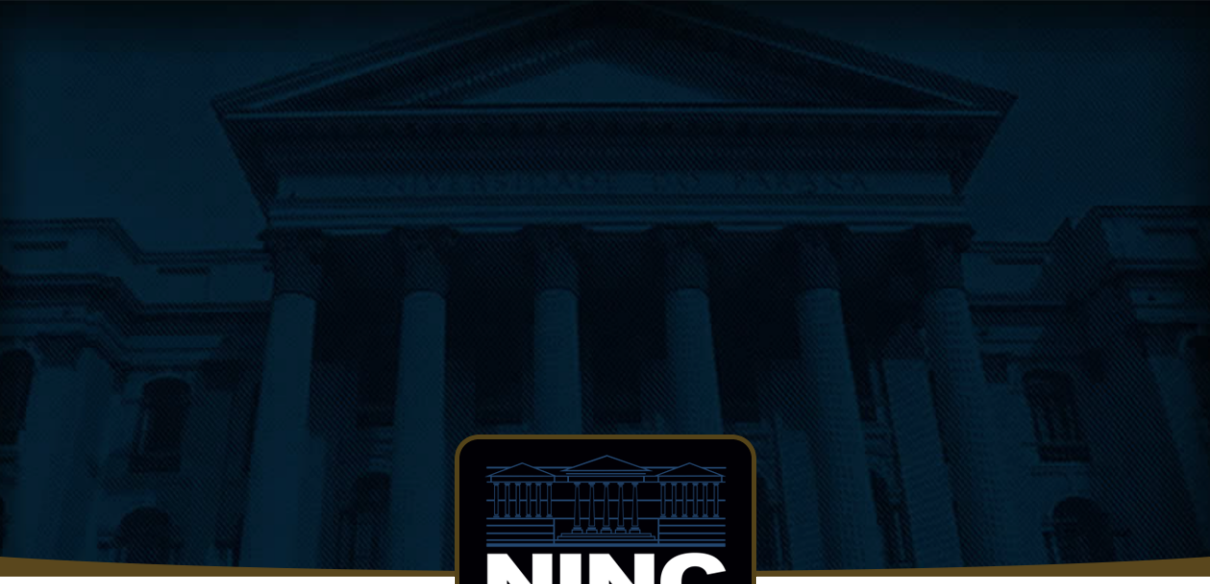

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The Role of the Judicial Branch in Brazilian Rule of Law Erosion*

O papel do Poder Judiciário na erosão do Estado de Direito brasileiro

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Abstract

The rule of law is the central milestone of modern democratic states. There is a gap, however, between what is on the constitutional texts and the lived-in world. The scholars use to concentrate their focus on the Executive Branch's role (and, sometimes, of Legislative Power) in situations of disregard of the Constitution. However, we chose to target the Judicial Branch and its decisions as contributions to the erosion of the rule of law and the production of democratic decay. We claim that the

Resumo

O Estado de Direito é o marco central dos Estados democráticos modernos. Há uma lacuna, entretanto, entre o que está nos textos constitucionais e o mundo vivido. Os estudiosos costumam concentrar seu foco no papel do Poder Executivo (e, às vezes, do Poder Legislativo) em situações de desrespeito à Constituição. No entanto, o artigo opta por focar o Poder Judiciário e suas decisões como contribuição para a erosão do Estado de Direito brasileiro e para a produção de decadência democrática. Afirma-se que o

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Judiciary started to play a crucial role in this process by assuming a populist bias and carrying out common lawfare practices – which can be well exemplified by judicial electoral decisions and the judicial decisions about Operation Car Wash. For researching the problem and discussing the hypothesis, we used the theoretical-deductive method. We carried out a literature review. We also use informative documentaries extracted from the media on the behavior of public authorities and the critical description of judicial decisions. The bibliography is interdisciplinary. We conclude that when the Judicial Branch becomes a political actor, it fosters a situation of instability and becomes an institution whose legitimacy depends on variations in the mood of society – which goes against the assumptions of democracy and the rule of law. This new judicial behavior causes an imbalance between the powers and the absence of an institution that moderates social conflicts. This situation contributed to the resurgence of the authoritarian identity of Brazilian civil society and the ideological polarization that culminated in the election of a far-right administration in 2018.

Keywords: Judicial Branch; democratic decay; lawfare; Brazilian democracy; Brazilian rule of law erosion.

Judiciário passou a ter papel fundamental nesse processo ao assumir um viés populista e realizar práticas de lawfare – o que pode ser bem exemplificado pelas decisões judiciais eleitorais e pelas decisões judiciais sobre a Operação Lava Jato. Para pesquisar o problema e discutir a hipótese, utilizou-se o método teórico-dedutivo. Foi realizada uma revisão da literatura acadêmica sobre o assunto e também em um documentário informativo extraído da mídia sobre o comportamento do poder público, além da descrição crítico-exemplificativa de decisões judiciais. O referencial bibliográfico é interdisciplinar. A conclusão assevera que, ao se tornar ator político, o Poder Judiciário fomenta uma situação de instabilidade e passa a ser uma instituição cuja legitimidade depende de variações no estado de espírito da sociedade – o que contraria os pressupostos da democracia e do Estado de Direito. Este novo comportamento judicial provoca um desequilíbrio entre os poderes e a ausência de uma instituição moderadora dos conflitos sociais. Essa situação contribuiu para o ressurgimento da identidade autoritária da sociedade civil brasileira e para a polarização ideológica que culminou com a eleição de um governo de extrema direita em 2018.

Palavras-chave: *Poder Judiciário; decadência democrática; lawfare; democracia brasileira; erosão do Estado de Direito.*

CONTENTS

1. INTRODUCTION: SHREDS OF POPULIST EVIDENCE ON BRAZILIAN JUDICIAL BRANCH

Usually seen for the constitutional theory as "the least dangerous branch",[1] the Judicial Branch in Brazil is threatening democratic constitutionalism by ignoring the constitutional text and substituting constitutional rules by personal conceptions of moral and justice. The superior courts' action rewrites the Constitution, giving more power to judges and fewer prerogatives for the elective branches, unbalancing the system. Claiming to truly represent the people's will and waiting for popular applause, justices and judges use populist grammar to justify their decisions.

[1] BICKEL, Alexander. **The least dangerous branch: The Supreme Court at the bar of politics**. New York: The Bobbs-Merrill Company, 1962.

The Superior Electoral Court establishes rules for the elections, despite the lack of normative constitutional competence. This activity undermines fundamental rights. And so it was in the invention of a hypothesis of loss of parliamentary mandate by abandoning the party for which the representative was elected.[2] In the name of a fairer and more authentic representation, "and, above all, moral reasons", the Superior Electoral Court ignored the constituent debates that expressly refused to incorporate the hypothesis in the congresspeople's constitutional statute.

In a more recent decision, using reasoning based on abstract principles and statistics, the Superior Electoral Court decided that the political parties share public money proportionally considering the candidates' race a few months before the elections. The decision brings no objective grounds for dividing the fund, and it postponed the new made-up obligation to 2022.[3] However, the Supreme Federal Court, decided, after the parties' resolutions about the fund division, that structural racism demands an urgent answer, creating a rule over the constitutional autonomy of political parties and the Political Parties Act.[4]

The fundamental rights were also the object of the judicial populist approach. Claiming the urge for ethics in politics and an obscure fundamental right of the society to be protected from bad candidates, the Electoral Court decided to immediately apply the Clean Record Law, disrespecting the constitutional principle of electoral anteriority and the non-retroactivity of fundamental rights restrictions.[5] That does not mean that judges always act contrary to fundamental rights. In Brazil, the first two decades of the 20th century demonstrate a very significant advance in some rights of vulnerable groups (such as the LGBTQIA+ population) through the Judiciary. However, the issue resides precisely in the absence of a rational criterion that determines which rights will be preserved and which will not be. To some extent, giving themselves the power to decide about these rights is a way of manifestation of the populist phenomenon. A phenomenon that is not only Brazilian and that affects both domestic and international law.[6] But in Brazil, the examples of dysfunctional performance by Public Authorities have been very eloquent. And the Judicial Branch cannot be immune to a critical approach.

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2 BRASIL. Tribunal Superior Eleitoral. **Consulta n. 1398**. Relator Ministro Cesar Asfor Rocha. Decisão em 27 de março de 2007. BRASIL. Tribunal Superior Eleitoral. **Resolução n. 22610/2007**. Relator Ministro Cezar Peluso. Decisão em 25 de outubro de 2007.

3 BRASIL. Tribunal Superior Eleitoral. **Consulta n. 060030647**. Relator Ministro Luiz Roberto Barroso. Decisão em 25 de agosto de 2020.

4 BRASIL. Supremo Tribunal Federal. **Medida Cautelar na Ação de Descumprimento de Preceito Fundamental n. 738**. Relator Ministro Ricardo Lewandowski. Decisão em 05 de outubro de 2020.

5 BRASIL. Tribunal Superior Eleitoral. **Agravo Regimental no Recurso Ordinário n. 906-78.2010.6.02.0000**. Relator Ministro Hamilton Carvalhido. Decisão em 25 de agosto de 2020.

6 LIXINSKI, Lucas; MOROSINI, Fabio. Populism and International Law: Global South Perspectives. **Revista de Direito Internacional**, Brasília, v. 17, n. 2, p. 55-65, 2020.

From the Brazilian Supreme Federal Court, the collection of dysfunctions is startling. The Clean Record Law, which establishes restrictions on the right to run for elections disproportionately and unreasonably, was upheld by the Federal Supreme Court. The justification was that the Law "(i) meets the moralizing purposes for which it is intended; (ii) establishes qualified requirements for ineligibility and (iii) impose sacrifice on the individual freedom to run for public office that does not exceed the socially desired benefits in terms of morality and probity for the exercise of said public munus". In other words, in search of applause from society, fundamental rights are helpless.[7]

Against the constitutional rule of innocence presumption, the Justices presented arguments on criminal public policies and questionable data against the constitutional guarantee. With no legal argumental, no constitutional basis, some Justices decided to narrow the constitutional protection in the name of the sense of justice.[8] It is interesting, however, to emphasize that this decision was not unanimous. Part of the Justices was against the result. However, this does not mean that it is possible to identify a part of the Court that is more attached and another part less attached to constitutional provisions. Depending on the political convenience, the same justices who protected the Constitution in a case can oppose it without embarrassment.

For example, the Supreme Federal Court discussed the possibility of renewing the directive tables of the National Congress's legislative houses (ADI 6524). The constitutional text is crystal clear when prohibiting this possibility: "Each of the Houses will meet in preparatory sessions, from February 1, in the first year of the legislature, for the investiture of its members and election of the respective Tables, for a mandate of 2 (two) years, with no possibility of re-election to the same post in the immediately subsequent election" (art. 57, 4). Nevertheless, the Court was one vote away from allowing re-election when the constitutional text prevailed. In this case, the group of justices who wanted to impose an interpretation entirely outside the text was the same one that defended the text in the previous case. The group that wanted to give a restrictive interpretation of the text, in this case, was the same group that wanted an extensive interpretation in the previous case. In both cases, the motivations of the justices were evidently political and not legal oriented.

Another example, from an extensive list, is the destruction of the representatives' constitutional prerogatives. The 1988 Constitution forbids the arrest of congresspeople unless in some limited cases. In the name of morality and the people's will, the majority

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7 BRASIL. Supremo Tribunal Federal. **Ação Declaratória de Constitucionalidade n. 29**. Relator Ministro Luiz Fux. Decisão em 16 de fevereiro de 2012.

8 BRASIL. Supremo Tribunal Federal. **Habeas Corpus n. 126292**. Relator Ministro Teori Zavascki. Decisão em 17 de fevereiro de 2016.

of the Supreme Federal Court's Justices sent to prison a Senator[9] and the House of Representatives' Chair.[10] In such cases, the decisions recognized that the Constitution does not allow such measures, but it is argued that exceptional situations would require exceptional measures. In other words, it would be up to the judges to decide outside the Constitution if the Constitution does not provide them with a morally acceptable answer to the question.

The Judicial Branch also is the stage for lawfare battles. One of the most shocking examples is the removal of Jackson Lago, elected governor of Maranhão. The Superior Electoral Court invalidated the majority of the electorate's choice based on a legal provision that in a subsequent decision was considered incompatible with the Constitution of 1988.[11] There was no majority recognition of any illicit fact on the campaign.[12]

At the Supreme Federal Court, a judicial decision seems to trigger the impeachment process against Dilma Rousseff. Dilma appointed former President Lula, the defendant in a criminal action linked to Operation Lava Jato (Operation Car Wash), [13] as his Chief Minister of the Civil House (a position similar to the U.S. Secretary of State). Alleging purpose deviation, a political party filed a lawsuit in the Federal Supreme Court. Despite the absence of specific Constitution requirements, a minister individually granted an injunction and prevented Lula from taking over.[14] When the vice president assumed the presidency due to the impeachment, he named for the same position a politician who was also a defendant in a criminal action. A political party filed a lawsuit before the Federal Supreme Court. Another rapporteur was selected by lot, who kept the appointment in the face of the impossibility of assuming purpose deviation.[15]

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9 BRASIL. Supremo Tribunal Federal. **Ação Cautelar n. 4039**. Relator Ministro Teori Zavascki. Decisão em 24 de novembro de 2015.

10 BRASIL. Supremo Tribunal Federal. **Ação Cautelar n. 4070**. Relator Ministro Teori Zavascki. Decisão em 24 de novembro de 2015.

11 BRASIL. Tribunal Superior Eleitoral. **Recurso contra a Expedição de Diploma n. 671**. Relator Ministro Eros Grau. Decisão em 03 de março de 2009.

12 SALGADO, Eneida Desiree; SOBREIRA, Renan Guedes. A democracia no tapetão: a Justiça Eleitoral contra a soberania popular. In: MORAES. F, Salgado, Eneida Desiree; AIETA, Vânia S. (Org.). **Justiça Eleitoral, controle das eleições e soberania popular**. Curitiba, Ithala, p. 115-153, 2016.

13 Operation Car Wash (Lava Jato) is a famous operation against corruption in Brazil, led by former judge Sergio Moro. Moro relies on the support of a significant part of the population but has been accused of being biased and of not following basic principles of Brazilian due legal process. For more details, check CASTRO, Matheus Felipe de. O martelo Moro: a "Operação Lava Jato" e o surgimento dos juízes partisans no Brasil. **Revista Brasileira de Ciências Criminais**, São Paulo, v. 25, n. 136, p. 293-319, 2017 and GABARDO, Emerson; LAZZAROTTO, Gabriel Strapasson; WATZKO, Nicholas Andrey Monteiro. Ética pública e parcialidade no combate à corrupção: o caso The Intercept Brasil vs. Operação Lava Jato. **International Journal of Digital Law**, Belo Horizonte, ano 2, n. 1, p. 151-198, jan./abr. 2021.

14 BRASIL. Supremo Tribunal Federal. **Medida Cautelar em Mandado de Segurança nº 34.070**. Ministro Gilmar Mendes. Decisão em 18 de março de 2016.

15 BRASIL. Supremo Tribunal Federal. **Medida Cautelar em Mandado de Segurança nº 34.609**. Ministro Celso de Mello. Decisão de 14 de fevereiro de 2017.

Judicial decisions based on moral arguments and appeals to exceptionality built obstacles to ex-president Lula's candidacy in the 2018 election. The same judge who irregularly publicized the tapped conversations between President Dilma and the former President, later ordered Lula's arrest. The first case was analyzed by the Federal Regional Court of the 4th Region, which considered an exceptional situation, requiring exceptional measures.[16] The pace of decisions about the ex-president was very peculiar, going hand in hand with the electoral schedule.[17] The ex-president has his candidacy denied by the Superior Electoral Court,[18] contrary to previous decisions that allowed candidates to participate in the election even with a judicial discussion about his eligibility. The judge who illegally publicized the conversation and ordered Lula to be arrested leaves the magistracy and becomes the Minister of Justice of the victorious government in an election where debatable judicial decisions removed the front runner from the dispute.

The self-image of the Federal Supreme Court is very peculiar. In analyzing the Court decisions in 2016, one of the Justices and two co-authors use the "cherry-picking" method. While one paragraph is dedicated to the controversial individual resolution on the former President Lula appointment – that was the very beginning of the crisis, the Federal Supreme Court's role in discussing the impeachment proceeding is celebrated as an example of self-restraint. Ironically, the analysis also cherishes the decision on the Lower House Speaker's suspension and the alteration of the line of presidential succession – both clearly against constitutional commands.[19] In other words: the Federal Supreme Court should be applauded when it practices self-restraining and when it does not, depending on a subjective analysis of when it is necessary to intervene in politics and when it is not. The effects are almost irrelevant to the alleged self-criticism.

And more: Brazilian superior courts systematically authorized the development of Operation Lava Jato, which carried out several arrests for corruption between 2014 and 2018, including that of former President Lula. Even having knowledge of the numerous abusive acts of the Operation, the STF – Federal Supreme Court did not impede the actions of judges and prosecutors. On the contrary, it systematically endorsed the Lava Jato's acts of lawfare, not recognizing the insults to the due process of law.

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16 BRASIL. Tribunal Regional Federal da 4ª Região. P.A. **Corte Especial nº 003021- 32.2016.4.04.8000/RS**. Voto do Relator Des. Federal Rômulo Pizzolatti. Decisão de 22 de setembro de 2016.

17 ANDRADE, Marcelo Santiago de Padua. Lula e lawfare política: o caso do processo penal com dupla velocidade. In: ARAGÃO, Eugênio José Guilherme de; ARAÚJO, Gabriela S. Soares de; SIQUEIRA NETO, José Francisco; RAMOS FILHO, Wilson (Coords.). **Vontade popular e democracia: candidatura Lula?** Bauru: Canal 6 Editora, p. 206-213, 2018.

18 BRASIL. Tribunal Superior Eleitoral. **Registro de candidatura n. 060090350**. Relator Ministro Luís Roberto Barroso. Decisão em 01 de setembro de 2018.

19 BARROSO, Luís Roberto; BENVINDO, Juliano Zaiden; OSORIO, Aline. Developments in Brazilian constitutional law: The year 2016 in review. **International Journal of Constitutional Law**. v. 15 n. 2, 495-505, 2017.

However, after the 2018 election and the rise of Jair Bolsonaro to the presidency of the Republic, the attitude has changed. The president's evidently authoritarian posture, and his attacks against the Judiciary, impacted the view of the Supreme Court Justices. As a result, the STF determined the complete annulment of the proceedings against former president Lula (based on procedural nullity due to an offense to due legal process – with the recognition of the suspicion of the responsible magistrate). The Supreme Court had been pragmatically lenient with Operation Lava Jato for years and then brought about its extinction. This unstable posture directly attacks the foundations of the rule of law. Furthermore, it represents an exceptional situation currently experienced, in which the Judiciary Branch changes its positions based on the political situation of the moment, on previous ideological conceptions, or on its moralistic view of reality.

Whether in the firm performance of Lava Jato (in disregard of due legal process), or in the unconstant actions of the Federal Supreme Court (allowing all irregularities for years to finally say that everything was irregular), the fact is that the Judiciary has become a relevant political actor on the national stage. Initially, there was a consensus that judicial activism in favor of fundamental rights was emerging. So, almost the entire legal community defended this posture (called neoconstitutional or post-positivist approach). However, the phenomenon gave rise to uncontrolled activism, inserted in a complex political and social context that gave rise to lawfare practices, democratic decay, and erosion of the rule of law. After a period of solid advances in democracy and fundamental rights, the authoritarian and elitist tradition in Brazil has radically returned – paradoxically, the backlash occurred with the participation of the Judiciary at the center of this authoritarian phenomenon of the rise of the far-right. This is the central issue that we will address in the article

For researching the problem and discussing the hypotheses, we apply the theoretical-deductive method. We use an interdisciplinary bibliographic reference that we consider relevant to the theme. The sources that give rise to the arguments are from the specialized literature and the Brazilian reality's subjective analysis. We did not present empirical data: our object is the ideas, practices, and representations about the subject verifiable from observing institutional and social phenomena, actions, and situations.

2. THE BRAZILIAN CONTEXT: EXCEPTION, LAWFARE, AND DEMOCRATIC DECAY

Modern politics demands the rule of law. And the idea of the rule of law requires some premises. Its "horizon of meaning" is based on three cardinal points: political power (sovereignty, the State), law (objective right, norms), and individuals (citizenry,

legitimacy).[20] As Martin Krygier emphasizes, the rule of law is not just a matter of "legal effectiveness" or "legal provisions".[21] It is a set of values that can be institutionalized in different ways. Law, produced by political power, serves as a barrier to the political power that threatens individuals – this is the somewhat peculiar logic of the notion of rule of law. Add the adjective "democratic," and the promise becomes more strenuous: The law produced by the power must be created with citizens' consent to guarantee individuals against the abuse of power. And more: It must be applied as the law establishes, respecting its procedure and substance, by elected officials democratically legitimized, directly or indirectly.

The constitutional and democratic Brazilian rule of law logic entails a series of institutional mechanisms to make it work. First of all, the supremacy of the public interest over the private is the ultimate principle of Public Administration. Although there are authors denying this principle's existence, they represent the minority literature, as has been well explained by Daniel Wunder Hachem.[22] Furthermore, some general characteristics surrounding the concept usually used in French, German and Anglo-American doctrine can be highlighted: the system of separation of powers, the checks and balances tools, and mutual controls are an essential part of its engineering, as well as instruments of transparency, participation, and control – horizontal and vertical accountability. Another indispensable component of this modern model of State is a bill of fundamental rights, liberty guarantees, and the counter majority power of minorities in the face of the decisions of the majority.[23] In the Brazilian case, it would also be possible to highlight the refusal of subsidiarity as a determinant of state power ends, as well as the central role of the Union (of the Federation) in the constitutional model realization.[24] These characteristics can be understood as the Brazilian constitutional "identity".[25]

In general, the Constitutions impose respect for fundamental rights on the part of public agents (all of them: parliamentarians, administrators, bureaucrats, members of the security forces, members of the Public Prosecutor's Office, judges). Given the horizontal effect of fundamental rights, it is even possible to affirm that individuals must

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20 COSTA, Pietro. The Rule of Law: a historical introduction. In: COSTA, Pietro, ZOLO Danilo (Coords.). **The Rule of Law: history, theory and criticism.** Dordrecht: Springer, 2007.

21 KRYGIER, Martin. False Dichotomies, True Perplexities, and the Rule of Law. In: SAJO A. (Ed.). **Universalism and Local Knowledge in Human Rights**, Kluwer, 2003.

22 HACHEM, Daniel Wunder. O Estado moderno, a construção cientificista do Direito e o princípio da legalidade no constitucionalismo liberal oitocentista. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, v. 11, n. 46, p. 199-219, 2011.

23 HALPERN, Philip. The Rule of Law. **New York State Bar Journal**. v. 33, n. 4, p. 256-260, 1961. p. 257.

24 GABARDO, Emerson. Estado Social e Estado Subsidiário: dois modelos distintos de desenvolvimento. **Revista de Direito Administrativo e Infraestrutura**. Belo Horizonte, v. 11, n. 3, p. 283-299, 2019.

25 Borrowing a concept that was used by Poland's Constitutional Court in 2010 when establishing the basic values that would portray the republic's identity). WYRZYKOWSKI, Miroslaw. Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland. **Hague Journal on the Rule of Law**, v. 11, p. 417-422. 2019.

respect fundamental rights in private relations. The constitutional guarantees of the individual against power must inform the drafting of the law, its application, its interpretation, and its adjudication.[26]

All of this is indisputable at the normative level. In the world of what "ought to be", the centrality of fundamental rights in a democracy is undeniable. However, internal and external enemies always jeopardize democracy and fundamental freedoms, and the struggle for their observance and implementation must be constant. In turn, this reality's impact on the traditional concept of the rule of law enshrined in the Brazilian Constitution of 1988 is evident.

Tzvetan Todorov describes the "intimate enemies of democracy." For the author, the constitutive elements of democracy are the people, freedom, and progress. The imbalance between the components transforms the dominant factor into an enemy of democracy, such as populism, ultraliberalism, and messianism. For him, morality and justice at the service of the politics of states damage both morality and justice: politics make them simple instruments in the hands of the powerful.[27] From another perspective, the Brazilian case can also be analyzed from the concept of democratic decay, as Tom Daly described. In other words, Brazil is experiencing a process of "incremental degradation of the structures and substance of liberal constitutional democracy".[28] In the present study, the object is not research on the erosion process of the traditional rule of law image. However, the recognition of democratic decay or the existence of enemies to the democratic system is a factor linked to the erosion of the rule of law, and several of the analyzes referring to one of the phenomena can be applied to the other.

Considering the facts experienced at the beginning of the 21st century, we consider essential the analysis of the contribution of institutions to the erosion of the rule of law and the construction of a social imaginary of exception. This social imaginary of exception means the advent of normalization of practices antagonistic to the rule of law model enshrined in the 1988 Constitution and until then recognized by the traditional mentality. The advent of this imaginary can be recognized from the analysis of several factors and elements. The most common analyzes focus on the behavior of the Executive Branch (sometimes in the legislative) – or even of society in general.

In the Brazilian case, of course, it would be possible to identify the historical influence of authoritarianism in all these fields of analysis. It is impossible not to refer to this complex phenomenon that is absolutely interconnected: the connection between

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[26] GOMES, Magno Federeci; FREITAS, Frederico Oliveira. Conexão entre a dignidade da pessoa humana e os direitos fundamentais. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, v. 10, n. 41, p. 181-207, jul.-set. 2010.

[27] TODOROV, Tzevtan. **The Inner Enemies of Democracy**. Tradução de Joana Angélica d'Avila Melo. Malden: Polity Press, 2014.

[28] DALY, Tom. Understanding Multi-Directional Democratic Decay: Lessons from the Rise of Bolsonaro in Brazil. **Law and Ethics on Human Rights**, v. 14, n. 2, p. 199-226, 2020. p. 3.

the behavior of the Branches of the State and civil society as an inseparable whole. However, we will analyze this reality based on the behavior of the Judiciary Branch. It is an original object, considering the majority of papers on the subject. As Tom Daly expounds, an excessive focus on the Executive Branch can lead to a less comprehensive analysis of the general process of democratic decay.[29] From another perspective, as Juliano Zaiden explains, "if it is possible to draw a normativity of the discourse justifying authoritarianism, Brazil serves as an important paradigm due to the way in which law – and the concepts that derive from it – were strategically biased to defend, in the dictatorship, the democratic varnish."[30] The new judicial rhetoric, founded on a change in the understanding of the concept of the rule of law, has a similar purpose to some extent, that is, to legitimize practices contrary to the current constitutional regime, maintaining the appearance of the regularity of its new behavior.

Considering this described research object, in Brazil's case, we hypothesize that the Judiciary played a crucial role in this process by assuming an authoritarian populist bias and carrying out a new kind of lawfare practices.[31] Judicial populism shares some characteristics with the political branches postures: it challenges the legitimacy of established powers, it claims to represent the *vox populi*,[32] it uses constitutional mutation to consolidate the power in the hands of Justices,[33] and to undercut the checks and balances system.[34] As their political fellows, the judicial populists do not deny political representation: they claim to be the true representatives.[35] In judicial populist decisions, there is less concern about the legal reasoning and the respect for the Constitution and more references to the "will of people".

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[29] DALY, Tom. Populism, Public Law, and Democratic Decay in Brazil: Understanding the Rise of Jair Bolsonaro. 11 mar. 2019. **14th International Human Rights Researchers' Workshop: 'Democratic Backsliding and Human Rights'**, organised by the Law and Ethics of Human Rights (LEHR) journal, 2-3 Jan. Disponível em: https://ssrn.com/abstract=3350098 Acesso em: 20 mai. 2020.

[30] Translation of the original text in Portuguese: "se é possível desenhar uma normatividade do discurso justificador do autoritarismo, o Brasil serve como um importante paradigma em razão do modo como o direito – e os conceitos que dele derivam – foram estrategicamente enviesados para defender, na ditadura, o verniz democrático." CARVALHO, Ângelo Gamba Prata; BENVINDO, Juliano Zaiden. Os "imperativos da revolução de março" e a fundamentação da ditadura. **Revista Direito & Práxis**. Rio de Janeiro, v. 9, n. 1, p. 113-145, 2018. p. 115.

[31] SALGADO, Eneida Desiree. Populismo judicial, moralismo e o desprezo à Constituição: a democracia entre velhos e novos inimigos. **Revista Brasileira de Estudos Políticos**, Belo Horizonte, v. 117, n. p. 193-217, 2018.

[32] NORRIS, Pippa. Is Western democracy backsliding? Diagnosing the risks. **Journal of Democracy**. v. 28, n. 2, 2017.

[33] LANDAU, David. Populist Constitutions. FSU College of Law, Public Law Research Paper n. 861, **University of Chicago Law Review**. n. 521, 2018. Disponível em: SSRN: https://ssrn.com/abstract=3053513 Acesso em: 12 out. 2020.

[34] NORRIS, Pippa. Is Western democracy backsliding? Diagnosing the risks. **Journal of Democracy**. v. 28, n. 2, 2017.

[35] MÜLLER, Jean-Werner. **What is populism?** Philadelphia: University of Pennsylvania Press, 2016.

At the level of International Law (or Law of War) Lawfare is a practice "that erodes the good faith application of the laws and customs of warfare is illegitimate and untenable", as Michael A. Newton explains.[36] However, adapting the concept to the "war against corruption", waged in national states' internal space, the idea takes on a peculiar feature. It is a strategy that uses traditional legal concepts and institutes (lawfully or illicitly, constitutionally or unconstitutionally) for a fight against opponents (ideological or political). Of course, this behavior is contrary to the traditional concept of the rule of law developed in European tradition and accepted by the current Brazilian Constitution – founded on the due legal process, separation of powers, and objectivity in applying the law.

The current Brazilian political situation has opened a window of opportunity for an exacerbated strengthening of judicial moralist activism,[37] culminating in a populist Judiciary that acts through lawfare. In general, it is customary to find the populism of charismatic leaders within the Executive, not in other branches. That occurs significantly in Latin America, although there are different approaches to the subject.[38] For this reason, it becomes interesting to reflect on whether a populist judiciary is possible. In turn, lawfare practices imply the use of law as a political weapon against opponents. In other words, the judges, who should be neutral and objectively use the law, start to create war strategies that promote an ideological approach of the due legal process.[39]

In the present Brazilian context, it seems possible to point out multiple enemies for democracy. The simulacrum of the rule of law now performs institutional ruptures. The "situation of exception" once again seems to return, but now it is not with a formal *coup d'état,* and it also comes from the Brazilian Judicial branch and not against it. This novelty requires even greater caution in dealing with the issue. The contrast with the traditional concept of the rule of law is evident on the one hand; on the other hand, not so much. The elements for analyzing the phenomenon are complex and require an eclectic approach.

After the 1988 Constitution, the Brazilian Judiciary gradually assumed an increasingly prominent role. In particular, after the first decade of 2000, there was an increase in its activist function, advancing more and more on the political activity of the other branches of the Republic. In Brazil, prevailed the idea of a living constitution, typical of

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36 NEWTON, Michael A. Illustrating Illegitimate Lawfare, Case Western. **Reserve Journal of International Law.** v. 43, n. 1 e 2, p. 255-278, 2010. p. 255.

37 GABARDO, Emerson. Os perigos do moralismo político e a necessidade de defesa do direito posto na Constituição da República de 1988. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, v. 17, n. 70, p. 65-91, 2017.

38 NYENHUIS, Robert. Populism in South America: Democratic Panacea or Pitfall? **American Journal of Economics and Sociology**. v. 78 n. 3, Mai. 2019.

39 ZANIN, Cristiano; MARTINS, Valeska Teixeira; VALIM, Rafael. **Lawfare: uma introdução**. São Paulo: Contracorrente, 2019.

organicists, who affirm that it is necessary to interpret the Constitution according to its time (values, meanings, intentions) as a form of "social power" to normalize life. This is a prevalent view in contemporary constitutionalism. However, in practice, this idea has been taken to a level of exercise of power never before imagined. Oscar Vilhena Vieira called the Federal Supreme Court's expansion of importance "supremocracy" – a phenomenon in which the Court began to exercise not only the power to interpret the Constitution but also to create rules, traditionally something exclusive to the other two State branches.[40] Currently, it is possible to identify an even more significant advance, in which the Judiciary aims to be, on the one hand, a direct representative of the people and, on the other, an enlightened elite with the power to propel history.[41] This is a trouble to the Brazilian rule of law.

However, it is not permissible for the Supreme Court Justices to feel at ease to "push history" or to present itself as the "enlightened vanguard." Judicial activism beyond constitutional boundaries based on extra-legal arguments harms the institutional state functions. Judicial messianism beyond constitutional boundaries based on extra-legal arguments harms the institutional state functions. As Tom Daly suggests, this kind of populism can demonstrate the Brazilian democratic decay process.[42] This different role of the Judiciary is new and problematic. Besides, it is a crucial component in the Brazilian institutional reconfiguration. Even without significant institutional formal changes since 1988, Brazilian judges' performance in the last twenty years has significantly changed the traditional checks and balances system. In the previous years, we can see this phenomenon's apogee and the consequent growing of criticism about it.

3. RULE OF LAW EROSION AND THE BRAZILIAN JUDICIARY

The rule of law characterizes the self-image of Western civilization. It is part of the identity of modern society since it has constituted the subject as a citizen. However, its meaning is uncertain and controversial, as it depends on different variables for its understanding. If, on the one hand, the concept of the rule of law has never been so prominent, on the other hand, this does not mean that the idea really has the same meaning at any time and place. As Martin Krygier says, no one can dictate a single

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40 VIEIRA, Oscar Vilhena. Supremocracia. **Revista Direito GV**. São Paulo, v. 4, n. 2, p. 441-464, 2008.

41 The defense of the Judiciary's role as an enlightenment vanguard is expressly carried out by Supreme Court Justice Luís Roberto Barroso. BARROSO, Luís Roberto. Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies. **The American Journal of Comparative Law**. v. 67, n. 1, p. 109-143, 2019.

42 DALY, Tom. Populism, Public Law, and Democratic Decay in Brazil: Understanding the Rise of Jair Bolsonaro. 11 mar. 2019. **14th International Human Rights Researchers' Workshop: 'Democratic Backsliding and Human Rights'**, organised by the Law and Ethics of Human Rights (LEHR) journal, 2-3 Jan. Disponível em: https://ssrn.com/abstract=3350098 Acesso em: 20 mai. 2020.

concept of the rule of law: "it is too late for that."[43] To start, the most common "dichotomy" is between the English tradition of Rule of Law and German Rechtsstaat.

Rechtsstaat is a concept that connects the state political system to the legal system as dissociated elements. At the same time, the rule of law is a theory constituted within the legal order inseparable from the idea of the State. But the fact is that the two concepts have similar answers to the same questions and over time they have come to understand the same core of meaning. It remains crucial, however, not to mistake "legal theory" (which is in the realm of the ideas) with "legal reality" (which is in the domain of practices and social representations).[44] In this regard, positivists like Hans Kelsen and Herbert Hart played a crucial role in constructing the contemporary concept of the rule of law, as Nicolas Barber explains.[45]

In the view of the history of ideas in Europe, the origin of the rule of law and Rechtsstaat concept stems from an environment of resistance to oppression and formation of a right to oppose power – which emerged in the 18th century from a liberal and anti-absolutist mentality that predicates the enlightenment.[46] However, the concept was not due to the French Revolution. The expression, as is common knowledge, came from Germany. Its core was the opposition to the "state of police". Moreover, the additional guarantees of private property and legal security expansion were vital to the new concept.[47] An ideal whose objective is to control power culminates in the 19th-century legal positivism of the Pandectists.[48] Indeed, the typical legality ideal of liberal constitutionalism of the 1800s, despite being considered timid and insufficient nowadays, portrays a crucial pillar for the future development of the contemporary political-legal system.[49]

Parallel to the continental-European construction of the rule of law concept, it's relevant to highlight England's tradition (that also influenced the western imaginary regarding the rule of law). British puritans such as John Locke and Johannes Althusius described the political characteristics of a proper system of "checks and balances":

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43 KRYGIER, Martin. The Rule of Law: Pasts, Presents, and Two Possible Futures. **Annual Review of Law and Social Science**, v. 12, n. p. 199-229, 2016.

44 CICHELERO, César Augusto; FERRI, Caroline; NUNES, Eduardo Brandão. From an idealized separation of powers to its practical problems in the Rule of Law. **Revista de Investigações Constitucionais**. v. 5, n. 1, p. 15-40, 2018.

45 BARBER, Nicolas W. Review: The Rechtsstaat and the rule of law. **The University of Toronto Law Journal**, v. 53, n. 4, p. 443-454, out. 2003.

46 VENTURI, Francesco. **Utopia e reforma no iluminismo**. Bauru: EDUSC, 2003.

47 GOYARD-FABRE, Simone. **Os princípios filosóficos do direito politico moderno**. Tradução de Tradução de Irene A. Paternot. São Paulo: Martins Fontes, 1999. p. 311.

48 GROSSI, Paolo. **Mitologias jurídicas da modernidade**. Tradução de Arno Dal Ri Júnior. Florianópolis: Boiteux, 2004.

49 HACHEM, Daniel Wunder. O Estado moderno, a construção cientificista do Direito e o princípio da legalidade no constitucionalismo liberal oitocentista. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, v. 11, n. 46, p. 199-219, 2011.

Primacy of law (especially for public administration), separation of the powers, recognition of the state as a legal entity, rights, and fundamental guarantees as supreme norms. These ideas consolidated upon a "due legal process" stemming from the *Bill of Rights* established by the Glorious Revolution.[50] Danilo Zolo explains that rule of law constituted itself as a legal pragmatism of a subjective rights authority in which the judge is many times more important than a legislator. Due to this tradition, essential guarantees such as the *habeas corpus* and the *writ of mandamus* emerged and became essential.[51]

The rule of law doctrine was received late in France, especially with Carré de Malberg, who was a critic of the French tradition of distrust of judges (opposition to the so-called "government des juges"). He sought to enlighten the fairly common confusion regarding "state interest", which was considered a political matter, and "state limitation", considered a legal matter. He elaborated on the distinction between the "État *de droit*" and the "État *légal*" (or legal state) from the German notion of *Rechtsstaat* and the U.S. notion of rule of law.[52] The legal state was related to a formal view of the legal system, contemplating the demand for a strong guarantee of the principle of the separation of the powers and legal certainty. The *État de droit*, in contrast, implied a guarantee of law enforcement upon politicians and public authorities, in addition to indicating the construction of a predictable and secure system based on formal procedures.

As Danilo Zolo maintains, the diversity of the rule of law concept loses importance when the idea's philosophical values and principles are in focus.[53] The notion of legality, for example, is an element present in different traditions and which definitely influenced the Brazilian tradition. For this reason, it would be possible to unify the historical experiences within a coherent theoretical framework, thus become plausible to understand the "rule of law" with the same conceptual identity. The idea of "*Estado de Direito*" that was developed in Brazil is an amalgamation of all these aspects, which can be combined in the same theoretical framework.[54] In the 20th century, the rule of law consolidated notion became one of the most essential political symbolic representations to Western capitalist society. Through this notion, it was possible to create the characteristic way of life of the 21st century. That was based on the valorization of life,

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50 MAGALHÃES FILHO, Glauco Barreira. **O imaginário protestante e o Estado de Direito**. Fortaleza, 246f. Thesis (Phd in Sociology). Universidade Federal do Ceará, 2010.

51 ZOLO, Danilo. The Rule of Law: a critical reappraisal In: COSTA, Pietro; ZOLO, Danilo (Coords.). **The Rule of Law: history, theory and criticism.** Dordrecht: Springer, 2007. p. 15.

52 ZOLO, Danilo. The Rule of Law: a critical reappraisal In: COSTA, Pietro; ZOLO, Danilo (Coords.). **The Rule of Law: history, theory and criticism.** Dordrecht: Springer, 2007.

53 ZOLO, Danilo. The Rule of Law: a critical reappraisal In: COSTA, Pietro; ZOLO, Danilo (Coords.). **The Rule of Law: history, theory and criticism.** Dordrecht: Springer, 2007. p. 19.

54 CADERMATORI, Sérgio. **Estado de direito e legitimidade – uma abordagem garantista**. 2. ed. Campinas: Millennium, 2007 and BONAVIDES, Paulo. **Do Estado Liberal ao Estado Social**. 6. ed. São Paulo, Malheiros, 1996.

equality, dignity, and happiness of the people as a criterion of State legitimacy and efficiency.[55] Notwithstanding and beyond only law, the modern State also became a Social and necessarily democratic order.[56] Brazil received this inspiration and consolidated it legally in the 1988 Constitution.

However, the historical process of receiving the traditional concept of the rule of law was not linear or straightforward. In Brazil, the general idea of the rule of law has been present since the days of the monarchy or even before, with the Portuguese royal family's arrival in 1808.[57] There was already an intellectual aristocracy responsible for bringing new political ideas from Europe, such as liberalism, parlamentarism, federalism, constitutionalism, democratic and republican theories. All of them influenced Brazil since its first Constitution in 1824, which inevitably means that these ideas were also constitutive of a new political culture.[58] Even after the change to the republican regime, fundamental characteristics of the rule of law in Brazil (such as submission to the law, separation of the powers, and the guarantee of fundamental rights) were consolidated only in the realm of ideas. However, society lived in an uncertain environment where the effective law was that of local power, people did not have access to the institutions, and the separation of the powers was unstable (Leal 1997).

The equality of rights was formal rhetoric contrasted by a stratified and highly personalist society. Additionally, Brazilian personalism tends to be stronger than any other perspective of republican humanism characteristic of the rule of law. The individual autonomy, the patronage, the typical Latin American clientelism,[59] the difficulty of voluntary associations aside from periods of crisis, and the almost impossible construction of bonds without the presence of authority are the effective characteristics of this historical reality.

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55 HACHEM, Daniel Wunder; GABARDO, Emerson. El principio constitucional de eficiencia administrativa: contenido normativo y consecuencias jurídicas de su violación. Cuestiones Constitucionales. **Revista Mexicana de Derecho Constitucional**. v. 39, p. 131-167, 2018.

56 RODRÍGUEZ-ARANA, Jaime. Dimensiones del Estado Social y derechos fundamentales sociales. **Revista de Investigações Constitucionais**, Curitiba, v. 2, n. 2, p. 31-62, 2015.

57 The arrival of the royal family was the result of the war between England and France in the early 19th century. Portugal, which was an ally of England, refused to obey the "Continental Blockade" determined by Napoleon Bonaparte. Afraid of the French reaction, King D. João VI decided to transfer his entire court to Brazil. Thus, Rio de Janeiro became the capital of the Portuguese empire, which resulted in transformations that had great importance in local development, culminating in the process of independence in Brazil in 1822. OLIVEIRA, Cecília Helena de Salles. Repercussões da revolução: delineamento do império no Brasil. 1808/1831. In: GRINBERG, Keila; SALLES, Ricardo (Coords.). **O Brasil imperial**. *1*. Rio de Janeiro, Civilização Brasileira, p. 15-54, 2009.

58 CUNHA, Pedro Octávio Carneiro da. A fundação de um império liberal: discussão de princípios. In: HOLANDA Sérgio Buarque de (Coord.). **História Geral da Civilização Brasileira**. 8. ed. Rio de Janeiro, Bertrand Brasil, v. 1, t. 1, 1993.

59 KITCHELT, Herbert; ALTAMIRANO, Melina. Clientelism in Latin America: Effort and Effectiveness Herbert Kitschelt and Melina Altamirano. In: CARLIN, Ryan E.; SINGER, Matthem M.; ZECHMEISTER, Elizabeth J. (Eds.). **The latin american voter. Pursuing representation and accountability in challenging contexts**. Ann Arbor: University of Michigan Press, 2015.

Brazil took a long time to establish an État *de droit* beyond an État *légal*. Even so, it was in an insecure, precarious, and dubious manner. The formation of the social imaginary around this notion could not have been different. Brazilians got used to the normalization of the arbitrary, rendering the rule of law ideal as the remaining mental space of resistance and hope, more than the consecration of the lived-in reality. Remarkably, the assertion of the rule of law is not enough to overcome the reasons of the State described realistically by Machiavelli.[60] Until the end of the 20th century, the authoritarian practices of the last five hundred years secured the Brazilian citizen as a subject compliant to the lack of certainty, impersonal and objective State space.[61] In this manner, the standard of living that is associative and of a collective identity seems to be limited to private circles.[62] The appreciation for democracy is not a characteristic of the local social imaginary. The normalization of exceptional situations contrary to the legal concept of the Brazilian rule of law is typical of its history. During most of Brazilian history, the idea of the rule of law has been something distant from reality. A mere abstraction originated in the academy or a formal judicial system that masks rights that are sometimes inefficient and other times are paradoxically arbitrary – but are nonetheless naturalized by a symbolic process of constitutionalization.[63]

From the process of re-democratization and, particularly with the advent of the 1988 Constitution – as well as with the governments that succeeded in power in the 1990s and 2000s – there was an important change with the increasing affirmation of the concept of the *Estado de Direito*, based on the model inspired by European tradition. The 1988 Brazilian Constitution is strongly a guarantor, containing explicit rules guaranteeing fundamental rights, due to legal process, presumption of innocence, state publicity, administrative impersonality, balance between powers, and procedural remedies against abuse of power. It is easy to recognize the German, French and Anglo-American inspiration in the constitutionally established institutes. However, the affirmation of the concept of the rule of law also resulted from a strong performance by the judges and the public prosecutors.

In Brazil, there is an environment of incomplete social modernization, ideological plurality, judicial flexibility, a strong increase of hedonistic individualism, and the adoption and maintenance of the universal principles seem improbable – except those

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60 PIRES, Luís Manuel Fonseca. Razões (e práticas) de Estado: os mal-estares entre a liberdade e a segurança jurídica. **Revista de Investigações Constitucionais**, Curitiba, v. 3, n. 3, p. 167-189, 2016.

61 ACUNHA, Fernando José Gonçalves; ARAFA, Mohamed A; BENVINDO, Juliano Zaiden. The Brazilian Constitution of 1988 and its ancient ghosts: comparison, history and the ever-present need to fight authoritarianism. **Revista de Investigações Constitucionais**, v. 5, n. 3, p. 17-41, set./dez. 2018.

62 BOTELHO, André. Público e privado no pensamento social brasileiro. In: BOTELHO, André, SCHWARCZ, Lilia Moritz (Coords.). **Cidadania, um projeto em construção: minorias, justiça e direitos**. São Paulo, Claro Enigma, 2012.

63 NEVES, Marcelo. **A constitucionalização simbólica**. São Paulo: Martins Fontes, 2007.

that come from faith. Thus, what predominates is ambiguity, deconstruction, and subjectivism. After all, in postmodern society, everything is interpretation. Rights depend on the language and personal power of those who have authority. Therefore, the rule of law known thus far becomes a typical institute of an outdated modernity. The "efficient democracy" defended by the right-wing parties after the 2016 parliamentary *coup* (a democracy that would be neither liberal nor social) goes along with the old format that has become popular once again: The so-called "Punitive State",[64] a postmodern version of the "Police State". And the Judicial branch is ready to give the public what it wants. In Brazil, responses to crime consist, for the most part, of severe penalties, translated into the absence of respect for constitutional guarantees and punishment as a solution to the problem (a false solution, obviously, but with strong popular appeal).

The consolidated concern in the average Brazilians' memory is not that of the guarantee of legal certainty but that of hope regarding their personal safety.[65] A discourse, much more present in the elite's *locus*,[66] but socially reproduced through a projection of the less favored classes regarding their ideal of the wealthy. The "Punitive State" individual wants security for himself; he accepts the due process of law to his family members; he defends the comprehensive formal defense for his friends. At last: what he truly wants is an *ad hoc* rule of law – only for those with whom he agrees (namely, those in the same groups, who belong in the same set). For the "other", he offers indifference, banishment; or even, he asks to throw them in prison, he desires punishment for them, he wants revenge. As described by Pierre Ansar, the repressed, and later manifested, hatred creates affective solidarity that, surpassing internal rivalry, allows for the reconstitution of cohesion, of a strong identification of each one with their own group.[67]

A common yet paradoxical concentration of defenders of Operation Car Wash and supporters of Jair Bolsonaro inside the same set of people illustrates well this

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64 AREND, Kathiana Pfluck. **Violência, punitivismo e criminalização da pobreza: as raízes do Estado penal à brasileira**. Dissertação. Mestrado em Serviço Social. Pontifícia Universidade Católica do Rio Grande do Sul. Porto Alegre, 2020.

65 It is not without reason that there is an expressive increase in the number of politicians elected with agendas related to "public safety" in the last elections – in general upholding punitive discourses and a general stance of violent repression against crime. The so-called "police" candidates are normally from the right-wing or those who are part of a physiological party, who defend a conservative agenda in terms of custom. BERLATTO, Fabia; CODATO, Adriano; BOLOGNESI, Bruno. Da Polícia à Política: Explicando o Perfil Dos Candidatos Das Forças Repressivas De Estado à Câmara Dos Deputados. **Revista Brasileira De Ciência Política**, 21, pp. 79-122, 2016.

66 In the history of Brazil, in spite of the ebb and flow of the transmutation processes, there are still subjective bonds which are detectable and that sustain the current state Brazilian social stratification. GOMES, Magno Federeci; FREITAS, Frederico Oliveira. Conexão entre a dignidade da pessoa humana e os direitos fundamentais. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, v. 10, n. 41, p. 181-207, jul.-set. 2010.

67 ANSART, Pierre. História e memória dos ressentimentos. In: BRESCIANI, Stella; NAXARA, Márcia (Org.). **Memória e (re)sentimento: indagações sobre uma questão sensível**. Campinas: Unicamp, 2004. p. 22.

description. Jair Bolsonaro is a famous Brazilian ex-representative, elected President in 2018, who is a defender of neo-fascist ideas and who, even though being accused of incitement of rape, not to mention also breaching parliamentary decorum, has a very moralist agenda.[68] Both Moro's and Bolsonaro's speeches seek to win the support of the "good citizen", who defend morals and good customs and are in favor of the maximum penalty for sinners and criminals. These good citizens seek for similars to constitute a community of the chosen people. Identity is the watchword, and the internet environment turns out to be very conducive to developing this ideological perspective.

Alterity, so precious to any State that portrays itself as social, seems to be a value incompatible with the "Era of Facebook". For "the other", ostracism, exclusion, subjective and discursive negation are exalted. An irrational, paradoxical action, but one that is often supported by religious belief. The everyday life tragedy is that the very "good citizen" is who shouts out for the suspension of fundamental rights. And they do so worked up by agents such as the media and the church. Also by new actors such as the Judicial branch – that in Brazil is composed of a "royalty in robes",[69] who upholds the highest salaries possible considering both public and private sectors.[70]

All corporate associations of judges publicly applauded when Sérgio Moro ordered the arrest of former President Luís Inácio Lula da Silva (of the Workers' Party), accusing him of corruption. In doing so, the path of its main competitor, Jair Bolsonaro, was facilitated in the presidential election that followed.[71] And they continued to support Moro when he accepted Bolsonaro's invitation to take up a ministerial post in the government that, as a judge, he helped to elect with his decisions. The situation is surreal, both from the point of view of democratic principles and under the values of the rule of law. The exceptional context implanted by Bolsonaro in his government, composed of insane and incompetents,[72] would not have been possible without the

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[68] For more details on the subject, check RUFFATO, Luiz. De volta para o passado: Político, Bolsonaro demonstra profundo desprezo pelas agremiações. "Católico fervoroso", Bolsonaro tem profundo desprezo pelo ser humano. 2016. *El País*. Disponível em: https://brasil.elpais.com/brasil/2016/04/27/opinion/1461763857_559135.html Acesso em: 20 mar. 2020. And: CIOCCARI, Deysi; PERSICHETTI, Simonetta. Armas, ódio, medo e espetáculo em Jair Bolsonaro. **Revista Alterjor**, São Paulo, v. 18, n. 2, p. 201-214.

[69] REZENDE, Maurício Corrêa. **Democratização do Poder Judiciário no Brasil**. São Paulo: Contracorrente, 2018.

[70] And that do not feel ashamed in defending their interests and privileges even in these most devastating times of social exclusion, unemployment, reduction of labor laws and economic crisis of the state. FORUM. **Mesmo com aumento de 16,38% do salário, juízes pedem para Luiz Fux, do STF, manter auxílio-moradia**. 24 nov. 2018. Disponível em: https://revistaforum.com.br/politica/mesmo-com-aumento-de-1638-do-salario-juizes-pedem-para-luiz-fux-do-stf-manter-auxilio-moradia/ Acesso em: 17 mar. 2020.

[71] POWER, Timothy J; HUNTER, Wendy. Bolsonaro and Brazil's illiberal backlash. **Journal of Democracy**. v. 30, n. 1, p. 68-82, 2019.

[72] An interesting analysis of the members of the Bolsonaro government was made by Tom Phillips and Don Phillips at The Guardian. THE GUARDIAN. **Unqualified, dangerous: the oddball officials running Bolsonaro's Brazil**. 2 jan. 2020. Disponível em: https://www.theguardian.com/world/2020/jan/02/bolsonaro-brazil-government-oddball-officials. Acesso em: 17 mar. 2020.

economic elites and the Judiciary having strongly supported the political setback – although more recently, the ruptures started due to the evident and predictable excesses of the neofascist government of Jair Bolsonaro.

Another small but significant demonstration of this fact is the current trivialization of "plea bargains" which have become a sign of the present moment in Brazil.[73] Better yet, the "snitch", so commonly criticized, has now achieved a position of social prestige. Without a doubt, this is a very illustrating caricature of the Brazilian's lack of attachment to the rule of law and republican ethics as part of their social identity.[74] The substitution of the virtues of sacrifice, courage, and honor for pragmatic concepts, typical of a reason with ulterior motives, reinforces the predominant individualism and the opportunism that is currently on high. Other mechanisms such as the presumption of guilt,[75] the lack of prestige regarding the guarantee of the due legal process,[76] and different strategies of flexibilization of the presumption of innocence,[77] constitute ideal representations that perfectly combine with the moralist social imaginary. That is predominant in history as well as authoritarian practices traditionally experimented. In other words, in the Brazilian constitutional experience, the public and institutions adjust themselves to the exception (to a certain extent) as the norm.[78] In contrast, when the police or morals become the primary value in a judicial system, the image of the lawyer becomes part of a rhetoric destined to legitimate a false process that is ultimately concerned with the interests and the passions of those who hold power (not of the

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[73] The plea bargain did not exist in the Brazilian legal system and was introduced at a dangerous time, considering the abuses that have been committed by the Judiciary. Contrary to the United States System, which has a strong tradition in this matter, the plea bargain in Brazil ends up being a strong mechanism for easing the fundamental guarantees of defense of the accused, that is, an instrument of an affront to the rule of law.

[74] One must point out that it is not about the plea bargain itself, but about the way in which it has been introduced in the practices of the Brazilian punitive system. In the realm of ideas, the bargains have been built on the premise of a pragmatic ideology that is against the tradition of thought which has been slowly built in the Brazilian intellectual environment and, especially, against the victorious constitutional sentiment built throughout the 80s.

[75] Examples: duty to prove that a fact did not happen, presumed intent, conscious guilt, Theory of the domain of the fact, willful blindness doctrine, objective sanctionary responsability. Ultimately, many instruments of the model rooted in the acceptance of the "diabolic evidence" as the basis of the conviction – with reversal of the burden of proof.

[76] PREUSSLER, Gustavo de Souza. Combate à corrupção e a flexibilização das garantias fundamentais: a operação Lava Jato como processo penal do inimigo. **Revista Brasileira de Ciências Criminais**. São Paulo, v. 25, n. 134, p. 87-107, 2017.

[77] Regarding the subject, see HACHEM, Daniel Wunder. Sepultamento da presunção de inocência pelo STF (e os funerais do Estado Democrático de Direito). **Direito do Estado**, n. 86. 2016. Disponível em: http://www.direitodoestado.com.br/colunistas/daniel-wunder-hachem/sepultamento-da-presuncao-de-inocencia-pelo-stf-e-os-funerais-do-estado-democratico-de-direito Acesso em: 20 mar. 2020 and BACELLAR FILHO, Romeu Felipe. O direito fundamental à presunção de inocência no processo administrativo disciplinar. **A&C – Revista de Direito Administrativo & Constitucional**. Belo Horizonte, v. 9, n. 37, p. 11-55. 2009.

[78] BERCOVICI, Gilberto. **Constituição e estado de exceção permanente: atualidade de Weimar**. Rio de Janeiro: Azougue, 2004.

positive legal system or justice). In this context, the figure of the lawyer is passed along to the side of the villains who must be fought (another historical recurrence).[79]

The positions "in robes" have always constituted the pinnacle of the group that sustains the system of structural privileges. Until the end of the 20th century, the political elites were not distinct from the economic and bureaucratic elites. The beginning of this rupture is only in the transition from the 20th to the 21st century, which allowed social eclecticism to begin to interfere in the system. As Armando Boito Jr. puts it, the directors of the Operation Car Wash at the same time act as part of and as representatives of politicians of the superior fraction of the middle class.[80] Besides, they act as State bureaucrats inserted in a specific branch of this apparatus whose private function is to in fact watch over and maintain the capitalist order – a specific capitalist order founded on patrimonialism of religious, hierarchical, and, above all, stratifying families. But Operation Car Wash is nothing more than a symbolic representation of the entire "robes corporation" which acts in a self-protecting form into a system of coordinated privileges, trades, and compensations, for they partake in the feeling of belonging to the same social body: the elegant conservative group which is intelligent, white, heteronormative, wealthy and religious. A part of the society that sees itself legitimized to seek "justice", oriented by their own subjective presuppositions of what is right and what is wrong, ultimately drawing the rule of law closer to an authoritarian ethical state.[81]

4. THE ILLIBERAL BACKLASH AND THE RETURN TOWARD AN AUTHORITARIAN PERSPECTIVE

The Constitution of 1988 started a peculiar process of social modernization by constructing a democratic environment and reinforcing fundamental rights that are typical of the rule of law. The economic development of the welfare state model in the first decade of the 21st century due to the emblematic election of a left-wing government finally consolidated this process. Nevertheless, surprisingly, there was a historic turnaround at the height of the consolidation of democracy, the rule of law, and social

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79 "Those who are left-winged lawyers are nothing but traitors", declaimed Erich Weinert in 1925, in a satire aimed at justice. Alfred Apfel, who was precisely one of these renowed lawyers, says that not only were the republican judges few, but they were inexistent in provinces, and that also the defense representatives, attacked by local press, saw themselves vunarable to violence on the streets. After having evoked numerous examples of partiality in the courts, hey concludeds with sorrow in 1933: "How does one frighten oneself upon seeing an edification (whose foundation, justice, which had been corroded) that fell?" [Free translation from Portuguese] RICHARD, Lionel. **A república de Weimar**. Tradução de Jônatas Batista Neto. São Paulo: Companhia das Letras, 1988. p. 270.

80 BOITO JÚNIOR, Armando. Lava jato, classe media e burocracia de Estado. **Revista Lumen**, São Paulo, v. 2, n. 3, p. 1-9, 2017.

81 Gentili was a prominent philosopher who in Italian fascismo. GENTILI, Giovanni. **Los fundamentos de la filosofia del derecho**. Tradução de Ernesto Campolongo. Buenos Aires: Losada, 1944.

modernization. Timothy Power and Wendy Hunter address this issue by recognizing the existence of an "illiberal backlash" in Brazil.[82]

Although surprising, the setback experienced in the second decade of the 20th century in Brazil is not a product of chance. The recent facts that destabilized Brazilian institutions have rationally explainable historical roots. After a somewhat "exotic" period at the beginning of the 21st century (an intense development process between the years 1994 and 2014), Brazil tends to return to what it has always been: a society of an incomplete citizenry and where the interest of the dominating political groups prevails. This new scenario of economic regression and the advancement of the conservative social imaginary imposes a new subjection to the vulnerable population – the poor, women, black people, gays, transgender people, the elderly, drug addicts, the mentally ill, atheists, natives, *quilombolas*, and *ribeirinhos* – groups of all sorts and kinds who do not fit in the aesthetic norms, be them hierarchical or meritocratic.[83] These are the not-chosen ones: the sinners, the subalterns, and the weird.

Several emblematic events illustrate this phenomenon. Some can be cited as an example: the "abusive impeachment" – lack of constitutional nor legal fundament impeachment of a legitimate elected president (and, unlike the United States, in Brazil, it is necessary to commit a crime to justify impeachment);[84] a law that forbids teachers from exposing any political opinion while in class;[85] judicial decisions that forbid university students' political meetings (although they were later annulled by the STF);[86] preparation of dossiers on the personal and political life of public servants who oppose

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82 POWER, Timothy J; HUNTER, Wendy. Bolsonaro and Brazil's illiberal backlash. **Journal of Democracy**. v. 30, n. 1, p. 68-82, 2019.

83 Quilombolas are social groups resulting from old Quilombos (communities in the forest where the slaves who fled the 19th-century slavery regime hid). They have the same ethnic identity and seek to maintain ancestral customs, distinguishing themselves from the rest of Society (Furtado, Pedroza and Alves, 2014). Ribeirinho is a type of inhabitant of the riverside in the north of the country. They live in a subsistence system based on fishing and extraction. SILVA, Josué da Costa; SILVA, Adnilson de Almeida; CASTRO, Sheila. Novas Espacialidades e organizações na vivência do ribeirinho na Amazônia. **Mercator**, Fortaleza, v. 11, n. 26, p. 121-130, oct. 2012.

84 BENVINDO, Juliano Zaiden. Abusive Impeachment? Brazilian Political Turmoil and the Judicialization of Mega-Politics. **International Journal of Constitutional Law Blog**. 23 abr. 2016. Disponível em: http://www.iconnectblog.com/2016/04/abusive-impeachment-brazilian-political-turmoil-and-the-judicialization-of-mega-politics/ Acesso em: 12 out. 2020; PIVETTA, Saulo Lindorfer. **Legisladores juízes: Impeachment na Constituição de 1988**. Tese. Doutorado em Direito. Universidade Federal do Paraná. Curitiba, 2017; KREUZ, Leticia Regina Camargo. **Constitucionalismo nos tempos do cólera: neoconservadorismo e desnaturação constitucional.** Tese. Doutorado em Direito. Universidade Federal do Paraná. Curitiba, 2020.

85 MADEIRO, Carlos. UOL Educação. 26 abr. 2016. **Deputados de AL aprovam lei que pune professor que opinar em sala de aula**. https://educacao.uol.com.br/noticias/2016/04/26/deputados-de-al-aprovam-lei-que-pune-professor-que-opinar-em-sala-de-aula.htm Acesso em: 31 out. 2020.

86 STF. Notícias STF. **Plenário anula decisões que proibiram atos com temática eleitoral nas universidades em 2018**. 15 mai. 2020. Disponivel em: http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=443456 Acesso em: 10 out. 2020.

the government;[87] public honoring of military regime torturers by elected authorities;[88] judges defending proposals for easing constitutional rights by authorizing illicit evidence;[89] flexibilization of the presumption of innocence and normalization of the presumption of guilt;[90] formal authorization from the courts so that judges may exact procedures unauthorized by the penal process code;[91] punishment for judges who abide by the law and grant freedom to inmates under inhuman conditions;[92] normalization of preventive arrests, even without starting the penal process nor having pre-determined time for its maintenance;[93] judicial selectivity in the verification of corrupt cases with the clear intention of political interference;[94] implementation of a governamental project that had been rejected during the elections;[95] an expressive increase of the murder rates of natives, quilombolas and landless workers);[96] public threats made by military against the ministers of the Supreme Court;[97] nomination of deans of universities who hadn't been elected in the first place by the university community;[98] police

87 STF. Notícias STF. **STF julga nesta quarta-feira (19) ação sobre investigação sigilosa do MJ contra servidores antifascistas**. 18 Aug. 2020b. Disponível em: http://stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=449807 Acesso em: 10 out. 2020.

88 G1. **Bolsonaro diz no Conselho de Ética que coronel Ustra é 'herói brasileiro'.** 08 nov. 2016. Disponível em: http://g1.globo.com/politica/noticia/2016/11/bolsonaro-diz-no-conselho-de-etica-que-coronel-ustra-e-heroi-brasileiro.html Acesso em: 12 out. 2020.

89 CONJUR. **Sergio Moro defende uso de provas ilícitas e teste de integridade de servidores**. 5 ago. 2016. Disponível em: https://www.conjur.com.br/2016-ago-05/moro-defende-uso-prova-ilicita-teste-integridade-servidor Acesso em: 23 nov. 2020.

90 HACHEM, Daniel Wunder. Sepultamento da presunção de inocência pelo STF (e os funerais do Estado Democrático de Direito). **Direito do Estado**, n. 86. 2016. Disponível em: http://www.direitodoestado.com.br/colunistas/daniel-wunder-hachem/sepultamento-da-presuncao-de-inocencia-pelo-stf-e-os-funerais-do-estado-democratico-de-direito Acesso em: 20 mar. 2020.

91 CONJUR. **"Lava jato" não precisa seguir regras de casos comuns, decide TRF-4.** 23 set. 2016. Disponível em: https://www.conjur.com.br/2016-set-23/lava-jato-nao-seguir-regras-casos-comuns-trf Acesso em: 23 nov. 2020.

92 TESTEMOTO, Rafael. Juristas criticam punição à desembargadora que liberou presos que já cumpriram pena. **Brasil de Fato**. 10 fev. 2017. Disponível em: https://www.brasildefato.com.br/2017/02/11/juristas-criticam-punicao-a-desembargadora-que-liberou-presos-que-ja-cumpriram-pena Acesso em: 20 mar. 2020.

93 CARDOSO, José Eduardo; PEIXOTO, Gabriela G.; RUTIS, Luiz A.; CARDOSO, Mayra M. O uso abusivo das prisões preventivas e o trabalho de Sísifo. **Conjur.** 3 ago. 2020. Disponível em: https://www.conjur.com.br/2020-ago-03/opiniao-uso-abusivo-prisoes-preventivas-trabalho-sisifo Acesso em: 20 nov. 2020.

94 CASTRO, Matheus Felipe de. O martelo Moro: a "Operação Lava Jato" e o surgimento dos juízes partisans no Brasil. **Revista Brasileira de Ciências Criminais**, São Paulo, v. 25, n. 136, p. 293-319, 2017.

95 SOUZA, Mariana Barbosa de, HOFF, Tuíze Silva Rovere. Governo Temer e a volta do neoliberalismo no Brasil: possíveis consequências para a habitação popular. **Urbe – Revista Brasileira de Gestão Urbana**, n. 11, 2019.

96 SUDRÉ, Lu. **Primeiros dias de 2020 já registram ataques contra indígenas e quilombolas**. Brasil de Fato. 14 Jan. 2020. Disponível em: https://www.brasildefato.com.br/2020/01/14/primeiros-dias-de-2020-ja-registram-ataques-contra-indigenas-e-quilombolas Acesso em: 10 mar. 2020.

97 SANTOS, Rafa. Villas Bôas volta a intimidar STF antes de sessão sobre 2ª instância. **Conjur**. 16 out. 2019. Disponível em: https://www.conjur.com.br/2019-out-16/general-escreve-mensagem-intimidatoria-antes-julgamento Acesso em: 15 nov. 2020.

98 VEJA. **Bolsonaro nomeia reitor menos votado pela terceira vez**. 10 ago. 2019. Disponível em: https://veja.abril.com.br/politica/bolsonaro-nomeia-reitor-menos-votado-pela-terceira-vez/ Acesso em: 21 mar. 2020.

raids in syndicate meetings and opposing political parties;[99] refusal to accept proof of scientific data by the government;[100] explicit governamental nepotism;[101] destruction of truth commissions;[102] ostensive murders of black people by the police in peripheric communities now undertaken as official public policy;[103] official denial of the Covid-19 outbreak for inappropriate political reasons;[104] among so many other examples that have been spread out as by geometric progression in the brief historical period of the second decade of the 21st century.

It would be impossible to describe all situations that could exemplify this authoritarian practices and social representations phenomenon. A subjection that maintains a society numbed and sedated before the expressive increase of cases of suspension of fundamental rights and rupture with the rule of law and democracy itself. In this context, it becomes perfectly explainable how a pernicious figure such as Jair Bolsonaro could have been elected as President of Brazil. However, the problem is not only in government branches. Particularly in law, it is necessary to denounce the "cynical reason" of jurists who support exception, be it because of opportunism, be it due to ignorance, be it through discourses that naturalize or camouflage their strategies of power.[105] Perhaps, it is possible to speak of a "dark side" of the rule of law, as suggested by András Sajó, when commenting on the "illiberal democracies".[106]

In this case, the President's actions are not illegal. However, it goes against the university spirit and the democratic practice hitherto usual in the last decades (respected by the previous administrations of the Federal Executive Branch).

99 FUP. **Polícia invade Sindicato no AM para interromper reunião contra Bolsonaro**. 25 jul. 2019. Disnponível em: https://www.fup.org.br/ultimas-noticias/item/24235-pm-invade-sindicato-no-am-para-interromper-reuniao-contra-bolsonaro Acesso em: 10 ago. 2020.

100 AOS FATOS. **Bolsonaro nega orientações da ciência e distorce informações para minimizar pandemia**. 24 de Mar. 2020. Disponível em: https://www.aosfatos.org/noticias/bolsonaro-nega-orientacoes-da-ciencia-e-distorce-informacoes-para-minimizar-pandemia/ Acesso em: 18 ago. 2020.

101 DAMASCENO, Victória. Nepotismo, emendas e MPs: 6 vezes que Bolsonaro praticou a "velha política". **UOL**. 17 ago. 2019. Disponível em: https://noticias.uol.com.br/politica/ultimas-noticias/2019/08/17/nepotismo-e-mendas-e-mp-5-vezes-em-que-bolsonaro-praticou-a-velha-politica.htm Acesso em: 10 nov. 2020.

102 FERNANDES, Talita; CARVALHO, Daniel. Bolsonaro muda comissão sobre a ditadura e diz que agora governo é de direita. **Folha de S.Paulo**. 01 ago. 2019. Disponível em: https://www1.folha.uol.com.br/poder/2019/08/bolsonaro-muda-comissao-de-mortos-e-desaparecidos-em-meio-a-ataques-sobre-o-tema.shtml Acesso em: 10 nov. 2020.

103 GRELLET, Fábio. Negros são 75% dos mortos pela polícia no Brasil, aponta relatório. **UOL**. 15 jul. 2020. Disponível em: https://noticias.uol.com.br/ultimas-noticias/agencia-estado/2020/07/15/negros-sao-75-dos-mortos-pela-policia-no-brasil-aponta-relatorio.htm?cmpid=copiaecola Acesso em: 12 nov. 2020.

104 GIMENES, Erick. Da negação à contaminação: o trajeto de Jair Bolsonaro até o encontro com o vírus. **Brasil de Fato**. 8 jul. 2020. Disponível em: https://www.brasildefato.com.br/2020/07/08/da-negacao-a-contaminacao-o-trajeto-de-jair-bolsonaro-ate-o-encontro-com-o-virus Acesso em: 12 nov. 2020.

105 VALIM, Rafael. O discurso jurídico brasileiro: da farsa ao cinismo. In: SOUZA J, Valim, R. (Coords.). **Resgatar o Brasil**. São Paulo: Contracorrente, 2018.

106 SAJÓ, András. The Rule of Law as Legal Despotism: Concerned Remarks on the Use of "Rule of Law" in Illiberal Democracies. **Hague Journal on the Rule of Law**. v. 11, n. p. 371-376, 2019.

Dealing specifically with the Judicial Branch, it is essential to emphasize its decisive role as a guarantee of fundamental rights since the 1990s. In the first twenty years of the 1988 Constitution, the Judiciary advanced in realizing the traditional concept of the rule of law. However, the current trend is no longer the same. Little by little, the Judicial Branch was gaining more power, greater public visibility, and better remuneration. At the same time, they became conservative, elitist, and authoritarian – seeking for themselves the leading role in the conduct of history and interfering in politics in a way incompatible with the concept of the rule of law hitherto in force and inspired by the separation of powers, in self-restraint of power, due process, and fundamental political rights. Several judiciary decisions from the second decade of the 21st century also eloquently exemplify this historic turnaround.

The manipulation of law for political purposes distorts the meaning of the Constitution, promoting a shift in the concept of either the "rule of law" to a new model, the "rule by law", as suggested by Tom Daly.[107] It would not be appropriate to consider Brazil as a kind of soft illiberal democracy. On the other hand, it is evident that the country is on a solid path contrary to the values of the rule of law and democracy. Although it is not simple to prove how far Brazil has departed from its constitutional assumptions, it is impossible to deny the departure evidence.

The struggle for revalorizing the rule of law and maintaining an external and isonomic judicial system is set. It has again become innovative to believe in positive law – and to some, this is something new. Hannah Arendt, in her visionary book entitled "The origins of totalitarianism," already warned us that the limits of positive law are to individuals' political existence and what memory is to his historical existence.[108] During an extended period, the problem was to try to escape from the state of exception and achieve the rule of law. Now, the struggle must be so that Brazil will not permanently become a state of exception due to the democratic decay and erosion of the rule of law.

5. AGAINST THE TRADITIONAL CONCEPT OF THE RULE OF LAW: A JUDICIAL NEW PERSPECTIVE

The beginning of the 20th century embraces the "new coup" phenomenon, in which anti-democratic and contrary to the rule of law practices maintain the formal institutional continuity. Instead of significant disruptions, there is a gradual erosion of the political-legal system and building new concepts and interpretations about the

[107] DALY, Tom. Populism, Public Law, and Democratic Decay in Brazil: *Op. cit*. p. 16.

[108] ARENDT, Hannah. **As origens do totalitarismo**. Tradução de Roberto Raposo. São Paulo: Companhia das Letras, 1989.

meaning of the rule of law.[109] A very illustrative example of this exceptional situation was the widespread support for the parliamentary *coup* of 2016.[110] It was done through a procedural *façade,* which would be typical of a state of exception, but legitimated by the media and by a significant percentage of the Brazilian people.[111] But the most critical detail is that the Judicial Branch could have avoided this scam.

The Judiciary, nevertheless, actively participated in the legitimation of political action. They did it through validation Supreme Federal Court's decisions (acting populistically) and also through actions contrary to the traditional due process by Operation Lava Jato (working by lawfare practices). However, the more time passes, the more "constitutional chicanery" becomes evident for the different sectors of Brazilian society.[112] Even so, the process of erosion of the traditional concept of the rule of law caused by this phenomenon of changing the orientation of the Judiciary remains permanent.

In the 21st century, the Judicial branch has become an essential body of implementing mechanisms of exception. One of the main characteristics of an important contemporary power strategy is lawfare, when the law is used as a war weapon against political enemies.[113] The current crisis of democracy fuels this mechanism as an institution. It is not without reason that many contemporary authors have approached the subject from a skeptical perspective, as is the case of David Runciman.[114] Decisive rules for the perfect functioning of democracy, such as "mutual tolerance" and the need for an "institutional reserve", are worn out. Without leaders and instituted powers that truly abide by rules and without a society that, in fact, values these rules, the inevitable decline of democracy becomes a sad foreboding,[115] foreshadowed by the corrosion of the rule of law.

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[109] TEIXEIRA, João Paulo Allain; CASTILHO, Natalia Martinuzzi. Desafios ao constitucionalismo na América Latina: uma visão geral sobre o "novo golpismo". **Revista de Investigações Constitucionais**, Curitiba, v. 5, n. 3, p. 303-323, 2018.

[110] For impeachment to take place in Brazil, the President must have committed a crime in the exercise of his function. Therefore, impeachment in Brazil is not just a political process – it is a legal process. This refers to the Dilma Rousseff´s impeachment which happened due to a fake crime, a new administrative orientation which was retroactively (and therefore illegally) applied by the Brazilian court of audits, and finally, the formal proceedings were carried out in a crude manner. Regarding the subject, see also the impeccable work of Glícia Reis. REIS, Glicia T. Teles. **Um olhar sobre o impeachment e o caso Dilma Rousseff**. Niterói, 82f. Monografia. Universidade Federal Fluminense, 2016.

[111] Abundant historical material will be produced in the future regarding this subject from a more precise point of view. Nonetheless, the resistance to the *coup* is already producing its counter-narrative. PRONER, Carol et al (Coords.). **A resistência internacional ao golpe de 2016**. Bauru: Canal 6, 2016.

[112] According to Sajó "constitutional chicanery" is an expression that portrays the evidence of a gross manipulation of the laws, the constitutional system, and, consequently, the rule of law. SAJÓ, András. The Rule of Law as Legal Despotism: Concerned Remarks on the Use of "Rule of Law" in Illiberal Democracies. **Hague Journal on the Rule of Law**. v. 11, n. p. 371-376, 2019.

[113] KITTRIE, Orde F. **Lawfare: Law as a Weapon of War**. New York: Oxford University Press, 2016.

[114] The author states that democracy, when its zenith had been reached, initiated a process of decline that can ultimately lead to its end. RUNCIMAN, Daniel. **How democracy ends**. New York: Basic Books, 2918.

[115] LEVITSKY, Steven; ZIBLAT, Daniel. **How democracies die**. New York: Broadway Books, 2018.

It is not only a Brazilian phenomenon, but it finds in Brazil one of its most peculiar manifestations – well represented by Operation Car Wash, a system characterized by the idea that the ends justify the means.[116] This is an idea contrary to the traditional concept of the rule of law, which requires stability and predictability – but it has been gaining strength as something compatible with a new perspective of the Judiciary. The lawfare tactics perfectly match with interests in predicting, delegitimizing, and destroying the "enemy". Leonardo Avritzer reminds us that Brazil lives under the famous adage for friends everything, "for enemies, the law".[117] There are several examples of these practices: manipulation of the rules of judicial jurisdiction,[118] frivolous charges, overcharging, creation of *ad hoc* rules, law retroactivity, the imposition of illicit obstacles to defense, manipulation of guidelines in the media, among others.[119] Instead of the punitive power of the State being used for the structural correction of the system, the real reason for fighting corruption is the production of a false sense of social and moral pacification, through the public exposure of a "degradation ceremonial" of the chosen enemy – a choice that is, of course, selective and ideological.[120]

What in other countries was limited to judicial activism inherent to the context of the confrontation between proceduralism and substantialism,[121] in Brazil became the authentic judicial populism.[122] In other words, the Brazilian Judiciary started to act seeking popularity. Some of its members have become true "stars" in the media (its deliberation sessions are broadcasted live to the entire population). The judicial decisions

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[116] "In other words, Operation Car Wash needed to generate political instability (one of the main elements of its strategy), by means of illegal leaks to the press, to impress public agents and superior instances of the judiciary to continue its fight against corruption. For this strategy to be successful, it became necessary to create an informal agreement between Operation Car Wash in Curitiba and the major means of communication (Globo, Bandeirantes, Folha, Estadão). With this agreement, it became possible to legitimize the mechanism, alongside the public opinion, without being investigated for their abuse of authority crimes. The ends (fighting against corruption and refounding Brazil) justify the means." PINTO, Eduardo Costa et al. **A guerra de todos contra todos e a Lava Jato: a Crise Brasileira e a vitória do Capitão Jair Bolsonaro**. Rio de Janeiro: Instituto de Economia da UFRJ. Texto para discussão 13. 2019. Disponível em: http://www.ie.ufrj.br/images/pesquisa/publicacoes/discussao/2017/tdie0132019pintoet-al.pdf Acesso em: 20 mar. 2020. p. 15.

[117] AVRITZER, Leonardo. O pêndulo da democracia no Brasil. **Novos Estudos – CEBRAP**. São Paulo, v. 37, n. 2, p. 273-289, mai./ago. 2018. p. 279.

[118] GABARDO, Emerson; LAZZAROTTO, Gabriel Strapasson; WATZKO, Nicholas Andrey Monteiro. Ética pública e parcialidade no combate à corrupção: o caso The Intercept Brasil vs. Operação Lava Jato. **International Journal of Digital Law**, Belo Horizonte, ano 2, n. 1, p. 151-198, jan./abr. 2021.

[119] ZANIN, Cristiano; MARTINS, Valeska Teixeira; VALIM, Rafael. **Lawfare: uma introdução**. São Paulo: Contracorrente, 2019. p. 73.

[120] PREUSSLER, Gustavo de Souza. Combate à corrupção e a flexibilização das garantias fundamentais: a operação Lava Jato como processo penal do inimigo. **Revista Brasileira de Ciências Criminais**. São Paulo, v. 25, n. 134, p. 87-107, 2017.

[121] COURA, Alexandre Castro; PAULA, Quenya Corrêa. Ativismo judicial e judicialização da política: sobre o substancialismo e procedimentalismo no Estado Democrático de Direito. **Revista Brasileira de Estudos Políticos**, Belo Horizonte, v. 116, p. 63-112, 2018.

[122] SALGADO, Eneida Desiree. Populismo judicial, moralismo e o desprezo à Constituição: a democracia entre velhos e novos inimigos. **Revista Brasileira de Estudos Políticos**, Belo Horizonte, v. 117, n. p. 193-217, 2018.

began to seek legitimacy based on the pressures coming directly from civil society, mediated by the mainstream media and social networks. In addition, judges are increasingly speaking out of Court. Thomas Bustamante calls these illegitimate pronouncements "abusive *obter dita*" – a covert way for the Judiciary to act politically without the need to base its manifestations rationally.[123] This situation facilitated abuses and the development of self-empowerment theories, mainly in the Supreme Federal Court.

As a consequence of expanding powers, there is a lack of prestige of laws produced by the Legislative branch.[124] Besides, there is a change in the political and legal situation that is opposed not only to the traditional postulates of the rule of law, but also to democracy itself. As Mads Damgaard affirms, "The Lava-Jato scandal not only made this sea change possible, but also precipitated the fall of a whole generation of politicians, and obliterated the citizens' already negligible trust in political authorities".[125] The principle of legality becomes malleable according to the judge's consciousness or subjective sense of justice – who assumes a position as a "corrector of the system", even if they decide in a different or even opposite mind to the laws produced by the representative democratic process. In this endeavor, it has become necessary to transform the social imaginary, which traditionally values the rule of law's principles in a robust format (that is, in terms of positivist legal philosophy).

A significant part of the Brazilian Judicial Branch has engaged in a utopia that let themselves be seduced by pragmatism, relativism, and the incorporation of actual "enlightened despots" – it would not be a mistake to call them "judicial epistocrats".[126] There are several examples of public statements by the Brazilian Supreme Court ministers that can illustrate this self-view. It is not a negative thing to adopt a neoconstitutional perspective based on principles and less positivist. It turns out that in recent years, this approach has exceeded all reasonable limits, falling into a real "judicial subjectivism". The objectivity of the legal system then becomes subject to the judge's feeling of justice (or consciousness), as Lênio Streck stated.[127]

This kind of flexibilization of positive laws is one of the typical characteristics of an autocratic ideology. In practice, its justice is partial, because it cannot detach from the oligarchic selectiveness deeply rooted in any non-democratic regime. That is not a

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123 BUSTAMENTE, Thomas R. Obter dita abusivos: esboço de uma tipologia dos pronunciamentos judiciais ilegítimos. **Revista Direito GV**, v. 14, n. 2, p. 707-745, 2018.

124 KATZ, Andrea Scoseria. Making Brazil work? Brazilian coalitional presidentialism at 30 and its post-Lava Jato prospects. **Revista de Investigações Constitucionais**. v. 5, n. 3, p. 77-102, 2018.

125 DAMGAARD, Mads Bjelke. **Media Leaks and Corruption in Brazil: The Infostorm of Impeachment and the Lava-Jato Scandal**. New York: Routledge, 2019. p. 1.

126 Using the term "epistrocrats" as David Eastlund does, but applying it to judges. EASTLUND, David. **Democratic Authority: a philosophical framework**. Princeton: Princeton University Press, 2009.

127 STRECK, Lênio. **O Que é Isto - Decido Conforme Minha Consciência?** Porto Alegre: Livraria do Advogado, 2010.

historical innovation. In the pre-nazi period, the famous "interest jurisprudence", full of good intentions, showed itself more repressive than the imperial justice, which preceded it. As Lionel Richard explains, it was a Judiciary of "double standards".[128] In Brazil's case, the process of social modernization changed the law, but it did not reach the structures of the Judiciary, which continues to organize itself intra-oligarchically.[129] Initially, in Brazil, the process of re-democratization in the early 1980s and the advent of the new Constitution promoted a break in the Judiciary's traditional behavior – which became intensely focused on the defense of fundamental rights. However, the change in the historical situation and the institutional setbacks experienced promoted a favorable environment for a reversal in the judges' position.

Furthermore, we can observe a paradox: the expansion of judicial activism in promoting fundamental rights soon changed to activism based on public policy reasons contrary to fundamental rights. The primary justification, without a doubt, is the fight against crime and, particularly, corruption (and so that became a *carte blanche* for all kinds of arbitrariness contrary to the traditional rule of law model). Some good and innovative laws, such as the new corporate anti-corruption law,[130] are misused to address punitive interests that do not match the legal system as a whole; an authentic "criminal prosecution of the enemy".[131]

It is important to emphasize that the "judicial populism" present in the contemporary Brazilian reality has no relation to the so-called "populist constitutional interpretation", which promotes precisely a critique of judicial supremacy, defending the supremacy of the people's will.[132] Judicial populism is an attempt to carry out the will of the people by expanding the judicial function. On the other hand, popular constitutionalism aims to carry out the people's will by restricting judicial function.

Both perspectives are wrong. It is not the case that the judicial function shall be restricted, nor is it the case that the judicial function shall directly implement the will of the people. Both are pragmatic tendencies based on a distorted conception of democracy and justice that destroy constitutionalist rationalism. In both conceptions, personal conscience replaces objective morality, which fosters moral relativism. As a

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[128] RICHARD, Lionel. **A república de Weimar**. Tradução de Jônatas Batista Neto. São Paulo: Companhia das Letras, 1988. p. 269.

[129] REZENDE, Maurício Corrêa. **Democratização do Poder Judiciário no Brasil**. São Paulo: Contracorrente, 2018.

[130] GABARDO, Emerson; SALGADO, Eneida Desiree; VIANA, Ana Cristina Aguillar. The Brazilian Anti-corruption Law: a new way to control the relationship between public administration and the private sector. **The Indonesian Journal of International & Comparative Law**, n. VI, p. 397-421, 2019.

[131] PREUSSLER, Gustavo de Souza. Combate à corrupção e a flexibilização das garantias fundamentais: a operação Lava Jato como processo penal do inimigo. **Revista Brasileira de Ciências Criminais**. São Paulo, v. 25, n. 134, p. 87-107, 2017.

[132] SEGOVIA, Juan Fernando. La interpretación constitucional populista. **Prudentia Iuris**. v. 76, p. 135-164, 2013.

general result of this process, there is a jurisprudence (and also a consequent doctrine) that deviates a lot from the traditional rule of law doctrine inspired by the European model and enshrined in the 1988 Constitution.

6. CONCLUSION

Other relevant factors perhaps would be important to understand the crisis of democracy and the rule of law in contemporary Brazil. Among the structural factors, an approach to the subject could be made from the Brazilians' authoritarian identity or the cleavage between right and left, as well as the role of elites and their impact on Brazilian cultural politics. Among the conjunctural factors, one could address the media's essential role in creating the "spectacle of corruption" in alliance with the Judiciary and the right-wing elites. This phenomenon led to the rise to power of President Jair Bolsonaro. However, we choose to left aside these elements for the clipping and specification of this article's object. In essence, such complementary factors require further study, which will be left for the other moment of the investigation.

Within this general context, the article has a methodological approach to demonstrate that although democracy and the rule of law are permanently in crisis in Brazil, there are particular elements in the situation experienced in the second decade of the 20th century. One of these elements is the role of the Judiciary in implementing exception mechanisms. In Latin America, it is usually the Executive branch that disrespects the assumptions of democracy and the rule of law. However, in contemporary Brazil, the Judicial Branch has a central role, adopting populist positions and typical lawfare strategies (a war through the law). This new judicial action causes an imbalance between the powers and the absence of an institution that moderates social conflicts. The members of the Judiciary make up a very well-paid and strongly corporate elite. Their performance reflects their profile.

The rule of law is one of the most significant achievements of modernity. However, its concept varies in time and space. There are at least three great traditions that gave rise to the understanding of the expression. Brazil received different influences on the construction of the rule of law as an idea. However, despite the advancement of the theme in the sphere of ideas, Brazilian history shows a strong dissonance between theory and social practices on the subject. The Brazilian social imaginary is, in reality, founded on authoritarian bases. Nowadays, this problem is even more severe, considering the flexibility of ideas and concepts in the postmodern environment.

Brazilians are used to institutional instability and the absence of democracy. Although there was a robust social modernization process in the transition from the 20th to the 21st century, realizing a genuine rule of law is still far from a predominant reality. On the one hand, there was a substantial consolidation of the ideal of the Brazilian rule

of law with the promulgation of the 1988 Constitution and, also, during its first twenty or twenty-five years of effectiveness. On the other hand, the consolidation of this traditional rule of law was not enough to give the political system the necessary institutional stability. On the contrary, the traditional idea of the rule of law came to be considered anachronistic. The Judicial Branch began to abandon the traditional sense of the rule of law in order to build a postmodern, flexible, subjectivist, and unstable interpretation. Assuming a populist profile and adopting lawfare practices, the Brazilian Judiciary is increasingly moving away from the foundations of democracy established in 1988.

Judicial populism removed from the traditional rule of law feeds, in turn, the traditional authoritarian mentality of Brazilian society. In 2018, the election of a President whose ideas are close to neo-fascism was an example of the lack of appreciation of Brazilian society for the postulates of democracy and the traditional rule of law. This situation directly impacts vulnerable people who are already victims of prejudice and discrimination, even in a position of democratic normality.

Several decisions of the Supreme Federal Court and the Superior Electoral Court have crossed the barrier of separation of powers, as well as not being concerned with respecting the principle of legality. This behavior of the upper courts ends up influencing the Judiciary's entire structure, towards the affirmation of a system that is materially different from the system formally established by the Constitution (and which has a strong backing in the history of the rule of law). Anti-corruption operations, such as Operation Car Wash (Lava Jato), are examples of pragmatic institutional action that disregards the due legal process's postulates. Also, judges and prosecutors begin to behave like enlightened despots, causing an erosion of the rule of law – the legal system, in this context, loses credibility and utility, becoming a weapon in the hands of those who have the power to decide. Abandoning an objective and rational hermeneutics, "justice" starts to be understood with subjectivity and in disagreement with the legislated law. With this populist behavior, instead of the Judiciary contributing to the normality of the rule of law and institutional balance, the Judicial Branch ends up fostering democratic decay and the consequent proliferation of ideological polarization with increasing far-right groups.

It is not surprising that, more recently, the judges "got a dose of their own medicine". In other words, more and more the Judiciary and, particularly, the Supreme Federal Court, has lost popularity. Moreover, the Court has been constantly attacked exactly by the political agents for whose election the judicial decisions had a decisive role. The paradox of the situation is evident but understandable. When the Judicial Branch becomes a political actor, it loses the position of objective institutional stability and becomes an institution whose legitimacy depends on variations in society's mood. In a moment of democratic decay, the authoritarian profile rising of the people is a

complicating element for a branch of the State that can only justify its existence based on the rule of law. In essence, the new profile of the Brazilian Judiciary ends up being a self-destructive factor.

7. REFERENCES

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