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>> ABOUT THE AUTHOR // SOBRE O AUTOR

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It's common that book reviews are opened with a kind of compliment that highlights the importance of a certain work to the field of study where it belongs. This is not exactly what one can say about *On the limits of constitutional adjudication: deconstructing balancing and judicial activism*, by Juliano Zaiden Benvindo. Not without a complication; not without the notion of field having already been complicated for at least two reasons. Firstly, although the book, which is a result of the doctoral thesis defended both at Universidade de Brasília and at Humboldt University, Berlin, announces itself as a study of constitutional law, it becomes most promptly clear to the reader that those limits are dissolved before the naturalness and consistency of Benvindo's journey through some of the most complex philosophical debates of the second half of the 20th century. Notably on what is organized around the names of Jacques Derrida and Jürgen Habermas. Secondly, the idea of *field* is harmed because the entire proposal of the work is nothing more than a strong critique to the hegemonic movement that informs contemporary constitutional law – both Brazilian and German versions. Therefore, Benvindo's work does not derive its *importance* from a so-called *importance to* the filed, but instead from how it challenges the strength of that common sense, taking part on its deconstruction.

If the object of the investigation is already displayed on the subtitle, that is, a certain objection to balancing (values, principles, maybe *values-principles*) and to judicial activism, it becomes thinkable through a certain course, a path where *one sees* the concept of *limited rationality coming*. Trail and treading in which the becoming of balancing and of judicial activism unfolds as one thing only; one same movement combining intention to rationality and centralization of major political decisions on constitutional courts. One circulates, somehow, around what Jean de la Fontaine would say on the fable *The wolf and the lamb*: "the reason of the strongest is always the best". Benvindo will demonstrate it, "subsequently", on the threefold division of the book.

In the first chapter it is discussed the presence of the principle of proportionality as a dominant method of adjudication and, on its inside, balancing, logical finishing line of this historical proceeding. Three cases are underlined to this matter: the *Crucifix case*, the *Cannabis case* and the *Ellwanger case*. Having this last one been ruled by the Brazilian Supreme Court (STF) and the two others by the German Federal Constitutional Tribunal (*BVG*), the outlines of hegemony that crosses both juridical cultures investigated by Benvindo are established: balancing as definitive entrance of values in the form-of-law. Dissolving the boundaries of this form, the balancing designs the transposition of the political reasoning of reaching common good to the typical space of constitutional courts activities.

This is exactly what Benvindo intends to oppose. The two chapters that follow analyze historically the emergence of the principles of proportionality and balancing to the condition of constitutional meta-principles. This movement introduces a clear guidance: the change in *BVG* and *STF* auto-comprehension towards a model of judicial activism. The

constitutional tribunals would then franchise the conversion of fundamental rights as subjective rights to their conception in terms of objective principles of a total legal order. Under such terms, the subjective right no longer functions as trump against the will of political majorities, being put in relation to the order of values that the principles would shape. The totality of the legal order is now the totality of the objective principles and every political question may be handled as a question of optimizing fundamental rights. If principles are indeed maxims, the constitutional courts may now describe themselves as the lawful path to the enforcement of values.

Benvindo supports the interesting thesis that, both in Brazil and in Germany, the change towards judicial activism was related to the need to respond to antidemocratic legacies. Saying "never more" to *Nazism* and to the military dictatorship involved, beforehand, distrusting legislative institutions and the executive power, considered responsible for the devastating authoritarian practices or, at least, incapable of standing against them. One foresaw the indispensability of a strong power that would endure the task of defending the values of constitutional democracy and enforcing fundamental rights. Autoimmunity: that which is built to protect democracy risks destroying it. Balancing becomes hegemonic in this context because it is capable of opening two different paths of legitimation: on one hand, it allowed treating rights as if they were values, widening the scope and nature of judicial activity in accomplishing its new task – even if this meant disregarding the traditional limits of the notion of division of powers; on the other hand, it allowed justifying judicial activism by granting it an aura of rationality. Through innumerous examples and a wide historical reconstruction of the role of *BVG* and *STF* in emerging German and Brazilian democracies, Benvindo demonstrates how balancing accompanies the rising centrality of constitutional courts erasing the borders between law and justice at the exact same time it emphasizes the rationality of its methodology.

The second part of the book is dedicated to the debate about the rationality of balancing. After all, what is weird about its emergence to the condition of guardian of the place of jurisdictional rationality? The forth chapter elects Robert Alexy's theoretical model as *locus* to the discussion and seeks to highlight the features of its main axioms. On the well-known *special case thesis*, developed on *Theory of Legal Argumentation*, it is already seen the problematic dissolution of the limits of law on a discourse in which the objectives of a given community may prevail over constitutional guarantees. On his *Theory of Fundamental Rights*, Alexy translates this logic into a method that would supposedly control the risks of irrationality on normative collisions. The principle of proportionality and, on its inside, balancing constitute a rational methodology to times of judicial activism.

Chapters 5 and 6 will attack these premises. Benvindo adopts a strategy somehow heterodox and, for this reason, really courageous: to oppose balancing by using a concept of *limited rationality* created through the productive tension between Jacques Derrida's *différance* and Jürgen

Habermas' proceduralism. As if replicating the former's reply to the invitation to a discussion proposed by the latter in 1999 – "it's time, we hope it's not too late" –, Benvindo makes the two philosophers dialogue before his need to confront and face balancing. With Derrida, he drafts a thought of justice that makes justice to the other. Law is, therefore, assimilated into the *double bind*, into the aporia between constitutionalism and democracy. Understanding that the law is properly de-constructible and that justice is the de-construction means realizing the indispensability of both and the fact that a decision worthy of the name is always the one that resides on undecidability– to be infinitely distinguished from indecision – on differentiation and on differing the presence of its content, on its irreducibility to any set of rules. This dynamic of infinite negotiations is poorly adjusted to a methodological ruling that intends to be rational precisely in controlling the *différance*. There is something extremely *logocentric* in balancing.

With Habermas, Benvindo searches a kind of *therapy* to the problem of law's indetermination and, therefore, of adjudication in the context of post-conventional societies. One may, then, develop a critique to balancing through the emphasis on proceedings oriented to mutual understanding. The Habermasian idea of intersubjectivity and its consequences to the motivation of a judicial activity that does not resort to previous methodologies sustain his critique. Benvindo is not limited to pointing out, from this critique, how balancing includes valorative elements in adjudication or how its criterion of discretionarity reduces rights of the minority, but he also disapproves the supposed heuristic capacity of its method of controlling knowledge.

The concept of *limited rationality*, finally discussed in depth on the third and last part of the work, tries to account for a possible dialogue between *différance* and intersubjectivity and, ergo, between a symmetric justice and another asymmetric. The thesis supported is that, as hard and improbable as this approximation may be, there is a game of complementarity and compatibility between them. If any translation is at the same time possible and impossible, then one has to turn the reflection to a resolution without resolution: the productive tension upon its horizon of (un)translatability. Benvindo bets on a kind of approximation between Derrida and Habermas' philosophizing about more concrete institutional matters, such as adjudication. The *limited rationality* does not only put itself on this place, but makes room for these issues to irrupt on a dynamic of searching for justice. The last chapter operates a return to the three judicial cases studied at the beginning of the work in order to reconsider them in light of this rationality that recognizes itself as limited. Three axioms on its approach are noticeable: a) focus on the singularity of the concrete case beyond the simplifying previous formula; b) reconstruction of institutional history to maintaining the consistency of the system of rights; c) a adjudication that asserts the otherness of the other.

This is how Benvindo proposes as an alternative to balancing a renewed connection between "the empirical world" and a limited reason. On the limit, a matter of limits. In this manner, rationality also invites to

think the porosity of its limitation, what crosses it, what undoes the pure boundaries. Whatever the answer may be, before the *limen*, it's necessary to read *On the limits of constitutional adjudication*.