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REPRESENTATIVE AND ILLUMINIST CONSTITUTIONAL JURISDICTION: AN OUTLOOK BASED ON THE HERMENEUTICAL CRITICISM OF LAW[1]

JURISDIÇÃO CONSTITUCIONAL REPRESENTATIVA E ILUMINISTA: UM OLHAR A PARTIR DA CRÍTICA HERMENÊUTICA DO DIREITO

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ABSTRACT: The present study analyzed the representative and illuminist role of the Constitutional Courts (Barroso) under the lens of the Hermeneutic Criticism of Law (Streck). The objective was to understand, based on these theoretical matrices, what to expect from Brazilian constitutional jurisdiction to adequately meet the constitutional project inaugurated in 1988. An approach was made to the representative and illuminist role of the Constitutional Courts and the Hermeneutic Criticism of Law (HCL) and, at the end, an analysis of the representative and illuminist role of the Constitutional Courts based on the HCL. It was noted that HCL offers elements that are best suited to the democratic implementation of the constitutional project inaugurated in 1988.

Keywords: Luís Roberto Barroso. Lenio Luiz Streck. Constitutional Interpretation. Presumption of innocence.

RESUMO: O presente estudo analisou o papel representativo e iluminista das Cortes Constitucionais (Barroso) sob as lentes da Crítica Hermenêutica do Direito (Streck). Objetivou-se entender, a partir dessas matrizes teóricas, o que se esperar da jurisdição constitucional brasileira para atender adequadamente ao projeto constitucional inaugurado em 1988. Foi feita uma abordagem do papel representativo e iluminista das Cortes Constitucionais e da Crítica Hermenêutica do Direito (CHD) e, por fim, uma análise do papel representativo e iluminista das Cortes Constitucionais a partir da CHD. Concluiu-se que a CHD oferece elementos que melhor se adequam à concretização democrática do projeto constitucional inaugurado em 1988.

Palavras-chave: Luís Roberto Barroso. Lenio Luiz Streck. Interpretação Constitucional. Presunção de inocência.

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1 INTRODUCTION

Contemporary Constitutionalism[3] is the result of the constitutionalist tradition, but it also has its own paradigmatic traits. It brings with it elementary characters that were inherited from modern constitutionalism, in which the need for a written bill of rights that limited state power emerged. Nowadays, there is also a need for an effectively supreme and normative constitution. In other words: capable of submitting political power to its empire and establishing the state based on its commandments.

The need for an effective and normative constitution, in a Democratic State of Rights, is essential. However, regarding the ways to achieve this desire, there are different approaches. Different proposals for Brazilian constitutionalism. Among them, two that will be the objects of this research stand out: the Doctrine of Effectiveness, developed by Luís Roberto Barroso and the Hermeneutic Criticism of Law (HCL), developed by Luiz Lenio Streck.

To the Doctrine of Effectiveness, the constitutional jurisdiction must have a greater role in order to fill legal gaps and meet social demands that reach the Court. For this purpose, it is based on three roles of the Constitutional Courts: "counter-majoritarian", representative and illuminist. For the second current, that is, CHD, the role of constitutional jurisdiction is based on a substantial perspective, far from activisms[4] and "decisionisms", from which the fundamental right to a constitutionally adequate response emerges (REBELO, 2021).

Based on these prominent proposals of the national doctrine, we question what can be expected from the brazilian constitutional jurisdiction to adequately meet the constitutional project inaugurated in 1988.

In this context, the present work sought, from the elements of the Doctrine of Effectiveness, to analyze two of them from the CHD: the representative role and the illuminist role of the Constitutional Courts. In order to extract constitutionally adequate

[3]According to Streck (2014), the term Contemporary Constitutionalism appears to oppose the thesis arising from neoconstitutionalism, from a perspective that does not accept the methodology of balancing and subsumption as defended by neoconstitutionalist currents. Therefore, Contemporary Constitutionalism adheres to a law that does not accept discretion and that has the hermeneutic critique of Law as its theoretical matrix. Thus, according to Streck (2014, p. 29-30),"o Constitucionalismo Contemporâneo representa um redimensionamento na práxis político-jurídica, que se dá em dois níveis: no plano da Teoria do Estado e da Constituição, com o advento do Estado Democrático de Direito, e no plano da Teoria do Direito, no interior da qual acontece a reformulação da teoria das fontes (a supremacia da lei cede lugar à onipresença da Constituição), da teoria da norma (devido à normatividade dos princípios) e da teoria da interpretação (que, nos termos que proponho, representa uma blindagem às discricionariedades e aos ativismos)".

[4] According to Tassinari (2014, p. 20), "há um equívoco em considerar judicialização da política e ativismo judicial como se fossem o mesmo fenômeno; [...] a judicialização da política é um "fenômeno contingencial", isto é, que insurge de determinado contexto social, independente da postura de juízes e tribunais, ao passo que o ativismo diz respeito a uma postura do Judiciário para além dos limites constitucionais".

elements to meet the constitutional project inaugurated in 1988, from the dialogue between the two doctrines now studied, with their flows and influxes.

To this end, an approach was made to the representative and illuminist role of the Constitutional Courts and the Hermeneutic Criticism of Law and, finally, an analysis of the representative and enlightening role of the Constitutional Courts based on the HCL, in which the voting theories were compared by Minister Roberto Barroso given in Constitutionality Declaratory Actions nº 43, 44 and 54.

This study was born from an eminently bibliographical research, with a critical study of the doctrine of Lenio Streck and Luís Roberto Barroso. A comparative analysis was used between the two doctrinal currents, as well as the analysis of the speech present in Minister Roberto Barroso's vote, delivered in the context of Constitutionality Declaratory Actions nº 43, 44 and 54.

2 DOCTRINE OF EFFECTIVENESS: REPRESENTATIVE AND ILLUMINIST ROLE OF THE CONSTITUTIONAL COURTS

The minister of the Supreme Federal Court, Luís Roberto Barroso, presents himself as a defender of a Brazilian doctrine of effectiveness, and not as a representative of neoconstitutionalism (LYNCH; MENDONÇA, 2017). Despite this, Barroso can be seen as the main exponent of neoconstitutionalism in Brazil (REBELO, 2021). Barroso (2006, p. 284) maintains that "the doctrine of effectiveness has consolidated itself in brazil as an efficient mechanism of countering the normative insincerity and of surpassing the political supremacy out and above the Constitution"[5]. In this context, according to the author, the doctrine of effectiveness sought to give national constitutional law "a normative dimension and fulfiller of modernity's promises; illimited power, promotion of the fundamental rights, material justice and political pluralism"[6] (BARROSO, 2006, p. 282).

As fundamental milestones of neoconstitutionalism, Barroso (2005) names the historical, philosophical and theoretical ones. The historical landmark is related to post-WWII constitutionalism, represented in Germany by the 1949 Constitution (Bonn's Fundamental Law) and in Italy by the 1947 Constitution. In Brazil, the 1988 Constitution represents the neoconstitutionalist historical landmark. As for the philosophical milestone,

[5]original text: "a doutrina da efetividade se consolidou no Brasil como mecanismo eficiente de enfrentamento da insinceridade normativa e de superação da supremacia política exercida fora e acima da Constituição"
[6]original text: "uma dimensão normativa e concretizadora das promessas da modernidade; poder limitado, promoção dos direitos fundamentais, justiça material e pluralismo político"

it is related to post-positivism, seeking to go beyond strict legality and bringing Law closer to philosophy (BARROSO, 2005).

The theoretical framework represents: i) the recognition of the normative force of the constitution; ii) the expansion of constitutional jurisdiction and iii) new constitutional interpretation. About this:

> Theoretical, philosophical, and ideological premises of traditional interpretation have been affected, notably concerning the role of the norm, its possibilities and limits, and the role of the interpreter, their function and circumstances. In this environment, alongside traditional elements of legal interpretation and the specific principles of constitutional interpretation developed over time, new perspectives have been discovered, and new theories have been developed. In this ever-expanding and evolving universe, categories have been created or reworked, such as modes of giving meaning to general clauses, the recognition of normativity in principles, the perception of clashes between constitutional norms and fundamental rights, the need to use balancing as a decision-making technique, and the rehabilitation of practical reason as a foundation for legitimizing judicial decisions. (BARROSO, 2020, p. 259 of the digital book).[7]

In this sense, for Barroso (2018a, p. 2218), the supreme courts and constitutional courts play three roles:

> Counter-majoritarian when they invalidate acts of elected powers; representative when they address unmet social demands by political institutions; and enlightenment-oriented when they promote civilizational advancements regardless of circumstantial political majorities.[8]

According to the author, it was up to the country's constitutional jurisdiction to decide on a series of issues that had (have) the support of the majority of the population, but which did not have their intentions accepted in the majoritarian politics (BARROSO, 2018a). This would justify the representative role of the Federal Supreme Court.

Thus, democratic constitutionalism would be based on the institutionalization of reason and moral correctness, so that a decision by the FSC, to be seen as legitimate, must demonstrate that the argument used was rational and fair, as well as that the decision corresponds to a social demand that can be demonstrated objectively (BARROSO, 2018b). In this way, the author admits that judges, when making decisions, can take into account

[7]original text: "Foram afetadas premissas teóricas, filosóficas e ideológicas da interpretação tradicional, inclusive e notadamente quanto ao papel da norma, suas possibilidades e limites, e ao papel do intérprete, sua função e suas circunstâncias. Nesse ambiente, ao lado dos elementos tradicionais de interpretação jurídica e dos princípios específicos de interpretação constitucional delineados ao longo do tempo, foram descobertas novas perspectivas e desenvolvidas novas teorias. Nesse universo em movimento e em expansão, incluem-se categorias que foram criadas ou reelaboradas, como os modos de atribuição de sentido às cláusulas gerais, o reconhecimento de normatividade aos princípios, a percepção da ocorrência de colisões de normas constitucionais e de direitos fundamentais, a necessidade de utilização da ponderação como técnica de decisão e a reabilitação da razão prática como fundamento de legitimação das decisões judiciais"

[8] original text: "contramajoritário, quando invalidam atos dos Poderes eleitos; representativo, quando atendem demandas sociais não satisfeitas pelas instâncias políticas; e iluminista, quando promovem avanços civilizatórios independentemente das maiorias políticas circunstanciais".

reality and the social sentiment, but without transforming the judiciary into a body submitted to public opinion

Illuminist decisions, in turn, seek to break institutional blockages and "push history" promoting civilizational advances. These decisions must, according to the author, be followed by rational conviction and must be exercised "with great parsimony because of the risk that it represents"[9] (BARROSO, 2018a, p. 2207).

Barroso (2020) bets on illuminism, idealism and pragmatism as necessary values to promote the country's advancement. Illuminism embodied in the ideals of reason, science, humanism and progress; idealism as a projection of a new, different and better reality, in which the human person is seen as a moral agent of progress; and pragmatism, in which the merit of actions is assessed based on the practical results they can produce (BARROSO, 2020).

It is clear, therefore, that Barroso, when defending the representative and illuminist role of the supreme courts, admits judicial discretion, unlike Lenio Streck, who rejects it (REBELO, 2021).

3 HERMENEUTICAL CRITICISM OF LAW

The HCL was built on theoretical bases arising from the ontological-linguistic circle and authors such as Luis Alberto Warat (criticism of theoretical common sense), Ernildo Stein (one of the main interpreters of Heidegger and Gadamer in Brazil), Martin Heidegger (*hermeneutic philosophy*) , Hans-Georg Gadamer (*philosophical hermeneutics*) , Wittgenstein (language as constitutive of consciousness) and Ronald Dworkin - theory of the decision that respects the coherence and integrity of Law (BARBOSA; QUARELLI, 2021).

The HCL has become a true theoretical matrix, as it adds epistemological assumptions "that combine Gadamer's philosophical hermeneutics with Dworkin's interpretative theory; a conceptual framework composed of its own categories and definitions; a specific method, in this case, the "phenomenological-hermeneutic method."[10](TRINDADE; OLIVEIRA, p. 325, 2017).

In short, according to Barbosa and Quarelli (2021):

> HCL is a new theory that emerges from the fusion of horizons of philosophical hermeneutics, philosophical hermeneutics, and Dworkin's integrative theory. From it arises the thesis that there is a fundamental right to a correct answer,

[9]original text: "com grande parcimônia, pelo risco democrático que ela representa"
[10] original text: "que aliam a hermenêutica filosófica de Gadamer à teoria interpretativista de Dworkin; aparato conceitual composto por categorias e definições próprias; método determinado, no caso o "método fenomenológico-hermenêutico"

> understood as adequate to the Constitution. It provides a theoretical framework with philosophical and legal foundations and, from a methodological perspective, develops the hermeneutic "method," which involves delving into the linguistic context upon which a given tradition is based to reconstruct the institutional history of the phenomenon.[11]

By differentiating itself from neoconstitutionalism, HCL becomes the theoretical matrix of Contemporary Constitutionalism, which seeks an interpretation of Law far from discretion and activism, notably because the epistemological paradigm of the philosophy of consciousness still prevails in the Brazilian legal field (STRECK, 2014).

Seeking to break with the aforementioned paradigm, HCL is located in another paradigmatic context: the ontological-linguistic turn, in which the subject ceases to be the foundation of knowledge, ceases to be the owner of the senses. Thus, the meaning is no longer located in the person's consciousness to be located at the level of public language. The act of judging is no longer limited to an act of will, that is, a subjective choice by the interpreter (STRECK, 2020a).

In this way, Streck (2016) is contrary to legal positivism and its inherent judicial discretion. It is from this fundamental premise that the HCL is built. Therefore, discretion is seen as incompatible with democracy. HCL aims to construct a decision theory that makes it possible to break with legal positivism. Thus, the constitutionally adequate response is one that, due to democratic requirements, is based on the law constructed by the community, and not by individual wills. The legal decision must be located in the field of intersubjectivity (STRECK, 2016).

> Thus, we can see that hermeneutics positions itself where there are no longer essences, nor consciousness as the ultimate foundation, but rather what occurs in the fluidity of history and dialogicity. Hermeneutics is this uncomfortable truth that settles between the chairs of objectivism and subjectivism. We also see that it is neither relativism nor an absolute truth, outside of time and the world. It is, indeed, a truth that establishes itself within the intersubjective nature of language, constraining subjective convictions. This places CHD directly against the philosophical concept called solipsism (STRECK; DELFINO; LOPES, p. 220, 2017).[12]

[11] original text: "a CHD é uma nova teoria que exsurge da fusão dos horizontes da filosofia hermenêutica, da hermenêutica filosófica e da teoria integrativa dworkiniana. Sendo que dela exsurge a tese de que há um direito fundamental a uma resposta correta, entendida como *adequada à Constituição*. Tem-se uma matriz teórica com fundamentos filosóficos, bem como de teoria do Direito e que sob o aspecto metodológico, desenvolve o "método" hermenêutico, isto é, realiza o revolvimento do chão linguístico em que está assentada uma dada tradição para reconstruir a história institucional do fenômeno".

[12] original text: "Desse modo, podemos ver que a hermenêutica se coloca onde não há mais as essências, nem a consciência como fundamento último, mas aquilo que se dá na fluidez da própria história e da dialogicidade. A hermenêutica é esta incômoda verdade que se assenta entre as cadeiras do objetivismo e do subjetivismo. Vemos também que não é relativismo, nem uma verdade absoluta, fora do tempo e do mundo. É, sim, uma verdade que se estabelece dentro do caráter intersubjetivo da linguagem, em que as convicções subjetivistas são constrangidas. Isto coloca a CHD diretamente contra a concepção filosófica chamada solipsismo. (STRECK; DELFINO; LOPES, p. 220, 2017)".

Solipsism places the world and knowledge at the disposal of the subject's consciousness, who begins to subject the world from his subjective point of view. This solipsistic subject refuses to submit to the constraints arising from intersubjectivity (STRECK, 2020a). Thus, CHD emerges as an antidote " against theories that pretend too claim a solipsist protagonist of judiciary" [13](STRECK, p. 329, 2021).

Consequently, according to Streck (2013), theories of law and the Constitution that intend to ensure democracy and the implementation of fundamental and social rights established in the Constitution need to be guided by a set of principles that establish hermeneutical standards, which aim:

> a) Preserve the autonomy of the law; b) Establish hermeneutic conditions for the realization of control over constitutional interpretation (final ratio, imposing limits on judicial decisions - the problem of discretion); c) Ensure respect for the integrity and coherence of the law; d) Establish that providing reasoning for decisions is a fundamental duty of judges and courts; e) Ensure that each citizen has their case judged based on the Constitution and that there are conditions to assess whether this response is constitutionally appropriate or not (STRECK, pp. 106-107, 2013).[14]

It can be noted, therefore, from all of the above, that judicial discretion is a key point. Not only to differentiate the two theoretical matrices now studied, but also to analyze their coherence and adequation when put into practice.

4 REPRESENTATIVENESS AND LAW ILLUMINISM PUT TO THE TEST IN CDA's nº 43, 44 and 54: WHAT DOES THE HCL HAVE TO SAY?

Despite the fact that the Federal Constitution of 1988 had, in an unprecedented way, expressively elevated the presumption of innocence to a fundamental right and guarantee, an immutable clause, and thus established its final mark (claim preclusion), the topic was the subject of many debates. Sometimes recognizing the possibility of serving the prison sentence only with the final judgment of the conviction; sometimes relativizing the presumption of innocence to allow for the early fulfillment of the prison sentence, starting after conviction in the second level of jurisdiction. Vieira (2020, p. 84) provides a panoramic picture of these jurisprudential oscillations, up to the year 2018:

[13] original text: "contra teorias que pretendam reivindicar um protagonismo solipsista do Judiciário"
[14] original text: "a) preservar a autonomia do direito; b) estabelecer condições hermenêuticas para a realização de um controle da interpretação constitucional (ratio final, a imposição de limites às decisões judiciais – o problema da discricionariedade); c) garantir o respeito à integridade e à coerência do direito; d) estabelecer que a fundamentação das decisões é um dever fundamental dos juízes e tribunais; e) garantir que cada cidadão tenha sua causa julgada a partir da Constituição e que haja condições para aferir se essa resposta está ou não constitucionalmente adequada". (STRECK, págs. 106-107, 2013).

Table 8[15]**:** Overview of FSC's court judgments about the possibility of enforcement of the custodial sentence before the claim preclusion (*res judicata*).

Lawsuit	Court understanding	Year of the trial
HC nº 68.726	It is possible to enforce the custodial sentence before the claim preclusion	1991
HC nº 69.964	It is possible to enforce the custodial sentence before the claim preclusion	1992
Regimental Appeal in the petition nº 1.079	It is possible to enforce the custodial sentence before the claim preclusion	1996
HC nº 84.078	It is not possible to enforce the custodial sentence before the claim preclusion	2009
RHC nº 93.172	It is not possible to enforce the custodial sentence before the claim preclusion	2009
HC nº 91.676	It is not possible to enforce the custodial sentence before the claim preclusion	2009
HC nº 126.292	It is possible to enforce the custodial sentence before the claim preclusion	2016
Declaration Embargoes on HC nº 126.292	It is possible to enforce the custodial sentence before the claim preclusion	2016
Cautionary Measure on CDA nº 43	It is possible to enforce the custodial sentence before the claim preclusion	2016
Regimental Appeal nº 964.246	It is possible to enforce the custodial sentence before the claim preclusion	2016
HC nº 152.752	It is possible to enforce the custodial sentence before the claim preclusion	2018

As it can be seen, despite the Federal Constitution of 1988 opening a new paradigm in search of a truly democratic and lawful State with respect for a substantial list of fundamental guarantees and rights, it was only in 2009, after more than 20 years, that was

[15] Table extracted in full from Vieira (2020, p. 84).

that the STF, in HC 84.078/MG [16], gave constitutional meaning, in its entirety, to the presumption of innocence. It was established that the early enforcement of the sentence violated the Constitution, and that prison could only be discussed before an immutable conviction was issued as a precautionary measure.

With the promulgation of the Federal Constitution of 1988, it became necessary to rethink the entire legal order in light of its fundamental precepts. A true constitutional filtering, which means we have to talk about a truly constitutional criminal process. In 1988, more than a new text was inaugurated, but a new and unique political spirit, demanding a new understanding on the part of society and the courts (DANTAS, 2018).

The fact that the FSC, the greatest guardian of the Constitution, maintained an understanding, until 2009, about the constitutionality of the provisional execution of the sentence when an appeal without suspensive effect is pending demonstrates remnants inherited from the authoritarian conceptions that were in force until 1988. From an ideology based on the fight against crime at any cost, on the basis of a maximum criminal law and a utilitarian criminal process (DANTAS, 2018).

This signaled a change in ideology, a new constitutional spirit, through the construction of a constitutional criminal process, in compliance with fundamental guarantees and rights; it succumbed to a setback in 2016. Once again, it was decided on the constitutionality of the provisional enforcement of the sentence, during the judgment of HC 126.292/SP, reported by Minister Teori Zavascki.

A new hermeneutical turn began, which was ratified in the precautionary actions filed in the context of Constitutionality Declaratory Actions 43 and 44, which aimed to declare the constitutionality of the article 283 of the Criminal Procedure Code. Likewise, the constitutionality of imprisonment after trial in the second instance was reaffirmed in Regimental Appeal 964.246/SP.

The arguments for this new interpretation revolved mainly around the fact that the probationary discussion ends with the second instance sentence, appeals of a delaying nature in extraordinary instances and society's interest in having an effective penal system (DANTAS, 2018). This disregards the constitutional and criminal procedural system itself, giving way to inquisitorial and punitive thinking.

[16]STF - HC: 84078 MG, Relator: Min. EROS GRAU, Data de Julgamento: 05/02/2009, Tribunal Pleno, Data de Publicação: DJe-035 DIVULG 25-02-2010 PUBLIC 26-02-2010 EMENT VOL-02391-05 PP-01048

On November 7, 2019, the FSC once again prioritized the principle of presumption of innocence. When in a tight vote, 6x5, it recognized the constitutionality of article 283 of the CPC, thus preventing the early enforcement of the sentence; in the context of the joint judgment of CDA 43, CDA 44 and CDA 54, reported by Minister Marco Aurélio.

Well, having completed this brief historical overview of the FSC's interpretation of the presumption of innocence, we reach the point that is most interesting to this study: the Constitutionality Declaratory Actions nº 43, 44 and 54 and, more specifically, the vote of minister Roberto Barroso. In a short summary, the minister maintained, in his vote, that [17]:

> (i) The Brazilian constitutional order does not require a final judgment for the decree of arrest. What is needed is a written and reasoned order from the competent authority (CF/1988, art. 5, LVII and LXI);
>
> (ii) The presumption of innocence is a principle, not an absolute rule applied in an all-or-nothing manner. As a principle, it needs to be balanced with other constitutional principles and values. Balancing is about assigning weights to different norms. As the process advances and leads to a conviction at the appellate level, the societal interest in the minimal effectiveness of the penal system carries more weight than the presumption of innocence;
>
> (iii) After a conviction at the appellate level, where there is no longer any doubt about the authorship and materiality of the offense, there is no room for further discussion of facts and evidence; the execution of the sentence becomes a matter of public order for the preservation of judicial credibility.
>
> 3.There are also pragmatic reasons that support the chosen interpretative approach here. In fact, the possibility of executing the sentence after a conviction at the appellate level:
>
> (i) makes the criminal justice system more functional and balanced by restraining the endless filing of dilatory appeals and promoting the value of ordinary criminal jurisdiction;
>
> (ii) reduces the degree of selectivity in the Brazilian punitive system, making it more republican and egalitarian, as well as reducing the incentives for white-collar crime due to the minimal risk of effective punishment;
>
> (iii) breaks the paradigm of impunity in the criminal system by preventing the need to await the final judgment of extraordinary and special appeals, which could result in prescription or a significant temporal gap between the commission of the offense and punishment, considering that such appeals have a minimal rate of acceptance.[18]

[17]Video vote available at <https://www.youtube.com/watch?v=YmeDtKcraGo&ab_channel=Lu%C3%ADsRobertoBarroso > and base text of te oral vote available at < https://www.conjur.com.br/dl /leia-voto- Ministro-barroso -execucao.pdf >

[18]original text: " (i) a ordem constitucional brasileira não exige trânsito em julgado para a decretação de prisão. O que se exige é ordem escrita e fundamentada da autoridade competente (CF/1988, art. 5º, LVII e LXI);
(ii) a presunção de inocência é um princípio, e não uma regra absoluta, que se aplique na modalidade tudo ou nada. Por ser um princípio, precisa ser ponderada com outros princípios e valores constitucionais. Ponderar é atribuir pesos a diferentes normas. Na medida em que o processo avança e se chega à condenação em 2º grau, o interesse social na efetividade mínima do sistema penal adquire maior peso que a presunção de inocência ;
(iii) depois da condenação em 2º grau, quando já não há mais dúvida acerca da autoria e da materialidade delitiva, nem cabe mais discutir fatos e provas, a execução da pena é uma exigência de ordem pública para a preservação da credibilidade da justiça.

These were the main theoretical arguments used by Minister Barroso. It is observed that the balancing of the presumption of innocence with the effectiveness of criminal law, the credibility of the penal system and the search to break with the feeling of impunity were the main bases for the vote. There would be an interest on the part of society in having an effective penal system that would contrast with the current demoralized penal system.

Another highlight in your vote was the empirical-pragmatic basis. Which, according to the minister, starts from "valuing experience as a source of knowledge and legitimizing public choices while striving for the best results within the semantic possibilities and limits of normative texts.".[19]

Such a perspective, under the lens of HCL, appears to be inadequate. Legal pragmatism is not compatible with constitutional interpretation. It is incompatible in terms of legitimacy, because it relies on judicial protagonism in interpretation. When the hermeneutic action is based on what is considered the best consequences, it ends up undermining the constitutional text in favor of subjectivity. It is also incompatible at the decisional level, as pragmatism has imprecise boundaries and ends up disregarding normative limits when it prioritizes the useful in detriment of normativity (MADALENA; SAMPAR; QUARELLI, 2022).

Furthermore, it is not possible to conceive a constitutional interpretation that is separated from the ground of history and constitutional tradition, specifically in this situation about the institutional history of the presumption of innocence. After all, the fight against corruption and crime must be done without breaking the Rule of Law and without abolishing citizens' rights (BREDA, 2020).

The so-called ponderation of the presumption of innocence is equally problematic, in which the social interest in the effectiveness of the penal system acquires greater weight, given that the consideration ends up privileging the discretion and subjectivism of the

3. Há, ainda, fundamentos de ordem pragmática que reforçam a opção pela linha interpretativa aqui adotada. De fato, a possibilidade de execução da pena após a condenação em segundo grau:
(i) permite tornar o sistema de justiça criminal mais funcional e equilibrado, na medida em que coíbe a infindável interposição de recursos protelatórios e favorece a valorização da jurisdição criminal ordinária;
(ii) diminui o grau de seletividade do sistema punitivo brasileiro, tornando-o mais republicano e igualitário, bem como reduz os incentivos à criminalidade de colarinho branco, decorrente do mínimo risco de cumprimento efetivo da pena;
(iii) promove a quebra do paradigma de impunidade no sistema criminal, ao evitar que a necessidade de aguardar o trânsito em julgado do recurso extraordinário e do recurso especial impeça a aplicação da pena (pela prescrição) ou cause enorme distanciamento temporal entre a prática do delito e a punição, sendo certo que tais recursos têm ínfimo índice de acolhimento;"

[19]original text: "valorização da experiência como fonte de conhecimento e legitimação das escolhas públicas e na busca dos melhores resultados, dentro das possibilidades e limites semânticos dos textos normativos".

interpreter in the choosing of conflicting principles. Now, is it possible to weigh a principle with values? What is the legal category of the so-called "social interest in the effectiveness of the criminal system" to be able to override the normativity of the principle of presumption of innocence? Is it necessary to mitigate this principle to seek an effective penal system?

On the point, Streck's criticism (2014, p. 29) is correct when he says that "under the "neoconstitutionalist" banner, there is a simultaneous defense of a constitutional right of law effectiveness, a right haunted by the weighing of values, an *ad hoc* realization of the Constitution, and a supposed constitutionalization of the system"[20] [...] as a result of the belief in jurisdiction as being responsible for incorporating the "true values" that define fair law (STRECK, 2014). In this context, the judge resorts to the use of values of negligible concrete density to remove the content of the Law, which is replaced by his own conviction supported by the principles and values invoked by the interpreter (STRECK, 2020b).

It is not up to the FSC, the greatest guardian of the Constitution (and not its owner), to seek to satisfy momentary majority desires emanating from within society, but rather to pay attention to legal-constitutional expectations, even when it has to make counter-majoritarian decisions (LOPES JÚNIOR, 2020). The Supreme Court, as guardian of the Greater Law, is equally subject to it. Therefore, attention must be paid to the implementation of the constitutional project that radiates from it, even if to do so it has to face discontent on the part of certain social sectors, which necessarily involves the uncompromising defense of their rights and guarantees.

This pragmatist, utilitarian and solipsist vision present in the vote now analyzed ends up subverting the constitutional logic. Its integrity and coherence are undermined. The primacy of its principles gives rise to criminal policy arguments. The imperative command of the presumption of innocence is disregarded, which opens space for legal realism, seeking to adapt the norm to social desires. Laws become subject to social views considered fair. These social elements start to subsidize distortions of the constitutional text (SARAIVA, 2020).

The coherence and integrity of the law are left aside. Concepts such as the presumption of innocence are distorted in favor of arguments guided by a "response to impunity". As Streck (2019) highlights, the Law has become a matter of opinion and

[20]original text: "sob a bandeira "neoconstitucionalista" defendem-se, ao mesmo tempo, um direito constitucional da efetividade, um direito assombrado pela ponderação de valores, uma concretização ad hoc da Constituição e uma pretensa constitucionalização do ordenamento"

subjectivism, the Law has been contaminated by emotivism. [21] Decisions are made according to the conscience of the judge (STRECK, 2013).

From all the above, it appears that the elements of the Doctrine of Effectiveness analyzed here (representative and enlightening role of constitutional courts) are not sustainable. This was evidenced in Minister Barroso's vote, analyzed in this chapter. This is because the thesis relies on activism and pragmatism to implement the Constitution. This makes interpretation susceptible to the solipsism typical of the philosophy of consciousness paradigm, while the meanings are made available to the interpreter, a fact that can lead to *ad hoc* interpretations . Therefore, this theoretical matrix shows itself to be insufficient and, due to the problems mentioned, incompatible to adequately meet the constitutional project inaugurated in 1988. After all, civilizing advances must be based on the constitutional project, not at its margin, or based on individual conceptions of interpreters of what is or is not fair.

HCL, in turn, appears to be more consistent as it itself provides elements of self-containment independently of the interpreter who instrumentalizes it, as it removes the disposition of the senses from the latter and places interpretation on an intersubjective plane that is subject to constraint by public language. Thus, it becomes a suitable theoretical matrix to achieve a constitutionally adequate response that holds legitimacy before the political community and not only before the interpreter's subjective perspective. Furthermore, as Costa and Chagas (2022) point out, the HCL seeks to build a path that overcomes legal realism and calls into question legal pragmatism and the mistakes of an objectification of law.

In this way, it is necessary, according to Lênio Streck, to construct epistemological constraints in order to contain decisionisms and solipsisms in favor of constitutionally adequate decisions. And, finally, based on Konrad Hesse (1991), the guardians of the Constitution must have less desire for power and more desire for the constitution. It is the Constitution that must shape the activity of the jurist, the interpreter, without appealing to subjectivist judgments for its implementation, as activism is pragmatist and used *ad hoc* (STRECK, 2013).

[21] According to Streck (2019, p. 86),"no Direito, estamos vivendo a era do emotivismo. A era do saber nenhum. A era da distopia de MacIntyre. E isso é muito grave. [...] É grave porque, na era do emotivismo, o Direito deveria ser exatamente o critério para resolver os desacordos. Pois é: emotivizaram o critério. Direito virou questão de opinião, de juízo subjetivo. Trocaram o Direito pelo emotivismo da auctoritas". Streck (2019, p. 86), brings the conception of emotivism, based on MacIntyre, as being "a doutrina segundo a qual juízos valorativos" — ou, mais especificamente, "todos os juízos morais" — "são nada mais que expressões de preferência, de atitude, de sentimentos, na medida em que tenham caráter moral ou valorativo".

FINAL CONSIDERATIONS

The Doctrine of Effectiveness, in which the representative and enlightening roles of the constitutional courts are located, as specifically evidenced in Minister Barroso's vote in Constitutionality Declaratory Actions nº 43, 44 and 54, appears to be fragile and susceptible to judicial solipsism and *ad hoc* interpretations of the Constitution, as these roles are situated in the paradigm of the philosophy of conscience and are adherents of legal pragmatism. HCL, on the other hand, is an ideal theoretical matrix to achieve a constitutionally adequate response, holding legitimacy before the political community and not only before the subjective of the interpreter, as it itself provides elements of self-containment independently of the interpreter who instrumentalizes it to the remove the disposition of the senses from him and place the interpretation on an intersubjective level.

In this context, it is expected from the Brazilian constitutional jurisdiction, to adequately meet the constitutional project inaugurated in 1988, that civilizing advances are promoted, but that these are always adequately based on the Constitution. That decisions are epistemologically constrained and never left at the mercy of voluntarisms that are volatile depending on the circumstances. That the supreme interests of the Constitution and its societal project be preserved to the detriment of individual and momentary interests that contrast with the constitutional order (even if supported by a supposed popular will).

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