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REVERSE JUDICIALIZATION AS A STRATEGY OF DOMINATION: CONCEPTUAL DISPUTES IN PUBLIC POLICIES ON QUILOMBO LANDS

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ABSTRACT: The work presented seeks to break the paradigms related to the common sense that involves the understanding of the institute of the judicialization of public policies and to present a new horizon for the perception that the institute, despite having been created in search of the effectiveness of democracy, can have its use distorted and used with the aim of de-democratization. The proposal followed the path of political science with a detailed analysis of the speeches present in ADI nº 3.239/2004 that had as objective the annulment of Federal Decree nº 4.887/2003. The action was proposed by a political party with a capitalist and liberal base against the decree whose purpose is the land regularization of quilombola lands. One of the argumentative points of the demand was the conceptual dispute about the concept of quilombo, since the contested decree presents self-assignment to quilombola as one of the requirements for access to the right to land. The use of the concept of the historic quilombo or the contemporary quilombo is a crucial point for the restriction or expansion of the subjects of rights provided for in art. 68 of the ADCT, which guarantees the right to land to quilombola communities, and the contested decree is the effective means of accessing this fundamental right. Therefore, for the dominant class to print its definition on the (historical) concept of quilombo is to restrict the subjects of rights and keep the land under the ownership of the landowners. As for the quilombola communities, broadening the understanding of the concept of the (contemporary) quilombo is more than recognition and guarantee of rights, reflecting a need for citizenship today and not in the past. Class struggles, domination and the perpetuation of inequalities permeate the discourses and constant manifestations of the analyzed process and reflect the use by the dominant class of legal instruments, which are daily understood as defenders of democracy in favor of their vested interests.
Keywords: judicialization; public policy; quilombos; right to land; citizenship.

INTRODUCTION

The judicialization of public policies has as its main scope the access of the less favored population to rights when the instituted powers are unable to fulfill their social role.

This article aims to investigate the possible misuse of the instrument of judicialization of public policies, that is, to reveal whether instruments created to strengthen democracy may be being used with nefarious objectives in the pursuit of de-democratization (BROWN, 2019).

The research sought to investigate whether and how the ruling class mobilizes democratic instruments (judicialization) as a strategy for perpetuating social inequalities.

The empirical field selected for research on the possible inappropriate uses of the justice system in the pursuit of de-democratization (BROWN, 2019) as a strategy for maintaining the *status quo* was ADI nº 3.239/2004.

Data collection took place on the website of the Federal Supreme Court [1]with the public consultation of processes indicating the expression "ADI 3.239/2004" as a research argument.

The choice of the *corpus* took into account the possibility of analyzing and extracting from the collected data the relations of symbolic power and strength between the groups and their interconnections with the production of meanings and concepts in the defense of particular interests (BOURDIEU, 1996, p. .24).

Delimiting the focus on conceptual disputes as a strategy for maintaining power, it was decided to identify, in the selected pieces, the arguments, foundations and elements that support this discussion, proposing, for the selected data, discourse analysis (FOUCAULT, 1996) as way of verifying which persuasive resources were used to create truths and how these persuasive resources were used by different actors to achieve their objectives in the demand.

The option for discourse analysis is justified by the issue involved in ADI nº3.239/2004 where there is a silent clash between the interests of the quilombola communities on the one hand and the real interests of political power and agribusiness on the other hand supported by the field of power and the justice system.

1 REVERSE JUDICIALIZATION: A NEW CATEGORY OF ANALYSIS.

The national courts have increasingly interfered in the social and political life of the country, this as a result of relatively recent demands based on the so-called social rights, after the 1988 Constitution, thus generating new arrangements and new strategies between the social actors and the State, making that the role of the Judiciary is expanded and not always well understood.

[1]www.stf.jus.br

Several scholars, from the most different areas of knowledge (ALVES; MACHADO, 2016; AVRITZER; MARONA, 2014; TAYLOR; DA ROS, 2008; OLIVEIRA, 2019; MCCANN, 2010; ENGELMANN; CUNHA FILHO, 2013; COUTO; OLIVEIRA, 2019) , have sought to analyze this growing expansion of the role and function of the Judiciary, in an attempt to understand the causes of this phenomenon and its impacts on political and social life.

The proposal that is presented is to suggest a completely new look at a practically unanimous theoretical construction in relation to the term *judicialization of public policies*, providing subsidies to understand how this phenomenon, of a democratic nature, can be used as a strategy to maintain domination and privileges of the ruling class, as well as presenting its possible harmful effects on the exercise of citizenship.

From this different point of view, which uses new lenses to analyze the phenomenon of judicialization, it is proposed the construction of a new category called *reverse judicialization of public policies.*

The intention, innovative in the field, is to present a different vision about what is called today the judicialization of public policies, demystifying the understanding that such a strategy is used only to seek effectiveness when rights are not met by the Executive or Legislative powers.

The term judicialization of public policies is understood, in its usual sense, as the "increasing use of the justice system in cases where the functioning of the Legislative and/or the Executive is perceived by the most diverse actors as flawed, omissive or simply unsatisfactory" (COUTO; OLIVEIRA, 2019, p.140).

In this sense, when talking about the judicialization of public policies, it means that political and social issues are no longer being decided only by traditional political instances – Executive and Legislative – but also by the Judiciary (RIBAS; SOUZA FILHO, 2014, p.41) .

The judicialization of public policies, normally, according to the cited authors, is understood as a strategy used by actors or social movements, groups and communities that make their choices of access to justice through the filing of judicial demands when the Executive and Legislative powers do not comply. with their constitutional functions diminishing, preventing or emptying the rights of citizenship.

In this text, the intention is to propose a new conception, breaking the unilateral interpretation about the positivity of the judicialization of public policies, demonstrating that this instrument of exercise of democracy and access to rights can be used to maintain power and domination.

2 CONCEPTUAL DISPUTES AND REVERSE JUDICIALIZATION: THE QUILOMBOLA CASE.

What is sought is to analyze, understand and debate the discourse presented in the petitions contained in ADI nº 3.239/2004 as a context of the language in use and as an instrument for sustaining power, and the possible maintenance of inequalities through the manipulation of knowledge and writing , after all, "it is the ideology that provides the evidence by which 'everybody knows' what a soldier is" (PÊCHEUX, 1995, p.160), in this case, everybody knows what a quilombola is(?).

It can be said that legislation and the judicial process are in themselves, historically, ways of maintaining domination and hegemony, being one of the pillars of support for social differences, since "it was the discourse that pronounced justice and attributed to each what is your part" (FOUCAULT, 2008, p.15).

This statement is based on the fact that the field of law is a field full of formalisms, procedures and rigidities, while the quilombola field (in opposition) is a field of social and cultural practices, for example.

ADI nº 3.239/2004, in short, is a demand that had the objective of annulling Federal Decree nº 4.887/2003, since this decree had the objective of regularizing quilombola lands in Brazil.

Without going specifically into the individual merits of each argument launched in the initial petition and in other procedural manifestations, even because there would be no space for this discussion in a scientific article, what is verified in the demand is a conceptual dispute about the characterization of the term "quilombo" and its "quilombola" derivation.

The demand is permeated by a semantic discussion that lasted for more than 17 years, blocking the exercise of quilombola rights related to the ancestral land, more specifically, the demand delayed the effective application of the provisions of art. 68 of the ADCT.

To demonstrate how this semantic discussion took place in the midst of the process, it is noteworthy that in the initial petition of the process, the author of the demand (PFL, current Democrats) attributes the quilombola condition as a rare characteristic: "In other words, the text, regulatory summarizes the rare characteristic of remaining quilombola communities in a mere manifestation of the interested party's will" (BRASIL, 2004).

That is, the author of the demand wants to exclude the maximum number of people from the status of quilombola, reducing the application of the fundamental right to land provided for in art. 68 of the ADCT.

In a diametrically opposite direction, the PT (Workers' Party), intervening in the process as *amicus curiae* after more than 7 years of processing the feat, claims that the recognition of the quilombola condition is based on scientific criteria that aims to "protect historically wronged communities ” (BRASIL, 2004, p.2002).

The Presidency of the Republic, the defendant in the claim, after discussing issues related to the constitutionality of the contested decree itself, recognizes that one cannot “make the naive mistake, (...) of believing that the studies alone will be sufficient to resolve conflicts and pressures inherent to the land regularization processes of quilombola communities” (BRASIL, 2004, p.66).

Regardless of the difficulties and pressures, the Presidency of the Republic defends the maintenance of the decree and the concept of quilombo in accordance with the outline defined by the Associação Brasileira de Antropologia (ABA) where the following understanding was established in 1994

> the remaining quilombo communities 'constitute ethnic groups conceptually defined by anthropology as an organizational type that confers belonging through norms and means used to indicate affiliation or exclusion.
> (...) “consist of groups that have developed practices of resistance in the maintenance and reproduction of their characteristic ways of life in a given place.”
> (...) therefore, the remaining quilombo communities constitute social groups that share an identity that distinguishes them from the others (BRASIL, 2004, p.72).

This conceptual dispute permeated the more than 4000 pages of the process and was even part of the votes of the ministers who judged the action.

See, for example, the words used by the reporting minister of the case, Cezar Peluso, who stated that the concept of quilombo is meta-legal.

> I reaffirm that the respectable works developed by jurists and anthropologists, who intend to expand and modernize the concept of quilombos, are meta-legal in nature and therefore do not, nor should they, commit to the meaning that I apprehend from the constitutional text. It is that such works, which denote noteworthy advances in the field of political, social and anthropological sciences, are not inhibited or contained by limitations of any kind, when the constituent legislator, it is undeniable, imposed them in a textual way (BRASIL, 2004 , p.3494).

In summary, the original rapporteur of the process upheld the requests contained in the demand to annul the contested decree, however, at the end of the vote, the demand ended up being judged unfounded, with the winning vote being the vote of Minister Rosa Weber.

Regarding the established semantic conflict, the minister notes that "the difficult **determination of the meaning of the word "quilombo"** is nothing new. Historical records show that **its use has always been instrumental and imprecise** " (BRASIL, 2004, p.3558, emphasis in the original).

And he goes on to claim that "quilombo, after all, describes an **objective phenomenon – albeit imprecisely defined** " (BRASIL, 2004, p.3559, emphasis in the original).

At this point it appears that the minister admits that quilombola communities are feasible, that is, they exist, as an objective phenomenon and not as something illusory.

Therefore, the minister concludes that,

> the controversy reflects a **hermeneutical disagreement between the Public Administration and the plaintiff** , more **about the content of art. 68 of the ADCT rather than the content of the infraconstitutional norm confronted with it** (BRASIL, 2004, p.3559, emphasis in the original).

The minister already signals that it is more of a conceptual interpretative dispute than exactly a situation of specific unconstitutionality.

Thus, in a subtle way, it is possible to identify how conceptual disputes were used in the justice system to maintain domination through the use of reverse judicialization of public policies.

3 THE REVERSE VIEW TO JUDICIALIZATION.

What is intended with the work presented is to change the perception of this cold understanding, to use the same term as Almeida (2002, p.47) in relation to the concept of quilombo, the term judicialization, breaking the paradigms created regarding its *motivations* that they are not always democratic.

In this context, it is important "to understand the process of forwarding demands from civil society to the Judiciary as a political phenomenon that can "tell us something" about our representative system" (LOSEKANN, 2013, p. 340).

It should be noted that there are those who argue that the judicialization of public policies establishes new, exclusively positive, patterns of interaction between the constituted

powers, “capturing the phenomenon within the scope of a process of improvement of democracies” (AVRITZER; MARONA, 2014, p. 85).

However, the judicialization of public policies does not always bring with it a positive activity in the sense of seeking democracy, legitimizing those involved with regard to the “effective” exercise of fundamental rights, which can be, in most cases, an action that has as its objective revoke, prevent, hinder or delay access to certain rights, constituting, then, what we call 'reverse judicialization'.

The mechanism of judicialization is not linked, specifically, to the final decision of the process, but rather in the search of the Judiciary to achieve an expected end, the expectation and motivation for filing the claim reflect the social logic of the claimant that may not be democratic.

Judicial tactics, in other words, are not necessarily based on the expectation of a judicial victory. For the same reason, viewing the political influence of the courts only from the perspective of cases in which they actually change the legislation means greatly restricting the analysis and leaving unappreciated important political tactics that involve the courts even in contexts where judicial victory is not possible . expected (TAYLOR; DA ROS, 2008, p.827/828).

It is in this sense that an attempt is made to denaturalize the role of the Judiciary and the very term “judicialization”, seeking a strangeness with common sense and directly questioning the performance of the actors involved.

If it is necessary to break the "natural senses of things" to be able to see beyond what is presented, the concepts introjected in society sometimes prevent seeing the deeper horizons in the intention of understanding the arrangements and strategies that work in favor of maintaining of power and inequality.

Therefore, building the concept of *reverse* judicialization of public policies is an arduous task, seeking at all times to break down conceptual barriers and look through other lenses through science, methodology and reason at previously established categories.

The intention is to search for new horizons to think critically to what extent the judicialization of public policies can be used "against their common use", that is, with the intention of barring, preventing or even delaying the exercise of social rights as a strategy used by political parties or corporations that support diverse and non-democratic interests.

When we deal with the theme “ *reverse* judicialization of public policies” we want to draw attention to the fact that the movement of the Judiciary Power by social actors, in

compliance with the principle of access to justice, is not always in line with the search for democracy, citizenship and equality.

The use of the Judiciary and the justice system for non-democratic purposes is real and can be justified by the most diverse intentions, including with the sole objective of delaying the realization of rights, as was the case of ADI nº 3.239/2004.

These four tactical objectives (delay, prevent, dismiss, declare) can be pursued on solid legal precepts (a strong belief that a law is unconstitutional, for example) and also on pure strategic grounds (for example, an effort to appeal of the political decision despite the clear recognition that this same appeal has no legal basis) (TAYLOR *apud* TAYLOR; DA ROS, 2008, p.827).

The understanding of what we are calling *reverse judicialization here* shows us that there is a movement of the Judiciary by social actors who aim to restrict access to fundamental rights by part of Brazilian society.

4 FINAL CONSIDERATIONS

First of all, a warning is necessary that all social groups act strategically with their own objectives, including through the filing of lawsuits, defending justified interests in elastic legal provisions, however this fact does not prevent the recognition of reverse judicialization as *a* fact , an action strategy and as a threat to the exercise of citizenship.

The use of one key or another in the interpretation of fundamental rights does not legitimize the proposition of actions that clearly violate fundamental rights, as is the case of ADI No. in national legislation of constitutional scope since 1988.

What is being discussed is that access to justice through the judicialization of public policies, which was previously understood as an advance in democracy and the exercise of citizenship, could, in theory, be in check when one envisions the use of access to justice through the *reverse* judicialization of public policies with demands that intend to restrict, delay, prevent or delay access to certain already acquired rights. It is a true paradigm shift.

In the case of ADI nº 3.239/2004, this political option is completely revealed when one realizes that the final intention of the demand is the protection of the interests of large landowners with the annulment of the contested decree, maintaining domination and the status *quo* .

Behind the reverse judicialization, in addition to the strategy linked to conceptual disputes for the reduction of the subjects of rights, there is also the use of the time of the process in favor of the ruling class, that is, the use of the slowness of the Judiciary Power as a strategy of action by social actors from the ruling classes to achieve non-democratic interests, McCann has already pointed out that "the current system strengthens the strategic game to take advantage of backwardness, which often benefits those who have more power in society or in the State" (2010, p. 194).

Therefore, it would be, in any analysis, at least, advantageous to file the demand to delay, due to the slowness of the justice system, the very effectiveness of the right.

This is the case of ADI nº 3.239/2004, because even with the judgment that the action was groundless, the author party's advantage was to be able to delay and hinder the exercise of the right provided for in art. 68 of the ADCT for approximately 17 (seventeen) years based, among others, on the conceptual dispute over the term quilombo between the fields involved.

Thus, the action strategy of the author-party with the use of the *reverse judicialization* of public policies, reached its objective of suspending and hindering the administrative processes that were in progress in the search for the regularization of the quilombola areas, since the judicial process could annul all acts already performed, as well as, at least, managed to delay the implementation of the provisions of art. 68 of the ADCT for almost 17 years, therefore, he did not do it without a reason, even if it is not a legal reason (semantic discussion).

BIBLIOGRAPHIC REFERENCES

ALMEIDA, Alfredo Wagner Berno de. Quilombos and the new ethnic groups. *in:* **Quilombos: ethnic identity and territoriality.** O´DWER, Eliane Cantarino (Org.). Rio de Janeiro: Editora FGV, 2002. p. 43-81.

ALVES, Fernando de Brito. MACHADO, Edinilson Donisete. Democracy and the judicialization of politics – problematizing judicial decisions on social rights. **Public Law Magazine** , Londrina, v. 11, no. 3, p.13-46, Dec. 2016.

AVRITZER, Leonardo; MARONA, Marjorie Correa. Judicialization of politics in Brazil: looking beyond liberal constitutionalism to see better. **Brazilian Journal of Political Science** , Brasilia, n. 15, p. 69-94, Dec/2014. Available at: <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0103-33522014000300069&lng=en&nrm=iso>. Accessed on: 03/13/2021.

BOURDIEU, Pierre. **Practical Reasons: on the theory of action.** Trans. by Mariza Correa. Campinas: Papirus, 1996.

BRAZIL. **Constitution of the Federative Republic of Brazil, 1988** . Brasília, DF: Presidency of the Republic, 1988. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>. Accessed on: October 12, 2020.

BRAZIL. **Decree n. 4,887 , of November 20, 2003.** Regulates the procedure for identification, recognition, delimitation, demarcation and titling of lands occupied by remnants of quilombo communities referred to in art. 68 of the Temporary Constitutional Provisions Act. Brasília, DF: Presidency of the Republic, 2003. Available at: <http://www.planalto.gov.br/ccivil_03/decreto/2003/D4887.htm>. Accessed on: October 12, 2020.

BRAZIL. **Public Policy Guide for Quilombolas.** Available at: <https://www.mdh.gov.br/biblioteca/igualdade-racial/guia-de-politicas-publicas-para-comunidades-quilombolas/view>. Accessed on: October 12, 2020.

BRAZIL, National Institute of Colonization and Agrarian Reform (INCRA). **INCRA and the challenges of quilombola territories: some experiences.** Brasília: MDA, 2006.

BRAZIL. Federal Court of Justice. **Direct action of unconstitutionality nº 3.239/2004** . 2004. Rapporteur Minister Cezar Peluso. Available at <http://portal.stf.jus.br/processos/detalhe.asp?incidente=2227157>. Accessed on: March 10, 2019.

BROWN, Wendy. **In the Ruins of Neoliberalism – The Rise of Undemocratic Politics in the West.** Translation by Mario A. Marino and Eduardo AC Santos. São Paulo: Editora Filosófica Politeia, 2016.

CARDOSO, Adalberto Moreira. **Slavery and Capitalist Sociability: An Essay on Social Inertia** . New Studies. CEBRAP, N. 80, March, 2008. Available at: <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0101-33002008000100006> Accessed on: May 18, 2020.

CARVALHO, Ernani Rodrigues de. Judicialization of Politics in Brazil: control of constitutionality and political rationality. **Social Analysis.** Lisbon, v. 44, no. 191, p. 315-335, April 2009. Available at: <http://analisesocial.ics.ul.pt/documentos/1244540513N8dQF1dd5Da71UX0.pdf> Accessed on: June 15, 2022.

CITTADINO, Gisele. Presentation. *in:* **Justice in Brazil: on the margins of democracy.** Marjorie Correa Marona and Andrés Del Río (eds.). Belo Horizonte: Arraes Editores, 2018. p. XVIII to XXII.

COUTO, Claudio Gonçalves; OLIVEIRA, Vanessa Elias de. Politicization of Justice: Do Judicial Actors Have Their Own Agendas? **Adenauer notebooks** . Sao Paulo, vs. 20, p. 139-162, 2019.

ENGELMANN, Fabiano; CUNHA FILHO, Marcio Camargo. Lawsuits, political content: an analysis proposal for the Brazilian case. **Journal of Sociology and Politics** . Dossiers. v. 21. n. 45. Curitiba, p.57-72, Mar/2013.

FANTI, Fabiola. Social movements, law and the judiciary: a theoretical meeting. *in:* **Political Sociology of Institutions** . Fabiano Engelmann (org.). Porto Alegre: Editora da UFRGS/CEGOV, 2017. p. 241-278.

FOUCAULT, Michael. **The order of speech.** Translation by Laura Fraga de Almeida Sampaio. 3. Ed. Sao Paulo: Loyola Editions, 1996.

FOUCAULT, Michael. **The archeology of knowledge.** Rio de Janeiro: University Forensics, 2008.

HAGINO, Cora Hisae; QUINTANS, Mariana Trotta Dallalana. The recognition of traditional peoples and the counter-hegemonic uses of law in Brazil: between violence and social emancipation. *in:* **Law and Praxis Magazine** , v. 6, no. 10, p. 598–644, 2015. Available at: <https://doi.org/10.12957/dep.2015.15428>. Accessed on: July 1, 2021.

LEITE, Ilka Boaventura. Quilombos and quilombolas: citizenship or folklorization? *in:* **Anthropological Horizons** . UFRGS. IFCH. Year 1, no. 1. Porto Alegre: PPGAS, 1999.

LOSEKANN, Christina. Mobilization of law as a repertoire of collective action and institutional criticism in the Brazilian environmental field. *in:* **Data Journal of Social Sciences.** Rio de Janeiro: 2013. vol. 56, no. 2, p. 311-349.

MCCANN, Michael W. Judiciary and the mobilization of law: a “users” perspective. Degrav. and Trans. Celly Cook Inatomi. *in:* **EMARF Magazine.** Thematic Notebooks. Rio de Janeiro: Dec/2010. P. 175-196.

MACHADO, Igor Suzano. Constitutional synecdoche: the (unequal) challenge of professional groupings to transform particular interests into universal constitutional values. *in:* **Journal of Social Sciences.** Fortaleza, v.49, n.2, Jul-Oct/2018. P. 59-92.

MONTEIRO, Manuel Ricardo. The discussions around the regulation of art. 68 of the ADCT and the inefficiency of land regularization in Brazil. *in:* **Boletim Científico ESMPU** , Brasília, a. 13. n. 42-43, p. 465-480. Jan./Dec. 2014.

O´DWYER, Eliane Cantarino (org.). **Quilombos: ethnic identity and territoriality.** Rio de Janeiro: FGV, 2002.

OLIVEIRA, Vanessa Elias de. **Judicialization of public policies in Brazil. [Presentation].** Rio de Janeiro: Fiocruz, 2019.

ORLANDI, Eni P. **Discourse Analysis. Principles and procedures.** Campinas: Bridges, 2015.

PÊCHEUX, Michel. **Semantics and discourse: a critique of the statement of the obvious** . 2 ed. Campinas: Unicamp, 1995.

RIBAS, Giovanna Paola Primor; SOUZA FILHO, Carlos Frederico Marés de. The Judicialization of Public Policies and the Federal Supreme Court. **Law, State and Society** . Rio de Janeiro, n.44, p. 36 to 50, Jan-Jun/2014.

RODRIGUES, Paulo Joaquim da Silva. **The history of the concept of judicialization in Brazilian political science (1996-2014).** Master's dissertation, State University of Rio de Janeiro, Rio de Janeiro, 2016. 93 p.

SCHMITT, Alessandra; TURATTI, Maria CM; CARVALHO, Maria CP Updating the concept of quilombo: identity and territory in theoretical definitions. *in:* **Environment and Society** , Campinas, n. 10, p. 129-136, 2002.

TAYLOR, Matthew M.; DAROS, Luciano. The parties in and out of power: judicialization as a contingent result of political strategy. *in:* **Data** , Rio de Janeiro, v. 51, no. 4, p. 825-864, 2008. Available at: <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0011-52582008000400002&lng=en&nrm=iso>. Accessed on: January 10, 2021.