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SALGADO, ENEIDA DESIREE

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Essay on the constitutional promises of democracy and republic

Ensaio sobre as promessas constitucionais de democracia e república

ENEIDA DESIREE SALGADO*

Universidade Federal do Paraná (Brasil)

desisalg@gmail.com

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Abstract

This essay aims at explaining what the democratic and republican principles declared in the Brazilian Constitution represent – or could represent. First, the work considers the notion of a Constitution and its models, combined with the concept of rule of law. The author goes further and examines the idea of freedom, as it changes depending on the constitutional model followed, be it derived from the French or the American Revolution. Presenting the preoccupations of different experts regarding a constitutional system, the essay compares their arguments before considering the elements of the Brazilian Constitution and its preamble. In this context, it is made clear the influence of Brazilian History in the understanding of the meaning of democracy and republic in the country. Furthermore, concepts such as “individual”, “citizen”, “citizenship”, “government”, “equality”, “communitarianism”, “solidarity”, “common good”, “vote”, among others, are all presented and understood through the lenses of the Brazilian Constitution and constitutional doctrine to build a wide-ranging yet comprehensible notion of democracy and republic in Brazil.

Keywords: Brazilian constitutionalism; democracy; republic; rule of law; freedom.

Resumo

Este ensaio busca explicar o que os princípios de democracia e república declarados na Constituição Brasileira representam – ou podem representar. Primeiro, o trabalho considera a ideia de Constituição e seus modelos, combinados com o conceito de Estado de Direito. A autora também examina o preceito de liberdade, que se altera dependendo do modelo constitucional seguido, seja derivado da Revolução Francesa ou dos Estados Unidos da América. Ao apresentar as construções de diferentes especialistas com respeito a um sistema constitucional, o ensaio compara seus argumentos antes de considerar os elementos da Constituição Brasileira e seu preâmbulo. Neste contexto, resta evidente a influência da História Brasileira na compreensão do significado de democracia e república no país. Ainda, conceitos como “indivíduo”, “cidadão”, “direitos e deveres do cidadão”, “governo”, “igualdade”, “comunitarismo”, “solidariedade”, “bem comum”, “voto”, entre outros, são trabalhados e entendidos através das lentes da Constituição Brasileira e da doutrina constitucional para construir uma ampla e compreensível noção de democracia e república no Brasil.

Palavras-chave: Constitucionalismo brasileiro; democracia; república; Estado de Direito; liberdade.

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* Adjunct Professor of Constitutional Law and Election Law at Universidade Federal do Paraná (Curitiba-PR, Brazil). Doctor in Public Law, 2010, Universidade Federal do Paraná. E-mail: desisalg@gmail.com.

The Brazilian Constitution of 1988 establishes a democratic and republican rule of law as a fundamental political decision¹ and as a legal norm of supreme hierarchy².

According to constituent power theory and its legal fictions, the constitution establishes the state from the beginning, *ab ovo*, configuring a political framework based on the structure of power and its limitation. This configuration is determined by the guarantee of rights, by the organization of sovereignty among government institutions and by the determination of ends to be pursued by both state authorities and society.³

The notion of constitution is inextricably linked to the notion of freedom and liberties. Its formulation in a formal document, written and protected against daily changes, reveals the intention to protect a set of rights and guarantees, as well as demonstrates the establishment of the organization and functioning of the state.

Maurizio Fioravanti presents different theoretical models adapted to constitutions derived from the French and the American Revolution and, later, the development of the concept of rule of law in Europe. While in the French Revolution the doctrine assumed freedom as individualist, statist and anti-historicist, in the American Revolution it combined individualistic, historicist, and anti-statist elements. The rule of law, developed from the nineteenth century on, eliminates the individualist element and keeps the combination of statist and historicist theories.⁴

Historicism assumes a perspective about freedoms that is originated out of the imperative force of rights, which has been confirmed over time in history, and goes beyond the contingent political will. The purpose of the combination with politics is to protect historically acquired positions, so that initial legal positions are not established based on an agreement of wills, which ignores historical rights. This conception does not fit in with the full notion of constituent power. According to the author, the individualistic model places the individual as the holder of rights, in a way that they have the constitutions as instruments to guarantee these rights and individual freedoms. The state law originates from the contractualism and is the only recognized authority. The limitation of individual rights arises from other individual rights and not from a social demand. The constituent power is primary and fundamental. Finally, the statist approach sees the state as a condition for the birth of rights and freedoms. The pact, derived from the contractualist theory, substitutes the contract in a way that the state,

¹ SCHMITT, Carl. **Constitutional Theory**. Chicago: Duke University Press, 2008. § 3.

² Kelsen, Hans. *Teoria Geral do Direito e do Estado*. São Paulo: Martins Fontes, 2000. Chapter X.

³ For Maurice Hauriou, the formation of constitutions comes from the juridical virtue of the constituent power, combined with the freedom of subjects and with an objective idea: "There is a foundation of power, which achieves an objective idea and from which the citizens have taken over in conditions such that the foundation is not revocable and that power is not bound by its own will, but by that of the subjects and by the ascendant of the objective idea". (HAURIU, Maurice. **Principios de Derecho Público y Constitucional**. 2. ed. Madrid: Instituto Editorial Reus, 1927. p. 19.)

⁴ FIORAVANTI, Maurizio. **Appunti di storia delle costituzioni moderne**. Le libertà fondamentali. 2. ed. Torino: G. Giappichelli, 1995. p. 17.

which originates from this pact, is taken as absolutely necessary for the existence of the political structure. Power and freedom are born together, they are not opposed.⁵

The combinations of these elements reflect the conception of freedom and rights, the notion of state, and the notion of constitution. The content of different constitutions shows evidences of these models and their incorporation. Contemporary constitutionalism, a concept that arose from the American Revolution, adopts a normative text of superior hierarchy in a formal document. Its primary content encompasses aspects related to limitation and organization of power and related to institutions of sovereignty, with the creation of a state whose action is linked to the law.⁶

Eduardo García de Enterría stresses that the notion of constitution originated in the French Revolution and in the American Revolution with a defined content out of certain assumptions. Its existence, according to article 16 of the Declaration of the Rights of Man and of the Citizen⁷, relates to the protection of individual rights and to the separation of powers in three branches, and its birth must come from popular or community will.⁸

This notion of constitution was lost during most of the nineteenth century.⁹ Hence, its origin and content no longer characterize the constitution, which became “a mere logical demand of the unity of system of laws”, in any state, at any time, and in any regime. This concept becomes formalized and abstract.¹⁰ The indispensability of certain contents, however, seems to reappear in the second decade of the twentieth century, with the idea of state tasks imposed by the constitutional text.

Maurice Hauriou lists three elements of constitutional matter. First, the moral, political and social ideas. Second, the law of the constitution. And third, the constitutional organization of powers. In addition, the author mentions three moral, political and constitutional beliefs that are the power of the constitutional system. Such beliefs include: 1) The individualist order, which limits the sovereignty of the state and has as principle the idea that “everyone lives their lives, taking responsibility of the risks and dangers”; 2) The doctrine of power, divided into minority power and majority power. The first is related to the political elite and to the institutions, whereas the second is

⁵ FIORAVANTI, Maurizio. *Appunti di storia delle costituzioni moderne. Le libertà fondamentali*. 2. ed. Torino: G. Giappichelli, 1995. p. 18-28; 28-41; 41-49.

⁶ CORVALÁN, Juan Gustavo. *Soberanía y Estado Constitucional*. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 15, n. 62, p. 45-71, out./dez. 2015.

⁷ Art. 16: “A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all”.

⁸ GARCÍA DE ENTERRÍA, Eduardo. **La Constitución como norma y el Tribunal Constitucional**. Madrid: Civitas, 1983. p. 41.

⁹ About that notion of constitution, see: NOBRE JÚNIOR, Edilson Pereira. Uma ideia de Constituição. **Revista de Investigações Constitucionais**, Curitiba, vol. 1, n. 1, p. 111-145, jan./abr. 2014. DOI: <http://dx.doi.org/10.5380/rinc.v1i1.40251>.

¹⁰ GARCÍA DE ENTERRÍA, Eduardo. **La Constitución como norma y el Tribunal Constitucional**. Madrid: Civitas, 1983. p. 42-43.

legitimized by popular election; and 3) Political freedom, conceived as the participation of each citizen as individual, instead of the nation as product of a collective development.¹¹

The constitution, for Karl Loewenstein, must contain distributions of functions into different government institutions, mechanisms of cooperation between the holders of power, mechanisms to resolve impasses between them (related to sovereignty of the people in democratic constitutionalism) and methods of adaptation to social changes. In the author's view, the constitution also covers a recognized sphere of self-determination with guarantees that ensure it.¹² On the other hand, Georges Burdeau gives emphasis to the part of the constitutional text which designates the rulers, establishing their legitimacy, their authority, and determining their responsibility.¹³

The models of state that aim at reducing social inequalities begin to incorporate other elements related to the guarantee of rights of equality in their constitutions.¹⁴ From this perspective, it is likely impossible to dissociate the terms "welfare state" from "democratic state" and "rule law", says Manuel Aragón¹⁵, because the elements of this defining formula are interrelated and mutually defined.¹⁶

The Brazilian Constitution brings in its set of fundamental political decisions the design of state and of democracy. It establishes the distribution of functions among the government institutions, provides individual rights and guarantees, determines legal provision for its modification within certain limits and settles rules for the legitimacy of the exercise of political power. Moreover, the constitutional text in the preamble¹⁷ and

¹¹ HAURIU, Maurice. **Principios de Derecho Público y Constitucional**. 2. ed. Madrid: Instituto Editorial Reus, 1927. p. 12-15; 49; 113; 187; 203. For the author, the minority power limits the majority power, except in its the performance of this revolutionary action, associated with self-defense, rights of resistance to oppression and insurrection, and rights of dissension and rights of active resistance (p. 204-209).

¹² LOEWENSTEIN, Karl. **Teoría de la Constitución**. 2. ed. Barcelona: Ariel, 1976. p. 153-154. For the author, constitutionalism represents the demand for the government responsibility (p. 71).

¹³ BURDEAU, Georges. **Derecho constitucional e instituciones políticas**. Madrid: Editora Nacional, 1981. p. 79; 91.

¹⁴ RODRÍGUEZ-ARANA MUÑOZ, Jaime. Dimensiones del Estado Social y derechos fundamentales sociales. **Revista de Investigações Constitucionais**, Curitiba, vol. 2, n. 2, p. 31-62, maio/ago. 2015. DOI: <http://dx.doi.org/10.5380/rinc.v2i2.44510>; DURÁN MARTÍNEZ, Augusto. Estado Constitucional de Derecho y servicios públicos. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 15, n. 60, p. 39-62, abr./jun. 2015.

¹⁵ ARAGON, Manuel. La eficacia jurídica del principio democrático. **Revista Española de Derecho Constitucional**, Madrid, a. 8, v. 24, p. 9-45, sep./dec. 1985.

¹⁶ RODRÍGUEZ-ARANA MUÑOZ, Jaime. La cláusula del Estado Social de Derecho y los derechos fundamentales sociales. **Revista Eurolatinoamericana de Derecho Administrativo**, Santa Fe, vol. 2, n. 1, p. 155-183, ene./jun. 2015.

¹⁷ "We, the representatives of the Brazilian People, convened in the National Constituent Assembly to institute a democratic state for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, founded on social harmony and committed, in the internal and international orders, to the peaceful settlement of disputes, promulgate, under the protection of God, this Constitution of the Federative Republic of Brazil." BRASIL. **Constituição (1988)**. Constituição da República Federativa do Brasil. Tradução de Istvan Vajda, Patrícia de Queiroz Carvalho Zimbres e Vanira Tavares de Souza. Brasília, DF: Senado Federal: Centro Gráfico, 2013.

in Article 1¹⁸ presents the constitutive political positions¹⁹, which frames the design of state and of the conception of democracy and republic.

Thus, the Brazilian Constitution establishes the rule of law as the foundation of contemporary citizenship, as well as a sense of democracy, a conception of political representation (indicating the framework of that relationship), and a republican ideal, based on a strong notion of freedom and equality, with the assumption of rights and duties of citizenship. For Paulo Bonavides, the Constitution is “the home of justice, freedom, legitimate powers, and it is also the palace of fundamental rights. It is therefore the house of principles, the seat of sovereignty”²⁰.

It is a qualified rule of law, which does not harmonize with any legal content. Public authorities and individuals are subject to the law regularly elaborated, as long as the constitutional values and principles have been observed and substantially considered.²¹ As Luigi Ferrajoli argues, this qualified dimension of the rule of law also implies a change in the nature of democracy, which is now limited and supplemented by fundamental rights.²²

According to Jürgen Habermas, the democratic constitutional state is framed as an order desired by the people and legitimized by free opinion formation and will, which allows the recipients of the legal system to see themselves as its authors. The state performance in the fulfillment of its constitutional tasks, relying on the law to handle factual inequality, makes the realization of equal rights possible. Thus, the breadth of this action expands the possibility of democratic self-legislation, intensifying society's capacity of self-conduction.²³

¹⁸ “Article 1. The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on: I – sovereignty; II – citizenship; III – the dignity of the human person; IV – the social values of labour and of the free enterprise; V – political pluralism. Sole paragraph. All power emanates from the people, who exercise it by means of elected representatives or directly, as provided by this Constitution”. BRASIL. **Constituição (1988)**. Constituição da República Federativa do Brasil. Tradução de Istvan Vajda, Patrícia de Queiroz Carvalho Zimbres e Vaníra Tavares de Souza. Brasília, DF: Senado Federal: Centro Gráfico, 2013.

¹⁹ Ronald Dworkin refers to the notion of comprehensive political theory as a systematic set of concrete and abstract political positions, formed by constitutive political positions (positions valued for their own sake, which can merge with other constitutive political position) and derivative political positions (which are means to affect the constitutive political positions, and which can be protected and absolute). DWORKIN, Ronald. **Liberalismo, Constitución y Democracia**. Buenos Aires: La isla de la luna, 2003. p. 12-15. no. 1.

²⁰ BONAVIDES, Paulo. Jurisdição constitucional e legitimidade (algumas observações sobre o Brasil). In: FIGUEIREDO, Marcelo; PONTES FILHO, Valmir (Orgs.). **Estudos de Direito Público em homenagem a Celso Antônio Bandeira de Mello**. São Paulo: Malheiros, 2006. p. 520-549. p. 520.

²¹ CASSAGNE, Juan Carlos. El nuevo constitucionalismo y las bases del orden jurídico. **Revista de Investigaciones Constitucionais**, Curitiba, vol. 2, n. 1, p. 167-224, jan./abr. 2015. DOI: <http://dx.doi.org/10.5380/rinc.v2i1.43660>.

²² FERRAJOLI, Luigi. Pasado y futuro del Estado de Derecho. In: CARBONELL, Miguel (ed.). **Neoconstitucionalismo(s)**. Madrid: Trotta, 2003. p. 13-29. p. 19.

²³ HABERMAS, Jürgen. A constelação pós-nacional e o futuro da democracia. In: _____. **A Constelação pós-nacional**. Ensaios políticos. São Paulo: Littera Mundi, 2001. p. 75-142. For the author, in a democracy informed by discursive ethics, “only the rules that are consented by all participants involved in a practical discourse can require validation”. Furthermore there are conditions for the discourse: the agreement must be motivated by epistemic reasons, there can be no coercion in the acceptance of the presumed consequences and of the side effects, everyone must be enabled to present their arguments and the arguments must be honestly made. (HABERMAS, Jürgen. Uma visão genealógica do teor cognitivo da moral. In: _____. **A Inclusão do outro: Estudos de teoria política**. São Paulo: Loyola, 2004. p. 13-62. p. 49; 58-60). Celso Luiz Ludwig explains: “the foundation of the Ha-

The constitution begins to incorporate a political, social and legal project, which is not neutral nor does it require obedience towards its form, but acts “directly due to the statement of a framework of values that interprets the deep fabric of society”²⁴. However, it is neither a matter of forming, in the constitutional text, an ideal of a good life, nor imposing it on citizens. From a republican perspective, there is the choice of objective values, which allows individuals to carry out their projects and their lives, as long as it does not prevent the others from doing so.²⁵

The constitution must ensure the protection of the fundamental rights of any person, going beyond the representation of a pretended general will or a segment of it.²⁶ As Luigi Ferrajoli states, the constitution guarantees the right of everyone, even regarding popular will, to ensure the coexistence of various interests in a heterogeneous society.

These constitutional promises of recognition, belonging and participation conflict with the national mentality, which is strongly individualistic.

The lack of popular participation in the proclamation of the Brazilian republic is evidenced by historians. José Murilo de Carvalho, for instance, presents different views on the republican model to be adopted, on the republican “traditions” in dispute and on the struggle to create the “myth of origin”, through stories, heroes and symbols. The author uses the term of Aristides Lobo to claim that the people were “petrified” and surprised while witnessing the birth of the Republic.²⁷

Maria Garcia claims that during the insurrections and uprisings of the end of the eighteenth century and the first half of the nineteenth century in Brazil – such as *Inconfidência Mineira*, *Inconfidência Baiana* (*Revolta dos Alfaiates*), *Revolução Pernambucana*, *Confederação do Equador*, *Cabanada*, *Revolução dos Farrapos* and *Sabinada* – it was possible to identify republican demands²⁸. Nonetheless, the author states that after the proclamation of the Republic of Brazil, the “different Brazilian republics” demonstrated

bermasian discursive ethics takes into account that only universalizable interests can serve as a basis for the validation of norms. Discursive ethics is based on the assumption that norms are rationally validable. The norms about which there is consensus, obtained through the practical discourse, are the valid ones. It is not, however, any form of consensus. The consensus is obtained following the criterion of universalization.” (LUDWIG, Celso Luiz. **Para uma filosofia jurídica da libertação**: paradigmas da filosofia da libertação e direito alternativo. Florianópolis: Conceito Editorial, 2006. p. 110-111).

²⁴ PALOMBELLA, Gianluigi. **Filosofia do Direito**. São Paulo: Martins Fontes, 2005. p. 181.

²⁵ For Emerson Gabardo, the Brazilian Constitution brings an ideal of good life related to the happiness of individuals and guaranteed by a series of constitutional devices, such as the minimum wage and the provision of services by the State. This ideal, however, does not hurt the freedom of the individual, because it relies on objective concepts and values (GABARDO, Emerson. **Interesse Público e Subsidiariedade**: o Estado e a Sociedade Civil para além do bem e do mal. Belo Horizonte: Fórum, 2009. p. 325-372).

²⁶ MOREIRA NETO, Diogo de Figueiredo. Princípios constitucionais fundamentais – uma digressão prospectiva. In: VELLOSO, Carlos Mário da Silva; ROSAS, Roberto; AMARAL, Antonio Carlos Rodrigues do (Coords.). **Princípios constitucionais fundamentais**. Estudos em homenagem ao professor Ives Gandra da Silva Martins. São Paulo: Lex, 2005. p. 327-342.

²⁷ CARVALHO, José Murilo de. **A formação das almas**: o imaginário da República no Brasil. São Paulo: Companhia das Letras, 1990. It is also worth checking the analysis of the journalist Hélio Silva (SILVA, Hélio. **1889: a República não esperou o amanhacer**. Porto Alegre: L&PM, 2005).

²⁸ Raymundo Faoro externalizes this impression in his analysis on the formation of Brazilian politics (FAORO, Raymundo. **Os donos do poder**. Formação do patronato político brasileiro. 3. ed, rev. São Paulo: Globo, 2001. p. 303 and ss.).

"the discontinuity of the democratic process, its gaps and shortcomings and, at the same time, the untying between institutions established in the name of republican regime, in its popular bases and roots."²⁹

Nevertheless, it is possible to affirm that the constitutional democratic movement that culminates in the Brazilian Constitution of 1988 promotes the foundation of a republic.³⁰ From the new constitutional framework, Brazilian society, which suddenly and by chance became republican, has a normative substrate through which it is possible to affirm that the Brazilian state is founded on a republican ideal and it enables the development of an *idem sentire de republica*³¹.

The notion of republic is not opposed to monarchy. In an eighteenth-century writing, Edmund Burke argues that the English monarchy is not only ensured by non-violation of the law by the prince, but requires that the monarch's discretionary powers "should all be exercised upon public principles and national grounds, and not on the likings or prejudices, the intrigues or policies, of a court". Burke emphasizes that everyone – parliamentarians, judges and the king – is "trustee of the people", "because no power is given for the sole sake of the holder".³² The notion of public principles as a criterion for legitimacy of political action is linked to the republican ideal. Their enemies are not confused with the king.

Philip Pettit argues that the republican thinking about citizenship and government is based on a notion of trust and also maintains that the role of government is to promote citizen's freedom. Trust in authorities derives from a conviction on their acting according to the legal rules and with a cooperative arrangement, which is seen as a civic virtue, thus impersonal and personal at the same time. Although impersonal trust is ensured by some mechanisms such as limited terms, separation of power in three branches, and democratic control, the republican relationship between rulers and the rest of the population always assumes virtue and trustworthiness on both citizens and rulers. To the citizens, claims the author, there is an eternal vigilance: without it, there is no hope for public virtue;³³ for there to be freedom, a civic virtue is necessary, and it

²⁹ GARCIA, Maria. **A República no Brasil**. Brasília: Programa Nacional de Desburocratização / Instituto dos Advogados de São Paulo, 1985. p. 21; 44.

³⁰ To see more about the characteristics of Brazilian Constitution of 1988: BERCOVICI, Gilberto. Revolution through Constitution: the Brazilian's directive Constitution debate. **Revista de Investigações Constitucionais**, Curitiba, vol. 1, n. 1, p. 7-18, jan./abr. 2014. DOI: <http://dx.doi.org/10.5380/rinc.v1i1.40249>.

³¹ Jürgen Habermas defends the idea that the formation of the democratic constitutional state requires self-determination of people. "In case the people, however, who understood themselves authoritatively, had not become a nation of self-conscious citizens, the driving force to a political and legal overhaul like that would be missing, and also the vital force to the republic formally instructed". The idea of nation fills this gap, being "capable of integrating the moral consciences" (HABERMAS, Jürgen. O Estado nacional europeu – sobre o passado e o futuro da soberania e da nacionalidade. In: _____. **A Inclusão do outro**. Estudos de teoria política. São Paulo: Loyola, 2004. p. 127-151. p. 135).

³² BURKE, Edmund. Pensamientos sobre las causas del actual descontento. In: _____. **Textos políticos**. Ciudad de México: Fondo de Cultura Económica, 1942. p. 259-293. p. 268; p. 274.

³³ PETTIT, Philip. Republican Theory and Political Trust. In: BRAITHWAITE, Valerie; LEVI, Margaret (Ed.). **Trust and Governance**. New York: Russell Sage Foundation, 1998. p. 295-314.

requires availability to participate in government and determination for the exercising of an eternal vigilance in relation to rulers³⁴.

It is possible to relate the republican ideal as a sharing of values to the concept of *Verfassung*. It is understood as a historical-existential condition and as a community of people who articulate themselves allowing the construction of a political community, and, therefore, of the state. *Verfassung* assumes a set of values that informs the legal system and the actions of the public authorities.

However, these values, as António Manuel Hespanha asserts, are neither dense nor thick. There is an agreement among the thin and minimum values: all of them agree with the democratic idea, but not with its content. According to Antonio D'Atena, the fundamental common value of all rules is the equality of citizens.

For Zygmunt Bauman, the republican idea does not impose a correct model of life, but promotes "the empowerment of citizens to freely discuss the models of life of their preference and execute them. The republic is a broadening, not a reduction of options – its goal is to increase, not to limit individual freedoms"³⁵. Aristotle states that the best government is "the government in which every individual finds the best way to live happily"³⁶. This aspect of the republican ideal is supported by constitutions such as the Brazilian Constitution of 1988³⁷.

The republican ideal reflects the value of equality. This value, a good to be pursued, is constitutionally based on a principle of equality, which is an initial good with normative content that guides actions and has a normative force.³⁸ Moreover, the requirement for equality is essential for the deliberative design of an epistemic theory of democracy: equal voice and equal voting are preconditions for the characterization of a substantive equality³⁹.

³⁴ PETTIT, Philip. Republican Political Theory. In: FLEURBAEY, Marc; SALLES, Maurice; WEYMARK, John A. (Ed.). **Justice, Political Liberalism, and Utilitarianism**. New York: Cambridge University Press, 2008. p. 389-410: "The price of liberty is civic virtue, then, where that includes both a willingness to participate in government and a determination to exercise eternal vigilance in regard to the governors" (p. 389).

³⁵ BAUMAN, Zygmunt. **Em busca da política**. Rio de Janeiro: Jorge Zahar, 2000. p. 190. There is, however, a necessity of paying attention on one of the author's remarks. The Republican idea denies the need of historical memory and establishes itself as a common good factory based on human capacity to criticize, reason and judge, assuming the triple freedom of speech, expression and association. It also places universal happiness as supreme purpose of the republic. The danger of the republic is to make a wrong commitment, and its purpose is to ensure a positive freedom to its citizens, combining individual freedom against interference and the citizen's right to intervene, such as mortar that unites the republican community (p. 166-169).

³⁶ ARISTÓTELES. **A política**. São Paulo: Martins Fontes, 1998. p. 59.

³⁷ GABARDO, Emerson. **Interesse Público e Subsidiariedade: o Estado e a Sociedade Civil para além do bem e do mal**. Belo Horizonte: Fórum, 2009. p. 367.

³⁸ The distinction drawn by Gustavo Zagrebelsky is taken here. The values allow the action or judgment in relation to the result sought at the end, while the principles establish the legitimate content of actions or judgments that pursue values from directions, without precise indication of the action or of the judgment (ZAGREBELSKY, Gustavo. *Diritto per: valori, principi o regole?* (a proposito della dottrina dei principi di Ronald Dworkin). **Quaderni Fiorentini per la storia del pensiero giuridico moderno**, Firenze, t. 1, n. 31. p. 865-897, 2002).

³⁹ NINO, Carlos Santiago. **La constitución de la democracia deliberativa**. Barcelona: Gedisa, 1996. p. 92.

This is not a liberal vision of equality which considers the subjects as equal owners of their own body, as equal towards the social contract, equal citizens in Rousseau and equal members of the nation, as Pietro Costa claims. The author emphasizes that, in this context, the defense of human rights against the power also means the defense of freedom against equality. Equality, for liberalism, is a formal and legal equality. It composes citizenship only to the extent that it allows everyone to become holders of rights. This is the only equality compatible with its notion of freedom.⁴⁰

Freedom, in republican thinking, is seen as non-domination. Non-domination does not exclude the interference. It only excludes arbitrary, substantial or procedural interference, even if it is a potential interference⁴¹, emphasizes Philip Pettit. The absence of domination allows everyone to be equal, without needing to show deference to or fear one another. The republican law does not restrict nor compromises freedom. It only conditions freedom. In addition to that, the meaning of the republican ideal implies a notion of distributive justice: the maximum distribution of freedom, considered as non-domination, requires a commitment to redistribution, averting factors that enable domination.⁴²

As stated by Sérgio Cardoso, the republican idea assumes “a common equalizer space, defined by the implication of all citizens into the system of political decisions”, extrapolating the requirement of political democracy in order to achieve “economic, social and cultural democratization”.⁴³

Roberto Gargarella dedicates his studies to the analysis of contemporary republicanism, which arises at the end of the twentieth century and ends up combining liberal and communitarian critiques. To the author, this current of thought defends civic values (such as gender equality, integrity, solidarity, commitment to others, among other values) and a strong idea of freedom – which requires a set of political and economic conditions in order to happen. The state, therefore, must act to ensure those conditions, but always under the effective control of citizens. Gargarella’s concern with republicanism is the possibility of intervention at the individual sphere, from the requirement of certain moral posture, with an ideal of excellence that reaches individual autonomy. It is possible, however, to have a commitment without vigorous moral

⁴⁰ COSTA, Pietro. **Democrazia politica e Stato costituzionale**. Napoli: Editoriale Scientifica, 2006. p. 27-28.

⁴¹ Newton Bignotto states that “for new republicans, a citizen must not only not suffer interference in their independence (negative freedom), but also have the institutional guarantee that this will not occur” (BIGNOTTO, Newton. *Humanismo cívico hoje*. In: _____. (Org.). **Pensar a República**. Belo Horizonte: Editora UFMG, 2000. p. 49-69. p. 56). It is worth repeating that it is not a question of interference, but of arbitrary interference, which configures domination.

⁴² PETTIT, Philip. *Republican Political Theory*. In: FLEURBAEY, Marc; SALLES, Maurice; WEYMARK, John A. (Ed.). **Justice, Political Liberalism, and Utilitarianism**. New York: Cambridge University Press, 2008. p. 389-410.

⁴³ CARDOSO, Sérgio. *Notas sobre a tradição do ‘governo misto’*. In: BIGNOTTO, Newton (Org.). **Pensar a República**. Belo Horizonte: Editora UFMG, 2000. p. 27-48. p. 29.

conception, assuming values “institutionally circumscribed” – it is a commitment to the public good, even though each individual could live as they wish.⁴⁴

The idea of equality assumed by the Brazilian Constitution indicates different readings, which extrapolate the notion of formal equality and adjust to the notion of freedom⁴⁵. It is not possible, at any moment, to exhaust the requirement of an “equality before the law”. The social setting of the state requires an effective action in order to foster equal conditions of life, of political participation and of personal achievement.

This is not a communitarian constitution⁴⁶, but a republican constitution, which combines liberal and egalitarian elements. The state and the constitution are not axiological neutral, but they do not impose a closed content for values they elected through democratic deliberation.⁴⁷

The objectives of the Federative Republic of Brazil, expressed in article 3 of the Brazilian Constitution, are: to build a free, just and solidary society; to ensure national development; to eradicate poverty and marginalization; to reduce social and regional inequalities; and to promote the well-being of all, without discrimination of origin, race, sex, color, age, and others. These objectives can also be understood as a demand to treat all citizens with equal consideration and respect.

The adjective “solidary” refers to a relationship of belonging to a community and to the joint responsibility for acts and targets of society. The task of eradicating poverty and marginalization highlights the need to recognize everyone as citizens, which is justified by the improvement of democratic institutions. There seems to be no doubt in relation to the other objectives: none of them value or disvalue conceptions of life and of individual morality.

⁴⁴ GARGARELLA, Roberto. **As teorias da justiça depois de Rawls**. Um breve manual de filosofia política. São Paulo: Martins Fontes, 2008. p. 183-221. Another important issue raised by the author is the primacy of common rights over individual rights, defended by republicanism.

⁴⁵ Sérgio Cardoso argues that republican claims constitute the remains of the left-wing political culture. These claims started after the abandonment of the requirement of the means of production socialization, as well as the requirement for social wealth and the democratization of social and political life (CARDOSO, Sérgio. Notas sobre a tradição do ‘governo misto’. In: BIGNOTTO, Newton (Org.). **Pensar a República**. Belo Horizonte: Editora UFMG, 2000. p. 27-48. p. 27).

⁴⁶ Roberto Gargarella criticizes communitarians and their view that not all the ideals of the good life are equally valuable (GARGARELLA, Roberto. **As teorias da justiça depois de Rawls**. Um breve manual de filosofia política. São Paulo: Martins Fontes, 2008 [1999]. p. 141 and ss.). Furthermore, Gargarella brings the position of Joseph Raz, to whom “the fact that the state acts motivated by certain ideals of common good does not imply assuming there is only one plausible moral conception (on the contrary – Raz adds –, perfectionism is compatible with a ‘value pluralism’ – having the idea that there are multiple forms of life that differ from one another and all of them are precious)” (p. 167).

⁴⁷ This critic is valid unless a weak perspective of communitarianism is adopted, such as Gisele Cittadino. The author claims that communitarianism is compatible with multiple social identities, with an idea of justice under shared values (provided that they are weakly shared) and with a view of the Constitution that brings content as a social project. Under this point of view, the author argues that there is a “communal constitutionalism” in Brazil, from the establishment of an ethical foundation for the legal system and from the establishment of values of equality and dignity as a priority. In addition, the author argues that the Brazilian Constitution of 1988 brings a communal language (CITTADINO, Gisele. **Pluralismo, direito e justiça distributiva**. 2. ed. Rio de Janeiro: Lumen Juris, 2000).

The common good⁴⁸ of Brazilian society is defined by article 3 and by other provisions of the Brazilian Constitution, which are measuring criterion of legitimacy and of legality of state actions. The common good does not interfere with individual freedom. Its demands relate to a notion of equality, but not to a total equality. It is through a notion of common good that the realization of political community is possible.

The republican model of democracy does not presuppose a moral objective truth once it is open to discussion of the purposes and the means of political society. This model, however, imposes the citizens' cooperation⁴⁹. Also at the heart of the republican idea is the visibility of the political decision. According to Jônatas Machado, the republican government is characterized by the public statement, the right to vote and the freedom of speech⁵⁰. It is still possible to perceive the connection between state agents and functions in the republican ideal. Such connection consists of an unsurpassed relationship between their competence and tasks, all constitutionally determined, in addition to individual self-determination.⁵¹

Geraldo Ataliba claims that the republican principle is the most important in the constitutional framework. The republic is the synthesis of all institutions, and it implies the representation of people while exercising public functions. The republican principle requires commitment of the rulers to the institutions and to the function they exert. The republic still requires free expression of minorities and the existence of institutional opposition channels. Ataliba argues that there are three basic principles of the republican institutions: legality, equality and the intangibility of civil freedom.⁵²

⁴⁸ Newton Bignotto underlines that "the notion of public good can seem abstract, the idea that the best of all is the sum of private interests also lacks the objectivity alleged by some theorists" (BIGNOTTO, Newton. *Humanismo cívico hoje*. _____. (Org.). **Pensar a República**. Belo Horizonte: Editora UFMG, 2000. p. 49-69. p. 64). In addition, if the lack of concreteness is an obstacle to the defense of a value or a principle, one cannot say that the Brazilian State defends freedom and equality, or that constitutionalism guarantees democracy. Then, the term "rule of law" should be completely discarded. Moreover, it is worth mentioning Zygmunt Bauman's remark on disbelief in the existence of a common good and its aftermath: "With the art of negotiating common interests and shared destiny falling into disuse, seldom if ever practised, half-forgotten or never properly mastered, with the idea of 'the common good' (let alone 'the good society') branded suspect, threatening, nebulous or addle-brained, seeking security in a common identity rather than in an agreement on shared interests emerges as the most sensible, naymost effective and profitable, way to proceed; but concerns with identity and its defence against pollution make the idea of common interests, and most notably negotiated common interests, all the more incredible and fanciful, and the ability and will to pursue them all the less likely to appear" (BAUMAN, Zygmunt. **Liquid modernity**. Cambridge: Polity Press, 2000. p. 106).

⁴⁹ For Andrea Greppi, this conception of Carlos Santiago Nino approaches John Stuart Mill's perfectionism and the virtuous citizen model of Rousseau. Still, Greppi claims that Nino establishes his valuable citizenship model without considering the tangible will of individuals (GREPPI, Andrea. *Consenso e imparcialidad. Sobre la justificación moral de la democracia en el pensamiento de C. S. Nino*. In: ROSENKRANTZ, Carlos; VIGO, Rodolfo L. (Comp.). **Razonamiento jurídico, ciencia del derecho y democracia en Carlos S. Nino**. Ciudad de Mexico: Fontamara, 2008. p. 229-259. p. 252-253).

⁵⁰ MACHADO, Jônatas E. M. **Liberdade de expressão**. Dimensões constitucionais da esfera pública no sistema social. Coimbra: Coimbra, 2002. p. 52; 61.

⁵¹ Eduardo García de Enterría points out that the content of the Constitution, popularly established, determines that "The power agents will be agents and servants of society and not their owners and, on their part, these functions must be defined as limited, especially through the establishment of areas exempt from power, reserved for private autonomy (freedom and fundamental rights)". GARCÍA DE ENTERRÍA, Eduardo. **La Constitución como norma y el Tribunal Constitucional**. Madrid: Civitas, 1983. p. 44-45).

⁵² ATALIBA, Geraldo. **República e Constituição**. São Paulo: Revista dos Tribunais, 1985. The author states that the principles of the republic and the federation "exercise chapter functions of transcendental importance, determining how to interpret the rest". These principles are also reaffirmed by numerous other constitutional provisions, and shape a very strict core of the Constitution (ATALIBA, Geraldo. *Eficácia dos princípios constitucionais – República – Periodicidade e alternância – Reeleição das*

Equal access to elective positions of power as an element of the republican principle is the emphasis of Gilmar Ferreira Mendes, Inocêncio Mártires Coelho and Paulo Gustavo Gonet Branco. A constitutional republic assumes equality of conditions, without any distinctions in the endowment and access to power and public office, provided that constitutional and legal conditions are fulfilled.⁵³

Celso Antonio Bandeira de Mello is concerned with the legal content of the equality principle, affirming the imposition of unequal treatment when there is relevant discriminant factor. Yet, this distinction must cohere with real difference, and be consistent with constitutional values and principles.⁵⁴

The notion of “constitution-project” or “*costituzione-indirizzo*” relates not only to the assignment of tasks to the state, but also to the imposition of duties upon citizens. From the understanding of the constitution as a system of values, not only the state has its power limited by the pursuit of certain purposes, but also society begins to be seen as *universitas*. In this perspective, each member of society plays a role on the execution of a collective enterprise.⁵⁵

One established aspect of the republican ideal in its relationship with the citizen is compulsory voting. Its acceptance, however, is not peaceful regarding the democratic principle and the idea of freedom. For Celso Antônio Bandeira de Mello, “the compulsory vote discredits both quality and effective representation of the elected rulers”. It does so by devaluing the decision to vote and by making manipulation easier.⁵⁶

Maurizio Fioravanti refers to voting as function while explaining the statist model of freedom. In this perspective, the state appears as source of rights. Thus, the choice of representatives neither means the exercise of individual freedom nor constitutes a transfer of power. For the exercise of this function, “that [function] of designating, in the public interest and on the basis of state law, those who will have the task of expressing the sovereignty of the state in the law”⁵⁷.

The republican ideal and the welfare state are demanding of citizens. They determine a more active attitude than the classic liberal position. Both the republican

mesas do Legislativo. **Revista de Direito Público**, São Paulo, n. 55-56, p. 166-170, jul./dez. 1980.).

⁵³ MENDES, Gilmar Ferreira; COELHO, Inocêncio Mártires; BRANCO, Paulo Gustavo Gonet. **Curso de Direito Constitucional**. 2. ed. rev. e atual. São Paulo: Saraiva: 2008. p. 147.

⁵⁴ BANDEIRA DE MELLO, Celso Antônio. **O conteúdo jurídico do princípio da igualdade**. 3. ed. São Paulo: Malheiros Editores, 2002. p. 21.

⁵⁵ FIORAVANTI, Maurizio. **Appunti di storia delle costituzioni moderne**. Le libertà fondamentali. 2. ed. Torino: G. Giappichelli, 1995. p. 136; 139

⁵⁶ BANDEIRA DE MELLO, Celso Antônio. Representatividade e democracia. In: ROCHA, Cármen Lúcia Antunes; VELLOSO, Carlos Mário da Silva (Coords.). **Direito Eleitoral**. Belo Horizonte: Del Rey, 1996. p. 41-53. p. 43.

⁵⁷ FIORAVANTI, Maurizio. **Appunti di storia delle costituzioni moderne**. Le libertà fondamentali. 2. ed. Torino: G. Giappichelli, 1995. p. 47: “... Which is to designate, in the public interest and on the basis of the positive state right, those who will have the power to express the sovereignty of the state in the form of law”.

ideal and the welfare state require a sense of belonging and destiny sharing, a growing concern with the collectivity and economic and objective solidarity.

The individual, then, is required to choose candidates and their minimum surveillance. The periodic voting, which either approves or disapproves rulers or adheres to a particular application, is not enough for democracy. Active citizenship becomes a claim, a democracy that goes beyond the election, a democracy that generates public opinion past the results of polls and referenda.

The citizen is required to take a leading role, not only in defense of their rights, but also "in the fulfillment of their duties and obligations"⁵⁸, consisting of an effective action. In addition to citizen duties, the republican principle requires a constitutional sense⁵⁹, a sharing of values that allows the setting of a legal community – even if the values are thin.

Contemporarily, the matter of citizenship is embedded in market logic. Theorists discuss users and rights against the state, but republican duties are excluded from general speech. Such exclusion is possibly due to either the emptying effect of politics or to the disbelief in democracy.⁶⁰

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BANDEIRA DE MELLO, Celso Antônio. **O conteúdo jurídico do princípio da igualdade**. 3. ed. São Paulo: Malheiros Editores, 2002.

⁵⁸ MONTUFAR, Cesar. Antipolítica, representación y participación ciudadana. Ecuador, **Quito Debate**, n. 62, Aug. 2004. Available at: <www.dlh.lahora.com.ec/paginas/debate/paginas/debate1126.htm>. Accessed: 03 March 2009. The author refers to four lines of action: demand and expansion of rights and guarantees; control, surveillance and petition; collaboration with authority and institutional strengthening; and political innovation.

⁵⁹ For Carmen Lúcia Antunes Rocha, Brazil suffers from "one of the worst plagues that can erode the legal and democratic practice of a society: ignoring or not experiencing constitutional sense" (ROCHA, Cármen Lúcia Antunes. A Constituição segundo a lei eleitoral ou a lei eleitoral segundo a Constituição. **Paraná Eleitoral**, Curitiba, n. 30, oct.1998).

⁶⁰ "(...) the other side of individualization seems to be the corrosion and slow disintegration of citizenship" (p. 36). "If the individual is the citizen's worst enemy, and if individualization spells trouble for citizenship and citizenship-based politics, it is because the concerns and preoccupations of individuals qua individuals fill the public space to the brim, claiming to be its only legitimate occupants, and elbow out from public discourse everything else. The 'public' is colonized by the 'private'; 'public interest' is reduced to curiosity about the private lives of public figures, and the art of public life is narrowed to the public display of private affairs and public confessions of private sentiments (the more intimate the better). 'Public issues' which resist such reduction become all but incomprehensible" (BAUMAN, Zygmunt. **Liquid modernity**. Cambridge: Polity Press, 2000. p. 37).

BANDEIRA DE MELLO, Celso Antônio. Representatividade e democracia. In: ROCHA, Cármen Lúcia Antunes; VELLOSO, Carlos Mário da Silva (Coords.). **Direito Eleitoral**. Belo Horizonte: Del Rey, 1996. p. 41-53.

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