only dealing here with normative devices that present a very high degree of abstraction and vagueness but also with normative devices that can only be applied to concrete cases when interpreted in the light of a conception of political morality (DWORKIN, 1996, p. 7-15). In these situations, the judiciary will inevitably give the last word on concepts disputed in society. And what is even more serious: because constitutional rules occupy the top of the normative hierarchy, this last word will often go against what was enacted as an expression of the will of the majority.

On the other hand, the solution to this question is far from simple, once it is recognized that the effective protection of some rights is also constitutive of the demands of legitimacy imposed by the notion of a constitutional democracy. In this sense, the judiciary, with its institutional independence, may find itself in an advantageous position in the exercise of a counter-majoritarian force, provided that the scope of its action is very well delimited by the institutional practice itself and by criticism of deviations by civil society. But where can we find criteria to establish these limits? Can the role of the judiciary in protecting fundamental rights be considered representative in any relevant sense, in the same way as the performance of the function of the mouthpiece of the law?

FIFTH THESIS: If the Judiciary is to play a role in defending the rights inherent in the notion of a constitutional democracy that goes beyond its role as the "law's mouthpiece", it cannot be based on its members' convictions about justice, nor by invoking a supposed empirical will of the people to be represented by it, but rather on representing what may be inferred as the interest of all citizens in a constitutional democracy.

According to the first three theses, no one can legitimize their action by invoking the will of the majority but with the support of the law or by a voting procedure established by it. Nonetheless, the fourth thesis shows the limits of this arrangement to meet the requirements imposed by the notion of a constitutional democracy. If it is possible that the majority will—even the will of all—runs against these requirements, what perspective should be adopted to adjudicate disputes over rights that are essential to the very legitimacy of the will of the majority?

The foundational principle of a constitutional democracy, which directly or indirectly justifies the six characteristics attributed at the beginning of this text, corresponds to equal respect and consideration for all people (DWORKIN, 1996, p. 15-9). As we have seen, this entails both a kind of equality in the creation of the law, embodied in the respect for the majority rule, and impartiality in the application of the law to the concrete case. However, as we have also seen, the equal respect and consideration clause imposes restrictions on the majority's will content. In this sense, it demands impartiality in the consideration of all people's interests while protecting certain interests of all individuals as part of their own status as autonomous persons (equal respect).

Consequently, no content attributed to these rights can be justified as a representation of what would be the empirical will of the people. The only possible path would be the representation of a transcendental will based on the consideration of interests ascertainable to individuals as citizens of a constitutional democracy. This is precisely the theoretical effort undertaken by John Rawls in his search for a political conception of justice that could provide legitimating reasons for the use of state power (thereby also setting its limits), leaving no room for anyone to reasonably reject them.[8]

To this end, Rawls makes use of a well-known fiction of the original position (RAWLS, 1999, p. 102-68). In this theoretical construction, the protagonists are representatives of interests attributed to citizens of a constitutional democracy according to a notion built on the characteristics that constitute the conditions of possibility of the practices in this kind of society and which serve for the formulation of an ideal type able to identify them (RAWLS, 2001, p. 14-24).

The function of the characters in this mental experiment, who are in a situation of perfect equality, is to deliberate freely on the principles of justice that should guide the rules and institutions that form the basic structure of society and distribute necessary goods to achieve any individual life plan that is compatible with the recognition of the same right of others to realize their life plan. For their deliberation to be representative of the common interest of free and equal citizens, these representatives are under the veil of ignorance, unaware of (1) the personal characteristics of the represented (abilities, physical condition, sex, color, etc.), (2) the position they will occupy in society, and (3) their preferences and conception of the good (RAWLS, 1999, p. 118-123).

In this way, deliberation over principles of justice departs from any empirical content given by what is in some individual's interest (either an interest that reflects his or her preferences or some interest that he or she is supposed to have by his or her particular characteristics). Instead, it is considered by a theoretical procedure that guarantees the impartiality of reasons only what can justifiably be assumed to be the interest of each citizen of a constitutional democracy as such, who recognizes themselves and others as free and equal, capable both of reflecting on their life plan and realizing it with the aid of reason, and of recognizing as worthy of respect the mutual restrictions imposed by rules and institutions that have the goal of ensuring that others have the same freedom to seek to satisfy their ends, on terms advantageous to all.

The outcome is that the theoretical artifice conceived by Rawls allows us, flesh and blood individuals driven by our desires, to access, through argumentative construction, what would represent the will of citizens in a constitutional democracy as such (URBINATI, 2009, p. 16-19). Based on arguments to be evaluated for their success or failure in representing such interests, which transcend the desires of existing individuals, it would then be possible for the courts to claim another representative role besides that of a mouth that pronounces the words of the law, which seems necessary to preserve the integrity of individual

[8] This is the project developed throughout his work, becoming clearer in RAWLS, 2005. If it is recognized that one can reasonably reject the reasons offered, this is a sign that (1) they are not correctly grounded in the political conception of justice or (2) the political conception of justice should be revised.

rights inherent in the notion of a constitutional democracy from undue advances of the will of the majority expressed by institutional mechanisms.

Closing remarks

The argumentative movements covered so far sought to defend that, in a democratic regime, Barroso's distinction between what the law determines and the representation of the empirical will of the majority makes no sense, precisely because the latter only exists as a construction through the institutional channels of the vote and the legislative process. What may exist is a discrepancy between the content of positive law and what may be justifiably assumed as the common interest of citizens in a democracy that mutually recognize each other as free and equal: the guarantee to all of the effectiveness of a satisfactory level of fundamental rights and freedoms, which in some way is already explicit in written constitutions and declarations of human rights and would fit well in the description of the counter-majoritarian role of constitutional courts made by the Supreme Court Justice.[9] Such a common interest, however, does not require correspondence with the empirical reality of the preferences of the adult population of a country, but claims a universal validity that can only be obtained through an argumentative construction of transcendental character, such as John Rawls' conception of justice as fairness.[10]

Consequently, the effort to justify judicial measures as representative of the will, interest, or feeling of the majority established in parallel to the institutional mechanisms of popular representation is vain. Such justification could not be based on a more perfect procedure of aggregation of individual preferences (as we have seen, this idea makes no sense without the institutional mediation of the vote), nor could it account for the demands of a possible argumentative representation. In the latter case, the onus is placed on us to show that we are representing what we have reason to take not as the will of the majority, but as what Rousseau called the "general will", which can be distinguished even from the empirical will of all (ROUSSEAU, 2002, p. 172ff). Failing to fit into either of these two hypotheses, the claim of a representative role by the judiciary would correspond to appealing to the old populist strategy of despising democratic institutions in the name of a supposedly authentic will of the people[11], which mysteriously always conforms

[9] Due to the recognized importance of this counter-majoritarian role as a possible instrument to ensure the minimum compliance with the requirements posed by the notion of a constitutional democracy, we may reject one of Barroso's arguments in favor of the representative role of the judiciary, according to which "[i]n a traditional and purely majoritarian view of democracy, it would boil down to an electoral legitimation of power, is meaningless. By this criterion, fascism in Italy or Nazism in Germany could be seen as democratic, at least at the time they were installed in power and for the period during which they had the support of the majority of the population. But legitimacy is measured not only at the moment of investiture, but also by the means employed in the exercise of power and the ends to which it aims." (BARROSO, 2018, p. 2203). Why would judicial control of the "means employed in the exercise of power and the ends to which it aims", in the author's own terms, be representative of the empirical will of the majority of the population as opposed to what was gauged by the electoral process? Wouldn't there be reasons left for the judiciary to try to prevent the human rights violating practices of Nazi-Fascism even if they had the broadest support in society?

[10] Obviously, this argument cannot have the cogency and precision of a mathematical deduction, which in no way prevents its evaluation as to its plausibility and its ability to account for the objections and counter-arguments raised in the course of the due process of law and the deliberation of the members of the courts.

[11] According to Barroso, "[...] it should not be surprising that the Supreme Court, by exception and never as a general rule, functions as an interpreter of social sentiment. In short: the vote, although indispensable, is not the exclusive source of democracy and, in certain cases, may not be sufficient to concretize it." (BARROSO, 2018, p. 2201). Although he acknowledges a few pages later that "the representative role can collapse into judicial populism, which is as bad as any other" (BARROSO, 2018, p. 2217), his position contrasts head-on with what I advocate in this paper: every time the judiciary bases its decision as representative of the "social sentiment" or the "will of the

to the aspirations of those who invoke it. More than contributing to a judicialization of politics or the politicization of justice, it would constitute the very negation of politics: the judicial decision would not be made in any sense—empirical or transcendental—in the name of the popular will[12], but rather in the name of the judge's own discretion. This would correspond to nothing other than the Kantian definition of despotism[13] (URBINATI, 2009, p. 12, 15; KANT, 1996, p. 324), even more so if it is considered that the judicial decision in a legal system that respects the rule of law is not usually susceptible to review by the other branches of power.

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majority" not captured by the institutional mechanisms of democracy, it would be adopting a populist stance. An emblematic example that the author himself brings is the permission of imprisonment after conviction in appeal without legal grounds and, at least at first sight, incompatible with the right guaranteed by Article 5, LVII, of the Brazilian Constitution. He describes it thus: "In another important case, the possibility of imprisonment after confirmation of the conviction by the court of appeals is affirmed, even when appeals to the higher courts are still possible. The three judicial decisions enjoyed broad popular support and represent changes that could have been promoted in the realm of majoritarian politics, but were not." (BARROSO, 2018, p. 2204) Would it be the role of a constitutional court in a constitutional democracy to sacrifice individual rights contrary to positive law, in the name of a supposed popular yearning?

[12] It is symptomatic that Barroso lists among the recurring topics of deliberation by courts the "conflicts that arise from popular indignation over corruption" (BARROSO, 2018, p. 2190-2191). What would be the nature of these conflicts? Why would the factor "popular indignation" be relevant to justify their processing and trial, not to say the content of the decision, in place of the impartial application of the law, *sine ira ac studio*, by an independent judiciary?

[13] Nadia Urbinati speaks of "autocracy", but this term is reserved by Kant for the *forma imperii* of the government of one as opposed to those of the government of some (aristocracy) and of all (democracy). Actually, he contrasts despotism with the republican *forma regiminis*, the only form that can be genuinely representative because it separates the persons of the legislator and those who execute his will, making possible the separation between public and private will (KANT, 1996, p. 324-325).

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