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Revolution through Constitution: the Brazilian's directive Constitution debate

Revolução por meio da Constituição: o debate sobre a Constituição dirigente brasileira

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Resumo

O artigo discute o fenômeno da Constituição Dirigente, apontando que diversas Constituições promulgadas ao longo dos séculos XX e XXI em países periféricos buscam vincular o legislador a um projeto constitucional, estabelecendo, assim, uma linha de atuação política que garanta a progressiva construção, através do Direito, de uma nova realidade social e econômica que permita a superação do subdesenvolvimento.

Palavras-chave: Constituição Dirigente; Teoria da Constituição; Subdesenvolvimento.

Abstract

The article discusses the phenomenon known as Directive Constitution and points out that several constitutions enacted in the 20th and 21st centuries in peripheral countries seek to bind the legislature to a constitutional project, thus establishing a political line of action that ensures the progressive construction – through the law – of a new social and economic reality, therefore overcoming underdevelopment.

Keywords: Directive Constitution; Constitutional Theory; Underdevelopment.

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One of the most important challenges to new democracies in Latin America after the 1980's is related to the implementation of their interventionist constitutions, characterized by the State's role on economic regulation. This recent reality has caused different expectations to societies that traditionally lived with a very strong economic and political private power to guarantee to few people the wealthy's participation. Besides these interventionist constitutions, elections during the past seven years in Latin America of leftist governments have leaded hopes to democratization and transformation in these societies. This paper suggests that constitutional law, seen under a Marxist view, could also be important to democracy's consolidation and recuperation of State's role, therefore, constitutional law, from a marxist analysis, can be converted in an important tool of the democratic consolidation and the recovery of the State's power especially if one considers law not as an automatic and dependent response to economic structure. On the other hand, the marxist understanding must also let the boundaries of the law to be evident in the transforming action as a revolutionary perspective.

This topic, directive constitution, appears at all times in the contemporary Brazilian constitutional debate. After its apogee, in the period immediately posterior to the promulgation of the 1988 Federal Constitution, the series of neoliberal constitutional reforms during the 1990's affects this constitution's model's defense and the perplexity of the Brazilian doctrine accentuates with the publishing of new theoretical positions of the Portuguese constitutionalist José Joaquim Gomes Canotilho, where he reviewed his masterpiece *"Constituição Dirigente e Vinculação do Legislador"*, from 1982, which had strongly influenced a good share of the Brazilian's public law doctrine's¹ conception. The debate about "death" or "survival" (or even "resurrection") of the directive constitution became one of the main / central topics of the Brazilian constitutional discussion².

¹ These changes are seen in the articles CANOTILHO, José Joaquim Gomes. *Rever ou Romper com a Constituição Dirigente? Defesa de um Constitucionalismo Moralmente Reflexivo*. **Revista de Direito Constitucional e Internacional**. São Paulo: Revista dos Tribunais. vol. 15. abr/1996.; CANOTILHO, José Joaquim Gomes. *A Teoria da Constituição e as Insinuações do Hegelianismo Democrático*. In: RIBEIRO, J. A. Pinto. **O homem e o tempo: Liber Amicorum para Miguel Baptista Pereira**. Porto: Fundação Eng. António de Almeida, 1999.; CANOTILHO, José Joaquim Gomes. *Da Constituição Dirigente ao Direito Comunitário Dirigente*. In: CASELLA, Paulo Borba (org). **Mercosul: Integração Regional e Globalização**. Rio de Janeiro: Renovar, 2000.; and CANOTILHO, José Joaquim Gomes. *O Direito Constitucional na Encruzilhada do Milénio: De uma Disciplina Dirigente a uma Disciplina Dirigida*. In: GARCIA DE ENTERRIA, Eduardo [et al.]. **Constitución y Constitucionalismo Hoy: Cincuentenario del Derecho Constitucional Comparado de Manuel García-Pelayo**. Caracas: Fundación Manuel García-Pelayo, 2000, partially reprinted in the Preface to the Second Edition of CANOTILHO, José Joaquim Gomes. **Constituição dirigente e vinculação do legislador**: contributo para a compreensão das normas constitucionais programáticas. 2. ed. Coimbra: Coimbra Ed., 2001.; or in CANOTILHO, José Joaquim Gomes. **"Brançosos" e interconstitucionalidade**: itinerários dos discursos sobre a historicidade constitucional. [Coimbra]: Almedina, [2006].

² See, by all the transcription of the debate in COUTINHO, Jacinto Nelson de Miranda (Org.). **Canotilho e a Constituição dirigente**. Rio de Janeiro: Renovar, 2002.; BERCOVICI, Gilberto. *A Constituição Dirigente e a Crise da Teoria da Constituição*. In: _____ [et al.]. **Teoria da Constituição: Estudos sobre o Lugar da Política no Direito Constitucional**. Rio de Janeiro: Lumen Juris, 2003.; and STRECK, Lenio Luiz. **Jurisdição Constitucional e Hermenêutica: Uma Nova Crítica do Direito**. Rio de Janeiro: Forense, 2004.

In 1961, when using the expression "directive constitution" ("*dirigierende Verfassung*"), the German jurist Peter Lerche, added a new dominium to the traditional existing sectors in the constitution. In his opinion, all constitutions would present themselves in four parts: the lines of constitutional direction, the determinant disposals of means, the rights, the guarantees and the division of State competency and the rules of principle³. However, modern constitutions characterize themselves by possessing, according to Lerche, a series of constitutional policies that configure permanent imposition for the legislator. These policies are what he determines as directive constitution⁴. Due to the fact that the directive constitution consists of permanent policies to the legislator, Lerche will claim that it is in the directive constitution's extent that the material discretionarity of the legislator could occur⁵.

The difference of conception of Peter Lerche's "directive constitution" from the renowned Canotilho's masterpiece is evident. Lerche is concerned in defining which rules link the legislator and comes to the conclusion that the permanent policies (the directive constitution) would make the material discretionarity possible to the legislator. Canotilho's concept is a lot wider, for not only a part of the constitution is called directive, but all of it⁶. The common ground between them, however, is the mistrust of the legislator: both wish to find a way to link, positively or negatively, the legislator to the constitution.

Canotilho's proposal is far wider and deeper than Peter Lerche's: his objective is the reconstruction of Constitutional Theory by means of a Constitutional Material Theory, conceived also as a social theory⁷. The directive constitution searches to rationalize politics, incorporating a materially legitimate dimension when establishing a constitutional fundament for politics⁸. The core of the idea of directive constitution is the proposal of material legitimation of the constitution by the means and functions anticipated by the constitutional text. In summary, according to Canotilho, the directive constitution's problem is a legitimating problem⁹.

For the Directive Constitution Theory, the constitution is not only a guarantee of the existent, but also a program for the future. When providing lines of procedure

³ Cf. LERCHE, Peter. *Übermass und Verfassungsrecht: Zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismässigkeit und der Erforderlichkeit*. 2 ed. Berlin: Keipe, 1999.

⁴ Ibid. p. 64-65.

⁵ Ibid. p. 65-77, 86-91, 325.

⁶ See CANOTILHO, José Joaquim Gomes. *Constituição Dirigente...*, p. 224-225, 313, note 60.

⁷ Ibid. p. 13-14.

⁸ Ibid. p. 42-49, 462-471. About this matter see QUEIROZ, Cristina M. M. *Os actos políticos no estado de direito: o problema do controle jurídico do poder*. Coimbra: Almedina, 1990. p. 111-113, 138-140, 146-150, 216-218.; and BERCOVICI, Gilberto. A Problemática da Constituição Dirigente: Algumas Considerações sobre o Caso Brasileiro. *Revista de Informação Legislativa*, Brasília, v. 142, 1999. P. 39-40.

⁹ CANOTILHO, José Joaquim Gomes. *Constituição Dirigente...*, p. 19-24, 157-158, 380.

for politics, without substituting it, the interdependency between State and society stands out: the directive constitution is a state and social constitution¹⁰. Canotilho's conception of directive constitution is linked to the defense of reality's change by law. The meaning, the objective of the directive constitution is to give strength and juridical substratum for social change. The directive constitution is an action program for society's alteration¹¹. This emancipative dimension is highlighted by all the versions of the directive constitution¹². Whether the directive constitution is revolutionary, like the 1976 Portuguese constitution, in which the original version had the transition to socialism be acclaimed with one of the Portuguese's Republic's objectives, or whether the directive constitution is "reformist" like the 1978 Spanish constitution and the 1988 Brazilian constitution, that even though they don't propose the transition to socialism, they determine a vast program of public policies, inclusive and distributive, through its "transforming clauses"¹³.

¹⁰ CANOTILHO, José Joaquim Gomes. **Constituição Dirigente...**, p. 150-153, 166-169, 453-456. See also BERCOVICI, Gilberto. *A Problemática...*, 37-39.

¹¹ CANOTILHO, José Joaquim Gomes. **Constituição Dirigente...**, p. 455-459. About the Constitution also as a project turned to the future, see SCHENUER, Ulrich. *Verfassung*. In: _____ [et. al.]. **Staatstheorie und Staatsrecht: Gesammelte Schriften**. Berlin: Duncker & Humblot, 1978. p. 173-174.

¹² To the distinction between the "revolutionary" and the "reformist" directive constitution see CANOTILHO, José Joaquim Gomes. **Constituição Dirigente...**, Prefácio. Something similar must have occurred with the concept that the Spanish Elías Díaz makes of the Democratic Rule of Law ("Estado Democrático de Derecho"). The political democracy, according to Elías Díaz, demands, as a base, economical democracy. For him, it is impossible to make democracy and capitalism compatible. The correspondence exists between democracy and socialism, and both agree and institutionalize in the Democratic Rule of Law, that, being so, overcomes the Welfare State. The Democratic Rule of Law, to Elías Díaz, must have a socialist economical structure, necessary to the present construction of a real democracy. Cf. DÍAZ, Elías. **Estado de Derecho y Sociedad Democrática**. 9 ed. Madrid: Taurus, 1998. p. 132-137, 142, 172-178. However, in the Brazilian case, José Afonso da Silva's interpretation strictly discards the presence in the constitutional text of 1988, of the Democratic Rule of Law with socialist content, even though the Constitution opens perspectives to social transformations. For him, the 1988 Constitution didn't promise a transition to socialism through an economical democracy and the deepening of the participative democracy keeping away from the concept elaborated by Elías Díaz. See SILVA, José Afonso da. *O Estado Democrático de Direito*. **Revista da Procuradoria Geral do Estado de São Paulo**, São Paulo, 1988. p. 68-71.

¹³ The "transforming clause" (as in the third article of the Brazilian 1988 constitution) enhances the contrasts between the unfair social reality and the need to eliminate it. In that manner, it prevents the constitution from considering done what is about to be done, implicating in the State's obligation of promoting the transformation of the social and economical structures. It's effectiveness doesn't mean an immediate demand of the concrete state action, but a positive attitude, constant and diligent, by the State in that direction established by the constitution. See MORTATI, Costantino. **Istituzioni di Diritto Pubblico**. 8 ed. Padova: Cedam, 1969. p. 945-948.; VERDÚ, Pablo Lucas. **Estimativa y Política Constitucionales: Los Valores y los Principios Rectores del Ordenamiento Constitucional Español**. Madrid: Universidad de Madrid, Facultad de Derecho, Sección de Publicaciones, 1984. p. 190-198.; Raúl USERA, Raúl Canosa. **Interpretación Constitucional y Formula Política**. Madrid: Centro de Estudios Políticos y Constitucionales, 1988. p. 303-305.; Francisco Javier Díaz REVORIO, Francisco Javier Díaz. **Valores Superiores e Interpretación Constitucional**. Madrid: Centro de Estudios Constitucionales, 1997. p. 186-199.; and BERCOVICI, Gilberto. **Desigualdades Regionais, Estado e Constituição**. São Paulo: Max Limonad, 2003.

At a first moment, the conservative authors will criticize the directive constitution for being filled with “contradictions” and “dilatory compromise”¹⁴, bringing up to date an argument developed in the Weimar Constitution, during the years of 1919-1933. Carl Schmitt, in his Constitutional Theory (*Verfassungslehre*) of 1928 affirmed that Weimar's German Constitution, even though it contained fundamental political decisions about the way of concrete political existence of German people, possessed in its text a number of compromises and obscurities that didn't represent any decision, but on the contrary, whose decision had been delayed. These compromises, denominated by Schmitt “dilatory formal compromises” (*dilatorischen Formelkompromiss*), fruit of partisan disputes that delayed the decision about certain themes, would only generate confusion to the interpreter. After all, for Carl Schmitt, in these mechanisms, the only will is not to have, temporarily, any will in that matter, not making it possible however to interpret an inexistent will. These “dilatory compromises” actually represent only one tactical victory obtained by a coalition of parties in a favorable moment, whose objective is to preserve its private interests against all majority parliamentary variables. The “dilatory formal compromises” would be particularly noticeable between the fundamental rights, whose guarantee would be debilitated with the subscription of social reform programs, of interest to certain political parties among the rights properly said¹⁵.

Also in the directive constitution, “programmatic norms” will be found and accused. They are a perception developed in a deeper manner by the Italian jurist Vezio Crisafulli from the debate of the execution of the Italian Constitution of 1947¹⁶. The conception of programmatic norm¹⁷ had an enormous importance in Italy when affirming that social devices of the constitution were also juridical rules and therefore could be applied by the courts in concrete cases. Crisafulli's ideas had a huge repercussion and were of great success in Brazil¹⁸. However, its practical application was disappointing, in Brazil and also in Italy. Programmatic norm came to be a synonym for a constitutional provision that has no concrete value whatsoever, contradicting the intentions of its

¹⁴ For the understanding of the 1988 Constitution as contradictory and full of programmatic norms, see FERREIRA FILHO, Manoel Gonçalves. **Direito constitucional econômico**. São Paulo: Saraiva, 1990. p. 72, 75-78, 80-83, 86, 98.; and FÁRIA, José Eduardo. **Direito e Economia na Democratização Brasileira**. São Paulo: Malheiros, 1993. p. 50-59, 91-92, 98-101, 152-155.

¹⁵ SCHMITT, Carl. **Verfassungslehre**. 8 ed. Berlin: Duncker & Humblot, 1993. p. 28-36, 128-129.

¹⁶ The classic texts that talk about the subject are “Le Norme ‘Programmatiche’ della Costituzione” In: CRISAFULLI, Vezio. **La Costituzione e le sue disposizioni di principio**. Milano: Giuffrè, 1952. p. 51-83.; and “L’Art. 21 della Costituzione e l’Equivoco delle Norme ‘Programmatiche’” In: idem, p. 99-111.

¹⁷ See Ibid. p. 53-55. See, also, SILVA, José Afonso da. **Aplicabilidade das normas constitucionais**. 3. ed. rev., ampl., atual. São Paulo: Malheiros, 1998. p. 138.

¹⁸ I should enhance, as the main published and systemizing piece of the conception of programmatic norm, SILVA, José Afonso da. **Aplicabilidade...**, 135-164. See, also, the (self) laudatory reconstruction of BARROSO, Luís Roberto. A Doutrina Brasileira da Efetividade. In: _____. **Temas de Direito Constitucional**. Tomo III. Rio de Janeiro-São Paulo: Renovar, 2005. I myself have wrongly used the conception of programmatic norm in the analysis of the 1988 Constitution, see BERCOVICI, Gilberto. A Problemática..., p. 36, 43-44.

spreaders¹⁹. The Brazilian doctrine imported Cristafulli's conception, but not its sharp critic, from few years after, to the usage of the idea of programmatic norm. As Cristafulli said, all inconvenient constitutional provisions came to be classified as "programmatic"²⁰, blocking, in practice, the effectiveness of the constitution and especially of the economical constitution and social rights.

The critic made to the directive constitution by the conservative authors corresponds, amongst other aspects, to the fact that the directive constitution "ties up" the politics, substituting the political decision process for the constitutional impositions. A greater responsibility was ascribed to the directive constitution for ungovernability²¹. The curious thing is that only the constitutional devices that are relative to public policies and social rights that "cover" politics, taking away the legislator's freedom to act. And the same critics of the directive constitution are the greater defenders of establishing policies of economic stabilization with the supremacy of the monetary budget on social expenses. With the imposition, through constitutional reform and infraconstitutional legislation, of the orthodox politics of fiscal adjustments and of economics liberalization, there was no demonstration whatsoever that they were "tying" the future governments to a one and only possible policy, without any alternatives. In other words, the directive constitution of public policies is understood as harmful to the country's interest, ultimate responsible for the economic crisis, public shortage and "ungovernability". The inverted directive constitution, or so, the directive constitution of neoliberal policies of fiscal adjustment, is seen as something positive to the country's credibility and trust joined with the international financial system. This inverted directive constitution is the real directive constitution that attaches all the Brazilian State's policies to the State custody of the capital's financial income and to the guarantee of the gathering of private wealth²².

¹⁹ See CRISAFULLI, Vezio. *La Costituzione...*, p. 101.

²⁰ Ibid. p. 105. Cristafulli's main critic to the programmatic norm is in the text "L'art. 21 della Costituzione e l'Equivoco delle Norme 'Programmatiche'" (In: Ibid, p. 99-111). This text, the third from Cristafulli's collection about the constitution and its principle devices, is strangely not analyzed the way it should have been by the Brazilian doctrine that imported the ideas from the Italian debate, bringing the conception of programmatic norm and not its critic.

²¹ See MOREIRA NETO, D. F. *Desafios Institucionais Brasileiros*. In: _____. [et. al.]. *Desafios do Século XXI*. São Paulo: Editora Pioneira, 1997.; and FERREIRA FILHO, Manoel Gonçalves. *Constituição e governabilidade: ensaio sobre a (in) governabilidade brasileira*. São Paulo: Saraiva, 1995. p. 5, 21-23, 142. See also BERCOVICI, Gilberto. *A Problemática...*, p. 39-40.; and CANOTILHO, José Joaquim Gomes. *A Constituição Europeia entre o Programa e a Norma*. In: NUNES, Antonio José Avelãs; COUTINHO, Jacinto Nelson de Miranda (Org.). *Diálogos constitucionais: Brasil/Portugal*. Rio de Janeiro: Renovar, 2004. p. 15-22.

²² This constitutionalization of pro-market liberalizing policies is denominated by Kanishka Jayasuriya, as a transition from political constitutionalism to some sort of economic constitutionalism. See JAYASURIYA, Kanishka. *Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?*. *Constitutions*, vol. 8, n. 4, 2001. About this subject, see BERCOVICI, Gilberto; MASSONETTO, L. F. *A Constituição Dirigente Invertida: A Blindagem da Constituição Financeira e a Agonia da Constituição Econômica*. *Boletim da Faculdade de Direito - Universidade de Coimbra*, Coimbra, v. XLIX, 2006.

The conservative critics can all be solved, formally, by a constitutional hermeneutics loyal to constitution²³. However, only that is not enough. To be able to resist to the critics and attempts of weakening and disfigurement of the 1988 Constitution, it is necessary to get out of the constitutional instrumentalism that the Brazilian constitutional doctrine have been thrown into by the adoption of the exaggerated uncritical of the Directive Constitutional Theory which is a Constitutional Theory that is self-centered. The Directive Constitutional Theory is self-sufficient from the constitution. Therefore, a Constitutional Theory was created so powerfully that the constitution by itself seems to solve all the problems. The constitutional instrumentalism is, in that manner, privileged: it is believed that it is possible to change society, to transform reality only with constitutional devices. Consequently, the State and politics are ignored, left aside. The Directive Constitutional Theory is a Constitutional Theory without State Theory and without politics²⁴. So, I disagree with Canotilho's vision that the Constitutional Theory's crisis comes from the sovereign State's crisis²⁵. After all, it is only through State and politics that the constitution will be effective.

This detachment of the Constitutional Theory from the State is also connected to the representativeness's crisis and to the political parties' crisis. After the Second World War, the instrument that guaranteed the State's political unit and made the popular sovereignty concrete, reducing it to its constitutional limits, was the political party. The political party was the big actor of the constitutional democracy, with the task of developing the constitution and its content. With the crisis of the political parties and their leading role in constitutional politics, the trend was, according to Italian legal historian Fioravanti, the emancipation of the political unit from the constitution, either from the constituent power or from the sovereign State. This emptiness of the political party's role would be filled by another power that will assume the function as the main actor of the debate and of the constitutional practice: the courts. The judges, and no longer

²³ About hermeneutics and juridical methodical loyal to constitution, see MÜLLER, Friedrich. **Juristische Methodik**. 7 ed. Berlin: Duncker, 1997. p. 12-13, 287-289, 327-329.

²⁴ To several authors, the main issue would have been moved, with new theoretical approaches that are relative to the State, from the State's spheres to the government's or from the so called "good governance". For a further analysis of this movement from the States to the governments, see VAN CREVELD, Martin. **The Rise and Decline of the State**. Cambridge: Cambridge University Press, 1999. About the influence of the multilateral organisms of the International Financial Institutions (specially International Monetary Funds and the World Bank) in the defense of the "good governance" see, among others, Chantal THOMAS, Chantal. Does the "Good Governance Policy" of the International Financial Institutions Privilege Markets at the Expense of Democracy?. Paper 1112. **Connecticut Journal of International Law**. New York: Cornell Law Faculty Publications, 1999. For the defense of good governance as the new central theme of constitutionalism, see CANOTILHO, José Joaquim Gomes. Constitucionalismo e Geologia da Good Governance. In: _____. **"Brancosos"...**, p. 325-334.

²⁵ CANOTILHO, José Joaquim Gomes. **Direito constitucional e teoria da constituição**. Coimbra: Almedina, 1998.

the political partisan-parliament, will arrogate themselves of the function of making the constitution concrete²⁶.

The constitutional doctrine was able to create, according to Eloy García, a technical mechanism in a mainly juridical territory. Politics was reduced to the formal vision of constituent power, and that turned over to second plan. The constitutional jurisdiction was made the warrantor of normativity's correct application, the only reference of the legitimacy of the system, sheltering itself to the doctrine of the exegesis of the constitutional court's interpretations. The supremacy of the courts over the other powers characterizes itself by the fact that the courts intend to be the "summit of the supremacy", in which they would dispose of their competence to decide in final instance, with binding character. In this manner, the constitutional court transforms itself in a substitute of the sovereign constituent power. However, with the "jurisprudential positivism", the constitutionalism continues incapable of leaving the formalist "must be" speech, with the constitutional jurisdiction, according to Pedro de Vega García, assuming the ambitious pretention of reducing and concentrating in it all the constitutional theory's problematic, abandoning essential matters such as, for example, democracy or the constituent power²⁷.

The risk of separation of the constitution regarding the State and politics with the hegemony of the constitutional courts and of a constitutional theory without any concerns with the State is the abandonment, by democratic and partisan politics, of the constitutional sphere. After all, if the constitution frees itself from politics, also politics can end up letting go by the means and tasks anticipated in the constitutional text. As Fioravanti affirms: "*Ad una costituzione libera dalla politica rischia di corrispondere una politica libera dalla costituzione*"²⁸. That is, when constitutionalizing everything, turning the constitutional court into the big actor of the constitutional text's interpretation and of its capability of being effective, the risk is that it represents, as a reaction, the constitutionalization of nothing, with the political partisan activity less and less linked, in practice, to the constitutional determinations.

²⁶ FIORAVANTI, Maurizio. **Costituzione e Popolo Sovrano**: La Costituzione Italiana nella Storia del Costituzionalismo Moderno. Bologna: Il Mulino, 1998. p. 12-20.; and FIORAVANTI, Maurizio. **Costituzione e Politica**: Bilancio di Fine Secolo. In: _____. **La Scienza del Diritto Pubblico**: Dottrine dello Stato e della Costituzione tra Otto e Novecento. 2. vol. Milano: Giuffrè, 2001. p. 878-886. To a contestation of the constitution as the center that assures the State's political unity, see ZAGREBELSKY, Gustavo. *El derecho dúctil: ley, derechos, justicia*. 3. ed. [Madrid]: Trotta, 1999. p. 9-20.

²⁷ BÖCKENFÖRDE, Ernst-Wolfgang. *Grundrechte als Grundsatznormen: Zur gegenwärtigen Lage der Grundrechtsdogmatik*. In: _____. **Staat, Verfassung, Demokratie**: Studien zur Verfassungstheorie und zum Verfassungsrecht. 2. ed. Frankfurt am Main: Suhrkamp, 1992. p. 189-191; BEAUD, Olivier. *La Puissance de l'État*. Paris: Presses Universitaires de France – PUF, 1994. p. 11-12, 307-308.; GARCÍA, Pedro de Vega. *El Tránsito del Positivismo Jurídico al Positivismo Jurisprudencial en la Doctrina Constitucional*. **Teoría y Realidad Constitucional**, n. 1, Madrid, Universidad Nacional de Educación a Distancia/Editorial Centro de Estudios Ramón Areces, jan./jun. 1998.; GARCÍA Eloy. *El Estado Constitucional Ante su "Momento Maquiavélico"*. **Editorial Cuadernos Civitas**, Madrid, 2000.; and GARCÍA, Pedro de Vega. *Mondializzazione e Diritto Costituzionale: La Crisi del Principio Democratico nel Costituzionalismo Attuale*. **Diritto Pubblico**, n. 3, Padova, CEDAM, 2001.

²⁸ FIORAVANTI, Maurizio. **Costituzione...**, p. 20.

Before this picture, what is the point of even mentioning the directive constitution? The meaning of directive constitution in Brazil is linked, in my point of view, to the conception of constitution as a project of national construction. The constitution has several meanings and functions, as it was well demonstrated by Hans Peter Schneider²⁹. Although among them, there's a certain point of view that must be highlighted, founded in Rudolf Smend, the constitution as a symbol of the national unit³⁰. Herbert Krüger overruns and understands the constitution as a national integration project³¹, which in Brazilian case, would be interesting to comprehend the idea of the constitution as a national project of development. A work's hypothesis would be of trying to understand if the States that seek to finish their national construction, such as Brazil, would end up adopting the idea of the constitution as a plan of social transformations and of State³², founded in the view of a national project of development. This hypothesis could explain the conception of directive constitution adopted by the Brazilian National Constituent Assembly of 1987-1988. And the corollary of it all would be the aspect that the Brazilian constituent crisis would be overcome with the fulfillment of the 1988 constitutional project, that would include the construction of the Nation³³.

This way, I can affirm that, while the pretention of constitutionalizing everything, and therefore, constitutionalizing nothing, the directive constitution doesn't make any sense. It ends up becoming an empty constitutional theory of politics and of the State and so, unproductive. However, it makes sense as an emancipatory project that expressively includes in the constitutional text the tasks that the Brazilian people understand as absolutely necessary for the outdoing of the underdevelopment and the conclusion of the Nation's construction and that weren't concluded. As a national project, and as a complaint of these non-accomplished wishes of the popular sovereignty in Brazil, to talk about directive constitution still makes sense.

²⁹ SCHNEIDER, Hans Peter. Die Verfassung: Aufgabe und Struktur. **Archiv des öffentlichen Rechts**, Mohr Siebeck, 1974.

³⁰ For a interpretation of the constitution as a symbol of the national unit see SCHEUNER, U; LIST, J. **Staatstheorie und Staatsrecht**: Gesammelte Schriften. Berlin: Duncker & Humblot, 1978. p. 174. Rudolf Smend defended, in the renowned Weimar's Debate, the constitution as an integrating reality, permanent and continuous. Cf. SMEND, Rudolf. **Staatsrechtliche Abhandlungen und andere Aufsätze**. Berlin: Duncker & Humblot, 1994. p. 189-196.

³¹ KRÜGER, Herbert. Die Verfassung als Programm der nationalen Integration. In: BLUMENWITZ, Dieter; RANDELZHOFFER, Albrecht. **Festschrift für Friedrich Berber zum 75. Geburtstag**. München: Beck, 1973. p. 247-249.

³² To the conception of the constitution as a plan, see the considerations of ACHTERBERG, Norbert (Die Verfassung als Sozialgestaltungsplan. In: _____ [et. al.] **in Recht und Staat im sozialen Wandel**: Festschrift für Hans Scupin zum 80. Geburtstag. Berlin: Duncker & Humblot, 1983.p. 305-315).

³³ I defended this point of view in my book's conclusion, BERCOVICI, Gilberto. **Desigualdades** p. 312-315 and in the article BERCOVICI, Gilberto. Estado, Soberania e Projeto Nacional de Desenvolvimento: Breves Indagações sobre a Constituição de 1988. **Revista Latino-Americana de Estudos Constitucionais**, Belo Horizonte, v. 1, p. 559-569, 2003.

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