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Dark Lighting: The Problem of Article 142 Interpretation at the Brazilian 1988 Constitution's Heart

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Abstract:

This paper reflects about the article 142 of the 1988 Brazilian Constitution, especially because there is a certain belief that this article, supposedly, could allow that alongside the legislative, executive and judicial powers, there could be some "permission" to the Armed Forces exercise a kind of "fourth power", a kind of "neutral power" or "moderate power". In other words, the Armed Forces are not a neutral or moderating power, but members of the executive power, and they must respect the separation of powers, the rule of law and the Constitution, something that needs to become part of their democratic culture. This paper uses the literature review methodology, with inductive aspects related to interpretation (hermeneutics), linked to the Brazilian historical context to conclude that there is no place for an interpretation in the sense of a "neutral" or "moderate" power.

Keywords: "Brazilian Constitution"; "Article 142"; "Neutral Power"; "Moderate Power"; "Armed Forces";

1. Previous Remarks

The Brazilian case is quite peculiar, to say very little. Recently, the Brazilian Supreme Court was provoked to express itself about one of the Brazilian constitutional democracy main problems. It should be noted that the Democratic Labor Party initiated a judicial review procedure, through Direct Action of Unconstitutionality nº. 6.457 before the Court, in a petition prepared by attorney Lucas de Castro Rivas because there was, once again, a terrible political ghost roaming our constitutional arena.

In his petition, based on the excessive Brazilian political discretion, and the background of our historical tragedy of disrespect for democracy, coupled with the need to limit President powers and privileges, he mentioned:

It is a great danger even for long-lived democracies. In the United States, this type of conceptual breadth of the President's authority over the Armed Forces - there, Commander-in-Chief - served as a legal subterfuge to retain even criminal law, supporting serious human rights violations, concentration camps for Japanese until, more recently, torture.

That mentioned Brazilian Supreme Court casedealt exactly with the interpretation of the extremely problematic article 142 from the 1988 Constitution. This paper analyzes thatarticle 142, seeking to reflect about its historicity and pointing out the most complex problems of its constitutional existence. In this paper we reflect from its historical trajectory, at the heart of our democratic constitutionalism, mentioning the fragility of our democratic culture, in addition to addressing the visible disrespect for the rules of the democratic game.

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The Brazilian military and Armed Forces have long considered themselves to be "enlightened guardians", when in fact they are responsible for melting our constitutional culture, always, in fact, based on a strange interpretation of what is today inserted exactly in article 142 from 1988 Constitution.

2. The Fragility of Brazilian Democracy

A reasonable demonstration of our constitutional democracy fragility is found in the fact that we have had many ruptures and few periods of normality, not always democratic. The present moment, at the 21st century first quarter, leads us to make some reflections that demand more than abstract concerns. Dated back to 2001 and, therefore, needing to be very little complemented, let us observe the sharp historical reflections of political scientist Octaciano Nogueira[3]:

Brazil, from discovery to independence, lived three hundred and twenty-two years without democracy, without vote and without Parliament, although it did not lack many and varied governments. After 1822, we started to have a vote, Parliament and government, but we did not get to have democracy, as we know it today, at least until 1934. Together, there are four hundred and thirty-four of our poorly celebrated five hundred years. A sign of how new and precarious democracy is among us. In those sixty-seven years [in 2020, 86][4], we have barely started to build it, and we have not yet finished improving it. Not all were years of democracy: twenty-eight of them were dictatorships, civil, from 1937 to 1945, and military, from 1964 to 1984. Congress was dissolved twice, in 1930 and 1937, and temporarily closed on three occasions: 1966 (by complementary act 23), 1968-69 (by complementary act 38) and 1977 (by complementary act 102). The dissolution of the Parties took place three times, in 1930, 1937 and 1965. Of the twenty-two presidents who held the Presidency, from 1926 to 2003, only three, with the exception of the generals of the dictatorship, completed their terms: Dutra, Juscelino and Fernando Henrique Cardoso, who [was] the first, in the entire period, to receive the presidential sash of his predecessor chosen by direct election and pass it on to a successor invested under the same conditions. Among these twenty-two presidents, there was one suicide and two resignations. Four were deposed, one died during his tenure and another, before taking office. We had a revolution, four coups d'état, four coup attempts and three rebellions. Among the generals of the military dictatorship, none exercised a mandate of the same duration as the others. Costa e Silva remained in power for two years, Castelo, three, Médici, four, Geisel, five and Figueiredo, six.

In other words, it is an extremely fragile democracy, with a tradition of hypertrophy in the Executive Branch, with many coups' d'état, closure of the congress, dissolution of institutions, arbitrary retirement of public employees and even ministers of the Supreme Court in 3 different periods. (1864, 1931 and 1968), in a total of 15 dismissed Supreme Court Justices, institutional ruptures, celebration of coups d'état and demonstrations calling for the closure of the Supreme Court and Congress.

The installation of the Constituent Assembly, in February 1987, and its completion on October 5, 1988, with the promulgation of the 1988 Constitution, represents a relevant historical landmark, in addition to its two "birth certificates" (the speech José Carlos Moreira Alves, then President of the Brazilian Supreme Court at the opening of the constituent, as well as the Ulysses Guimarães speech, deputy and president of the National Constituent Assembly).

While Moreira Alves said, in 1987, that the constitution to be drafted was an mere "instrument", but that it could not quell people's hunger and thirst, and that they should take care of implementing mechanisms to overcome crises (political, economic and social), on the other hand, Ulysses Guimarães repudiated the dictatorship, calling the Constitution that was being born the "Citizen Constitution", which emerged to implement citizenship of Brazilians.

Far from the desired perfection, or from the expected pragmatism, the 1988 Constitution mirrors human defects and virtues, within a true aura of humanism (fraternity) that represents your soul, due to the need for peaceful, humanistic coexistence and harmonic, far from the poles and extremes that characterize mere politics, in a clear message that, perceptible from the Preamble to the last of the articles of the Transitional Constitutional Provisions Act, invokes democracy and republic, in addition to the dignity of all, without distinction of any kind.

[3] NOGUEIRA, Octaciano. **A Democracia que Terminou em Tragédia** (prólogo), In: A Constituinte de 1946. Getúlio, o Sujeito Oculto. São Paulo: Martins Fontes, 2005. p. xiii-xiv.

[4] Update information, without highlighting and not included in the original.

For each possible problem, an answer within the strict framework of the constitutional dream realized. For each unforeseen response, the confession of its incompleteness, in a message of humility, present in the admission of its own change through the mechanism of the Constitutional Amendment, marked by material, formal and circumstantial limitations.

The 1988 Constitution is not a suicidal pact, but the most humane of the civilizing pacts. It is also not a runaway truck with no brakes, on a steep, wet and dangerous slope, but a sober and complex normative that provides the goals for straight government and to prevent runaway. Nor did it create a Republican Federation, but a Federative Republic, when the order of factors totally changes the result, in a context that stems from the previous Brazilian constitutional experience.

3. The Brazilian Constitutional Tradition: from 1891 to 1988

There is a serious need to reflect from a historical point of view. With regard to article 142, it is necessary to observe the Brazilian constitutional tradition since 1891, until we reached the tutelary opening of power after dictatorship (slow, safe and gradual) in 1988, when we woke up from the dictatorial nightmare.

In this sense, we need to go through our old Constitutions (1891, 1934, 1937, 1946, 1967, and Amendment no. 1/69), before entering the current constituent cycle, which started in February 1987, and ended on October 5, 1988 which, in turn, involves the Afonso Arinos draft, as well as article 192 fromSubstitutional Amendment 1 (8/26/1987), article 160 fromSubstitutional Amendment 2 (9/18/1987), article 167 from Project A (11/24/1987), article 148 from Project B (5/7/1988), and article 142 from Project C (9/15/1988) and, finally,the definitive version in the Systematization Commission.

Below, the different legal forms, as possible genesis, and the remote antecedents of the claim to normativity of article 142:

BRAZILIAN CONSTITUTIONS	TEXT
1891 Constitution	Art. 14 - The forces of land and sea are permanent national institutions, destined to the defense of the Fatherland abroad and the maintenance of laws inside. The armed force is essentially obedient, within the limits of the law, to its hierarchical superiors and obliged to support constitutional institutions. Art. 15 - Legislative, Executive and Judiciary branches are harmonious and independent from each other.
1934 Constitution	Art. 162 - The armed forces are permanent national institutions, and, within the law, essentially obedient to their hierarchical superiors. They are designed to defend the Fatherland and guarantee constitutional powers, and order and law.
1937 Constitution	Art. 161 - The armed forces are permanent national institutions, organized on the basis of hierarchical discipline and faithful obedience to the authority of the President of the Republic.
1946 Constitution	Art. 176 - The armed forces, constituted essentially by the Army, Navy and Air Force, are permanent national institutions, organized based on hierarchy and discipline, under the supreme authority of the President of the Republic and within the limits of the law. Art. 177 - The armed forces are destined to defend the Fatherland and to guarantee the constitutional powers, the law and the order.
	Art 92 - The armed forces, constituted by the Navy, Army and Military Aeronautics, are national institutions, permanent and regular, organized based

1967 Constitution	on hierarchy and discipline, under the supreme authority of the President of the Republic and within the limits of the law. § 1 - The armed forces are destined to defend the Fatherland and to guarantee the constituted Powers, the law and the order.
First Amendment to the 1967 Constitution, approved in 1969.	Art. 90. The Armed Forces, constituted by the Navy, the Army and the Air Force, are national institutions, permanent and regular, organized based on hierarchy and discipline, under the supreme authority of the President of the Republic and within the limits of the law. Art. 91. The Armed Forces, essential to the execution of the national security policy, are intended for the defense of the Fatherland and the guarantee of the constituted powers, the law and the order.

Subsequently, also follows below the different "routes" and article 192 transcription versions after the military dictatorship, with the different texts, until the final form approved in 1988:

THE CONSTITUENT AND THE 1988 CONSTITUTION	
Affonso Arino's Draft	Art. 413 - The Armed Forces, constituted by the Navy, the Army and the Air Force, are national institutions, permanent and regular, organized according to the law, based on hierarchy and discipline, under the supreme command of the President of the Republic.
Substitutional Amendment 1 (8/26/1987)	Art. 192. The Armed Forces, made up of the Navy, Army and Air Force, are permanent and regular national institutions, organized on the basis of hierarchy and discipline, under the supreme authority of the President of the Republic, and intended to defend the Nation, guarantee the constitutional branches of government and, **on their express initiative**, of the constitutional order
Substitutional Amendment 2 (9/18/1987)	Art. 160. The Armed Forces, made up of the Navy, Army and Air Force, are permanent and regular national institutions, organized on the basis of hierarchy and discipline, under the supreme authority of the President of the Republic, and intended to defend the Nation, guarantee the constitutional branches of government and, **on the initiative of one of them**, of law and order.
Project A (11/24/1987)	Art.167. The Armed Forces, made up of the Navy, Army and Air Force, are permanent and regular national institutions, organized on the basis of hierarchy and discipline, under the supreme authority of the President of the Republic, and intended to defend the Nation, guarantee the constitutional branches of government and, on the initiative of **one of them**, of law and order.
Project B (7/7/1988)	Art. 148. The Armed Forces, made up of the Navy, Army and Air Force, are permanent and regular national institutions, organized on the basis of hierarchy and discipline, under the supreme

	authority of the President of the Republic, and intended to defend the Nation, guarantee the constitutional branches of government and, **on the initiative of any of these**, of law and order.
Project C (9/15/1988)	Art. 142. The Armed Forces, made up of the Navy, Army and Air Force, are permanent and regular national institutions, organized on the basis of hierarchy and discipline, under the supreme authority of the President of the Republic, and intended to defend the Nation, guarantee the constitutional branches of government and, **on the initiative of any of these**, of law and order.
Project D (9/21/1988)	Art. 142. The Armed Forces, made up of the Navy, Army and Air Force, are permanent and regular national institutions, organized on the basis of hierarchy and discipline, under the supreme authority of the President of the Republic, and intended to defend the Nation, guarantee the constitutional branches of government and, **on the initiative of any of these**, of law and order.
Final Text of the 1988 Constitution (5/10/1988)	Art. 142. The Armed Forces, made up of the Navy, Army and Air Force, are permanent and regular national institutions, organized on the basis of hierarchy and discipline, under the supreme authority of the President of the Republic, and intended to defend the Nation, guarantee the constitutional branches of government and, **on the initiative of any of these**, law and order.

Well, the reference contained in the 1891 Constitution is contextualized from the events related to the coup of the Proclamation of the Republic (in 1889), linked to the so-called "Brazilian militarism", masterfully described by Aliomar Baleeiro, reproduced below, although in a relatively long paragraph, justified by context and importance:[5]:

In the monarchical period, the militarism of the Spanish-American republics - source and basis of the typical caudillism of all of them - had sporadic outbreaks in the reign of Pedro I who, after Independence, soon after removing the Andradas, tried to surround himself with officers of the troop of the line, especially the Portuguese by birth, to remain in the military service of Brazil. As soon as, in Bahia, the Portuguese were beaten on 2-7-1823 and embarked by pulse back to the former metropolis, the Emperor guaranteed a place in the Brazilian Army to those who wanted to stay, a fact that generates disgust among patriots wary of preferences Lusophilic throne. Supported by these soldiers, he dissolved the 1823 Constituent, exiled deputies and brutally repressed the revolution that Pernambuco in 1824 opposed to the imperial coup d'état of the previous year.

José Honório Rodrigues exposes this in his book about the1823 Constituent, published in 1974: 'most of the officers were foreigners. For 98 Portuguese officers, there were only 47 Brazilians. Otávio Tarquínio de Sousa, a historian specializing in that period and a biographer of Emperor Dom Pedro I, says that, at barracks parties, without ladies, he danced alongside the officers. He brought Irish and German mercenaries and even thought of using them to restrict the freedoms claimed by Brazilians, an attitude reflected by his confessor and intimate adviser Frei Arrábida. But these mercenaries, to some extent justified by the Cisplatin War, became uncomfortable and turbulent, until they revolted, and in a reaction of the Brazilians, in Rio, one hundred of them were killed and wounded in street fighting..

[5] BALEEIRO, Aliomar. **Constituições Brasileiras, Volume II: 1891** ─ 3. ed. ─ Brasília: Senado Federal, Subsecretaria de Edições Técnicas, 2012, p. 35-37.

When, at last, on April 7, 1831, the people of Rio rebelled against the first Emperor in Campo de Sant'Ana (now Praça da República, in Rio), the troops joined the movement and the stubborn and reckless monarch ended without even having his own guard in the palace of São Cristóvão. The Regency, with great difficulty, relying on the National Guard, a militia of civilians, gradually reduced the line troops in number and, consequently, on the possibility of interfering in the destinies of the country. Pedro II did not appreciate the military appearance or apparatus, due to his humanistic education, which made him administer the Regency. He dressed like a civilian and, when he wore a uniform, he preferred the Admiral's. On the other hand, the proletariat soldiers, in the Empire, were affiliated with the two great Parties and within them acted as civil politicians. Francisco de lima e Silva, father of the future Duque de Caxias, participated in the Regência Trina (…)

The military officers who made the Republic and defended it in 1893, many of whom were positivists, animated by the "esprit de corps", hinted at Floriano's stay and, even after his death in 1895, secretly conspired to depose Prudente and install the "Scientific dictatorship", by Augusto Comte. The failure of the attempt against the Chief of the Nation and the murder of Marshal Bittencourt, minister of war, in the defense of Prudente's life, brought this sudden popularity alongside the condemnation of Florianists, mostly military. This allowed Prudente de Morais, at the end of his stormy presidential period, to say that he had pacified the country and consolidated the civil order. And it was true, although it allowed some violence that caused conflict with the Brazilian Supreme Court.

Thus, the wording of articles 14 and 15 of the 1891 Constitution is explained, by mentioning the armed forces as "permanent national institutions", being "destined to the defense of the Fatherland abroad and the maintenance of laws in the interior", in addition to "essentially obedient, within the limits of the law, to their hierarchical superiors ", as constitutional republican norms precursor to the pillars of hierarchy and discipline, who should be" obliged [s] to support constitutional institutions ", at the same time as the three powers , mentioned as "organs of national sovereignty", harmonious and independent from each other.

The historical context, moreover, does not dispense with the description of the previous monarchical period, within which there was intense participation and influence of the military in national destinations, less military than political, and the difficulties of national implementation of the Armed Forces, as well noted by Nelson Werneck Sodré in his classic "Military History of Brazil"[6].

The 1934 Constitution[7], for the first time, spoke of "national security", and, "the issues connected with it would be studied and coordinated by the Superior Council for National Security, chaired by the President of the Republic and the Ministers of State, as well as by the heads of the army and navy staff (art. 159) ". The structure, therefore, changed to no longer guarantee only constitutional powers, but also "order and law", in a historical moment of the rise of fascism in Europe, which it will find in Italian fascism, especially in the codification of Rocco (1930), its maximum expression. In fact, as recorded by Kristal Gouveia and Arno Dal Ri Jr[8]., about the historical period that influenced us a lot:

The building up of the fascist regime was supported by a series of political, social and legal movements in an attempt to make the domain of the sectors of life of individuals total, using institutions as sounding boards for the objectives of a center of total and unifying power. These are movements that, according to Emilio Gentile, would characterize the Italian fascism imposed by Benito Mussolini since 1924 as a peculiar modality of totalitarianism. [9]

In this context, there is a state conception that attributes "peculiar personality to the State", with the centralization of power, failing to preponderate the protection of individuals, so that the statist aspect is privileged, with the rescue of the institute of "*laesa maiestas*", present idea of the *ancien régime*, something that:

[6] SODRÉ, Nelson Werneck. **História Militar do Brasil**. São Paulo: Expressão Popular, 2010.
[7] SODRÉ, Nelson Werneck. **História Militar do Brasil**. São Paulo: Expressão Popular, 2010.
[8] DAL RI JR., Arno; GOUVEIA, Kristal Moreira. **A Função da "Personalidade do Estado" na Elaboração Penal do Fascismo Italiano: laesae maiestas e tecnicismo-jurídico no Código Rocco (1930)**. Sequência, n. 81, p. 226-249, Apr. 2019.
[9] DAL RI JR., Arno; GOUVEIA, Kristal Moreira. **A Função da "Personalidade do Estado" na Elaboração Penal do Fascismo Italiano: laesae maiestas e tecnicismo-jurídico no Código Rocco (1930)**. Sequência, n. 81, p. 226-249, Apr. 2019.

Embodies an important feature of the fascist authoritarian regime: the structural centralization of legal protection to the State, the choice of its elements as protected legal assets and the definition of punishable conduct: These elements are representations of conscious choices made at the expense of individual protection, seen only as instrumental to the state's will (and often opposed to the latter, in which case the state's will should definitely prevail).[10]

This invokes, as well known, the fascist conception of Alfredo Rocco, Mussolini's Minister of Justice, with the opposition against contractualist philosophy and, therefore, against "the notion that state power derives from the will of individuals, who delegate it to according to a given limitation imposed by them. These conceptions, which he calls "ultra-individualist" are diametrically opposed to the ideology of fascism"[11].

In turn, now under the sign of the Constitution of 1937, from the dictatorship of the Estado Novo, led by Getúlio Vargas, the limits of the law were shamelessly excluded, subjecting the Armed Forces to the exclusive authority of the President of the Republic, consolidating many aspects of a fascist character, in a context that would be repeated uncritically in the other constitutional texts.

Following the previous normative lines, in turn, articles 176 and 177 of the 1946 Constitution, already with democratic opening, again instituted the Armed Forces from the double pillar of hierarchy and discipline, under the supreme authority of the President of the Republic, again restored to the limits of the law, with the functions of defending the motherland and guaranteeing the institutions and the law and order, without forgetting the context that Getúlio Vargas removed from that power cycle, ended up being the "hidden subject of the Constituent", in a game of scene perceived since the annals of the constituent by the political scientist Octaciano Nogueira[12].

Some years later, on March 31, 1964, the advent of the civil-military coup occurred, based on an initial speech of "vacancy of the presidency of the republic", later adjusted with the Institutional Act, of April 9, 1964 , who mentions a curious fantasy disguised as a farce, stating: "The Heads of the victorious revolution, thanks to the action of the Armed Forces and the unequivocal support of the Nation, represent the People and in their name exercise the Constituent Power, of which the People are the sole holder".

It is within this spirit of political-legal farce, by the way, that the Armed Forces, dressed up as Constituent Power, had to hide the opinion polls carried out on the eve of the coup d'état, which indicated that President João Goulart, deposed by the coup , had 70% (seventy percent) approval, and would win the elections of the following year (1965), in other words, what was called the "March Revolution of 1964" was actually nothing more than a "Coup de Instigating Betrayal"[13].

In the same spirit, in effect, subsequent changes were made, with the wording of Article 92, the 1967 Constitution, and Articles 90 and 91 of Amendment no. 1/69, who maintained the essence of the previous Constitution, also from the double pillar of hierarchy and discipline, also under the supreme authority of the President of the Republic, again restored to the limits of the Law, with the functions of defending the Nation and the guarantee of institutions and law and order.

With the return of power to civilians, from the Constituent Assembly (1987/1988), new discussions on the role of the Armed Forces arise, initially with the Afonso Arinos Draft, which, in its article 413, does not innovate at all, maintaining the reproduction of the previous models, supported by the other proposals in the Systematization Committee, from Substitutes 1 and 2 (respectively, articles 192 and 160) and from Projects A, B, C and D (respectively, articles 167, 148 and 142),

[10] DAL RI JR., Arno; GOUVEIA, Kristal Moreira. **A Função da "Personalidade do Estado" na Elaboração Penal do Fascismo Italiano: laesae maiestas e tecnicismo-jurídico no Código Rocco (1930)**. Sequência, n. 81, p. 226-249, Apr. 2019.

[11] DAL RI JR., Arno; GOUVEIA, Kristal Moreira. **A Função da "Personalidade do Estado" na Elaboração Penal do Fascismo Italiano: laesae maiestas e tecnicismo-jurídico no Código Rocco (1930)**. Sequência, n. 81, p. 226-249, Apr. 2019.

[12] Cf. NOGUEIRA, Octaciano. **A Constituinte de 1946. Getúlio, o Sujeito Oculto**. São Paulo: Martins Fontes, 2005.

[13] BRASIL. Câmara dos Deputados. **Jango tinha 70% de aprovação às vésperas do golpe de 64, aponta pesquisa**. Fonte: Agência Câmara de Notícias. Disponível em: <camara.leg.br/noticias/429807-jango-tinha-70-de-aprovacao-as-vesperas-do-golpe-de-64-aponta-pesquisa/>, acesso em 2020.

Which ended up forming the approved version and contained in the final wording of the current art.142from 1988 Constitution, of October 5, 1988, innovating in the part in which it establishes the three powers as triggers of the request for guarantee of institutions and of law and order.

It is on the final version of article 142 that some jurists have maintained the possibility of "constitutional military intervention", as if the armed forces were a kind of "moderating power".

The jurist Ives Gandra Martins, in a first gesture of interpretation, mentioned that due to a determined Supreme Court decision, if it is understood as "undue", it would authorize the armed forces to carry out intervention "so that they restore law and order, as determined in article 142 of the Supreme Law"[14]. Subsequently, the same jurist Ives Gandra returned to the topic, in the face of the controversy caused, contextualized by countless anti-democratic acts that counted on the presence of the President of the Republic, in which his supporters systematically manifested themselves with signs and calls for support for a "constitutional military intervention." This is the reason why Ives Gandra defended an exotic position. He said that it would be up to the Armed Forces to carry out" punctual moderating intervention, (...) he would say what is the correct interpretation of the law applied in the conflict between Powers, IN HAVING INVASION OF LEGISLATIVE COMPETENCE OR OF ATTRIBUTIONS ", that is, with the Armed Forces exercising the moderating power[15].

In turn, the Attorney General of the Republic, chosen for the first time since 2003 without observing the unwritten constitutional rule (custom and non-judicial precedent) from the list procedure, by participating "in an interview with the program "Conversation with Bial", on TV Globo, [from 6/6] (...), when he affirmed "that a Power that invades the competence of another Power can give rise to an intervention by the Armed Forces".

In turn, another jurist, the former President of the São Paulo Court of Justice, retired Judge Ivan Sartori, and at the time pre-candidate for the position of Mayor of Santos/SP, also spoke, stating that "What is happening in this country is demanding an operation of article 142 of the Federal Constitution. It is not military intervention at all. But the president needs to guarantee law and order and call the Armed Forces because this is a mess"[16].

More recently, Ives Gandra, again consulted on the subject[17], was asked to give a concrete example, saying:

The imaginary example: the Brazilian Supreme Court issues a law and orders the president of the Senate to be arrested for having refused to accept it. "He can appeal to the Armed Forces saying: 'Look, here it is in article 49, item XI, of the Constitution, which determines that it is up to the Legislative to ensure its normative competence'".

The concrete example: for Ives Gandra, in 2015, the then president of the Senate, Renan Calheiros, could have refused the Delcídio do Amaral's order of imprisonment, determined by the Supreme Court. "Senators could complain that Article 53 was disrespected. If they did, the Armed Forces could say: - "Supreme Court, wait a while until the Senate decides. This is trying to restore law and order, "said the lawyer.

Well, on these positions there was a manifestation to the contrary through the opinion prepared by the National Presidency and the Constitutional Attorney of the Federal Council of the Brazilian Bar Association (from June 2, 2020), in defense of the legal order and the democratic state of law, as one of the institutional functions of the Bar Association, for whom the Armed Forces do not exercise moderating power.

[14] MARTINS, Ives Gandra. **Harmonia e independência dos poderes?** Conjur, de 2 de maio de 2020.
[15] MARTINS, Ives Gandra. **Cabe às Forças Armadas moderar os conflitos entre os Poderes**. Conjur, de 28 de maio de 2020.
[16] SARTORI, Ivan. '**É inconstitucional', diz Ivan Sartori, ex-presidente do TJSP, sobre decisão do STF**. Revista Oeste, de 23 maio 2020.
[17] MARTINS, Ives Gandra. [Entrevista]. **Ives Gandra: Constituição permite 'intervenção pontual' das Forças Armadas**. O Antagonista, em 02 de junho de 2020.

The lawyer Adriana Cecílio[18], rescuing the historicity of the constituent debates about art. 142 of CF/88, also noted that although the constituents discussed an alleged moderating role for the Armed Forces, that role was discarded. This is also corroborated by the speeches of the then constituent congressman, Fernando Henrique Cardoso, in dialogue with General Leônidas Pires, and by the memories of José Sarney about the episode with the constituent congressman Bernardo Cabral[19].

The constituent congressman Bernardo Cabral, rapporteur of the 1988 Constitution Systematization Commission, in an interview with Jornal do Brasil (on September 2, 1987), expressly acknowledged the coup environment, already in the constituent, by mentioning: "The draft Constitution now under discussion at the Constituent Assembly, it is, in fact, the result of a climate of insecurity, provoked by the threat of a military coup that ended up being [...] just rumors (...) But, where there is smoke, there is fire"[20].

Nevertheless, it is known that the Constitution does not allow itself to be interpreted in strips, or in pieces, as Brazilian Supreme Court Justice Eros Grau recalls. More than that, especially for those who did not understand the post-1988 democratic moment, or who ignore the historical roots of art 142 itself, and its meaning, will never understand that the 1988 Constitution does not tolerate coups.

The professor Lenio Streck[21] also manifested himself a few times, affirming the inadequacy of some kinds of article's 142 reading, asserting that the "literal content itself - if one wishes to take a textualism - of article 142 precludes the possibility of autonomous action by the Armed Forces without subordination to a civilian power", and, even, "article 142 does not allow intervention military.Any constitutional law course teaches what is the principle of constitutional unity"[22]. It is also worth mentioning the expressive article by jurists Marcelo Andrade Cattoni de Oliveira, Thomas da Rosa de Bustamante and Emilio Peluso Meyer, in the sense that "in the Democratic Rule of Law, legitimacy intrinsically refers to constitutional-democratic legality, because inherent to it"[23].

Well, it is observed that there is no provision in the 1988 Constitution for the Armed Forces to exercise the role of moderating power, either due to the absence of such reference in article n 2,at the constitutional text, which provides, in a topographical and purposeful order, the Legislative, Executive and Judiciary Powers, but there is not any reference to a Moderating Power. In addition, the location of art. 142, within Title V of the Constitution, in the part called "Defense of the State and Democratic Institutions", meaning that the armed forces must respect constitutional democracy, making it quite tragic that it must be said in the 21st century.

4. The Moderating Power as "The Ghost" that surrounds Brazilian Constitutionalism

Brazil adopted the "Moderating Power" in the 1824 Constitution, under the influence of Benjamin Constant[24] who, in turn, was influenced by the writings of Clermont-Tonnerre (Réflexions sur les Constitutions). Analyzing the said Moderating Power, from the point of view of the constitutional monarchical practice of Brazil-Empire, the classic work of Góes and Vasconcellos, to conclude a reasoning on the central point here institutionalized:

[18] CECÍLIO, Adriana. **Documentos da Assembleia Constituinte revelam que deputados discutiram e descartaram papel moderador Forças Armadas.** Migalhas de 5 de junho de 2020.
[19] CARVALHO, Luiz Maklouf de. **1988: Segredos da Constituinte**. Rio de Janeiro: Record, 2017.
[20] CABRAL, Bernanrdo. [Entrevista]. **Cabral diz que boatos de golpe condicionaram seu anteprojeto**. Jornal do Brasil, política, 2 de setembro de 1987.
[21] STRECK, Lenio. **Interpretações equivocadas sobre intervenção militar no artigo 142**. Conjur de 7 de maio de 2020.
[22] STRECK, Lenio. **Ives Gandra está errado: o artigo 142 não permite intervenção militar!** Conjur de 21 de maio de 2020.
[23] CATTONI DE OLIVEIRA, Marcelo Andrade; BUSTAMANTE, Thomas da Rosa de; MEYER, Emilio Peluso. **A Constituição protege o sistema político contra qualquer intervenção militar**. Conjur, de 11 de outubro de 2017.
[24] CONSTANT, Benjamin. **Réflexions sur les Constitutions, la distribution des pouvoirs, et les garanties dans une Monarchie constitutionnelle, essentiellement constitué de son Esquisse de Constitution**, H. Nicolle, 1814; CONSTANT, Benjamin. **Principes de politique, applicables à tous les gouvernements représentatifs et particulièrement à la constitution actuelle de la France**, A. Eymery, 1815.

"The key to political organization is less this or that power in itself than the division of powers, and that the mission of maintaining independence, balance and harmony is not characteristic of any of them, but the destiny of all."[25]

As can be seen, there is a previous political-legal, minority interpretation of jurists who defend that the Armed Forces would expressly exercise the role (and play the role) of a Moderating Power, despite the absence of any provision for a "Fourth Power" in the 1988 Constitution. In addition, two institutions are known to have received the constitutional assignment of defenders of the Legal System and the Democratic Rule of Law:the Public Ministry (art. 127, 1988 Constitution) and the Federal Council of the Brazilian Bar Association (art. 44, n. I, of Federal Statute n 8.904/94), but not the Armed Forces.

None of the two institutions, however, can carry out intervention (or "intermediation"), but, at most, resort to the judiciary, based on the principle of judicial review (art. 5, n. XXXV, 88 Constitution), seeking the safeguarding the legal order and the democratic rule of law. The lack of understanding of the role of the Armed Forces, present in art. 142, however, is very dangerous, mainly due to the existence of a certain literature that advocates the role of "militant moderator", concealing, however, its coup and rupture character[26]. As José Reinaldo Lima Lopes recalled, observing in a clear way the fact that such a discussion is part of the work of Carl Schmitt, the famous Nazi jurist, regarding the controversy about "The Guardian of the Constitution":

The debate on Moderating Power continued to be vigorous, especially in the interwar period (1919-1939) as the crisis of liberal democracies in the process of transformation changed. It is worth mentioning only as an example of the work of Carl Schmitt, Der Hütter der Verfassung (The defender of the Constitution) of 1931 in which the question of some body or power with political capacity and electoral impartiality to arbitrate constitutional conflicts is posed. Chapter III begins with a significant note regarding the moderating power of the Empire of Brazil, referring to the theory and practice that had sustained neutral power here. Schmitt draws attention to the fact that the moderating power, explicitly adopted in Brazil and Portugal, is in fact a typical institution in all the liberal bourgeois constitutions of the 19th century, embodied in a 'repertoire of prerogatives and powers of the head of state' (Monarch) or President of the State). [27]

According to Carl Schmitt's[28] own reading, the emergence of a theory of neutral, intermediary and regulatory power - pouvoir neutre, intermedmediaire, et régulateur- (moderator) stemmed from the struggle of the French bourgeoisie "for a liberal Constitution against [Bonapartism] and [the] monarchical restoration". Furthermore, according to the same Nazi jurist, writing under the interpretive support of the Weimar Constitution, which was later destroyed by hermeneutical work in the sense that the executive branch could exercise neutral (moderator) power and, therefore, would be the best Constitution defender, also due to the caricature and bizarre interpretation that the mere fact that there is a constitutional determination of oath (art. 42) in the sense that the president "will defend the constitution", would be sufficient for the effective "guarantee [defense] of the constitution"[29].

That is, those who advocate the position that the Armed Forces exercise the role of "moderating [neutral] power", seek, in fact, to make them emulate Hitler's Nazi executive, without any constitutional basis for that in the 1988 Constitution. Furthermore, within our tradition, such interpreters seek to ensure that the Armed Forces begin to exercise, in the republic, that monarchical attribution of the duality of articles 98 and 99 of the Political Constitution of the Empire of 1824, which combine irresponsibility and the sacred element of the Emperor in the exercise of Moderating Power, absolutely incompatible with the republican principle.

[25] VASCONCELLOS, Zacarias de Góes e. **Da natureza e limites do poder moderador**. Rio de Janeiro: Typ. Universal de Laemmert, 1862, p. 19-20.
[26] STEPAN, Alfred. **Os militares na Política**. Rio de Janeiro: Editora Artenova, 1975; MORAES, João Quartim de. **Alfred Stepan e o mito do poder moderador**, Filosofia Política, (2): 163-99, 1985; MARTINS FILHO, João Roberto. **O Palácio e a Caserna: A dinâmica militar das crises políticas na Ditadura(1964-69)**. São Paulo: Alameda, 2020.
[27] LIMA LOPES, José Reinaldo. **O Oráculo de Delfos: O Conselho de Estado no Brasil-Império**. São Paulo: Saraiva, 2010, p. 115.
[28] SCHMITT, Carl. **O guardião da Constituição**. Belo Horizonte: Del Rey, 2007, p. 194.
[29] SCHMITT, Carl. **O guardião da Constituição**. Belo Horizonte: Del Rey, 2007, p. 233.

They also seem to be unaware, or perhaps worse, about the fact that in the Empire of Brazil the Moderating Power (Fourth Power) was exercised by means of (and before) the Fifth Power, as José Honório Rodrigues[30] called the *Conseil d'Etat* (State Council), making suspicious the hermeneutic claim, since after the Supreme Court make public the recordings of the Council of Ministers meeting (a meeting between the President and all Brazilian Secretary's, chiefs of all federal executive departments), on April 22, 2020, and it soon becomes clear what kind of collegiate meeting would be the director of an alleged exercise of moderating power, with profanity, hatred of indigenous peoples, disrespect for public employees ("grenade in the enemy's pocket"), clandestine speeches about "arrest of governors and mayors", contempt for small and medium-sized companies ("losing money with small and medium-sized companies"), contempt, violence and omission towards the Supreme Court ("put these vagabonds all in jail.Starting with Supreme Court justices"), in addition to the decision to "arm the population" in a strange way ("send a big message"), and inadequate treatment of an important part of the heritage of all Brazilians, with the theme of the so-called "privatization" ("sell fast the fuc*** bank of brazil"), among other absolutely non-republican speeches, such as the intention to interfere in the Federal Police (a kind of Brazilian FBI) to save the President's family and friends from the dangers of the Law.

In addition, the already fateful (and always regrettable) act of the current President, when attributing to himself the characteristic or claim to be himself the Federal Constitution ("I am the Constitution"). The obvious parallel of the question, of course, lies in the fact that in the Constitution of the Empire of 1824 it was incumbent upon the Council of State to advise the monarch in the exercise of the functions of the moderating power, except in the case of the appointment and dismissal of Ministers of State, according to art. 142, being certain that the functions of the moderating power were provided for in art. 101.

There the problem would be semantic: from "neutral" power (moderator), it would become "involved power" (destructor), as in the Weimar Constitution, under the perspective of Carl Schmitt and his caricatures about "neutral power". Even in recent readings on the "moderating power", in a comparative study on the cases of the presidency of the republic in France and Italy, the requirements imagined by Benjamin Constant are not observed, resulting much more from a bad adaptation to the Republic, becoming in a legitimation argument, rather than a "limitation" argument[31].

It should be remembered, by the way, that in the Brazilian case, even after the fall of the monarchical regime, two texts are fundamental to understand the rugged path of our republicanism. The first, written by Ernest Hambloch[32], despite the intense controversy it caused, and the invitation to the author to leave the country after its publication, identifies in the Brazilian constitutional praxis remnants of an imperial irresponsibility that suggested the need to adopt a model parliamentarian with moderating power. The second, by Borges de Medeiros[33], sought to improve Presidentialism through the adoption of the Moderating Power, transforming the head of the executive branch into anarbitrary magistrate, rather than a ruler that respects the rule of law.

However, no one has gone so far in trying to insert the Armed Forces into the political turmoil as redemptive of institutional problems, in the role of neutral or moderating power, and those who repeat this assertion seem to have something else in mind, except those who fantasize and enjoy the absurd. In this sense, therefore, if the Armed Forces were a neutral power (which they are not, since art. 142 does not refer to them as "power"), in addition to not being able to be inserted in the bowels of the government, they should have a constitutional position consistent with said expression, with constitutional authorization in the art. 2, and should have the attribution of political participation with regard to checks and balances (checks and balances) when they do not work properly.

[30] RODRIGUES, José Honório. **Conselho de Estado: O quinto Poder?** Brasília: Senado, 1978.
[31] SPONCHIADO, Lucie. **Des usages républicains de la thèse du «pouvoir neutre monarchique» de Benjamin Constant en France et en Italie**. In M.-A. Cohendet et A. Lucarelli, L'équilibre légitimité-responsabilité-pouvoir. Actes de la journée d'étude franco-italienne organisée le 7 novembre 2014 par l'Université Paris I Panthéon-Sorbonne et l'Università degli Studi di Napoli Federico II.
[32] HAMBLOCH, E. **Sua majestade o presidente do Brasil: um estudo do Brasil constitucional**. Brasília: Senado Federal, 2000.
[33] MEDEIROS, Borges de. **O poder moderador na república presidencial**. São Paulo: Forense, 2018.

Apparently, such a conception of the Armed Forces as "neutral power" or "moderator", in addition to finding no refuge in the constitutional text, nor in Brazilian tradition, except in the visions that boast a rupture pragmatism, seeming to call for action preponderance of the "coup", confusing moderation with a coup d'état, as a kind of "ghost that surrounds Brazilian constitutionalism", dragging its heavy rusty chains, whose clinking of links and fetters makes its image unbearable to the eyes and ears of Balzaquian1988 Constitution. This is what the readings of Oscar Vilhena Vieira[34], José Reinaldo Lima Lopes[35] and Alfred Stepan[36] suggest, if the reading evidently privileges the sense of democratic constitutionalism.

As a matter of fact, the one who came closest to formally inheriting the tradition of moderating power was the Brazilian Supreme Court, according to the reference of Lêda Boechat Rodrigues[37], in rescue of the old dialogue of Emperor Pedro II, who was thinking of transferring the imperial moderating power to a Supreme Court "like the one in Washington".

In fact, part of our German tradition, inherited from the previous Representation of Unconstitutionality, imposed, more than subtly, at least from 1965 (EC n16 /1965) the presence of an objective process (*objektives verfahren*), without subjects and aimed at pure Defense of the Constitution (*Verfassungsrechts-Bewahrungsverfahren*)[38], coupled with the fact that, as Justice Moreira Alves said, the judicial review is a process that "is not an procedure juridic Action, in the classic, genuine sense of Procedural Law, [being] a political institution"[39], implemented by civil-military dictatorship itself, trying to imitate the Kelsenian conception of Constitutional Court (which defeated the post-war Schmittian perspective).

With that, we have in Brazil a Supreme Court (like the of American tradition), from the premises established by the case Marbury v. Madson (1803) and also with influences from the european Constitutional Court model, the latter being certainly above and outside the classic separation of powers, as Mauro Cappelletti[40] and Inocêncio Mártires Coelho[41] emphasize, making it clear that in such a model, it would be the Supreme Court, and not the Armed Forces, which would have the proximity of exercising a moderating function (or role), although recognizing the various constitutional problems of such a "patchwork" formulation.

5. The Meaning and Scope of Article 142 from 1988 Brazilian Constitution

As seen, the art. 142 has a historicity, although it does not admit the interpretation that it would be permissive or authoritative for the Armed Forces exercise the role (or function) of a neutral or moderating power.

In fact, the art. 142 establishes that they (the Armed Forces) are constituted by the combination of the 3 forces (Navy, Army and Air Force), as permanent and regular national institutions, under an organization that goes back to its double pillar (hierarchy and discipline), repeating the reference that they respond to the "supreme authority of the President of the Republic", and are intended, as provided, for the defense of the Nation, for the guarantee of constitutional powers and, on the initiative of any of these, of law and order.

In the post-1988 non-constitutional scope, the first issue was disciplined through Complementary Statute Law n. 69, from 1991, which provided for "the general rules for the organization, preparation and employment of the Armed Forces", coming from Complementary Statute Law Project nº 181/1989, sent to the National Congress[42] through the message n. 695/89. Said rule was replaced by Complementary Statute Law n.

[34] VIEIRA, Oscar Vilhena. **O Supremo Tribunal Federal: Jurisprudência Política**. São Paulo: RT, 1994.
[35] LOPES, José Reinaldo de Lima. **Direitos Sociais: teoria e prática**. São Paulo: Método, 2006.
[36] STEPAN, Alfred. **Os militares na Política**. Rio de Janeiro: Editora Artenova, 1975.
[37] In this sense: "As Leda Boechat Rodrigues recalls, Pedro II himself, at the end of his reign, asked whether the solution to the Empire's institutional impasses would not be to replace the Moderating Power with a Supreme Court like Washington". RODRIGUES, Lêda Boechat. **História do Supremo Tribunal Federal**, vol. I. Rio de Janeiro: Civilização Brasileira, 1991; VIEIRA, Oscar Vilhena. Supremocracia. Revista Direito GV, 4(2), JUL-DEZ 2008.
[38] MENDES, Gilmar. **Moreira Alves e o Controle de Constitucionalidade**. São Paulo: Feitas Bastos, 2000, p. 17.
[39] BRASIL. Supremo Tribunal Federal. **REPRESENTAÇÃO n. 700**, Rel. Min. Moreira Alves, DJ 27.06.1967, RTJ 45, p. 714.
[40] Cfr. CAPPELLETTI, Mauro. **O controle de constitucionalidade das leis no sistema das funções estatais**. Revista de Direito Processual Civil, São Paulo, v. 3, p. 38, 1961.
[41] COELHO, Inocêncio Mártires. **Apontamentos para um debate sobre o ativismo judicial**. Revista Brasileira de Políticas Públicas, v. 5, número especial, 2015.p. 8.
[42] BRASIL. Congresso Nacional. **Diário do Congresso Nacional**, Seção I, de 26 de outubro de 1989, p. 12348.

97/1999, originating from Complementary Statute Law Project n. 250/1998, sent to the National Congress[43] through the message n. 1.418/99.

Indeed, it is observed that there's no discipline of moderating action, not even present in their explanatory statements, and could not even do so without distorting or disturbing the legal provisions of unconstitutionality, but legislative curiosity is intended, rather, to verify the level and intensity of the Armed Forces' performance from the legal point of view.

With regard to employment for Guarantee of Law and Order, there is the Statute Law (the Decree n. 3,897/2001), in which it is observed the Legal Opinion of the Attorney General of the Union, an organ of legal representation and legal advice of the executive branch (Opinion n. GM-025, of August 10, 2001), who preceded and guided the editing of the aforementioned decree, whose conclusion is as follows:

The use, emergency and temporary, of the Armed Forces, in guaranteeing the law and order - it was seen - occurs after the instruments destined to the preservation of public order and the safety of people and property, listed in art. 144 of the Federal Constitution (cf. Complementary Statute Law n 97/1 999, art. 15, paragraph 2). In other words: the purpose of the use of the Armed Forces is to preserve (or restore) public order, including ensuring the safety of people and property (public and private). And the enhanced preservation (or restoration) is the responsibility of the Military Police, under the terms of the Greater Law.

Thus, in view of the above, we are already in a position to realize that the use of the Armed Forces is something exceptional, always in the "Defense of Democratic Institutions", never exercising an undue and non-existent "role or moderating function", and always dedicated to the performance of its triple constitutional mission, under the terms of art. 142: a) defense of the Nation; b) guarantee of constitutional powers; and, c) guarantee of law and order.

In the first case (defense of the Nation), systematic interpretation leads to the conclusion that there should be a prior exercise of the private competence of art. 84, XIX from Brazilian Constitution, with the declaration of war, in the case of foreign aggression, "authorized by the National Congress or endorsed by it, when it occurs between legislative sessions, and, under the same conditions, decree, totally or partially, the national mobilization", with the participation of the National Defense Council (art. 91), and with the prior decree of the State of Siege, in the form (and according to the strict requirements and deadlines) of art.137, with authorization from the National Congress, pursuant to art. 49, IV, from the same 1988 Constitution.

In the other two cases (guarantee of constitutional powers and guarantee of law and order), it must be a previous Federal Intervention or State of Defense, with the necessary approval from the National Congress, according to art. 34, III and IV, ("putting an end to a serious compromise of public order" and "guaranteeing the free exercise of any of the Powers in the Federation states"), always under the supervision of the National Congress (art. 140) and the provision of accountability (art. 141) of agents and executors, including the President of the Republic, Ministers of State and military (squares and officers) of the Armed Forces.

6. Conclude Remarks

As general conclusions, from a constitutional point of view, the Armed Forces were not elevated by the 1988 republican constituent to the role of "neutral power" or "moderator", something that does not even belong to the tradition of the Brazilian constitutionalism in the republican period, and which in the monarchical period involved a complex joint action by the Monarch (considered sacred and irresponsible) under the guidance of the Council of State.

Furthermore, by the way, the admission that the Armed Forces would exercise a kind of moderating function in the republic, in spite of the normative reality (and, therefore, in view of the cleavage between the real country and the legal country) only serves to diminish its democratic function, as well as to hide the coup and rupture action (unfortunately present in a certain part of the national political-legal thought). Therefore, art. 142 from the current 1988 Constitution cannot be interpreted in isolation, nor does it admit an interpretation that ignores the "defense of the state and democratic institutions", that is, the triple constitutional mission of the Armed Forces consists of "defense of the Nation" , the "guarantee of constitutional powers" and the "guarantee of law and order".

[43] BRASIL. Congresso Nacional. **Diário da Câmara dos Deputados**, de 22 de janeiro de 1999, p. 3228

With this, they can only be triggered with the previous existence of State of Defense, State of Siege and Federal Intervention, with the participation of the National Congress in the inspection functions, and of authorizing and approving, allied to the inevitable promotion of the accountability of agents and executors. Nor should it be said that the Armed Forces cannot practice ordinary civic and citizenship acts, within the connection with the Law and the pillars of hierarchy and discipline, such as assistance in public service activities, as they are anomalous (non-constitutional) activities attributed by Law and that could be assigned to any federal public servants.

In other words, this is not the request forecasts to guarantee the right to vote by the Superior Electoral Court (Federal Statute n. 4,737/1965), or the possibility of using the so-called "slaughter shot" in the destruction of hostile aircraft, through the Federal Statute n. 9,614/1998, among other hypotheses. Furthermore, the 1988 Constitution is no longer the document of the type that regulated society in the 1930s and, therefore, no longer allows a peculiar interpretation based on the doctrine of national security or a break with contractualism, in privilege to the State. with prejudice to individual rights, typical of fascist societies of the period, that is, the guarantee of constituted powers and law and order must always privilege the fundamental rights of the 1988 constitutional text, and the separation of powers.

Only in a context of backward enlightenment (dark light) could it be admitted that the Armed Forces could carry out a kind of inspection and moderation of the powers (legislative, executive and judiciary), something that would only occur through the ignoble ignorance of the Brazilian constitutional tradition. Article 142 of the 1988 Constitution, therefore, does not allow any military intervention in politics, precisely because the Armed Forces owe obedience to constitutional (constituted) powers. Anything other than that is nothing more than the will to power, arbitrariness and violence. Something unfortunately common in the rear view of our constitutional trajectory.

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