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Daniel Rocha Chaves

**The reconstruction of the summit in Brazilian under-democracy:**  
concept and evolution in a systemic approach

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Daniel Rocha Chaves

**The reconstruction of the summit in Brazilian under-democracy:**  
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Prof. Luiz Henrique U. Cademartori, Dr.  
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To my aunt Liduina (Tia Nina), whose life is summed up in  
devoting to neighbor.

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*One of the greatest sins that men are guilty of is—some will say pride—but I say ingratitude, going by the common saying that hell is full of ingrates.*

*Miguel de Cervantes*

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The future as such gives cause for concern. That is its meaning and naturally this applies also to the future of democracy. (LUHMANN, 1986)

## ABSTRACT

Understanding the ideas of democracy in modernity means understanding the social formation of modernity itself. Several descriptive forms have been elaborated to comprehend the processes of formation, consolidation, and erosion of democracy, but always following minimalist criteria or incurring a dichotomy between autocracy and democracy. The present thesis is based on the idea that the forms of evaluation and classification of political regimes suffer from analytical deficits that do not take into account the structural asymmetries of world society. Thus, making use of the theory of social systems developed by Niklas Luhmann, as well as authors who work in the same framework, the concept of under-democracy was developed throughout this research as a distortion of the secondary codification that the legal system makes on the political, as a result of allopoietic influxes in the mentioned systems. Attending the spatial delimitation to the Brazilian case and the temporal scope of what is called the Trump Effect, the first chapter tried to discuss the systems of law and politics under the prism of systems theory, identifying some operational concepts necessary for a better understanding of the theory, as well as introducing the idea of modernity and world society, culminating in the understanding of democracy in that theoretical reference. In the second chapter, we worked on the development of the concept of democracy along its course throughout history, making a differentiation between how democracy was seen by the Greeks and by the moderns (especially in the context of the French Revolution and the Independence of the 13 Colonies). After this, the unfolding of democracy in modernity was introduced, in such a way that it was verified that democracy started to guide predominantly the structure of the political system, as well as its evolutionary acquisitions. Next, the idea of democracy in its peripheral modernity was worked on, and how it acts differently from what is seen in the center of world society. Moreover, it is shown how populism, which has been gaining strength in recent years, acts as a form of implosion of the mechanisms of circulation and counter-circulation of power, leading to the reconfiguration of the political system, which is no longer guided by the criteria of government/opposition and starts to be guided by the friend/enemy code, and how this can have more serious consequences, such as the state of exception and authoritarianism. The last chapter works more directly with the proposal of under-democracy, contrasting it with other forms of classification of political regimes (hybrid regimes, pseudo-democracy, semi-democracy, and anocracy). Through factual analysis, focusing on the Brazilian case, it was verified that the hypothesis of under-democracy as a distortion in the secondary codification is more viable for the observation of countries inserted in a context of peripheral modernity.

**Keywords:** Democracy. Peripheral modernity. Under-democracy. World society.

## ZUSAMMENFASSUNG

Die Ideen der Demokratie in der Moderne zu verstehen, bedeutet die soziale Formation der Moderne selbst zu verstehen. Um die Prozesse der Entstehung, Konsolidierung und Erosion von Demokratie zu verstehen, wurden verschiedene Beschreibungsformen entwickelt, die jedoch stets minimalistischen Kriterien folgten oder eine Dichotomie zwischen Autokratie und Demokratie vornahmen. Die vorliegende Doktorarbeit geht davon aus, dass die Formen der Bewertung und Klassifizierung politischer Regime unter analytischen Defiziten leiden, die den strukturellen Asymmetrien der Weltgesellschaft nicht berücksichtigen. Unter Rückgriff auf die von Niklas Luhmann entwickelte Theorie sozialer Systeme sowie auf Autoren, die im gleichen Framework erforschen, wurde daher im Rahmen dieser Untersuchung den Begriff der Subdemokratie als eine Störung der sekundären Kodifizierung entwickelt, die das Rechtssystem auf das Politische ausübt, und zwar als Ergebnis *allopoietischer* Einflüsse in den erwähnten Systemen. Unter Berücksichtigung der räumlichen Eingrenzung auf den brasilianischen Fall und des zeitlichen Umfangs dessen, was als Trump-Effekt bezeichnet wird, wurde im ersten Kapitel versucht, die Systeme des Rechts und der Politik unter dem Prisma der Systemtheorie zu erörtern, wobei einige für ein besseres Verständnis der Theorie notwendige operative Konzepte identifiziert sowie die Idee der Moderne und der Weltgesellschaft eingeführt wurden, was im Verständnis der Demokratie in diesem theoretischen Bezug gipfelte. Im zweiten Kapitel haben wir uns mit der Entwicklung des Demokratiekonzepts im Laufe der Geschichte befasst und dabei differenziert, wie die Demokratie von den Griechen und von der Moderne (insbesondere im Zusammenhang mit der Französischen Revolution und der Unabhängigkeit der 13 Kolonien) gesehen wurde. Danach wurde die Entfaltung der Demokratie in der Moderne vorgestellt, womit festgestellt wurde, dass die Demokratie in erster Linie die Struktur des politischen Systems sowie seine evolutionären Errungenschaften zu bestimmen begann. Als nächstes wurde die Idee der Demokratie in der peripheren Moderne bearbeitet und, wie sie sich anders verhält als im Zentrum der Weltgesellschaft. Darüber hinaus wird gezeigt, wie der Populismus, der in den letzten Jahren an Stärke gewonnen hat, als eine Form von Implosion der Mechanismen von Zirkulation und Gegenzirkulation der Macht wirkt, was zu einer Neukonfiguration des politischen Systems führt. Das wird nicht mehr von den Kriterien Regierung/Opposition geleitet, sondern vom Freund-Feind-Code, und es wird auch gezeigt, wie dies schwerwiegendere Folgen haben kann, wie den Ausnahmezustand und den Autoritarismus. Das letzte Kapitel befasst sich direkter mit dem Vorschlag der Subdemokratie und stellt sie anderen Formen der Klassifizierung politischer Regime gegenüber (hybride Regime, Pseudodemokratie, Halbdemokratie und Anokratie). Anhand einer phatischen Analyse, die sich auf den brasilianischen Fall konzentriert, wurde bestätigt, dass die Hypothese der Unterdemokratie als eine Korruption in der sekundären Kodifizierung für die Beobachtung von Ländern, die sich in einem Kontext peripherer Modernität befinden, praktikabler ist.

**Stichwörter:** Demokratie. Periphere Modernität. Unter-Demokratie. Weltgesellschaft.

## RESUMO

Compreender as ideias de democracia na modernidade significa compreender a formação social da própria modernidade. Várias foram as formas descritivas que foram sendo elaboradas para compreender os processos de formação, consolidação e erosão da democracia, mas sempre atendo-se a critérios minimalistas ou incorrendo em uma dicotomia entre autocracia e democracia. A presente tese parte da ideia de que as formas de avaliação e classificação dos regimes políticos padecem de déficits analíticos que não levam em conta as assimetrias estruturais da sociedade mundial. Desta feita, fazendo-se valer da teoria dos sistemas sociais desenvolvida por Niklas Luhmann, bem como de autores que trabalham no mesmo framework, foi-se desenvolvido ao longo desta pesquisa o conceito de subdemocracia como deturpação na codificação secundária que o sistema jurídico faz sobre o político, como fruto de influxos alopoiéticos nos referidos sistemas. Atendo-se à delimitação espacial ao caso Brasileiro e o recorte temporal aquilo que se chama de Efeito Trump, no primeiro capítulo procurou-se discorrer acerca dos sistemas do direito e da política sob o prisma da teoria dos sistemas, identificando alguns conceitos operacionais necessários para melhor compreensão da teoria, bem como introduzir a ideia de modernidade e sociedade mundial, culminando na compreensão de democracia no referido referencial teórico. No segundo capítulo foi trabalhado o desenvolvimento do conceito de democracia ao longo do seu percurso ao longo da história, fazendo uma diferenciação entre como a democracia era vista pelos gregos e pelos modernos (especialmente no contexto da Revolução Francesa e Independência das 13 Colônias). Isto posto, adentrou-se nos desdobramentos da democracia na modernidade, de modo que foi verificado que ela passou a orientar de forma preponderante a estrutura do sistema político, bem como suas aquisições evolutivas. Em seguida se trabalha com a ideia de democracia na modernidade periférica e como ela atua de forma diversa do que se vislumbra no centro da sociedade mundial. Ademais, mostrou-se como o populismo, que vem ganhando força nos últimos anos, atua como forma de implosão dos mecanismos de circulação e contra-circulação de poder, acarretando a reconfiguração do sistema político, que deixa de se guiar pelos critérios de governo/oposição e passa a orientar-se pelo código amigo/inimigo, e como isso pode ter consequências mais graves, como o estado de exceção e autoritarismo. O último capítulo trabalha mais diretamente com a proposta de subdemocracia, contrastando com outras formas de classificação de regimes políticos (regimes híbridos, pseudodemocracia, semidemocracia e anocracia). Por meio de análise fática, atendo-se ao caso brasileiro, verificou-se que a hipótese da subdemocracia como deturpação na codificação secundária é mais viável para a observação dos países inseridos em um contexto de modernidade periférica.

**Palavras-chave:** Democracia. Modernidade periférica. Sociedade mundial. Subdemocracia.

## **RESUMO EXPANDIDO**

### **Introdução**

Compreender as ideias de democracia na modernidade significa compreender a formação social da própria modernidade. Várias foram as formas descritivas que foram sendo elaboradas para compreender os processos de formação, consolidação e erosão da democracia, mas sempre atendo-se a critérios minimalistas, eleitoralistas ou incorrendo em uma dicotomia entre autocracia e democracia. A presente tese parte da ideia de que as formas de avaliação e classificação dos regimes políticos padecem de déficits analíticos que não levam em conta as assimetrias estruturais da sociedade mundial, especialmente se se levar em conta a distinção entre centro e periferia. Desta feita, fazendo-se valer da teoria dos sistemas sociais desenvolvida por Niklas Luhmann, bem como de autores que trabalham no mesmo framework, foi-se desenvolvido ao longo desta pesquisa o conceito de subdemocracia como deturpação da codificação secundária que o sistema jurídico faz sobre o político, como fruto de influxos alopoiéticos nos referidos sistemas.

### **Objetivos**

Atendo-se à delimitação espacial ao caso Brasileiro e o recorte temporal àquilo que se chama de Efeito Trump, no primeiro capítulo procurou-se discorrer acerca dos sistemas do direito e da política sob o prisma da teoria dos sistemas, identificando alguns conceitos operacionais necessários para melhor compreensão da teoria, como é o caso da diferenciação funcional e dos acoplamentos estruturais, bem como introduzir a ideia de modernidade e sociedade mundial, culminando na compreensão de democracia no referido referencial teórico. Para tanto, explanou-se o funcionamento dos sistemas jurídico e político de acordo com os referenciais teóricos adotados. No segundo capítulo foi trabalhado o desenvolvimento do conceito de democracia ao longo do seu percurso ao longo da história, fazendo uma diferenciação entre como a democracia era vista pelos gregos e pelos modernos (especialmente no contexto da Revolução Francesa e Independência das 13 Colônias). Isto posto, adentrou-se nos desdobramentos da democracia na modernidade, de modo que foi verificado que ela passou a orientar de forma preponderante a estrutura do sistema político, bem como suas aquisições evolutivas. Em seguida se trabalha com a ideia de democracia na modernidade periférica e como ela atua de forma diversa do que se vislumbra no centro da sociedade mundial. Ademais, mostrou-se como o populismo, que vem ganhando força nos últimos anos, atua como forma de implosão dos mecanismos de circulação e contra-circulação de poder, acarretando a reconfiguração do sistema político, que deixa de se guiar pelos critérios de governo/oposição e passa a orientar-se pelo código amigo/inimigo, e como isso pode ter consequências mais graves, como o estado de exceção e autoritarismo. O último capítulo trabalha mais diretamente com a proposta de subdemocracia, contrastando com outras formas de classificação de regimes políticos (regimes híbridos, pseudodemocracia, semidemocracia e anocracia).

### **Metodologia**

O âmbito temático da pesquisa desenvolvida demandou o uso de uma perspectiva sociológica para abordar o problema investigativo bem como trabalhar a hipótese levantada, atendo-se com mais afinco à sociologia jurídica. Para atingir os objetivos também se fez valer de alguns dados empíricos que deram sustentação à argumentação feita, mas sem caracterizar uma pesquisa qualitativa/quantitativa. Em termos metodológicos mais diretos, trata-se de uma pesquisa de natureza básica (ou pura) cujo propósito investigativo é de caráter explanatório, tendo o indutivismo como método de abordagem e o sociológico como método interpretativo.

## **Resultados e discussão**

Ao se desenvolver a ideia de democracia na periferia da sociedade mundial, verificou-se que há a ocorrência de processos de desdiferenciação funcional e corrupção sistêmica que implicam na modificação das estruturas dos sistemas político e jurídico na modernidade. Em função do Efeito Trump – mas não somente em relação a ele – movimentos populistas vêm ganhando força e exigindo que haja formas menos opacas de observação e descrição das comunicações jurídico-políticas.

Com esse intento, após explanar os fundamentos teóricos que alicerçam a tese, isto é, a teoria dos sistemas sociais, bem como traçar as modificações semânticas em torno do conceito de democracia, parte-se para uma perspectiva evolucionista acerca de como a democracia atua no funcionamento operacional dos sistemas político e jurídico. Feito isto, chega-se à conclusão de que a democracia na modernidade atua como um limitador normativo às comunicações que se reproduzem no interior dos sistemas em análise.

Após se compreender a relevância estrutural para qual a democracia moderna tem para com os sistemas citados, verifica-se que não há uma similaridade entre o estabelecimento e manutenção da democracia na sociedade mundial, em razão das assimetrias estruturais que são próprias dela. Quando se leva em consideração os países que estão inseridos na modernidade periférica – e por razões metodológicas se focou no caso brasileiro –, se verifica a existência de um processo de desdiferenciação funcional. Por seu turno, ao se atentar à ascensão de movimentos políticos de vieses e discursos autoritários – cujo estopim se deu com a eleição de Donald Trump – o que se percebe é um fenômeno de recodificação do sistema político, que deixa de se orientar pela relação governo/oposição, e passa a ter como novo parâmetro a ideia de amigo/inimigo.

Esse processo de recodificação não ocorre abruptamente e, em razão disso, mostrou-se que a escalada de movimentos populistas são o ponto de inflexão para a ascensão de formas de estado de exceção e *lawfare*, até culminar em uma situação de autoritarismo. Por seu turno, faz-se mister salientar que o autoritarismo que se vê nas últimas décadas não domina todos os âmbitos sociais e, para tanto, novas formas de observação sociológica são necessárias.

No capítulo derradeiro, a proposta que capitaneia a presente pesquisa – a ideia de subdemocracia – é colocada em evidência quando confrontada com os principais conceitos avaliativos de regimes políticos: regimes híbridos, pseudodemocracia, semidemocracia e anocracia. Por serem conceitos que trabalham com critérios eleitoralistas e/ou minimalistas, a sub-democracia acaba se saindo melhor quando se busca avaliar regimes da modernidade periférica.

## **Considerações finais**

Por meio de análise fática, atendo-se ao caso brasileiro, verificou-se que a hipótese da subdemocracia como corrupção na codificação secundária é mais viável para a observação dos países inseridos em um contexto de modernidade periférica, em razão de compreender como os fluxos alopoiéticos influenciam seus processos comunicativos e de reprodução das comunicações.

**Palavras-chave:** Democracia. Modernidade periférica. Sociedade mundial. Subdemocracia.

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## 1 INTRODUCTION

“The future as such gives cause for concern. That is its meaning and naturally, this applies also to the future of democracy”<sup>1</sup>. Although these words were written – originally in Germany – in 1986 by the sociologist Niklas Luhmann, democracy has been the *Leitmotiv* of social and philosophical research since the concept of democracy was coined by the Greeks.

However, there has been a range of books and research published, most of them from 2016, whose theme of "democracy" has been very perceptive, due to Donald Trump's Effect caused – or until then – would cause in the American's institutions. But Trump was just a trigger of a new flow that is happening in the world geopolitics. Many other politicians with authoritarian impetus were already being elected, as is the case of Viktor Orbán, who has been Hungary's prime minister since 2010; Recep Erdogan, president of Turkey since 2014; Jair Bolsonaro, Brazilian president since 2018.

The election of conservative names by the democratic system is not a problem in itself, insofar as conservatism is a legitimate expression of political freedoms and should be defended as another way of doing politics. The problem arises when, under the label of conservative – but without keeping any relation to a real political conservatism – are candidates and politicians who reverberate discourses of authoritarian bias.

The red alarm to these names went off because, since their campaigns, many discourses against the proper democracy have been given; human rights and others civilizational issues were attacked and, most worryingly, several people agreed with their speeches and campaigned for their election.

Regardless if it occurs in Weimar, Rome, Washington or Brasilia, it is known what happens when the schema “government/opposition” is switched for a reason ruled by the “friend/enemy” idea, which is clearer if this is dealt with by us/them arrangement, where indicate the other – or the enemy – is easier: in the last century it was the Jews, communists, black people, gays and so on. Today the foreigners, Muslims, refugees, LGBTIQA+ community, for instance, are the enemy.

A reaction and alert were proclaimed by political scientists, sociologists, philosophers, jurists, and other researchers, fearful that the totalitarian spirit that haunted the 20th century could come back to haunt the 21st century and destroy all the civilizational achievements that

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<sup>1</sup> LUHMANN, Niklas. The Future of Democracy, **Thesis Eleven**, v. 26, n. 1, p. 46, 1990.

were won after the despotic periods that overshadowed the last century. As result, more than a diagnosis, it was realized that democracy could die, may be criticized, it might end, may go into a crisis or the people may confront it, to name but a few studies published about these vicissitudes<sup>2</sup>.

Although most of the conclusions have convergence in their results, it's necessary to indicate that the main purpose of their researchers consisted of analyzing the United States situation for obvious reasons: if the so called or even self-proclaimed bigger and longer democracy in the world were to falter or swing up and down, there would be an expected collapse in most of the democratic institutions around the globe.

Bringing in the discussion regarding the Brazilian scenario, there are the same concerns on the authoritarian wave after Jair Bolsonaro's election. Many scholars try to explain and evaluate the source and consequences of the way of the President of Republic, and his allies, rules the public politics and State's affairs, whether national or international character.

Many hypotheses have been sustained towards inflexible societal structures that, according to them, have governed the social dynamics since the foundation of the Brazilian State, such as slavery, economic under-development, gender inequality and so on. Although these issues are very relevant and crucial for any analysis which aim at understanding different aspects of the society, mainly the Brazilian one, it's hard — and why not to say misplaced — point out a couple of reasons to explain a complex reality such as modern society, if one wants to elaborate a sociological evaluation that can accommodate the mentioned social complexity.

Summing up, part of social theory directs its analysis of society to a monocausal explanation, concluding that society is guided by this singular mechanism and, consequently, the understanding of it would be crucial to comprehend the society as a whole<sup>3</sup>.

Michel Foucault<sup>4</sup>, for instance, underpinned the analysis about the power relations in society, distinguishing it in three modalities: sovereign power, disciplinary power and biopower. In this case, from these basic categories, any social occurrences, Foucault seems to imply, are the result of power relations. It is not a matter of doubt that power relations are

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<sup>2</sup> A reference to the title of the following publications: LEVITSKY, Steven; ZIBLATT, Daniel. **How democracies die**, New York: Crown Publishing, 2018. DAHL, Robert A. **A democracia e seus críticos**, São Paulo: WMF Martins Fontes, 2012. RUNCIMAN David. **How Democracy Ends**, New York: Basic Books, 2018. PRZEWORKSKI, Adam. **Crises of Democracy**, Cambridge: Cambridge University Press, 2019. MOUNK, Yasha. **O povo contra a democracia: por que nossa liberdade corre perigo e como salvá-la**. São Paulo: Companhia das Letras, 2018.

<sup>3</sup> NEVES, Marcelo. Niklas Luhmann: eu vejo o que tu não vês. In: ALMEIDA, Jorge de; BADER, Wolfgang (org.). **O pensamento alemão no século XX**. São Paulo: Cosac Naify, 2013. p. 333.

<sup>4</sup> FOUCAULT, Michel. **Microfísica do Poder**. Rio de Janeiro: Edições Graal, 1979.

present in our societal conjecture, but any attempt to face the social phenomena through a single perspective, besides being a pretentious one, may sound nowadays like theoretical *naïveté*.

Another example to explain this line of reasoning is the concept of dromology developed by Paul Virilio, through which he intended to demonstrate the velocity as social and historical subject<sup>5</sup>. Dromology, according Virilio, is the field of knowledge focused in illustrate how the idea of domination is related with the notion of speed, insofar as the fastest (country, agent etc.) is the one who can ensure its dominance – whether to achieve the best lands or to assure military power.

Nowadays, everyone who is fastest and, consequently, arrives first, may secure the best places to gain power and influence. Thus, it is noticeable that the world has become faster, mainly after the dromologic revolution (the way how Virilio refers to Industrial Revolution), but many social occurrences cannot be justified only by the speed's logic, and this is a critical concern if one wishes to gain more insight into the modern society in its overt complexity.

The list, of course, is not exhaustive – the theory of risk society (Ulrich Beck<sup>6</sup>), necropolitics (Achille Mbembe<sup>7</sup>), state of exception (Giorgio Agamben and Chantal Mouffe<sup>8</sup>), liquid modernity (Zygmunt Bauman<sup>9</sup>) or neoliberalism as a "new way of the world" (Pierre Dardot and Christian Laval<sup>10</sup>) could also be cited. On the other hand, the critics did above are not unmotivated to the reasoning that is intended here, inasmuch as the purpose is to justify the choice of a particular theoretical background that is appropriate for the research that is intended to be developed in this thesis. The fact that there are gaps and failures of logical sequence in the line of reasoning developed by interpreters of modernity undermine and make impossible any possibility of making a correct diagnosis of the reality that is being observed.

The examples quoted above serve to illustrate a certain point: a problem that any theoretical social framework has when it intends to assess all the aspects of society by invoking one condition to a sociological investigation, and this should be highlighted because, in contrast to pre-modern society, the modernity has particularities which will be exposed better later, but the most relevant aspect is its high complexity and with its complexity comes another problems that should be observed, as the range of pathologies and paradoxes.

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<sup>5</sup> VIRILIO, Paul. **Speed and Politics**. Los Angeles: Semiotexte, 2006.

<sup>6</sup> BECK, Ulrich. **Risk Society: Towards a New Modernity**. London: SAGE Publications, 1992.

<sup>7</sup> MBEMBE, Achille. **Necropolitics**. Duke: Duke University Press, 2019.

<sup>8</sup> AGAMBEN, Giorgio. **State of Exception**. Chicago: The University of Chicago Press, 2005; MOUFFE, Chantal. **Sobre o Político**. São Paulo: WMF Martins Fontes, 2015.

<sup>9</sup> BAUMAN, Zygmunt. **Liquid Modernity**. Cambridge: Polity Press, 2006.

<sup>10</sup> DARDOT, Pierre; LAVAL, Christian. **The new way of the world: on neoliberal society**. London: Verso, 2013.

To continue, illustratively, the critique of Foucault's approach to power relations and demonstrate how his point do not assure a correct conception on modernity and its paradoxes, Jürgen Habermas analyzed his works on the critic of power and concluded that there are many performative contradictions in Foucault's thought, labeling it as aporias<sup>11</sup>.

Highlighting this is how could be clarified a use of a specific theoretical model, it is, if intend observe the modern society, is necessary a theory developed to embrace mostly of features of modernity – never all of that. Despite of several social changes occurred in the last years, the modernity paradigm has yet overcome, although other perspectives has been elaborated to rewrite or redescribe what is happening since 1950<sup>12</sup>.

It was for this purpose that Niklas Luhmann developed his social theory, that is, a theory which aim better observe the modern society, despite on the vicious and blind spots that any observation may contain<sup>13</sup>. The use of systems theory as framework, that was anticipate in the first line of this introduction, is justifiable inasmuch as are debugged mostly of the problems on the observation on modernity, concerned above one single mechanism to explain social reality and develop equivocate diagnosis.

Having said that, the current research intends to examine one of the most relevant acquisitions of the political modernity: democracy. Democracy is one of the themes and operational concepts that most dispute the interest of researchers who have the social sciences – in a broad sense – as a field of investigation.

It is in this purpose that one intends to search the meanderings that surround not only the concept, but the idea of democracy within the paradigm of social systems developed by the sociologist Niklas Luhmann. He will act as a catalyst for the inter-courses developed throughout the research, seeking approaches of a sociological, philosophical and, above all, legal nature to

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<sup>11</sup> HABERMAS, Jürgen. **The Philosophical Discourse of Modernity**: twelve lectures. Cambridge: Polity Press, 1990.

<sup>12</sup> It is relevant note the list written by James Beniger (**The Control Revolution**: technological and economic origins of information society. Cambridge: Harvard University Press, 1986, p. 4-5) content several classifications and nominations on modern societal transformation identified since 1950, as well as the authors who developed them, counting 22 labels, could be mentioned: New social class, Meritocracy, Educational revolution, Postcapitalist society, End of ideology, Industrial society, New working class, Postbourgeois society, New industrial state, Neocapitalism, Postmodern society, Technocracy, Postcollectivist society, Postideological society, Postliberal age, Age of information, Postindustrial society, Posttraditional society, Third industrial revolution, Anticipatory democracy, Information society, Network marketplace, Communications revolution and Information age.

<sup>13</sup> The well-known preface to **Theory of Society** (2012, p. xi) [*Die Gesellschaft der Gesellschaft*] illustrate the Niklas Luhmann's ambition: "On my appointment to the Department of Sociology established at the University of Bielefeld in 1969, I was asked what research projects I had running. **My project was, and ever since has been, the theory of society**; term: thirty years; costs: none". (Our emphasis)

the problematic of democracy in the context of world society, with focus in the Brazilian context.

It should be emphasized that, although it is a starting point, the research that will be developed has as one of its scopes to go beyond Luhmann's writings, as well as those of other authors who follow his line of thought – be it heterodox or orthodox –, with the purpose of confronting his understanding about democracy, as well as the usability of this concept.

It is from the understanding of the concept of democracy that the main purpose of the present work will be pursued: the idea of under-democracy as corruption of secondary coding that the legal system operates over the political system. This way, the present thesis addresses the following research problem: in countries of peripheral modernity, with special attention to the Brazilian case, the idea of a democracy in its full state cannot be conceived, there being severe derogations in the demands required by the polysemy of the concept.

Such derogations demand a new attention for the description of modern society that, at the theoretical level, is formed in the development of a new concept to better explain the legal and political context in peripheral modernity. The concept of under-democracy, which will be proposed, developed, and defended here, arises, therefore, as an enhancement of the description and observation of society.

Within Luhmann's theory of systems democracy is described as the semantics of differentiation of the political system in modernity. Thus, this supposes division of powers, inclusion in all social systems, orientation of communications according to the code of government/opposition, and structural coupling with the legal system through the Constitution.

Niklas Luhmann<sup>14</sup> elaborated a very synthetic and categorical definition of what is meant by democracy. In his words, he wants to conceive democracy as "the splitting of the summit" [*Spaltung der Spitze*]<sup>15</sup>, that is, to engender democracy as division, more precisely differentiation of the political system through the government/opposition codes, rather than the codification of the pre-modern societies, in which political system was driven by a hierarchical relationship that conceived a distinction between superior and inferior power [*machtüberlegen/machtunterlegen*].

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<sup>14</sup> LUHMANN, Niklas. The Future of Democracy, **Thesis Eleven**, v. 26, n. 1, p. 47, 1990.

<sup>15</sup> The expression Luhmann uses served as a motto for the title of this thesis, but with due poetic license. Moreover, it should be emphasized that when speaking of reconstruction, one is not invoking the methodology developed by Jürgen Habermas, but rather an invitation to a new approach to democracy.

However, it is possible to observe that this differentiation is not present in some parts of the globe, due to structural asymmetries in world society, even if these political systems describe themselves as democratic, as will be verified in the Brazilian case. Differentiation is understood as a way of a division and specialization of functions of society. The modern society has as characteristic its organization in systems which are distinguished according to its function (law, economy, religion etc. operates based on its own criteria and preference codes).

Thus, the recrudescence of populist and authoritarian spectres ends up undoing the internal difference of the political system, whose operations are based on the government/opposition codes and becomes guided by the criteria of friend/enemy, which has the consequence of disrupting the primacy of functional differentiation, taking up again the idiosyncrasies pertaining to pre-modern societies, in which democracy was often seen as a metaphysical apostolate.

Corroborating with Friedrich Schlegel<sup>16</sup> when he says that it is impossible to begin the study of history – or a thesis, as in this case – without a hypothesis, and once the problem has been formulated, with the certainty that it is scientifically valid, the following hypothesis is proposed: inasmuch as the concept of democracy above is unsatisfactory to analyse the juridical and political dimension of peripheral modernity's countries, it's necessary a new approach, in this case, the development of the concept of under-democracy as corruption of the secondary coding that differentiates the political and juridical systems.

It is necessary to emphasize this point, albeit briefly, that the idea of secondary coding here sustained follows the same argumentative path that Niklas Luhmann explored as an answer to the thesis developed by Marcelo Neves<sup>17</sup>, who affirmed that in countries which there is perennial systemic corruption, the primacy of functional differentiation was jeopardized.

By contrast, Luhmann<sup>18</sup> justified that the relation between inclusion and exclusion on the systems operated as a meta-code that mediate other codes. As a rejoinder, Neves<sup>19</sup> argued that if there is a meta-code ruling other codes, consequently there is no functional differentiation as primacy, because the primacy would belong to the meta-code.

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<sup>16</sup> SCHLEGEL, Friedrich. **Philosophical Fragment**. Minneapolis: University of Minnesota Press, 1991, p. 48-49. "Since people are always so much against hypotheses, they should try sometime to begin studying history without one. It's impossible to say that a thing is, without saying what it is. In the very process of thinking of facts, one relates them to concepts, and, surely, it is not a matter of indifference to which. [...]"

<sup>17</sup> NEVES, Marcelo. **Constituição e direito na modernidade periférica: uma abordagem teórica e uma interpretação do caso brasileiro**. São Paulo: Martins Fontes, 2018.

<sup>18</sup> LUHMANN, Niklas. **Law as Social System**. Oxford: Oxford University Press, 2004, p. 489.

<sup>19</sup> NEVES, Marcelo. Niklas Luhmann: eu vejo o que tu não vês. In: ALMEIDA, Jorge de; BADER, Wolfgang (org.). **O pensamento alemão no século XX**. São Paulo: Cosac Naify, 2013. p. 348-349.

Another factor should be explained: when working on the idea of codes, it is necessary to realize that it operates in a binary form: legal/illegal, government/opposition, have/not-have. It occurs, amongst other reasons, as way to exclude a third possibility (third excluded), enabling only the opposition of form be included in the system.

On the other hand, although the form is binary, there are levels inside the form. Marcelo Neves<sup>20</sup> realized that there are levels of integration on peripheral modernity, resulting in under-integration and over-integration relations. The under-integration circumstance implies in a denial of access to system benefits, although there are perennial claims of bureaucratic impositions and punitive institutions. For its part, an over-integration association involve the access to system benefits without dependency, having support of state bureaucracy.

In the under-democracy's hypothesis, the relation with politic and law acts with some similarities, but in another way: whereas the political power, in a full process of functional differentiation and democratic paradigm should be distinguished by the government/opposition code, the same does not occurs in a peripheral modernity circumstances because there is a corruption of the secondary codification that law operates over the political system through democratic ways – which would prevent the hypertrophy of the political system. Within the context of under-democracy, if democracy is compromised as a differentiating factor of the political system, and if law, as a secondary code, is damaged as well other social systems, such as the economic and scientific ones, could be harmed through their respective structural couplings.

The existence of secondary codification is a result of the structural technification of social systems, with the most recognizable examples being the secondary codification of property, which takes place through money, and the codification of power through law, which is our object of study<sup>21</sup>.

This deserves proper attention because, although there is a relationship of interactive interdependence between the partial systems of society, as a result of the evolutionary directions that world society has taken in its establishment, a new interactive arrangement was demanded to maintain the civilizational achievements reached over the years. In the relationship issue between law and politics, despite the interaction occurring preferably through its structural coupling – the constitution – the predominant use of the law is necessary for the maintenance

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<sup>20</sup> NEVES, Marcelo. Between Under-Integration and Over-Integration: Not Taking Citizenship Seriously. In: SOUZA, Jessé; SINDER, Valter. **Imagining Brazil**. Lanham: Lexington Books, 2005, p. 68-69.

<sup>21</sup> LUHMANN, Niklas. **Theory of Society**: Volume 1. Stanford University Press: Stanford, 2012.

of democracy, which is the form that gives distinction to the political system in modernity through the distinction government/opposition.

The recent Brazilian political situation demands an explanation that involves not the full concept of democracy or functional differentiation, nor abandon the peculiarities of its institutional and social arrangement.

Therefore, the general objective of present research is to develop the concept of under-democracy as a corruption of secondary coding that operates in the legal and political systems as a way of assimilating partial systemic dysfunctions, verifying its applicability in the context of world society in the face of countries of peripheral modernity, with Brazil as an example.

In order to accomplish the above objective, the following specific objectives will be taken into consideration.

In the first instance, the aim is to describe and conceptualize the function and structure of the political and legal systems, within the prism of systems theory, detailing their main characteristics and peculiarities, as well as their arrangement in the face of the so-called world society, leading to the concept of democracy.

Secondly, it intends to decompose the concept of democracy in a historical perspective, as well the concept elaborated by Niklas Luhmann, in addition to its attributions in relation to the legal and political systems, exposing its evolution and unfolding, along with to gazing the concept of democracy elaborated by other theorists.

The third step is to categorise the model of democracy now being worked on, considering the problems of the countries of peripheral modernity, following the example of new authoritarian spectres, populism and the instrumentalization of democratic discourse as a form of subterfuge for anti-democratic conduct, focusing mainly on the Brazilian legal and political situation.

At last, once all the above considerations have been made, the aim will be to discuss the concept of under-democracy and whether it is a viable form of mechanism for describing and observing society, more specifically in the case of Brazil. Inasmuch as there is levels of democracy, not been a fully concept, but a normative horizon, the concept of under-democracy helps to analyses societies that are part of central or peripheral modernity when they have democratic deficits, whether perennial or occasional. This chapter will discuss some classifications of political regimes (semidemocracy, hybrid regimes, anocracy and semidemocracy) and then contrast them with the proposal of under-democracy.

The commitment to this research is justified by the emergence of democratic issues in a global context. In this way, there is a complex network of relationships that require normative expectations between *alter* and *ego*. For this, modern law ends up acting as a stabilizer of these expectations, while the State acts as a reducer of complexity.

In world society, especially after the Cold War, constitutionalism and democracy end up being normative demands with pretensions of regulation within the domestic and international order, acting as an element of selective pressure in the partial systems of society.

The existence of tensions that make use of the instrumental use of the discourse of constitutional and democratic legality ends up leaving these expectations in a symbolic plan, not only in the context of constitutionalization, which can be, for the “confirmation of social values”, or an “alibi legislation” type or “legislation as a dilatory compromise formula”<sup>22</sup>; but also, the symbolic use of this discourse to legitimise undemocratic issues.

This time, the research that is intended to be developed is based, as far as its actuality is concerned, on the emerging issues surrounding the theme of democracy in world society, in which Brazil is included, since new social phenomena claim forms of a political organization that meet democratic principles, such as the current populist and authoritarian waves that manifest themselves in a very acute manner.

The emergence of the theme of democracy was also felt by the Brazilian population. According to Latinobarómetro, when asked if “democracy is preferable to any other kind of government”, 32,4% said yes in 2016 – year whose main political event in Brazil was the impeachment of President Dilma Rousseff<sup>23</sup>.

In 2018 33,9% said yes to the same question, which represents a small increase in confidence in democracy. Nevertheless, there was a modest variation to the preference to an authoritarian government: when in 2016 13% of people consulted said that an authoritarian government may be preferable in some circumstances, in 2018 the percentage was 14%. This year was remembered for the fact that President Jair Bolsonaro was elected<sup>24</sup>.

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<sup>22</sup> According to the classifications described in NEVES, Marcelo. **A Constitucionalização Simbólica**. São Paulo: WMF Martins Fontes, 2011.

<sup>23</sup> LATINOBARÓMETRO. **Support for democracy**: which of the following statements do you agree with most? Online Analysis 2016. Retrieved from: <https://www.latinobarometro.org/lat.jsp>. Accessed at: 18 Nov. 2021.

<sup>24</sup> LATINOBARÓMETRO. **Support for democracy**: which of the following statements do you agree with most? Online Analysis 2018. Retrieved from: <https://www.latinobarometro.org/lat.jsp>. Accessed at: 18 Nov. 2021.

The latest available data is for the year 2020. The results show that 39.7% of people surveyed prefer democracy to any other type of government, while 11% preferred an authoritarian government<sup>25</sup>.

Therefore, there is a significant reaction in relation to previous years. It is known that correlation does not imply causality, but it can be inferred that the actions of the Federal Executive Branch in the management of the Covid-19 Pandemic, as well as the economic and fiscal management, passing through the authoritarian excesses perpetrated by the President of the Republic, may have influenced the change in the numbers.

Despite that, it cannot be said that Brazil is an undemocratic country, since it is part of democracy to take responsibility for its choices. Within democratic paradigm there is deficits that should be supported by the institutions and the concept of under-democracy will assist to do this observation more accurate.

As far as its relevance is concerned, the thesis that is sought shows itself as a way of elaborating diagnoses about the political and legal conjuncture through legal-sociological observation, which can be fruitful for the emergence and development of new discussions and research agendas.

Regarding originality and innovation and hoping that Robert Musil was wrong when he maintained that "universal history happens like all other histories. The authors have no new ideas, and copy each other"<sup>26</sup>, the research now intended manifests its uniqueness by, among other reasons, making use of theoretical and methodological references that propose a critical and analytical dimension of legal and political phenomena that are urgent in contemporary society.

Moreover, developing a new concept is a hard research work. Max Weber, for instance, discusses the importance of Ideal-Types as a task of a sociologist. More than necessary, Ideal-Types are research tools that acts as a conceptual construction for an investigation, been unviable develop any social research without them, at long last, elaborate an ideal type isn't an objective, but a way to achieve this objective.

In Max Weber's words: "The ideal typical concept will help to develop our skill in imputation in **research**. It is no 'hypothesis' but it offers guidance to the construction of

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<sup>25</sup> LATINOBARÓMETRO. **Support for democracy**: which of the following statements do you agree with most? Online Analysis 2020. Retrieved from: <https://www.latinobarometro.org/lat.jsp>. Accessed at: 18 Nov. 2021.

<sup>26</sup> MUSIL, Robert. **O homem sem qualidades**. Rio de Janeiro: Nova Fronteira, 1989, p. 378.

hypotheses. It is not a **description** of reality but it aims to give unambiguous *means* of expression to such a description”<sup>27</sup>.

In this way, when proposing to elaborate a new concept, as is the case of “under-democracy”, one innovates with an increment in the observation of society, making use of the heuristic potential that systems theory possesses, as already said above.

In the methodological scope, the research now developed, as regards its nature is basic (or pure) research aimed at developing new knowledge that is appropriate to legal science. As far as addressing the problem is concerned, it is a qualitative research, considering aspects of reality that cannot be quantified, although some quantitative surveys are cited.

With regard to its purpose, the research is explanatory, since it seeks to identify the factors that contribute to the phenomena studied here. In addition, this type of research is the one that most scrutinizes the knowledge of reality, since it explains the reason of the occurrence of the phenomena observed.

The method of approach will be the inductive one, taking into consideration the three fundamental elements that are listed by Lakatos and Marconi, among many others: observation of the social phenomena now described; the discovery of the existing relationship between them; and finally, generalization of the relationship discovered through induction<sup>28</sup>.

In relation to the method of interpretation used, the work uses the sociological interpretation, because it makes use of categories and concepts elaborated in order to observe the society as an epistemological axis.

As a final aim, is intended to reassure that democracy around us is not a “misunderstanding” since its birthmark – as dubiously affirmed by Brazilian historian Sérgio Buarque de Hollanda<sup>29</sup> – but, until then, the better way to achieve any means which has a civilizational purpose<sup>30</sup>.

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<sup>27</sup> WEBER, Max. "Objectivity" in social science and social policy. In: WEBER, Max. **The Methodology of Social Sciences**. Glencoe: The Free Press, 1949. p. 90. (Author's emphasis)

<sup>28</sup> LAKATOS, Eva Maria; MARCONI, Marina de Andrade. **Fundamentos de metodologia científica**. 6. ed. São Paulo: Atlas, 2005, p. 87.

<sup>29</sup> The original quote is “Democracy in Brazil has always been a lamentable misunderstanding [*A democracia no Brasil foi sempre um lamentável mal-entendido*]”. It should be noted that, specifically in this passage, the author is referring to the psychosocial conditions of Brazilians that would have jeopardized the consolidation of democracy in the country. HOLLANDA, Sérgio Buarque. **Raízes do Brasil**. São Paulo: Companhia das Letras, 1995, p. 160.

<sup>30</sup> It should be noted that the so called critical-progressive debate around the defense of democracy – as a par excellence “nuclear regime of the capitalism” (Badiou, Žizek etc.) – is not ignored. On the other hand, a book that aim to discuss the current necessity of a “transdemocracy” is about to be published (Marcelo Neves).

## 2 LAW AND POLITIC: SYSTEM, STRUCTURE AND FUNCTION

With modernity, the necessity came to light. Johann Gottfried Herder is reputed to have claimed for a new mythology, political or popular, in which modern people could see themselves reflected. Such a demand was also expressed in The Oldest Systematic Program of German Idealism: “we must have a new mythology [*wir müssen eine neue Mythologie haben*]; this mythology must, however, stand in the service of ideas, it must become a mythology of reason”<sup>31</sup>.

Much more than the need for a new mythology, modern man felt that the times he was living in were different and he needed new means to understand all the changes that were taking place. In the scientific sphere the same feeling was also shared, especially in the Sciences of Spirit [*Geisteswissenschaften*].

The emergence of the social sciences had as one of its purposes, perhaps one of the most relevant, to understand – the modern – society. All the founding fathers of sociology tried to express how occurred the passage of pre-modern to modern society and its implications e new mechanisms that enabled that society to exist.

Some of these changes can be seen clearly. In religion, the phenomenon of secularization came into effect, displacing the religious question from the public to the private sphere. In the economy, in turn, the industrial revolutions changed the dynamics of commercial relations, altering rural and urban production relations. As far as science is concerned, since the Copernican revolution in the 16th century, new scientific paradigms have been established and revised.

Among the issues that have received most attention, law and politics are highlighted in the writings of Max Weber, Emile Durkheim, and Karl Marx, although the latter did not give the same attention to law as the others.

Indeed, separation of powers, the rise of constitutional charters, more involvement of popular participation in decision-making processes, and the establishment of parameters for enhancement of legal certainty are some of the factors that contributed to the rise of law and politics in modernity.

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<sup>31</sup> BECKENKAMP, Joãozinho. O mais antigo programa de sistema do Idealismo Alemão. **Veritas (Porto Alegre)**, [S.L.], v. 48, n. 2, p. 211, 30 dez. 2003. Retrieved from: <https://revistaseletronicas.pucrs.br/ojs/index.php/veritas/article/view/34794>. Accessed at: 09 Feb. 2022.

When electing the systems theory as the main theoretical reference, some justifications should be made. First, it consists of a descriptive theory – and not a normative one, as critical theories usually are – with a high heuristic potential, since it has no dogmatic pretension, which allows modifications for the improvement of sociological observation without compromising the structure of the theory.

Another factor that contributes to the justification for choosing systems theory as a theoretical framework is not to consider the analysis of society taking into account only one prism, once many authors treat modernity as being guided by a single determining diapason that constrains all social dimensions.

The list of authors who follow this determining trend is long, and one can mention Paul Virilio, with his perspective on speed in modern society, which he comes to call Dromology. Neoliberalism and the state of exception are also the totalizing approaches of Pierre Dardot, Christian Laval, Giorgio Agamben, and Chantal Mouffe, respectively.

According to Niklas Luhmann, what determines the difficulty of analyzing modern society is its hyper-complexity, and for an observation to be minimally adequate, one must take into consideration that, unlike pre-modern societies, today relations are more complex, and by complexity we should understand that there are more communications in the system than the system's capacity to be actualized.

Based on these considerations, this chapter aims to explain how the issue of law and politics occurs in the paradigm of social systems, that is: within the theoretical parameter developed by Niklas Luhmann, how do political and social relations occur. In addition, some heterodox considerations regarding systems theory will also be made.

Based on this, four main points will be highlighted. Firstly, it will be addressed how the modern society is viewed within the systemic paradigm to then explore how modern society should be understood, as a result of functional differentiation, as a world society. The third topic will deal with the legal system as an autopoietic system, as well as its characteristics, and the fourth and last point will be about the political system of society, as well as its relation to the legal system.

Only by explaining how the legal and political systems operate can we understand how democracy acts in its communicative networks. The very notion of under-democracy, the main objective of the present research, is based directly on the language of systems theory and, therefore, a previous theoretical-conceptual framework is necessary for this objective to be reached.

Thus, it is expected that the main exposition concepts', and bases of the theory of autopoietic social systems can serve as a foundation for the development of the purposes pursued in this research.

## 2.1 MODERN SOCIETY AND SYSTEMS THEORY

*The proclamation of the "postmodern" has at least one virtue. It has clarified that contemporary society has lost faith in the correctness of its self-description.*

Niklas Luhmann<sup>32</sup>

The sociology is the field of knowledge that studies the society. Albeit apparently obvious, this sentence perhaps was controversial when sociology appeared over a hundred years ago. Taking as an example Max Weber, sociology was meant to study the empirical science of action, more specifically the social action. That is, the object of sociology study is social action, not society. Even more emphatically, Max Weber refuses to conceptualize what society is, and in neither of the two editions of his fundamental work "Economy and Society" is there any mention of what he means by society<sup>33</sup>.

"Society", although a relevant operational concept for starting relevant sociological research, is still a concept that lacks univocity. Within sociological theory, distinctions are already being made between different research approaches, such as social theory (which encompasses methodological and epistemological issues), social diagnostics (which enters the normative realm and in which part of critical theory lies), and theory of society (which is concerned with modern society)<sup>34</sup>.

The approach that will be developed here will focus on the third sphere of the division made, that is, the theory of society. However, before developing the problematic around society, we need to make an effort to understand what a theory is.

If we take Jeffrey C. Alexander as a basis, he will define theory as "a generalization separated from particulars, an abstraction separated from a concrete case"<sup>35</sup>. We must, however,

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<sup>32</sup> LUHMANN, Niklas. Preface. In: LUHMANN, Niklas. **Observations on Modernity**. Stanford: Stanford University Press, 1998. p. IX.

<sup>33</sup> SCHLUCHTER, Wolfgang. **O desencantamento do mundo**: seis estudos sobre Max Weber. Rio de Janeiro: Editora UFRJ, 2014, p. 214.

<sup>34</sup> SELL, Carlos Eduardo. O que é teoria sociológica contemporânea? In: SELL, Carlos Eduardo; MARTINS, Carlos Benedito (org.). **Teoria Sociológica Contemporânea**: autores e perspectivas. São Paulo: Annablume, 2017. p. 18-19.

<sup>35</sup> ALEXANDER, Jeffrey C. What is Theory? In: ALEXANDER, Jeffrey C. **Twenty Lectures**: Sociological Theory since World War II. New York: Columbia University Press, 1987. p. 2.

disagree with the definition quoted here. It is not because a theory is wide ranging that it cannot have applications to particular cases. Likewise, abstractions are not equivalent to forms outside of reality that do not fit concrete cases. It is wrong, therefore, to say that at the abstract level everything is possible. Ontologically impossible objects are not conceivable in any sphere of application.

On this wise, we will focus on a perspective of theory of society, which, regretting the redundancy, is a specific branch of sociology that, in the present case, is based on social systems theory. Sociology, therefore, is a product of the partial system that is science, which, in turn, observes society from the inside. The same is true for theories – including sociological ones –, which are produced internally to the system of science, and which are guided by the true/false codification.

Another attention should be highlighted on a theory of society within systemic approach: “The theory of society managed without a concept of the comprehensive [*umfassenden*] system of society”<sup>36</sup>. This consideration already has the purpose of excluding any totalizing pretensions that can impute to the theory. Every observation made in any one of society's partial systems has blind spots that enable it impossible to make observations that encompass all of society's communications. Each communication can only be seen by another communication.

These preliminary considerations, made by way of prolegomenon, are prerequisites for a better development of systems theory and its premises for law and politics. However, other issues must be considered in order to obtain greater deepness in the problems worked on here. Thus, to work on law, politics and, more specifically, democracy, within a systemic perspective, some points should be explained with more density, as is the case of modern society.

### **2.1.1 A sociology of modernity**

It is redundant to speak of a sociology of modernity, considering that sociology emerged with the purpose of understanding modernity. As previously mentioned, modernity was the turning point that caused 19th and early 20th century thinkers to become focused on studying the changes that were taking place in their time.

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<sup>36</sup> LUHMANN, Niklas. **Theory of Society**: Volume 2. Stanford University Press: Stanford, 2013, p. 297.

Law, religion and economy are examples of the changes that were occurring at the time. But these themes are components of something bigger and that, consequently, was experiencing changes: the society.

From a descriptive, rather than normative perspective, systems theory has the theoretical claim to observe society, more specifically, modern society. As can be seen in the epigraph of this topic, Niklas Luhmann starts from a kind of denunciation: that there is a deficiency of self-descriptive analysis of society.

It has already been mentioned that the main characteristic of modern society is its hyper-complexity, that is, there are more operations and communications going on than one can realize, and this is why a theoretical apparatus that can reduce this complexity is needed, in order to be able to better observe and describe society.

Furthermore, it is necessary to evaluate that modernity, as a distinction between Antiquity and the Middle Ages, is a fruit of modernity itself. Thus, within a temporal plan, modern society is modern in relation to other demarcations of time.

In this sense, it is necessary to point out what follows:

The time span separating us from tradition is undisputed and unacceptable. **It would have to be determined in what ways contemporary society is structurally and semantically different from its predecessors.** But this would require a social theory that could determine in what sense these historical differences distinguish systems that are in many ways similar if not identical, that is to say, that are social systems<sup>37</sup>. (Our emphasis)

That said, it can be seen that with the rise of modernity came changes that altered the semantic and structural character of what pre-modern society was. Semantic distinctions are more common to find, and it is worth mentioning the historical-conceptual work of Jürgen Habermas, that – in some moments refers to Hans Robert Jauss – mentions the different uses and applications of the concept modernity<sup>38</sup>.

On the one hand, at the structural level, one must pay attention to the changes that have brought about new forms of operation reproductions within the partial systems that, in turn, are responsible for the orientations of the expectations that are created in a relationship that connects past and future.

These preliminary explanations already anticipate how social systems theory diverges from other social theories, especially with regard to the theory of society. In the unfoldings of

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<sup>37</sup> LUHMANN, Niklas. Modernity in Contemporary Society. In: LUHMANN, Niklas. **Observations on Modernity**. Stanford: Stanford University Press, 1998, p. 4.

<sup>38</sup> HABERMAS, Jürgen; BEN-HABIB, Seyla. Modernity versus Postmodernity. **New German Critique**, [S.L.], n. 22, p. 3-4, 1981.

this topic, some conceptions of society will be exposed and confronted in order to justify the use of the concept of modern society according to the parameters established by the systems theory.

During the explanation, new fundamental concepts will be gradually explained, always on the basis of laying the foundations for the development of the main research problem: to elaborate the concept of Brazilian under-democracy.

#### *2.1.1.1 Before and now*

If one takes into consideration the semantic and structural changes in the passage from pre-modern to modern society, some points should be highlighted when talking about this paradigm shift.

As it was said, sociology emerged with the purpose of understanding this change and, of the classical sociologists, Ferdinand Tönnies undertook an attempt to classify and differentiate pre-modern society from modern society. In his case, specifically, his understanding of premodernity is called "community" [*Gemeinschaft*], while modern society has the same denomination [*Gesellschaft*]<sup>39</sup>.

Tönnies is emphatic in differentiating the two forms of social organizations. In the community, there is an orderly and harmonious development of human wills, and it is this will that promotes cohesion among individuals in a natural way. The first communitary bonds take place through kinship relations – parents and children, husband and wife, brothers and sisters – and this is the reason why there is, according to the author, more organicity. The issue of authority in other community spheres is rooted in paternity. The will has a natural character and promotes a relationship of organic solidarity<sup>40</sup>.

When it comes to society, the forms of organization differ substantially. Although there are residues of the communitarian way of organizing, the societal form occurs in an artificial, that is, mechanical way, acting instrumentally according to finality and purpose. This is because society has a propensity to diffusion and conflict, but nevertheless holds together. In

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<sup>39</sup> Ferdinand Tönnies has not yet had the attention he deserves in the social sciences. Regarded by Fritz Ringer as the father of modern German sociology, he was also the founder of the German Society for Sociology, which established the discipline for posterity. RINGER, Fritz K. **The Decline of The German Mandarins: The German academic community, 1890-1933**. Cambridge: Harvard University Press, 1969, p. 164.

<sup>40</sup> TÖNNIES, Ferdinand. **Community and Society: Gemeinschaft und Gesellschaft**. Mineola: Dover Publications Inc, 2002, p. 37.

Tönnies' words: “[...] in Gemeinschaft [community] they remain essentially united in spite of all separating factors, whereas in the Gesellschaft [society] they are essentially separated in spite of all uniting factors”<sup>41</sup>.

The forms of community and social organization are dependent on the means and conditions that make their existence possible. The human will is this condition of possibility. In the community the will is natural [*Wesenwille*] and Tönnies associates this naturalness with the psychological constitution of the human being. Society, on the other hand, is supported by the rational will [*Kürwille*] that is the fruit of subjective thinking, which has as its reference the author of the thought<sup>42</sup>.

Therefore, human groupings have as their main means of identification the predominant human will – natural or rational. In Tönnies' view, in the modernity there has been a predominance of acting in relation to finality, in other words, the rational will prevails, which gives rise to social formation.

It is relevant to highlight, in an evolutionary scope, how the passage from a communal to a social grouping takes place.

In the same way as the individual natural will evolves into pure thinking and rational will, which tends to dissolve and subjugate its predecessors, the original collective forms of Gemeinschaft have developed into Gesellschaft and the rational will of Gesellschaft. In the course of history, folk culture has given rise to the civilization of state<sup>43</sup>.

Apparently, there is a certain preference, on the author's part, for communal grouping over societal, often bordering on a kind of fondness. When he speaks of "subjugate its predecessors", this denotes a relationship of violence of the rational will against those who make use of the natural will.

In fact, from the work of Ferdinand Tönnies on, many authors have made use of the arguments created of the difference between community and society to justify criticism against modern society. Tönnies himself even went so far as to infer that the redesign of community relations to move towards social relations is the “great tragedy of history”<sup>44</sup>, although he did

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<sup>41</sup> TÖNNIES, Ferdinand. **Community and Society: Gemeinschaft und Gesellschaft**. Mineola: Dover Publications Inc, 2002, p. 65.

<sup>42</sup> TÖNNIES, Ferdinand. **Community and Society: Gemeinschaft und Gesellschaft**. Mineola: Dover Publications Inc, 2002, p. 103.

<sup>43</sup> TÖNNIES, Ferdinand. **Community and Society: Gemeinschaft und Gesellschaft**. Mineola: Dover Publications Inc, 2002, p. 225.

<sup>44</sup> RINGER, Fritz K. **The Decline of The German Mandarins: The German academic community, 1890-1933**. Cambridge: Harvard University Press, 1969, p. 166.

not corroborate with the totalitarian ideologies of National Socialism that used similar criticisms against modernity.

On the contrary, despite being a bit more optimistic about modernity, it must be recognized that many pathologies are inherent to existence within the modern conjuncture. What one cannot agree with is Tönnies' detracting of modernity, since it appears to be more a fruit of *Zeitgeist* – to use Herder's expression – in which he was contextualized, especially by the turn of the 19th to the 20th century.

These considerations made about Ferdinand Tönnies' work, a relevant fact should be considered for those who seek a deeper understanding of the subject: Tönnies makes a comparison between two different social conditions – community and society – but does not elaborate on the main fundamentals that distinguish modern society from what has already occurred.

The differences in human wills between natural and real do not provide an account of the complexity of the phenomenon that is modernity. Nor is there a deepening of the theme if we take the idea of real will as the functional equivalent of action in relation to finalities, well described by Max Weber in his *Fundamental Concepts of Sociology*. Even if this comparison is made, Weber designates social action in relation to finalities and values for the purposes of a comprehensive sociology, inasmuch as the conceptualization of what society would be was not among his theoretical goals.

Once the very conceptualization of what society is was left aside, since there was no in-depth study, only a distinction in relation to pre-modern society as an antagonistic form, we still lack a theory that can directly indicate what is understood by society<sup>45</sup>. For this purpose, we will make use of the systemic perspective.

### 2.1.2 Society as Social System

In order to work with the idea of society from a systems theory perspective, it is necessary to highlight the main concepts that structure this theoretical framework. Unfortunately, it may become repetitive in relation to other works and papers that address the same subject, especially those by Niklas Luhmann, but due to its high degree of abstraction,

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<sup>45</sup> LUHMANN, Niklas. **Theory of Society**: Volume 2. Stanford University Press: Stanford, 2013, p. 297.

some points should be highlighted to better explain the original purpose of the research developed here.

All this considered, we will make use of a quotation made by Niklas Luhmann in which he lists the main points of what can be understood by society as a system. Each point will be further detailed below.

If we describe contemporary society structurally according to sociological tradition as a functionally differentiated system, then it follows that the differentiated functions systems, having become autonomous, distinguish themselves from their surroundings (both intrasocial and extrasocial). Such distinctions are accomplished operatively by the simple continuation of their own operations. But these operations can only be controlled, accounted for, and observed within the system if the system – each system in its own way – has access to the distinction between self-reference and external reference. This is only possible in the form of a systems-internal distinction. Otherwise the terms of "self" and "other" would lose their meaning<sup>46</sup>.

To work within systemic approach – besides its hiper-complexity that was explained previously – another significant concept that should be detailed is functional differentiation. The first sentence of the quote above makes the core of the issue explicit, as it places functional differentiation as a condition of possibility for the other characteristic descriptions in a systemic perspective.

Thus, we will move on to the next topic, which will deal with functional differentiation.

#### *2.1.2.1 Functional differentiation*

*The differentiation concept enabled modern society to admire and criticize itself.*

*Niklas Luhmann<sup>47</sup>*

The act of drawing differences/distinctions is something that accompanies societies since pre-modern times. In ancient Athens, for example, women, slaves, and foreigners – so called metics – were distinct from the citizens who made up the *Polis* and, consequently, could not participate in the political processes that were part of everyday public life.

In the sociological realm, perhaps the easiest dimension of social differentiation to turn to was that used by Emile Durkheim when he described the division of labor and forms of moral

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<sup>46</sup> LUHMANN, Niklas. Modernity in Contemporary Society. In: LUHMANN, Niklas. **Observations on Modernity**. Stanford: Stanford University Press, 1998, p. 9-10.

<sup>47</sup> LUHMANN, Niklas. **Theory of Society**: Volume 2. Stanford University Press: Stanford, 2013, p. 2.

solidarity. In turn, when the differentiation perspective is brought into social systems theory, new forms of observation emerge.

The differences are made from observations. Each observation results in a distinction. In line with systems theory, from the observation made arises the difference between system and environment [*Umwelt*].

Every distinction has its beginning in an observation, and it is from this that the peculiarities that make up the distinguishable parts are traced. When a distinction is made, not only is it said what A or B is, but the composition of A, besides constituting and describing itself, also helps in the description of what B is, and vice versa.

Differentiation, therefore, should be understood as “the reflexive form of system building”<sup>48</sup> and it is from this difference that unity arises, that is, it is the difference that makes the difference. The first thing to keep in mind is that "systems" are epistemological tools for observing society.

Still on the subject of differentiation in sociology, pre-modern societies went through various forms of differentiation, with their own peculiarities inherent to each period under observation.

Moreover, the forms of differentiation eventually impose limitation means for the evolution processes of the system – here understood by the mechanisms of variation, selection and restabilization – being necessary means of rupture in this moment of stability for the emergence of a new form of social differentiation.

The first form of differentiation to be mentioned is the segmentary one, which has as its main characteristic the existence of equality among the partial systems of society, in which the distinction is made by relations of descent or of residential communities, or in a combination of the two criteria<sup>49</sup>.

Another form of differentiation is that which takes into consideration the criteria of center and periphery. Within it, a relation of inequality is admissible, which is already a breaking point if one considers segmentary differentiation, which had equality between partial systems as a characteristic, which already makes possible the emergence of a plurality of segments on the two sides distinguishable by form<sup>50</sup>.

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<sup>48</sup> LUHMANN, Niklas. Differentiation of Society. *Canadian Journal of Sociology / Cahiers Canadiens de Sociologie*, [S.L.], v. 2, n. 1, p. 31, 1977.

<sup>49</sup> LUHMANN, Niklas. *Theory of Society*: Volume 2. Stanford University Press: Stanford, 2013, p. 12.

<sup>50</sup> LUHMANN, Niklas. *Theory of Society*: Volume 2. Stanford University Press: Stanford, 2013, p. 13.

The third form of differentiation is the product of stratifications, in other words, there is a hierarchical difference due to the inequalities between the partial systems. Another characteristic is that this differentiation occurs in pairs, such as the relationship between nobility and plebs, although this is more unstable precisely because it can be reversible. On the other hand, there are forms of stratified differentiation that have stability, as is the case of the caste system in India<sup>51-52</sup>.

The fourth and final form of differentiation, and the main approach of this topic, is functional differentiation, which is characterized by an ambivalence of equality and inequality between the partial systems, i.e., “Functional systems are alike in their dissimilarity”<sup>53</sup>, and it is by this form of differentiation that modern society is structured.

It is in this new semantics that modernity begins, that is, taking into consideration the functions that each system is performing. However, it is a challenging task to try to define the principle that has triggered all these changes. Revolutions, for example, are means of irruption that help us seek these explanations, as is the case of the French Revolution, which was responsible, directly and indirectly, for significant changes in the legal and political sphere in the West.

Albeit it is difficult to determine what initiated such a form of differentiation, one cannot help but look for speculations about what triggered it. In any case, Niklas Luhmann tries to explain, even partially, what gave rise to functional differentiation.

It is difficult to date the beginnings because they can hardly be distinguished from what we call preadaptive advances. The semantics of implementation—hardly surprisingly—initially drew on traditional conceptuality. What is important is that at some point or other, the recursivity of autopoietic reproduction began to take hold and achieved closure, after which only politics counted for politics, only art for art, only aptitude and willingness to learn for education, only capital and profit for the economy, and the corresponding intrasocietal environments—which included stratification—were now seen only as irritating noise, as disturbances or opportunities<sup>54</sup>.

In this way, functional differentiation is not merely a form of specialization that occurs in modernity. It is the recursive reproduction of preference criteria that are the results of a

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<sup>51</sup> LUHMANN, Niklas. **Theory of Society**: Volume 2. Stanford University Press: Stanford, 2013, p. 13.

<sup>52</sup> It is interesting to note what Luhmann says regarding differentiation by stratification and classical Greece: “The Greek term *isonomia* (Mau and Schmidt, 1964; Meier, 1970) referred to the equality of citizens as one strata of the society, successfully claiming to be or to represent the whole system. But it presupposed inequality with respect to other strata of the society. It defined, in other words, the internal environment of the society by inequality, and it depended in its own identity and self-conception on this presupposition”. In LUHMANN, Niklas. *Differentiation of Society*. **Canadian Journal of Sociology / Cahiers Canadiens de Sociologie**, [S.L.], v. 2, n. 1, p. 33, 1977.

<sup>53</sup> LUHMANN, Niklas. **Theory of Society**: Volume 2. Stanford University Press: Stanford, 2013, p. 13.

<sup>54</sup> LUHMANN, Niklas. **Theory of Society**: Volume 2. Stanford University Press: Stanford, 2013, p. 66.

process of difference. From the moment that law, or any other social system, begins to make use of its own criteria for its operational reproduction, i.e., of its communications, making possible a better coordination of expectations.

Transform improbability into probability. This is what functional differentiation is all about. By turning unstructured complexity into structurable complexity, that is, by reducing complexity, more experiences, within the respective functions of the systems, become achievable.

Society, as a social system, has a fundamental functional role, which is to reduce the existing complexity internally and externally, so that the system and the environment have the possibility to find enough support to maintain its structure and, consequently, its high selection capacity. The same applies to the partial systems that make up society, and the same mechanisms are repeated until reaching the organizational and interactional systems<sup>55</sup>.

From the above, even if briefly, it can be seen that functional differentiation is a primordial element for a systemic observation of society. Niklas Luhmann even says that functional differentiation exists as a "primacy" of modern society<sup>56</sup>, which later brought criticism by Marcelo Neves and that will be explained.

In any case, for what has been explained here, functional differentiation is a key concept for the unfolding of the concepts related to the theory of social systems that will be exposed below.

#### *2.1.2.2 Structural Couplings*

When conceiving modern society as a set of partial social systems that are interdependent on each other, one has to ask how these systems communicate with each other; after all, they are not isolated.

First of all, it should be pointed out that systems have a typical relationship of closure and openness, namely, they are closed for their internal operations (operational closure) and at

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<sup>55</sup> LUHMANN, Niklas. Differentiation of Society. *Canadian Journal of Sociology / Cahiers Canadiens de Sociologie*, [S.L.], v. 2, n. 1, p. 31, 1977.

<sup>56</sup> "The **primacy** of functional differentiation is the form of modern society. And form means nothing other than the difference with which it reproduces its unity internally, with which it can observe its own unity as the unity of what is differentiated". (Our emphasis) In LUHMANN, Niklas. **Theory of Society: Volume 2**. Stanford University Press: Stanford, 2013, p. 108.

the same time they are open for external communications (cognitive openness) that enter the system, if the selection criteria are satisfactory<sup>57</sup>.

However, there is an openness relationship in which there is a reciprocal interference between two systems, that is, at some point in time, the systems maintain a stable interference relationship in which there is no corruption or preference between the criteria of one system over another.

To supply such coordination and functions is that Niklas Luhmann makes use of the concept of structural coupling. Originally formulated in the philosophy of biology by Francisco Maturana and Humberto Varela, the concept of structural coupling was conceived in the context of biological systems, especially cells<sup>58</sup>. Luhmann's theory, for having a multidisciplinary character, incorporated the concept of structural coupling, along with that of autopoiesis, to his theory of social systems.

Assertively, structural coupling is understood as follows:

**Structural couplings limit the scope of the possible structures with which a system can carry out its *autopoiesis*.** They presuppose that every autopoietic system operates as a structurally determined system, in other words, a system that can determine its own operations only through its own structures. **Structural couplings hence preclude environmental factors from specifying in accordance with their own structures what happens in the system**<sup>59</sup>. (Our emphasis in bold)

Structural couplings, therefore, act as a form of reciprocal interpenetration between two systems, one system being the environment of the other and vice versa. It is from this relationship that there is an accord between the structures of both systems that are related without jeopardizing systemic autonomy.

In this way, it should be emphasized that the structural couplings are evolutionary achievements of the systems. They act to select the noise produced in the environment. If the communications produced in the environment enter the system without any criteria, there will be a destabilization of the systemic order. The structural coupling, therefore, helps as a selective filter.

Another characteristic of structural couplings is their high stability, since they will act as filters of information coming from the environment, they must be able to withstand the

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<sup>57</sup> Marcelo Neves, in a lecture, made an example that illustrates well the relationship between operational closure and cognitive openness: the human body is simultaneously open and closed. Open to the food we consume, but closed in itself, otherwise it would fall apart in the air.

<sup>58</sup> Maturana, Humberto R; Varela, Francisco J. **A árvore do conhecimento: as bases biológicas da compreensão humana**. São Paulo: Palas Athena, 2011, p. 87-88.

<sup>59</sup> Luhmann, Niklas. **Theory of Society: Volume 1**. Stanford University Press: Stanford, 2012, p. 54-55.

system structural modifications. If there is a very severe systemic irritation, the coupling must be prepared to neutralize it, otherwise the system is damaged.

Having made these considerations, we must now list how structural couplings are organized in modern society.

When the relationship between the systems of law and politics is taken into consideration, the coupling that emerges between them is the Constitution.

Related to what has already been explained, it is through constitutions that a limitation of the contact zones in both systems – legal and political – is achieved, with an increase in reciprocal irritability. The result of this relationship, on the one hand, is the increase of possibilities for the legal system to register political decisions according to legal forms. On the other hand, the political system makes use of the law to achieve its goals<sup>60</sup>.

In turn, when it comes to the relationship between economics and law, the existing structural coupling takes place through contract and property. Due to the preference code of economics – have/not-have – the form of contract and of property acquisition maintain the relations of reciprocity between both systems.

Within the legal sphere, property is a sector with regulatory functions, among many others, while for the economy it acts within the centrality of the codes of preference. In Luhmann's words:

In the system of law, property is a component of certain programs that make it possible to establish who, in the event of a dispute, is right and who is wrong - who is legal and who is illegal. In the system of economics, property is a component of the binary code, the only one that can differentiate the system<sup>61</sup>. (Our translation)

That said, let us now explore the other side of the structural coupling between economics and law: the contract. The freedom to contract is a turning point in the very form of contracting, and one that has only had its full function in modernity. This way, the economic system can avail itself of executing commercial transactions having as support and security the legal determinations listed in the contract. On the other hand, the legal system acquires freedom to interpret, in retrospect, the will of the contracting parties, in the sense of having implications relative to what was not explicitly thought in the contract<sup>62</sup>.

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<sup>60</sup> LUHMANN, Niklas. **Law as Social System**. Oxford: Oxford University Press, 2004, p. 404.

<sup>61</sup> LUHMANN, Niklas. El origen de la propiedad y su legitimación: un recuento histórico. **Revista Mad**, [S.L.], v. 1, n. 33, p. 14, 23 Sep. 2015. Universidad de Chile.

<sup>62</sup> LUHMANN, Niklas. **Law as Social System**. Oxford: Oxford University Press, 2004, p. 399.

Still in an exemplificative and explanatory character, it remains for us to speak of the coupling that mediates the relations between the system of politics and economics, which is the economic and monetary policy or, more specifically: “The coupling of politics and the economy is achieved (...) through taxes and charges. This does not alter the fact that all disposal over money as payment takes place in the economy. But disposal can be politically conditioned and where this is the case it is not directed toward profit”<sup>63</sup>.

The guidelines that the State, the main formulator of economic policies for the scope that we are observing here, starts to guide the economy is filtered by the criteria of the political objectives that are to be achieved.

In this way, the economy also reacts, since the laws of the markets – supply, demand and scarcity relations – also guide the decisions that are made within the scope of the economic policies implemented by the State.

After explaining three different types of structural couplings – law and politics (Constitution); law and economics (contract and property); and economics and politics (fiscal and monetary policy) – it should be emphasized that this exposition is not limitative. For each partial system of society there is a form of reciprocal interpenetration with another system, that is, a specific structural coupling.

Finally, it was seen how structural couplings act as evolutionary achievements of the partial systems of modern society. It is through them that stability can be obtained between the existing relations between two systems, allowing the entrance of information and denying access to communications that are not in accordance with the criteria established by the structure and the operational codes of each system.

Furthermore, new theoretical structures have already been proposed within the legal sociological theory, as is the case of Marcelo Neves:

Structural couplings are fundamentally mechanisms of concentrated and lasting *interpenetration* between social systems. In the context of Luhmannian theory, interpenetrations merely enable each system to place disordered complexity reciprocally at the disposal of the other’s self-construction. In other words, ‘the complexity each system makes available is an incomprehensible complexity – that is, disorder – for the receiving system’. Thus, there is no possibility that, reciprocally, the ‘preordered complexity’ and the very rationality processed by one of the systems can be placed at the disposal of the other, which would make them accessible to it as the receiving system. **This is what permits the construction of a transversal rationality between autonomous spheres of communication in world society.** Here we are not dealing with mere *operative* ‘interferences’ as defined by Teubner, but rather with *structural* mechanisms that enable experiences to be constructively exchanged by various partial rationalities. The exchange will vary intensely in form and content in accordance with the type and singularity of the respective systems or

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<sup>63</sup> LUHMANN, Niklas. **Theory of Society**: Volume 2. Stanford University Press: Stanford, 2013, p. 111.

discourses and their specific relations<sup>64</sup>. (Our emphasis in bold) (Author's emphasis in italic)

In the quote above, Neves makes use of the theoretical framework of structural couplings to introduce his proposition about bridges of transition and transversal rationality. For the author, transversal rationality, unlike structural couplings – which follow a form involving only two systems – serve as a mechanism of exchange and reciprocal learning between practices with diverse rationalities, with a mutual sharing of complexity between the systems involved<sup>65-66</sup>.

The reference to Marcelo Neves' work – which apparently has no relation with the problematic addressed in this research – is not gratuitous. The intention is to bring to light a fundamental issue for the development of the theory of social systems, which is the emergence of the world society.

By proposing relations involving transversal rationalities, Marcelo Neves brings to light a paradigm shift that adds new factors to the issue of complexity in modern society, especially in the legal field. Although it is placed in a subtle way in the discussions listed here, working with the idea of world society is a paradigm shift that still causes disagreements among sociologists.

Knowing this, the purpose of the next topic is to explain and develop the concept of world society, as well as to contrast it with other sociological propositions within the framework of theory of society.

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<sup>64</sup> NEVES, Marcelo. **Transcontitutionalism**. Oxford: Hart Publishing, 2013, p. 27.

<sup>65</sup> NEVES, Marcelo. **Transcontitutionalism**. Oxford: Hart Publishing, 2013, p. 35.

<sup>66</sup> To understand the proposition of the bridges of transition and transversal rationality in summary form, it is recommended to read: ELMAUER, Douglas. Transconstitucionalismo: Do acoplamento estrutural à racionalidade transversal. **Revista da Faculdade de Direito, Universidade de São Paulo, [S. l.]**, v. 108, p. 855-864, 2013. Retrieved from: <https://www.revistas.usp.br/rfdusp/article/view/68006>. Accessed at: 22 Feb. 2022.

## 2.2 WORLD SOCIETY IN SYSTEMS THEORY

*La historia de la sociedad moderna es también la historia de una sociedad mundial. La emergencia de un mundo que “se ha unido tan estrechamente y por pocos hilos”.*  
Nathaly Mancilla Órdenes<sup>67</sup>

Many denominations and classifications of modern society, as well as its transformations, have been made over the years<sup>68</sup>. Sociologists and theorists from related fields dwell on a new label that serves to identify a partial characteristic of society.

Although he is critical of one-sided observations of modern society, Niklas Luhmann has not escaped from bringing a label that indicates a peculiarity of society, albeit this label – or new concept –, has a theoretical background that is justifiable within social systems theory: the world society.

The consequence of defining society as the comprehensive social system is that there can be only one system of society for all connective communication. In purely factual terms, a number of societal systems may well exist, just as one used to speak of a plurality of worlds; but only in the absence of communicative links between these societies or, from the point of view of the individual society, where communication with others is impossible or without consequence<sup>69</sup>.

Apparently the emergence of the world society is an inevitable consequence of the steps that society has taken throughout its evolutionary process. Once communicative processes can no longer be limited to specific contexts – despite the exception of regionalization – we can already visualize the formation of a society as a system that encompasses all the communications produced in its structure.

Today it is already noticeable how some experiences leave the regional scope and start having a global reach. Perhaps the economic and financial scope is the easiest to understand. Economic crises do not only affect the epicenter where the cracks occurred: the events of 1929 and 2018 are examples of how the consequences of poor financial management can affect many different economies – albeit there is a factor that propitiates the spread of the economic system on a global scale: money as a symbolically generalized means of communication.

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<sup>67</sup> ÓRDENES, Nathaly Mancilla. Del sistema-mundo a la sociedad mundial: la necesidad de una reconstrucción histórica. *Estudios Públicos*, [S.L], v. 1, n. 56, p. 120-129, abr. 2019. Retrieved from: [https://www.cepchile.cl/cep/site/docs/20191205/20191205082239/revista\\_estudios\\_publicos\\_156.pdf](https://www.cepchile.cl/cep/site/docs/20191205/20191205082239/revista_estudios_publicos_156.pdf). Accessed at: 09 Mar. 2022. The sentence in quotation marks belongs to Johann Gottfried von Herder.

<sup>68</sup> For some of these labels, see footnote No. 6 in the Introduction.

<sup>69</sup> LUHMANN, Niklas. *Theory of Society*: Volume 1. Stanford University Press: Stanford, 2012, p. 83.

Other changes can also be perceived – and they will be duly explored in this topic. However, this brief exposition aims to bring about questions about how this new social arrangement works globally.

Thus, the present topic will attempt to explain how the formation of the global society happened, its peculiarities, and how it is an unfolding of modern society.

### 2.2.1 World society: a begin

It is usual to talk about Brazilian society, European society, Chinese society or American society. Regionalization are ways of reducing complexity due to their territorial delimitation and are still fruitfully used. However, in the sociological framework, there are limitations in the theoretical sphere that jeopardize their use due to the course that society has taken since the 15th century.

The economic system was the first to have its world expansion, and this is mainly due to the period of the great navigations in the 15th century. In this period, the world has its widening and shortening: a new world was discovered (the American continent) and naval technology enabled faster access to more remote locations.

It is evident that all social relations cannot be summarized only by a single determining criterion – the economic one – but it always takes the forefront when it comes to the reproduction of communications, especially when it comes to money as a symbolically generalized medium.

Perhaps the researcher who best explored this expansion of the world economy was Immanuel Wallerstein with his World-Systems theory. Although his writings have a sociological understanding that is not limited to economics, it is very noticeable that the economic sphere stands out among the others<sup>70-71</sup>.

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<sup>70</sup> The world in which we are now living, the modern world-system, had its origins in the sixteenth century. This world-system was then located in only a part of the globe, primarily in parts of Europe and the Americas. It expanded over time to cover the whole globe. It is and has always been a world-economy. It is and has always been a capitalist world-economy. We should begin by explaining what these two terms, world-economy and capitalism, denote. It will then be easier to appreciate the historical contours of the modern world-system – its origins, its geography, its temporal development, and its contemporary structural crisis. In WALLERSTEIN, Immanuel. *The Modern World-System as a Capitalist World Economy: production, surplus-value, and polarization*. In: WALLERSTEIN, Immanuel. **World-Systems Analysis: an introduction**. Durham: Duke University Press, 2004. p. 23.

<sup>71</sup> To better understand the relationship between Niklas Luhmann's systems theory and Immanuel Wallerstein's World-Systems theory, we recommend reading: ÓRDENES, Nathaly Mancilla. *Del sistema-mundo a la sociedad mundial: la necesidad de una reconstrucción histórica*. **Estudios Públicos**, [S.L], v. 1, n. 56, p. 120-129, Apr.

However, when talking about world society, it is necessary to invoke the systemic paradigm for its better understanding. The postulate sustained by Niklas Luhmann understands that in modernity regional societies have given way to a single social system, namely, the world society.

The process of functional differentiation – already explained above – is the first point that helps us understand the formation of world society. While in the pre-modern context there was communication between separate societies, when the process of functional differentiation began, the communicative reach was expanded, enabling the emergence and stabilization of global systems<sup>72</sup>.

According to Rudolf Stichweh, “Functional differentiation establishes itself as the primary mode of internal differentiation of world society”. This implies that functional differentiation acts as a condition of possibility for the formation of world society. The same author also states that “In each case arises via differentiation a function system which is in its **core a system of communications** which is global in its scope as it is highly specific in its communicative operations”<sup>73</sup>.

Besides the issue of functional differentiation, other mechanisms contributed to the establishment of world society. Organizations, for example, played a fundamental role in the diffusion of communications around the world. Through and because of their structure, organizations were able to take to other locations an informative content that was previously restricted to a single place. The examples cited by Stichweh help us to better understand how this happens. The missions of the Society of Jesus – Jesuit Order – were responsible for bringing to Brazil – or to China, as Stichweh says – part of the bureaucratic and institutional knowledge that had been developed in countries such as Spain, Portugal, and Italy<sup>74</sup>.

Contemporarily, still following the example of organizations, Non-Governmental Organizations play the promoted role of global communications as they deal with climate, human rights, public health, and other humanitarian issues<sup>75</sup>.

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[https://www.cepchile.cl/cep/site/docs/20191205/20191205082239/revista\\_estudios\\_publicos\\_156.pdf](https://www.cepchile.cl/cep/site/docs/20191205/20191205082239/revista_estudios_publicos_156.pdf).

<sup>72</sup> STICHWEH, Rudolf. En torno a la génesis de la sociedad mundial: innovaciones y mecanismos. **Revista Mad**, [S.L.], n. 26, p. 5, 26 Apr. 2012. Universidad de Chile.

<sup>73</sup> STICHWEH, Rudolf. En torno a la génesis de la sociedad mundial: innovaciones y mecanismos. **Revista Mad**, [S.L.], n. 26, p. 5, 26 Apr. 2012. Universidad de Chile. Our emphasis.

<sup>74</sup> STICHWEH, Rudolf. En torno a la génesis de la sociedad mundial: innovaciones y mecanismos. **Revista Mad**, [S.L.], n. 26, p. 6, 26 Apr. 2012. Universidad de Chile.

<sup>75</sup> STICHWEH, Rudolf. En torno a la génesis de la sociedad mundial: innovaciones y mecanismos. **Revista Mad**, [S.L.], n. 26, p. 6-7, 26 Apr. 2012. Universidad de Chile.

The ultimate institutional invention that acted as a motor for the world society were the communication technologies, such as the press, the new means of communication – telegraph, telephone, internet – that drastically reduced the territorial and temporal distances that information used to travel<sup>76</sup>.

The question of time is also useful to understand how a world society is established. With the emergence of the scientific consensus about the division of the globe into time zones, as well as the adoption of a single calendar for the whole world – the Gregorian calendar, which replaced the Julian calendar and became effective in the 15th century – promoted the increase in the stabilization of expectations, no longer located only in regions, so that new communications could be produced worldwide.

The examples cited here, although directly determinant, do not exhaust other factors that have acted in the formation of world society. However, using the words of Niklas Luhmann, "These structural shifts change the concept of world"<sup>77</sup> and it is on the emergence of a "new concept of world" that we must focus.

### **2.2.2 *Allegro ma non troppo*: world society in development**

It is from the conception of world society that it is understood that there is only one system, in this case, society. Law, politics, education, and economics are, therefore, sub-systems – or partial systems – that make up the world society system.

Furthermore, since we live under the aegis of a global system, it does not mean that there is a semantic hegemony and homogeneity in all corners of the planet – *gris on gris* – in which there are no particularities and/or peculiarities inherent to each location under analysis. The issue of regional difference can be fully explained.

Although the communications performed by society's structures have spread over the past centuries due to the reasons explained above – functional differentiation, the emergence and formation of organizations, and the development of new communication technologies – it is inevitable that there is no homogeneous diffusion across the globe.

The fact is that communications of global scope that are not accessible in some regions are of a residual nature, which does not detract from the form and structure of how world society

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<sup>76</sup> STICHWEH, Rudolf. En torno a la génesis de la sociedad mundial: innovaciones y mecanismos. **Revista Mad**, [S.L.], n. 26, p. 7, 26 Apr. 2012. Universidad de Chile.

<sup>77</sup> LUHMANN, Niklas. **Theory of Society**: Volume 1. Stanford University Press: Stanford, 2012, p. 88.

has established itself. Albeit regional communications are still formulated, they reduce their reach to the locality in which they are situated. However, the mechanisms developed in the world society system have the possibility of expanding the reach and diffusion of these regional operations, which places regionalization as a phenomenon that has the power for a global diffusion, precisely because of the structures of world society.

Another issue that takes into account the argument – implausible, by the way – homogenizing society is that, if we take into account the idea of the world society, inequalities will gradually disappear from the world.

For this argument we can use the words of Niklas Luhmann:

Depending on the comparative perspective adopted, we can throw light on divergence or similarities in regional development. This discrepancy cannot be resolved methodologically, and we must know that we reproduce it with our choice of comparative perspective. For this very reason, a theory must be sought that is compatible with such differences and that can interpret them. Such a theory will not claim that regional differences are gradually disappearing (convergence thesis), for there is too little indication that this is so. On the other hand, **the assumption of a world society is not refuted. The dissimilarity argument speaks not against but for world society.** The interest in development, like the interest in maintaining the cultural diversity of individual countries, is itself shaped by society, **and this is particularly evident when we consider the typically modern paradox of simultaneously striving for change and conservation**<sup>78</sup>. (Our emphasis)

This shows how regional inequalities are not antagonistic to the constitution of world society since they are of a residual nature<sup>79</sup>.

It should be noted that residualities are common in modernity. In relation to the process of functional differentiation, for example, it does not encompass all the spaces of the globe – as is the case of the Indian society that still maintains the caste system – but it is maintained according to the specificity of criteria and codes of preference in the formation of each partial system.

By taking functional differentiation into account, world society has parameters and reference points that serve as criteria for analyzing the problems that arise in the regions, it is: “We are better able to see and especially to explain why certain regional data make a difference

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<sup>78</sup> LUHMANN, Niklas. **Theory of Society**: Volume 1. Stanford University Press: Stanford, 2012, p. 93.

<sup>79</sup> The issue of homogenization can be brought up within a critical-normative questioning if part of critical theory is taken into consideration: “Upon close inspection the project 'modern society' shows a paradoxical face: freedom and equality, self-realization and solidarity. But the paradox is called 'reason', and the project is, to use an 18th-century slogan, pregnant with future”. In LUHMANN, Niklas. *Globalization or World society: How to conceive of modern society?* **International Review of Sociology – Revue Internationale de Sociologie**, [S.l.], v. 7, n. 1, p. 69, 1997.

and why given differences grow or diminish depending on how they interconnect with world-societal givens”<sup>80</sup>.

Having made these considerations, one must then ask how the border delimitations arising from the formation of the states are to be dealt with. Previously we talked about how the concepts of "Brazilian society" or "European society" are used as a way to reduce complexity, but nowadays we can only speak – with the necessary sociological accuracy – of world society.

Obviously this does not mean the abolition of borders or other territorial demarcations. When we speak of world society and functional differentiation, it necessarily implies that the functions of each partial subsystem can be applied in a unitary and global context. If this were not possible, one could not speak of functional differentiation. The example of the economy is very fruitful in demonstrating how a system can diffuse globally.

However, there are two exceptions to the widespread of subsystems in world society inasmuch as is not plausible – until now – that these non-inclusions are able to apply its criteria to whole world. We are talking about the political and legal systems. Differently the other systems, law and politics are differentiable in the form of States and, consequently, through their boundaries, laws, statements, and domestic policies<sup>81</sup>.

Today we can already see new legal and political forms (this last one to a lesser degree) that tangent the state form and spread globally as the other partial systems of society, as is the case of transnational law.

Democratic issues can also be the subject of regionalization and globalization – here not understood in the usual sense. However, because they are usually domestic issues, it is inevitable that issues involving democracy are restricted to the local context in which they are embedded, even in international events.

Thus, in order to better assimilate the problematic brought to the present research – the issue of Brazilian under-democracy – the next topics will address how law and politics operate as partial systems in world society.

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<sup>80</sup> LUHMANN, Niklas. **Theory of Society**: Volume 1. Stanford University Press: Stanford, 2012, p. 94.

<sup>81</sup> LUHMANN, Niklas. **Theory of Society**: Volume 1. Stanford University Press: Stanford, 2012, p. 96.

## 2.3 THE SYSTEMS OF THEMIS AND LEVIATHAN<sup>82</sup>

When we deal with the conception that society is a social system, we necessarily assume some theoretical assumptions that are required to support this statement. First, we have that a system is formed by its difference with the environment that forms around it. In the case of social system, biological and psychological systems are examples of the environment that is formed from the distinction. Another point is that social systems are closed for their internal operations, but open cognitively to receive information from the environment. For this reception of information, the systems developed – from an evolutionary process – a mechanism of filtering and reciprocal exchange of information with other environments, in this case, the structural couplings.

That said, one last point must be considered: the processes of distinction between the systems that compose the system of society consider the criteria of specialty of a given function. When the structures of the system assume a single criterion of preference for their operational production, the system makes possible its own reproduction and coordination of expectations.

It is from this process of differentiation by functions – functional differentiation – that the partial systems of society are formed.

These preamble made, the present topic will develop the functioning of the systems of law and politics, their processes of functional differentiation, giving a special focus to their codes of preference, until culminating in the thematic of democracy.

### 2.3.1 On law of society

A preliminary clarification must be made: when it comes to approaching a particular partial social system, some peculiarities must be taken into consideration. In the case of the legal system, one must distinguish between observations internal and external to the system, and this is of fundamental importance to analyze the dimensions of the observations made.

When it comes to the scientific sphere – and sociology is inserted here, as well as the researches performed under the criteria of science – it is an observation that is external to the legal system, as they are carried out from the perspective of the system of science.

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<sup>82</sup> The title of this topic is inspired by the book "Between Themis and Leviathan", authored by Marcelo Neves. Original reference: **Entre Têmis e Leviatã: uma relação difícil**. O Estado Democrático de Direito a partir e além de Luhmann e Habermas. São Paulo: WMF Martins Fontes, 2013.

In turn, the internal operations of the legal system can also be observed according to its criteria and, to this aim, legal dogmatics and legal theory perform their internal observation function within the legal system.

These considerations between internal and external observation are not without reason, to the extent that an internal observation, in other words, a self-observation and self-description serve as a delimitation and distinction of the object observed - law and its intrinsic operations, in the present case<sup>83</sup>.

Once these considerations are understood, it should be emphasized that the present research is the result of an external observation of legal and political systems, which is where the disciplines of sociology of law and political sociology are located.

When looking at law from a sociological perspective, especially taking into account systems theory, themes such as the evolution and formation of the systems in modernity should be explored; however, one would be risking running away from the research purpose intended here, that is: to develop and explore the idea of under-democracy in the Brazilian context.

In dealing with law in modernity, especially within a structural-functionalist approach, one should take into consideration, therefore, the functions that have been developed in the structure of the system. In the case of law, perhaps one of its most relevant functions – although it is not the only one and does not have the status of primary function – is to stabilize the expectations that are formed through the double contingency involving the operations inherent to the law system, that is, the normative expectations.

To state it otherwise, the hyper-complexity of modern society requires evolutionary modifications of partial systems so that they are able to absorb, select, and reproduce communications in a structurable order<sup>84</sup>.

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<sup>83</sup> This relation between internal and external observations to the partial systems of society also brings consequences in the theoretical sphere that are often disregarded, as is the case of the view that there is a social system outside society, which is what can be inferred when one comes across expressions such as "Law and Society". Luhmann was careful in his monographs about the partial systems of society, always using the declension in its genitive form in his titles [*Das Recht der Gesellschaft*], which in English would be translated as "society's law". LUHMANN, Niklas. **Law as Social System**. Oxford: Oxford University Press, 2004, p. 59-60.

<sup>84</sup> Luhmann makes a relevant point regarding the stabilization of normative expectations and evolution: [...] the functional specificity of law in processing normative expectations is, in itself, not a sufficient explanation for the evolutionary differentiation of the legal system, even though the latter is also not possible without engagement with a specific legal problem. LUHMANN, Niklas. **Law as Social System**. Oxford: Oxford University Press, 2004, p. 102.

The stabilization of normative expectations – as is the case of the legal system – acts as a complexity reducer for the selection of new communications, since it reduces the scope of possibility of the next operations<sup>85</sup>.

This does not mean that there is a kind of "iron cage" – to use Max Weber's expression – that imprisons all operations and communications of the system, but rather that, in truth, when expectations are stabilized, vagueness is reduced and a greater chain of operations arising from the expectations created is made possible.

When dealing with the stabilization of normative expectations, one is not only taking into consideration theoretical resources that involve social systems theory, since it is empirically observable, especially when the issue of legality itself and the positivization of law are under analysis.

The enactment of a law – and here its validity, currency, and effectiveness are already assumed – enables and constrains a series of expectations that give sequence to a chain of communications. To avoid focusing exclusively on the criminal field, which is recurrent due to its sanctioning nature, we can analyze the legal content of a loan, which is civil in nature and exemplifies the relationship of normative expectations.

By lending a certain asset to someone, a reciprocal legal relationship is born in which the lender has the expectation of receiving the lent asset, and the borrower has the expectation of returning the lent asset. It is evident that a series of externalities and misfortunes can occur so that the good that was lent does not get returned. This is not left aside when we talk about stabilization of expectations, but only if there is stability can there be legal relations, as is the case with the example of the loan, take place. In other words: "Norms do not promise conduct that conforms to norms but they protect all those who are expecting such conduct"<sup>86</sup>.

By firming and stabilizing the expectations that can be formed, as stated above, the scope of uncertainty is reduced, although uncertainty can still occur. However, within the minutiae and range of existing possibilities, the system holds a binary form that excludes that which is not in accordance with its structure and maintains that which is in consonance with the system, through its preference codes.

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<sup>85</sup> In a similar way, according to the theory of law: "For we have to hand, both in daily life and in the law, something which will enable us to understand it far better. This is the operation of a *promise* which in many ways is a far better model than that of coercive orders for understanding many, though not all, features of law". HART, Herbert L. A. **The Concept of Law**. Oxford: Oxford University Press, 1994, p. 43. (Author's emphasis).

<sup>86</sup> LUHMANN, Niklas. **Law as Social System**. Oxford: Oxford University Press, 2004, p. 150.

Another way of stabilizing expectations is when it is established that the legitimate exercise of force, sanction, and administration of justice will be done by the State. Far from authoritarian impulses and pluralist utopias, when it is recognized that the State will be the only organization that will have the legitimacy to have legislative and judicial administration, communications are channeled to a single mechanism, which considerably reduces doubts about which norm is to be obeyed or to whom the laws that have been enacted should be answered.

Today, in addition to international legislation, there are supra-national – as is the case of the European Union – and transnational legal orders – such as the International Institute for the Unification of Private Law (UNIDROIT). However, these normative spheres that escape the domain of state monism do not exclude the functional capacity to stabilize expectations. Countries or private entities that are signatories to such agreements are bound to accept their determinations and to act in accordance with what has been agreed upon.

The absence of the State acting as a central element with a channeling function does not inhibit the fact that diverse forms of normative expectation stabilization are possible. What cannot be conceived – and this was previously called a pluralist utopia – is that within a legal order others may arise that compete on the same theme and competence, going against the idea of stabilization of expectations.

Moreover, in addition to thematic competition, there is a risk of emptying the content of the decisions taken in the realm of parastatal orders – with the exception, of course, of transnational and supra-national ones. Although there are many democratic deficits in decision-making from the political system, it can still sustain a broad debate, since it is a qualified public sphere, and adopt procedural criteria that ensure structurable dissent in the face of the disagreements that may arise in disputes for political power.

One cannot say the same about decisions made in a space where there are no procedural guarantees for dissent to be maintained, as well as without forms and mechanisms for legislative change and administration of justice – which Herbert Hart would frame as rules of de change and rules of adjudication, respectively<sup>87</sup>.

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<sup>87</sup> “There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity **and its rules of change and adjudication** must be effectively accepted as common public standards of official behaviour by its officials”. HART, Herbert L. A. **The Concept of Law**. Oxford: Oxford University Press, 1994, p. 116. (Our emphasis).

That being said, the resource that acts as a primary form of stabilization of expectations are laws, which only have their validity, currency, and effectiveness from a previous moment, which is the legislative process, as well as their enactment. This is only possible when there is another social system acting simultaneously with the legal system, namely, the political system.

According to Niklas Luhmann:

In order for law to be enforced it needs politics, and without the prospect of enforcement there is no stability to norms that are credible to (or which are expected by) everybody. Conversely, politics use law to diversify access to politically concentrated power. But, to put it simply, because of this cooperation between the systems, it is necessary that they be differentiated<sup>88</sup>.

The difference between partial social systems, regardless of whether there is a primacy or not, is one of the elements that is verified in modernity, as exposed above. Although this distinction is fundamental, the existing amalgamation between law and politics, or even their conception as a unitary system, remains in the imagination of the social sciences, although it is not a predominant thought.

The realization that law and politics consisted of a unit, due to natural law, began in the second half of the 16th century with the writings of Jean Bodin, Francisco Suárez, and Samuel Pufendorf. The foundation of such conjecture was the idea that only through this unity could the individual be a subject of law, and this would be a condition of possibility for the emergence of an economy supported by the division of labor and the contract<sup>89</sup>.

Another perspective that considers the relationship between law and politics is the concept of Rule of Law [*Rechtsstaat*], which integrated the idea of the State an observation made from within the legal system. Here there is a more accurate social dimension: it is not only the rule of law that prevails over the political order but also a conditioning form of freedom itself<sup>90</sup>.

It must be concluded, therefore, that the idea of legality brought about by the establishment of law incurs the dimension of freedom, which is ensured by the parameters and marks instituted by the legal system.

However, the difference between the legal and political systems can be better perceived through their codification. While the legal system is oriented by a code of preference whose relation of conformity to the system orbits the idea of legal and illegal, the political system is oriented by the distinction between government and opposition – unlike pre-modern

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<sup>88</sup> LUHMANN, Niklas. **Law as Social System**. Oxford: Oxford University Press, 2004, p. 162.

<sup>89</sup> LUHMANN, Niklas. **Law as Social System**. Oxford: Oxford University Press, 2004, p. 359.

<sup>90</sup> LUHMANN, Niklas. **Law as Social System**. Oxford: Oxford University Press, 2004, p. 362-363.

societies that had the superior and inferior power configuration as a way of orienting political relations.

Understanding this new form of codification that has emerged in modernity is a condition of possibility to understand how democracy becomes a parameter for political and, consequently, juridical relations.

For this purpose, after having explained – albeit briefly – how the legal system works, the next topic aims at approaching the political system.

### 2.3.2 Politics as Social System

When one works with the operational concept of a system, some assumptions and consequences must be assumed – most of which have been better detailed above. A system is formed to have a function that solves some demands of society. This demand does not need an express content since there would be a significant reduction in the scope of problem-solving concerning the temporal issue.

The function, therefore, seeks to solve a problem. As seen in the legal system, the stabilization of normative expectations is in the proscenium of the functions of law. In the political system, it is no different either. Because it has a cognitive opening through which problems originating from other partial social systems enter, the political system has the function of solving these problems that are left open by society, and the mechanism by which this is done is the so-called binding decision [*bindende Entscheidung*]<sup>91</sup>.

Moreover, binding decisions arise through agencies related to political power, such as parliament, government, and administrative bureaucracies. Luhmann labels this set of bureaucratic political entities as administration [*Verwaltung*] (in a broad sense) that, together with politics [*Politik*] (in a narrow sense) deals with practices related to the construction of power, as is the case of political parties; and with the recipients of binding decisions, who also have active electoral capacity, are called audience [*Publikum*]<sup>92</sup>.

In other words, the success of binding decisions as a form of complexity reduction occurs because there are selective processes of information elaboration that are ongoing and whose results are accepted by the system's environment, regardless of what the reason is. The

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<sup>91</sup> LUHMANN, Niklas. **Sociología Política**. Madrid: Editorial Trotta, 2014, p. 38.

<sup>92</sup> LUHMANN, Niklas. Machtkreislauf und Recht in Demokratien. **Zeitschrift für Rechtssoziologie**, [s. l], v. 1, n. 2, p. 164, 1981.

justifications for accepting these decisions are unrelated to the political system, which does not mean that they do not exist and are not necessary for the existence of a lasting political system<sup>93</sup>.

Decision-making within the political system, therefore, by becoming binding, allows the existing complexity to be reduced. However, one should be cautious when speaking of binding, because one can be led to understand – mistakenly – that there is a necessary relation with some authoritarian aspect, which is not true, although the binding aspect may be used for authoritarian reasons.

Politics, in passing through the process of functional differentiation, results in clear distinctions with its environment as well as a new form of organization and internal orientation. While the *Ancien Régime* – as well as its correlates in world society – maintained the process of stamental differentiation, in which codification took place through the relationship between superior and inferior power [*machtüberlegen/machtunterlegen*], the Democratic Revolutions – which will be explained in the next chapter – enabled the inclusion of new communications in the political system.

Despite the possibility of the emergence of authoritarian binding decisions, what was perceived in modernity was a wave of inclusion – albeit, at first, this inclusion was restricted only to those who were considered citizens – that allowed greater participation of the people in politics, which before was restricted to the higher strata of society, such as nobility and clergy.

This political inclusion required new forms of binding decision making – specific to the political system – since massive popular participation is now expected. Luhmann even says that the inclusion of the population in all functional systems, especially in the political system, is now called democracy<sup>94</sup>.

From the emergence of a new semantics in the political form, the codification that guided the relations of the political system, which used to have a stratified character, is being left aside, and they start to be guided by a new codification, which represented the scheme of government and opposition.

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<sup>93</sup> LUHMANN, Niklas. **Sociología Política**. Madrid: Editorial Trotta, 2014, p. 39.

<sup>94</sup> LUHMANN, Niklas. **Die Politik der Gesellschaft**. Frankfurt am Main: Suhrkamp, 2002, p. 97. Originally: “Man nannte die prinzipielle Inklusion der **Gesamtbevölkerung** in alle Funktionssysteme im Sonderfalle des politischen Systems jetzt Demokratie”. (Our emphasis). This general inclusion, as stated by Luhmann, is not an adequate description of the world society that, in countries belonging to peripheral modernity, does not have a full inclusion process, as stated by Marcelo Neves in *Between Under-Integration and Over-Integration: Not Taking Citizenship Seriously*. In: SOUZA, Jessé; SINDER, Valter. **Imagining Brazil**. Lanham: Lexington Books, 2005, p. 61-90. However, in a previous moment, Luhmann already recognizes that there is no possibility of concrete participation of the entire population in political processes: *Complejidad y democracia*. In: LUHMANN, Niklas. **Teoría de los sistemas sociales: artículos**. Ciudad de México: Universidad Iberoamericana, 1998. p. 84.

Therefore, the new form of organization of the political system and its understanding through the emergence of a new codification enables the approach of democracy as a concept within the theory of social systems, as will be seen in the next topic.

## 2.4 DEMOCRACY IN A SYSTEMIC APPROACH

Government and opposition: this is the democratic codification of power. This statement may seem to be very categorical and simplistic, but it brings valuable assumptions to its support, considering that it assumes the possibility of the existence of political opposition to those in power, as well as making this opposition's existence a condition of possibility for the maintenance of the democratic political system.

While the political order oriented by the form of superior and inferior power aimed at the preservation of power by those who were in the higher ranks, the democratic political order institutes a new orientation that enables the dispute for power in a non-violent way, through procedures that allow the existence of political divergence without the elimination – physical or institutional – of those who disagree with those in power.

Moreover, when holding that the existence of opposition is a condition of possibility for the existence of democracy, it is necessarily assumed that the opposition can come to power through legitimate electoral processes and, consequently, there must be a peaceful transition between those who are in power and those who will assume it.

Although it is an assumption of what Luhmann sustains, the question of the alternation of power is taken as the main theme in some other conceptions about democracy, such as that of Adam Przeworski

The view of democracy I adopt is “minimalist” and “electoralist”: democracy is a political arrangement in which people select governments through elections and have a reasonable possibility of removing incumbent governments they do not like (...). **Democracy is simply a system in which incumbents lose elections and leave when they lose**<sup>95</sup>. (Our emphasis)

Notwithstanding the fact that the existence of electoral processes, as well as the transition of power, is of fundamental importance, the theoretical status sustained by Luhmann precedes and succeeds the moment of elections, since the existence of opposition to the

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<sup>95</sup> PRZEWORSKI, Adam. **Crises of Democracy**. Cambridge: Cambridge University Press, 2019, p. 5.

government confers reflexivity to the political system that claims to be democratic. In other words: the opposition only exists because there is a government that it must oppose.

This way, we enter more directly into the concept of democracy developed by Luhmann.

First, it is necessary to exclude two concepts that, in Luhmann's words, are impossible or extremely improbable. The first is that democracy should not be conceived as "rule of the people over the people" and the second is that democracy is not "a principle according to which all decisions must be made participatory". Minimistically, democracy should be conceived as "splitting of the summit [*Spaltung der Spitze*]: the splitting of the summit of the differentiated political system through the distinction between government and opposition"<sup>96</sup>.

Regarding the new form of codification of the political system that has democracy as its purpose, it is possible to say the following:

The code, which provides that everything that can be made politically relevant serves either the government or the opposition, appears to ensure a high degree of openness for events and information. It also seems to function like a kind of inbuilt permanent stimulus for the search for themes and for innovation. On the other hand while this guarantees spontaneity, other structures arise from this basis which restrict further possibilities. Expectations and habits become fixed. **Everything which comes later must adapt to the structures or seek to alter the structures in a specific respect through measures which adapt to the structures or seek to alter them in a specific respect** etc. until imagination, resources, willingness to participate are exhausted<sup>97</sup>. (Our emphasis)

Democracy, therefore, becomes the reference that shapes the habits and expectations that are created under the aegis of the political system that is oriented by the distinction between government and opposition.

Binding decisions, peculiar to the political system, are also the target of this new orientation. It has already been said that such decisions can have an authoritarian character, which does not make the existence of the political system impossible. However, by leaving aside an orientation that considers stratified forms of social differentiation, there is pressure for binding decisions to have a democratic content.

This constraint to the democratic form [*Zwang zur demokratischen Form*]<sup>98</sup> becomes the new way of doing politics, making itself valid as a selective process of the operations that enter the political system. In an evolutionary scope, it can be said, thereby, that democracy acts as a normative constraint (a theme that will be developed at the end of the next chapter).

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<sup>96</sup> LUHMANN, Niklas. The Future of Democracy. *Thesis Eleven*, v. 26, n. 1, p. 47, 1990.

<sup>97</sup> LUHMANN, Niklas. The Future of Democracy. *Thesis Eleven*, v. 26, n. 1, p. 50, 1990.

<sup>98</sup> LUHMANN, Niklas. *Sociología Política*. Madrid: Editorial Trotta, 2014, p. 212.

Although there is a demand for democracy through the filtering and selection processes of the systems, there cannot be a demand for intense and committed participation by the population that is now included in the political system, as that would compromise the freedom of someone to participate or not in political or electoral decision-making processes. If such a demand persists, there is coercion that goes against any conceptions of democracy<sup>99-100</sup>.

This question of the demand for committed participation in politics leads to a question that is directly related to the theme: the role of the people in democracy.

If we look at it from the perspective of systems theory, we will see that the people have the role of closing the political system<sup>101</sup>. However, because it is a key operational concept for the understanding and problematization of democracy – considering that it is a "government of the people" – it is necessary to focus on some semantic and conceptual dimensions of what can be understood as people.

For this purpose, we will first use the distinctions of people developed by Friedrich Müller, who understands the people as "active people", "legitimizing people", "people as icons" and "people as addressees of the benefits of the state".

By active people [*Aktivvolk*] we should understand all those who have the legal capacity and political legitimacy to exercise the right to vote. In the Brazilian case – leaving aside the compulsory and optional nature of voting – all Brazilian citizens, native or naturalized, older than 16 years of age and in the enjoyment of their political rights are considered eligible to vote – which excludes prisoners sentenced by final criminal judgment, for example<sup>102</sup>.

Another conception to be understood is the "people as legitimizing people", that is, "as a global instance of the attribution of legitimacy" [*als globale Instanz der Zurechnung von*

<sup>99</sup> LUHMANN, Niklas. Complejidad y democracia. In: LUHMANN, Niklas. **Teoría de los sistemas sociales: artículos**. Ciudad de Mexico: Universidad Iberoamericana, 1998. p. 85.

<sup>100</sup> This brings up the discussion on Compulsory voting. According to the International Institute for Democracy and Electoral Assistance, among the 203 countries analyzed, 27 (13%) have compulsory voting, while 172 (85%) do not have compulsory voting, and 4 (2%) have no elections. In Brazil, voting is compulsory since the promulgation of the 1988 Constitution. INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE - IDEA. **Compulsory Voting: what is compulsory voting?** Retrieved from: <https://www.idea.int/data-tools/data/voter-turnout/compulsory-voting>. Accessed at: 13 Apr. 2022.

<sup>101</sup> LUHMANN, Niklas. **Die Politik der Gesellschaft**. Frankfurt am Main: Suhrkamp, 2002, p. 265. Original quote: "Die Schließung des Systems erfolgt an der Stelle, wo das Weisungen empfangende, administrativ belästigte Publikum der Individuen, Gruppen und Organisationen zum Volk wird; an der Stelle, wo die *volonté de tous* zur *volonté générale* wird. Diese Transformation bleibt aber ein Geheimnis". This information was acquired through an interview by Marcelo Neves: OCAMPO, Sergio Pignuoli; BRASIL JUNIOR, Antonio. O cenário "Pós-Luhmanniano" e a América Latina: entrevistas com Marcelo Neves e Aldo Mascareño. **Sociologia & Antropologia**, [S.L.], v. 10, n. 1, p. 31, Apr. 2020. FapUNIFESP (SciELO).

<sup>102</sup> MÜLLER, Friedrich. **Quem é o Povo?: a questão fundamental da democracia**. São Paulo: Editora Revista dos Tribunais, 2011, p. 51ss.

*Legitimität*]. In this theoretical scope, the people are the addressee of the political and juridical actions that are performed by the State in the exercise of its functions. In a vulgar way, everything that is done by the State, in a broad sense, is done for the people, and it is this justification of acting on behalf of the people that provides the legitimating character to the people<sup>103</sup>.

A third conception of people has as its main motto the "people as icon" [*Volk als Ikone*], which results from an instrumental use, by those in the exercise of political functions, of the idea of "people" for their interests. In the present case, we are not talking about those who vote or are the legitimators of State action. By iconization of the people, we should understand that there is a mythical and artificial image of the people that act as justification for authoritarian acts. The phenomenon of populism is an example of how the people are used as an icon<sup>104</sup>.

In contrast to the first two distinctions of people, which have a more direct link with the idea of operational closure of the political system, as proposed by Luhmann, and the idea of people as an icon, which contains a critical diapason for the rhetorical use of the idea of people, the fourth conception of people elaborated by Friedrich Müller has a character closer to a normative program that the idea of democracy should bring.

By categorizing the "people as Addressee of civilizational State achievements" [*Volk als Adressat zivilisatorischer Staatsleitungen*], the idea of the people is broadened from a subject restricted only to a state sphere to a subject of law that has legal and political support in the global sphere. Modernity, when erecting a world society, has the obligation to ensure the provision of benefits within the content of human and fundamental rights<sup>105</sup>.

Although Friedrich Müller makes use of the State to ensure these civilizing benefits, it is already known that there are demands for the provision of human rights by transnational legal entities, such as Non-Governmental Organizations – NGO that deal with human rights or multinational companies that adopt sustainability policies and due diligence protocols on human rights, also known as Environmental, Social and Corporate Governance – ESG<sup>106</sup>.

<sup>103</sup> MÜLLER, Friedrich. **Quem é o Povo?:** a questão fundamental da democracia. São Paulo: Editora Revista dos Tribunais, 2011, p. 54ss.

<sup>104</sup> MÜLLER, Friedrich. **Quem é o Povo?:** a questão fundamental da democracia. São Paulo: Editora Revista dos Tribunais, 2011, p. 59ss.

<sup>105</sup> MÜLLER, Friedrich. **Quem é o Povo?:** a questão fundamental da democracia. São Paulo: Editora Revista dos Tribunais, 2011, p. 69ss.

<sup>106</sup> For an environmental law perspective on the application of mandatory due diligences, we recommend reading SCHILLING-VACAFLOR, Almut; LENSCHOW, Andrea. Hardening foreign corporate accountability through mandatory due diligence in the European Union? New trends and persisting challenges. **Regulation & Governance**, [S.L.], v. 1, n. 1, p. 1-17, 6 May 2021. Wiley.

In listing the people as the fundamental issue of democracy, Müller seeks to develop two descriptive distinctions (legitimizing people and active people) a normative distinction (people as addressee of civilizational State achievements) and a distinction whose invocation is rhetorical in character (people as icon).

However, when dealing with a hypothesis in which the issue of under-democracy is problematized, the descriptive dimensions and rhetorical usage are more fruitful for the problem being faced. In the first instance, the descriptive distinctions of the people, which legitimize legal and political activities act as an operational closure to the political system. In turn, the critique of the people as an icon is a symptom of how the systems under analysis can suffer from democratic deficits without, however, compromising their own autonomy.

Populism, one of the symptoms of this crosscutting made by under-democracy, exposes how the people continue to close the political system, while significant democratic procedures still have continuity, such as elections, and the process of functional differentiation is maintained.

In this chapter, by bringing the systems theory approach to the issue of democracy, we tried to use a theoretical apparatus to discuss an emerging problem. When one comprehends how the legal and political systems are situated in a modern polycontextual society, one aims to be able to work with the idea of democracy more accurately, as well as the problems that can arise from this analysis.

Aiming at a more conceptual approach, the next chapter seeks to unfold how the semantics of democracy has changed with the different social contexts that have emerged.

### 3 THE SPLITTING OF THE SUMMIT: CONCEPT AND SENSE OF DEMOCRACY

Is unquestionable that democracy is a very polysemic term with a range of meanings and uses. Using democracy as a thematic axis for research demands prudence and analytic accuracy in its application, decompounding its varietals meanings and employs, as wells as its evolution in history.

Although the present research does not have a historical perspective, is necessary to clarify how the democracy idea was varied or fluctuated throughout history. Succinctly, a term coined in ancient Greece that, practically, was overlooked for several centuries and was resurrected when de modernity arises. Some centuries later, the same concept is fragmented and/or multiplied in many new variations with different contexts of application demanding, many times, a deeper dedication to its analysis.

While research subjects, the democratic matter has become a university discipline, mainly as Theories of Democracy, trying to encompass the politic dynamic to scientific analysis. The study on democracy, on the other hand, introduced new ways to evaluate and investigate both the concept and the social phenomenon. Trespassing the political and juridical ambit, democracy has become a societal issue – in common sense: economy and education, for instance, embrace democratic methods to its well operalization. Daily democratic ways to solve disagreements are used to avoid uses of force, whether within the private or public sphere. Therefore, it can be anticipated that democracy is a civilizational achievement of modern society.

Nevertheless, some boundaries should be drawn to the specific purpose of or of the present research, and the main scope will be legal and political. To achieve this general objective, the current chapter will have the status of prolegomenon, introducing some issues on the concept of democracy.

It is inevitable to write on this theme without describing its origins in ancient Greece, even if only briefly, and the first topic of this chapter will be how democracy arises in Greek context. It is necessary because there is a huge change of meaning during its uses when was coined and when it becomes applied in modernity.

A preliminary remark should; however, be made before approaching Greek democracy to avoid anachronisms in the development of the operational concept under analysis. Herewith,

it is relevant to the assertion that Marcelo Neves<sup>107</sup> makes when dealing with a process of re-signification of democracy, beginning in Hellenistic Greece and ending in modernity. Nor do I intend to make a historical explanation of Greek democracy in the sense that it is a preliminary stage of modern democracy that is in a process of evolution, within the theoretical aspect that will be developed at the end of this chapter when we will deal with evolution under a sociological aspect.

Another point that will be explained is how modernity recovered the idea of democracy and how it is something almost inherent to its composition, although the authoritarian effects have also emerged, and with greater force, in modernity.

Some authors deserve emphasis inasmuch as they dedicate several intellectual efforts to understand, interpret and refine the studies on democracy. Jürgen Habermas and Robert Dahl will be examples in which their text on democracy will be explained better, as well as debated.

Finally, will be exposed the concept of democracy according to Niklas Luhmann and why this concept, within a systemic paradigm, demonstrating that democracy is an evolutionary achievement [*evolutionäre Errungenschaft*] of political and legal systems.

### 3.1 CARYATIDS AS SUMMIT'S SUSTAINER

Once the allegoric premise of this work is based on the summit (dome) idea which will be constructed, divided and reconstructed – as the title indicates, something should be the foundation for this summit that will be (re)building. It is well knowing the Greek's roots of democracy and to start the present work it's necessary to introduce the theme as a foundation way.

Caryatids are feminine sculptures that act as columns that sustain and support the roof of the Erechtheion, a temple destined to goddess Athena's cult and is situated in the city of Athens. As pillars that underpin a temple to tribute the knowledge goddess, the Greek democracy also provides the basis for the aims of the present research.

A warning must be made: the present topic, although it seeks to explain the development of Greek democracy, does not intend to make an apologetic statement about the then-nascent democracy, but to trace the historical paths of the operational concept that figures in the proscenium of this thesis.

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<sup>107</sup> NEVES, Marcelo. **Transdemocracy**. (Unpublished). I would like to thank Prof. Marcelo Neves for making available the manuscript that, at the moment, is still unpublished.

Moreover, when it concerns on Greek's democracy, should be highlighted that one is not dealing with an unambiguous term and a linear process. Discuss this matter is "neither an evolutionary differentiation nor an abrupt emergence of the political, but a whole sequence of political transformations linked by an ongoing dynamic", as Johann P. Arnason rightly warned<sup>108</sup>.

Indeed, the rise of a model of government that expresses the uniqueness of Athenian society should be highlighted in comparison with other Hellenics cultures, as the Spartan. There was a specific identification of democracy with the social context of Athens, bordering a personal recognition. Perhaps the most significant excerpt has been the speech made by Pericles on the occasion of the funeral of the Athenians who died at the beginning of the Peloponnesian War and was recounted by Thucydides:

[...] This is a land occupied continuously by the same people through a succession of generations up to the present day and handed on as a free country, a bequest of their courage. [...] **We enjoy a form of government that does not emulate the institutions of our neighbours; indeed we ourselves are more often the model for others than their imitators. Democracy is the name we give to it, since we manage our affairs in the interests of the many not the few; but though everyone is equal before the law in the matter of private disputes, in terms of public distinction preferment for office is determined on merit, not by rank but by personal worth;** moreover, poverty is no bar to anyone who has it in them to benefit the city in some way, however lowly their status. A spirit of freedom governs our conduct, not only in public affairs but also in managing the small tensions of everyday life, where we show no animosity at our neighbours' choice of pleasures, nor cast aspersions that may hurt even if they do not harm. Although we associate as individuals in this tolerant spirit, in public affairs fear makes us the most severely law-abiding of people, obedient to whoever is in authority and to the laws, especially those established to help the victims of injustice and those laws which, though unwritten, carry the sanction of public disgrace<sup>109</sup>. (Our emphasis)

The way in which Pericles conjure the collectivity and how he also belongs to the same integrality of citizens shows the primacy of the difference among other Hellenics societies and he is keen to emphasize that Athenians are different. Moreover, is perceptible the relation between the public and private sphere in Athens, when *polis* and *oikia* are separable and the public domain is, according to the quote above, free of direct interferences of the particular realm.

However, the rise of democracy does not happen on the Pericles command but through the reforms implemented by Clisthenes, who first applied structural conditions for the validity

<sup>108</sup> ARNASON, Johann P. Exploring the Greek Needle's Eye: civilizational and political transformations. In: ARNASON, Johann P.; RAAFLAUB, Kurt A.; WAGNER, Peter (org.). **The Greek Polis and the Invention of Democracy**: a politico-cultural transformation and its interpretations. Malden: Wiley-Blackwell, 2013. p. 24.

<sup>109</sup> THUCYDIDES. **The war of the Peloponnesians and the Athenians**. Cambridge: Cambridge University Press, 2013, p. 110-112.

of an isonomic reality for Athenian standards. Isonomy is a key concept which uses are different of the current meaning and is extremely binding with the Clisthenes' reforms and, consequently, the beginning of democracy. Albeit there is a strict link, isonomy should not assimilate as democracy synonym, once the use of this term is more associated with political freedom than a form of government. Insofar as the isonomic dynamic was established in Athens, rises conditions of possibilities to the emergence of democracy, enabling the participation of the *demos*.

But what did the reforms made by Clisthenes consist of? The main significative, and so far, historically confirmed, was the initiative of, firstly, splitting the citizens into groups of constituencies and delegated administrative incumbencies. Secondly, he established the Council of 500, inasmuch as the new constituencies were represented proportionally and the Council had a consultative or advisory role, not deliberative. Finally, the council had its composition renewed annually, coexisting with the already established ancient council of the nobles on the Areopagus<sup>110</sup>.

When the Clisthenes' reforms are faced with the old order, is notable the recognition of the *demos* after reform, and the isonomy matter is one of the causes for a change, once the traditional aristocratic families had their power mitigated as a result of the emergence of the Councils and its possibility of egalitarianism, whether political or legal.

For research whose main theoretical framework is system theory, is relevant to highlight the early beginnings of the social – not functional – differentiation that even incipient, shows how the political and juridical systems in a pre-modern society start to differentiate. Even the concept and notion of law has undergone a change of its form, modifying the idea of *thesmos* and adopting the schema of *nomos*.

The distinction between *thesmos* and *nomos* was only possible when the **isonomy**, derived by Clisthenes' reforms was established. For *thesmos*, some meanings could be quoted, but for current proposals, the main meaning is a rule that is imposed and already established. In a juridical realm, *thesmos* "is a law given by a lawgiver who is thought of as standing apart from and above the persons upon whom his law is binding".<sup>111</sup>

<sup>110</sup> MEIER, Christian. **The Greek discovery of Politics**. Cambridge: Harvard University Press, 1990, p. 55.

<sup>111</sup> OSTWALD, Martin. **Nomos and the Beginnings of the Athenian Democracy**. Oxford: Oxford University Press, 1969, p. 19. In his book here quoted, Martin Ostwald (page 18) lists the possible meanings for *thesmos*: (a) a physical object placed in a significant location, (b) an institution or establishment, (c) the ordinance by which such an institution is called into being, (d) the propriety inherent in obedience to fundamental regulations, and (e) specific statutes or regulations of a political or religious character.

Niklas Luhmann is not insensible to this change: his perception is that law is susceptible to contingencies of a political character, and on democracy, the law and *nomos* form a new political program, once the *thesmos* and its application by consuetudinary and religious reasons are set aside to be replaced by laws enacted and approved by equals citizens and social consent<sup>112</sup>.

With the *nomos*' institution came political derivation which should be mentioned: in addition to the already mentioned isonomy, *Eunomia*, *Disnomia* and *Anomia*. Within etymological framework, *Eunomia* represents a positive concept that means the well and due order [*Wohlordnung*], while *Anomia* means the unlawful state [*ungeordneter Zustand*] and *Disnomia* denotes illicitness [*wiederrechtlicher*]<sup>113</sup>.

In the legal sphere, which was backed up by the political sphere, popular participation was guided by formal equality that was desired and respected. According to Christian Meier,<sup>114</sup> isonomy becomes no longer the only parameter, that is, the coordination of legal and political actions was not only due to the feeling of isonomy that had been put into effect since the reforms of Clisthenes. The *nomos* starts to have its own validity and with this, the respect for the law was claimed.

That said, the main criticisms of the model of democracy instituted in Athens are well known, especially its exclusionary character. While “government of the people”, the idea of democracy in ancient Greece is intimately bounded to the exercises of political capacities in the public sphere at Greek society: the *polis*. Albeit of the anachronical critics to the elitist way of democracy in Athens, once only the citizens were able to exercise the local politics, excluding women, slaves and free foreigners (called metics)<sup>115</sup>.

<sup>112</sup> LUHMANN, Niklas. **Contigencia y derecho**: la teoría del derecho em um contexto interdisciplinario. Madrid: Editorial Trotta, 2019, p. 81; **Theory of Society**: Volume 1. Stanford University Press: Stanford, 2012, p. 187 and 409.

<sup>113</sup> MEIER, Christian. *Democratie: Antike Grundlagen*. In: BRUNNER, Otto; CONZE, Werner; KOSELLECK, Reinhart (org.). **Geschichtliche Grundbegriffe**: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland - Band 1 (A-D). Stuttgart: Klett-Cotta, 2004. p. 822.

<sup>114</sup> MEIER, Christian. *Democratie: Antike Grundlagen*. In: BRUNNER, Otto; CONZE, Werner; KOSELLECK, Reinhart (org.). **Geschichtliche Grundbegriffe**: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland - Band 1 (A-D). Stuttgart: Klett-Cotta, 2004. p. 823.

<sup>115</sup> On the women's exclusion in political decisions, is curious the ancient explanation which draws on mythology: Saint Augustine of Hippo, quoting Marcus Terentius Varro, explains that the origin of Athens goes back to a dispute between the gods Athens and Poseidon in which the inhabitants of the region under dispute should choose which of the two gods would be recognized as their protector. During the public choice, the men gave preference to Poseidon, who had gifted the region with a fountain of water, while the women, who until then had been able to participate in the decisions, chose Athena, who regaled them with an olive tree. The women were the winners because there was one more woman than men. The men, having been defeated, penalized the winners with the following punishment: “they were to lose the right of suffrage; they were not to give their own names to their children; they were never to be known as Athenians”. (AUGUSTINE of Hippo. **The Fathers of the Church**: The City of God. Book XVIII, Chapter 9. Washington: The Catholic University of America Press, 2008, p. 95.

The beginning of democracy in an exclusionary scenario was not an Athenian exclusivity. This has been repeated across history and it did not go unnoticed: United States' democracy, for instance, were born in an absolute segregated context, where all the political rights are restricted to whites – in this sense, Democrats and Republicans were not much different. The full inclusion just occurred in 1964-1965 with the enactment of the Civil Rights Act and Voting Rights Act<sup>116</sup>. In Brazil, the right to vote until the Republic was restricted to educated men with a fixed annual income. Women conquered the right to vote only in the 1930 decade and the full capacity to vote occurred only in 1988 with the inclusion of the analphabets. This topic will be better developed in a future chapter.

Another aspect of Ancient Greek democracy is its direct character, where the ones who have, political capacity were allowed to express their own claims at the Agora, without intermediaries or representants, albeit some functions of leaderships were delegated by lots or public choice.

On the comparison between direct and indirect democracy, Giovanni Sartori highlight that, although there were some mitigations of direct exercise of democracy – as seem above – the direct democracy allows a perennial influence and participation of the people qualified to public life, while indirect democracy acts to limit and control the political power<sup>117</sup>.

However, democracy, whether direct or indirect, was never unanimous and in Greek society it had several critics. As far as detractors of democracy are concerned, perhaps one of the most relevant is Plato. In his book *The Republic*, in which Socrates, Glaucon and Adeimantus are in dialogue, is said that there is only a single way of virtue, while there are many forms of vices and four should be mentioned<sup>118</sup>.

The allegory of vices and virtue serves to illustrate the five forms of state: aristocracy, timocracy, oligarchy, democracy and tyranny, explaining the way of transition between each form. For being an advocate of aristocracy – a political situation ruled by a philosopher king, an ideal man formed by a rigorous educational system prepared to govern with wisdom and liability – Plato sustains other ways of government are sequences of detraction of other. In this case, timocracy arises from aristocracy, oligarchy arises from timocracy and so on. Indeed, oligarchy, according to Plato, is the single virtue while the other ones are the vices.

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<sup>116</sup> LEVITSKY, Steven; ZIBLATT, Daniel. **How democracies die**. New York: Crown Publishing, 2018, p. 119.

<sup>117</sup> SATORI, Giovanni. **The Theory of Democracy Revisited: Part Two: The Classical Issues**. New Jersey: Chatham House Publishers, 1987, p. 280.

<sup>118</sup> PLATO. **The Republic**. Cambridge: Cambridge University Press, 2018, p. 143 (Book IV-445c).

Democracy emanates from oligarchy degeneration when occurs a civil war between the oligarchs and “the poor are victorious, when they kill some of their opponents and send others into exile, give an equal share in the constitution and public office to those who remain, and when public office in the city is allocated for the most part by lot”<sup>119</sup>. Some similarities with the reforms implemented by Clisthenes are perceptible.

However, the liberty established in a democratic regime is not healthy to the well-been of the Polis, inasmuch as there is no liability to the formation of the youth in the ideal always determined by Plato in aristocracy; a liberty that has arisen without values. It is from this unmediated freedom that the passage from democracy to tyranny occurs: “The same ailment which arose in oligarchy, and destroyed that, arises in this regime also – only more widespread and virulent because of the licence it is given. Here it enslaves democracy. Indeed, excess in one direction generally tends to produce a violent reaction in the opposite direction”<sup>120</sup>.

Plato's criticism of democracy often borders on disdain and contempt for such political organization. However, the main objective of *The Republic* is to describe the acting justly within a social context; the forms of states are moments of this description, and it is inevitable ignoring his analyses. Perhaps part of the content against the democracy arose from the social context that Plato was included: his family has political and social importance in Athenas and was impelled to surrender their power for democratic reasons. Moreover, maybe his incredulity to democracy also came from the death of his master, Socrates, who was sentenced to the death by a democratic court, a court that belonged to a city that despised the values that he considered inherently good<sup>121</sup>.

Certainly, Plato's view on democracy deserves attention for its reverberation across political thinking, however, his predictions did not prove to be correct. Since the Peloponnesian War Athenian democratic institutions were undermined, but not according to Plato's prognosis. There's were no tyranny and the full freedom rejoiced over by the Athenians was not the cause of the distortion of the democratic values then cultivated. Despite all that, the most relevant achievement of Plato's *Republic* was elevate the level of political analysis, making diagnoses e prognosis on the political reality and it is a powerful tool to be added to studies on politic democracy.

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<sup>119</sup> PLATO. **The Republic**. Cambridge: Cambridge University Press, 2018, p. 268 (Book VIII-557a).

<sup>120</sup> PLATO. **The Republic**. Cambridge: Cambridge University Press, 2018, p. 277 (Book VIII-563e).

<sup>121</sup> DUNN, John. **Setting the people free: the history of democracy**. Princenton: Princenton Universty Press, 2019, p. 19-20.

The Greek social conjuncture could be even better developed for the understanding of the emergence of democracy, but it would demand an attention that would leave the purposes of the research here developed. The present topic had the function of introducing, even if briefly, the factors that led to the passage of a social organization based on oligarchic criteria to a new conjuncture in which there was direct popular participation, even if considered excluding for contemporary parameters.

Moreover, although it is a pre-modern context, classical Athenian society shows us how the social differentiation that gave rise to a new legal order could be formed, moving from an immutable relationship and deeply theological and customary bases to a more formal legal understanding based on the decisions and deliberations that were taken in public sphere.

On the other hand, when it comes to the construction and reconstruction of the summit, the argumentative path has taken so far is in line with what Marcelo Neves<sup>122</sup> declares when he emphasizes the "intrinsically excluding" character of Greek democracy, that is, there is no division of the summit.

Even if in an introductory way, explaining how democracy was formed in ancient Greece leads us to reflect on how a form of political organization crossed centuries without being taken into consideration to resurface in modernity. Democracy, as a simple word or even concept, is today a prerequisite for the debate on politics, even if its meaning has gained modifications and derivations.

In the next topic, we will discuss how the idea of democracy was rescued in modernity, as well as how this reception occurred, and which were the derivations of this renaissance. The support of the dome is slowly being built and, for that, we need to go beyond the invocation of the Muses that were responsible for the inspiration of Homer and Hesiod.

### 3.2 SPIRIT OF LIBERTY AS HERALD OF MODERNITY

Drawing attention to the delimitation of the subject of this research, which aims to work on law, politics and democracy in a modern context, a long gap in the development of the concept of democracy will not be properly approached, namely the Middle Ages.

Briefly, it can already be said that, in the Middle Ages, there are not many mentions of democracy that are worth working on in the present work. Right at the beginning of the entry

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<sup>122</sup> NEVES, Marcelo. **Transdemocracy**. (Unpublished)

on Tradition and reception of the concept of democracy in the Middle Ages, Hans Leo Reimann already alerts us that in the period in question the term "democracy" did not have the pretension and use to describe activities and conditions of a social and political character<sup>123</sup>.

Further on an important warning is made: no sufficiently in-depth study of the concept of democracy in the Middle Ages has yet been developed, and therefore, trying to define a concept of democracy in the Middle Ages can lead to erroneous conclusions [*falschen Eindruck erwecken*] about the topic<sup>124</sup>.

Starting from these clarifications, the present topic aims to explore how the concept of democracy was received in modernity. Although the definition of when modernity began does not have a consensus among scholars on the subject, since there are many historical events that may have given rise to this change of social paradigms (Protestant Reformation, fall of Eastern Roman Empire, Renaissance and so on), in the legal and political spheres perhaps the most relevant event that modified the social structures of the old and new world was the French Revolution.

Taking the French Revolution as a parameter to modernity and having solid support from the Caryatids at the beginning of the chapter, the illustration of the Spirit of Freedom [*Génie de la Liberté*] – a bronze statue that stands atop the July Column, the centerpiece of Place de la Bastille in Paris – was chosen to illustrate and support the theme developed in this section<sup>125</sup>.

### 3.2.1 Rebuilding a concept

As has already been argued, democracy was not a usual concept in Middle Ages, albeit some authors had some uses of the word, the meaning there was not the same semantical usage that in Greek Polis.

According to John Dunn, there were two political events which relevance brought the concept of democracy to eighteenth: French Revolution and the independency of thirteen

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<sup>123</sup> REIMANN, Hans Leo. Überlieferung und Rezeption im Mittelalter. In: BRUNNER, Otto; CONZE, Werner; KOSELLECK, Reinhart (org.). **Geschichtliche Grundbegriffe**: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland - Band 1 (A-D). Stuttgart: Klett-Cotta, 2004. p. 835.

<sup>124</sup> REIMANN, Hans Leo. Überlieferung und Rezeption im Mittelalter. In: BRUNNER, Otto; CONZE, Werner; KOSELLECK, Reinhart (org.). **Geschichtliche Grundbegriffe**: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland - Band 1 (A-D). Stuttgart: Klett-Cotta, 2004. p. 838.

<sup>125</sup> In fact, it should be noted that the monument in question was not originally erected for the French Revolution, but for the insurgency that took place in 1830. However, the place where it was erected and the meaning it ended up incorporating are in keeping with the ideals professed by the revolutionaries of 1789.

British colonies. When democracy was impelled by political leaders as watchword in American independence, the meaning was into a depreciative way, as some a political situation that should be avoided. The perception on democracy just was changing later the enactment of the constitution in 1787<sup>126</sup>.

If we take as parameter the Federalist Papers, is perceptible that dimension of democracy was understandable in a naïve way: a “pure democracy”, according to John Madison, is “a society consisting of a small number of citizens, who assemble and administer the government in person”. This conception came out of the idea that democracy was a measure, if adopted, that would equalizer all the peoples, undermining freedom that make them different and unique: the property rights<sup>127</sup>.

Liberty, perhaps the value most esteemed by Americans to this day, was already the object of careful attention and should be protected against a way of government in which will all the contingencies, opinions and properties would be levelled. Madison's proposition, as an alternative to democracy, was a form of government which, in his words, is "a government in which the scheme of representation takes place", that is, the republic. In his opinion, under a republic, problems resulting from the large number of citizens and the extension of the territory to be governed would be mitigated due to the representative character by which the republic would be governed. In this way, a forced homogenization of all citizens in their direct exercise of political power would be avoided, as it would occur in a democratic context.

This same opinion can still be found in other articles of the Federalist, such as in Federalist 14, in which it is reaffirmed that democracy should be reserved for localities of small territorial extension, unlike the republic, since in the first one, the people exercise their political activity in loco, while in the second one, the exercise of power takes place through their representatives<sup>128</sup>.

In Federalist 63, for his part, Madison uses the example of democracy exercised in Athens at the height of the democratic period in classical antiquity, stating that "many of the

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<sup>126</sup> DUNN, John. **Setting the people free: the history of democracy**. Princeton: Princeton University Press, 2019, p. 49

<sup>127</sup> MADISON, James. The Federalist 10: the same subject continued. In: HAMILTON, Alexander; MADISON, James; JAY, John. **The Federalist Papers**. Oxford: Oxford University Press, 2008. p. 52.

<sup>128</sup> MADISON, James. The Federalist 14: An objection drawn from the extent of country answered. In: HAMILTON, Alexander; MADISON, James; JAY, John. **The Federalist Papers**. Oxford: Oxford University Press, 2008. p. 69.

executive functions were performed, not by the people themselves, but by officers elected by the people, and representing the people in their executive capacity"<sup>129</sup>.

Going on with what can be called the Great Democratic Revolution<sup>130</sup>, in the context of the French Revolution, the term was redeemed less abruptly: since 1730 the word democracy was employed in a political sense by a French nobleman who wrote a manuscript with his reflections on Government of France: Marquis d'Argenson. His considerations bring the democracy idea different that used applied by medievalists or Federalists, which main conceptions orbiting around the Aristotelian model tripartite – monarchy, aristocracy, and democracy – or in a high equalizer and suffocating individual freedoms and the right to property.

If we take the considerations on the Marquis de D'Argenson's manuscript, it can be seeing the recurrent use of the word democracy, since he does not want us to confuse the term with another one. Moreover, he believed that amplifying power of the kings privileged democracy and equality against nobility and aristocracy – this is controversial for contemporary political thought, but for the period in which it was written it brought innovations to the theory of power<sup>131</sup>.

Furthermore, in the context of the French Revolution itself, the classical moment which is applied the word democracy is in a Robespierre's speech which purpose was to present the constitutive moral principles for the French government in the Convention on February 5, 1794<sup>132</sup>.

When analyzed the speech, it is perceptible that the use of the word democracy, although used in a revolutionary context, is closer to what is usual today and it is not confused with the classical conceptions of Aristotle, which are often used:

A democracy is not a state in which the people, continually assembled, manages all public business for itself, still less one in which a hundred thousand fractions of the people, through isolated, precipitate and contradictory measures, would decide the fate of the whole society: no such government has ever existed, and it could only exist to take the people back to despotism.[...] **Democracy is a state in which the sovereign people, guided by laws which are its own work, does for itself all that**

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<sup>129</sup> MADISON, James. The Federalist 63: A further view of the constitution of the Senate in regard to the duration of appointment of its members. In: HAMILTON, Alexander; MADISON, James; JAY, John. **The Federalist Papers**. Oxford: Oxford University Press, 2008. p. 312.

<sup>130</sup> PALMER, Robert Roswell. Reflections on the French Revolution. **Political Science Quarterly**, New York, v. 67, n. 1, p. 67, Mar. 1952.

<sup>131</sup> PALMER, Robert Roswell. Notes on the Use of the Word "Democracy" 1789-1799. **Political Science Quarterly**, New York, v. 68, n. 2, p. 205, jun. 1953.

<sup>132</sup> PALMER, Robert Roswell. **The Age of the Democratic Revolution: a political history of Europe and America, 1760-1800**. Princeton: Princeton University Press, 2014, p. 15-16.

it can do properly, and through delegates all that it cannot do for itself<sup>133</sup>. (Our emphasis)

Differently of James Madison's concept of democracy in Federalist Papers, Robespierre conciliate a direct exercise of the political power with representative dimension, minding that they are not exclusionary, but complementary, as can be seen in the highlighted passage.

In addition, it is necessary to emphasize that democracy claimed by the French revolutionaries was considered a Revolutionary Democracy, when there was the belief in the Sovereign of the People, that was a new approach in political associations which there was an individual dimension of the people and even consider capacities in law-making and norm-setting realm<sup>134</sup>. The conception of the sovereignty of the people was as revolutionary as the political reforms that were being implemented to abandon the structures coined in the *Ancien Régime*.

Should be highlighted that not only these events – French Revolution and independence of thirteen British colonies – are considered to understand how idea of democracy came to light in eighteenth, inasmuch as several others political revolutions happened, albeit some of them were influenced by, or even a consequence of, what was happening in France and the United States.

It is not for nothing that Robert Palmer calls the period in question the Great Democratic Revolution: in 1798 a revolution rose in Ireland; Netherland, in 1795, saw the emergence of Batavian Republic; Helvetic Republic was founded on 1798 in Swiss. For its part, in the Italian peninsula there were revolutions in Milan in 1796, Rome in 1797 and Naples in 1798. The heirs of Hellenic civilization also received the revolutionary winds: in 1797 representatives from Athens, Crete and Macedonia came together to form an insurrection against the Ottoman Empire and to this end obtained support from the French army<sup>135-136</sup>.

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<sup>133</sup> ROBESPIERRE, Maximilien. On the principles of political morality that should guide the National Convention in the domestic administration of the Republic. In: ROBESPIERRE, Maximilien. **Virtue and Terror**. London: Verso, 2017. p. 190.

<sup>134</sup> PALMER, Robert Roswell. Reflections on the French Revolution. **Political Science Quarterly**, New York, v. 67, n. 1, p. 69, Mar. 1952.

<sup>135</sup> PALMER, Robert Roswell. Reflections on the French Revolution. **Political Science Quarterly**, New York, v. 67, n. 1, p. 65, Mar. 1952.

<sup>136</sup> On the conflict between Greeks against the Ottoman Empire, is curious how the Hellenistic impetus affected the literature: the German poetry Friedrich Hölderlin published his epistolary novel "Hyperion or the hermit in Greece" during the conflict and the protagonist and his friend – Hyperion and Alabanda, respectively – fight in the war of independence. Another literary personality who fought in the uprising against Ottoman domination was the poetry Lord Byron, but he dies in 1824.

To conclude this topic, is noticeable that the term democracy, since the historic events previously quoted, in addition to having come to light, has come to be widely used and contested. Furthermore, a several social applications was developed, inasmuch as the term, besides to define a form of government, now characterizes forms of social and politics association, as well as being the target of new word combinations (social-democracy, labor democracy and so on)<sup>137</sup>.

### 3.2.2 Democracy and modernity

It has already been mentioned, albeit briefly, that modernity is a concept that does not have the accuracy to determine when it began throughout history. Various events are used to determine this marking of time, such as the French Revolution or the Protestant Reformation. For the purpose of studying democracy, the period of the Great Democratic Revolutions, in which the French Revolution is included, was taken as the main parameter.

This perception that there is definitely something new – not necessarily better – in what is temporalized as modernity is not mere contemporary speculation: since the mid-eighteenth century there have been accumulating indications that a concept of a “new time” was emerging<sup>138</sup>.

Thus, it is no coincidence that this temporal perception emerged just when the democratic revolutions were taking place, regardless of their location – although they all took place in what is now central Europe and the United States.

In the field of the study of democracy, whether as a concept or as a juridical-political phenomenon, its link with the emergence of modernity is very verifiable and perceptible. Thus, the present topic aims to address the relationship between modernity and democracy.

#### 3.2.2.1 A new ‘Weltanschauung’

It’s hard not to associate the winds of French Revolution with any civilizational achievement in modernity, inasmuch as its auspices claims for *liberté égalité et fraternité* and,

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<sup>137</sup> MEIER, Hans. Auflösung der Tradition in der frühen Neuzeit. In: BRUNNER, Otto; CONZE, Werner; KOSSELLECK, Reinhart (org.). **Geschichtliche Grundbegriffe**: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland - Band 1 (A-D). Stuttgart: Klett-Cotta, 2004. p. 847-848.

<sup>138</sup> KOSSELLECK, Reinhart. “Modernidade” – sobre a semântica dos conceitos de movimento na modernidade. **Futuro Passado**: Contribuição à semântica dos tempos históricos. Rio de Janeiro: Contraponto/PUC-Rio, 2006, p. 282.

in a wide sense, this postulate encompasses many of the political ideas that was developed in the period concerned.

For the proposition here situated, liberty will be the inflection point to the political and philosophical thinking, not only because of the liberalism that was already being cultivated in United Kingdom, but also because of the idea of liberty that was already being promoted in the other contexts, like German Idealism, which one of its exponents design a model of liberty that unveiled the modernity for philosophy and social thinking: Georg Wilhelm Friedrich Hegel is his name.

Here the philosophical system developed by Hegel will not be explained, but some ideas that orbit around the concept of freedom that became fundamental parameters for the social and political thought that emerged later will be exposed.

Freedom, according to Hegel's philosophy, is not an opposition or reaction against external duress upon an individual – what would come to be called negative freedom and the reference to Isaiah Berlin being a well-known one.

It is only with the impulse of the Spirit that freedom can be develop. The practical philosophy (Objective Spirit), which in the Hegelian system is in its second moment and is better explored in the book “Elements of the Philosophy of Right”, flanked between the Subjective and Absolute Spirit, shows us where freedom obtains its effectiveness: in the Family, in the institutions of Civil Society [*bürgerliche Gesellschaft*] and in the State.

As the spirit moves forward, freedom becomes more effective, but for this, something must act as a driving force. In this sense, Hegel's compliments to the French Revolution and the figure of Napoleon Bonaparte are well known<sup>139</sup>.

In addition, it should be noted that there is a contrast of opinions between the young and the old Hegel thought about the French Revolution. For the former, there was a certain enthusiasm for what had occurred in 1789. The latter, on the other hand, still recognizes civilizing gains, but with certain reservations.

In the end of Philosophy of History, Hegel makes new considerations between the French Revolution and its achievements with the reversals that came from it:

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<sup>139</sup> About Napoleon Bonaparte, in truth, one should demystify the mythical conception attributed to Napoleon. Common sense attributes to Hegel phrases of almost messianic admiration for Napoleon – “I saw the Spirit of the World riding through Jena –, although the real sense would be admiration for the personality of the French emperor, and not because he was an embodiment of the Spirit. For more on this it is recommended to read: VIEWEG, Klaus. **O Pensamento da Liberdade: Linhas Fundamentais da Filosofia do Direito de Hegel**. São Paulo: EdUSP, 2019, p. 554, n. 310.

**We have now to consider the French Revolution in its organic connection with the *History of the World*; for in its substantial import that event is World-Historical [..].** As regards outward diffusion its principle gained access to almost all modern states, either through conquest or by express introduction into their political life. Particularly all the Romanic nations, and the Roman Catholic World in special — *France, Italy, Spain* — were subjected to the dominion of Liberalism. **But it became bankrupt everywhere;** [...] Thus Liberalism as an abstraction, emanating from France, traversed the Roman World; but Religious slavery held that world in the fetters of political servitude. For it is a false principle that the fetters which bind Right and Freedom can be broken without the emancipation of conscience — that there can be a Revolution without a Reformation<sup>140</sup>. (Our emphasis in bold) (Author's emphasis in italic)

In quotation above Hegel recognizes merits of French Revolution for that named “History of the World”. In fact, the revolution was a turning point in many dimensions of public and private sphere, many unpleasant consequences have come from the reforms. The Roman World, it is, countries which has the Catholic Church as main religion, were not able to free themselves from the bonds that religion imposed on them.

The sentence that concludes the quotation sounds like a conformation that the claims and the horizon of expectations that had been created with the French Revolution still depended on structural reforms, after all, there is no revolution without reform.

Albeit the not so optimistic bias of late Hegel, his considerations on practical philosophy still been towards the liberty in modernity: both are a consequence of each other. Liberty, that we know nowadays, just is possible since the rise of modernity, and in philosophical realm, Hegel was a watershed. Klaus Vieweg is assertive when he says that “Freedom became the flag of the world, on whose advance Hegel stood, and for which his philosophy with every reason can be termed as *idealism of freedom*, as *idealism of modernity*”<sup>141</sup>.

This conception on Hegel and modernity is not a mere speculation, insofar as other authors had already had the same diagnosis. Jürgen Habermas in his Philosophical Discourse on Modernity is categorical when says that Hegel was not “the first philosopher to belong to the modern age, but he is the first for whom modernity became a problem”<sup>142</sup>.

All this effusiveness towards modernity is not gratuitous: understanding formation in modernity is a condition of possibility for the development of this research. Further on, as will

<sup>140</sup> HEGEL, Georg Wilhelm Friedrich. **The Philosophy of History**. Kitchener: Batoche Books, 2001, p. 472-473.

<sup>141</sup> VIEWEG, Klaus. **O Pensamento da Liberdade**: Linhas Fundamentais da Filosofia do Direito de Hegel. São Paulo: EdUSP, 2019, p. 104. Our translation. Author's emphasis in italic.

<sup>142</sup> HABERMAS, Jürgen. **The Philosophical Discourse of Modernity**: twelve lectures. Cambridge: Polity Press, 1990, p. 43.

be exposed, the theory of social systems elaborated by Niklas Luhmann starts from the observation of modern society.

Moreover, with modernity some institutional landmarks emerged in the legal and political sphere – separation of powers, individual liberties, positivation of law, etc. – but for the theoretical framework chosen, it is the process of functional differentiation that will result such purchases.

In a future topic it will be argued that democracy is an evolutionary achievement – following a luhmannian framework – of political and juridical systems and, therefore, the considerations about democracy and modernity that have been elaborated here serve as prolegomena to the forthcoming content.

The foundation, therefore, that we want to build in these first topics are of instructive and introductory character to sustain that democracy is a condition of possibility for the development and maintenance of the communications of the political and juridical systems in modern society.

In conclusion, it is hoped that we have been successfully able to demonstrate, albeit briefly, the relations between democracy, freedom, and modernity, which will lead us to the problems surrounding law and politics in countries inserted in the context of peripheral modernity, as is the case of Brazil.

### 3.3 DEMOCRACY AS AN EVOLUTIONARY ACHIEVEMENT

The emergency of the idea of democracy brought consequences to development of juridical and political institutions that was unfolded on modernity's auspicious: rule with democratic aspects became a necessity, although not always something that was intended or properly implemented.

Indeed, even today it is hard to achieve democratic guidelines in every institution, but what should be highlighted is that democracy acts as normative horizon which principles ought be followed in each decision-making.

However, democracy was not imposed on the political and juridical realms suddenly, since it is as process of social evolution that never ceases, since it is always being restructured and restabilized. More than that, here we support the hypothesis that **democracy, above all, is an evolutionary achievement of the juridical and political systems**, and this should be adequately explained.

On this purpose, the present topic aims to address the question of how evolution occurs, in a sociological scope, in the social systems of law and politics, as well as to try to endorse the idea of democracy as an evolutionary achievement<sup>143</sup>.

### 3.3.1 Evolution: a sociological approach

Evolution is a theme rounded by polemics and misunderstands. We can mention, firstly, the friction that religious people had with Charles Darwin's scientific proposal when claiming that he would be removing God from the creation of the world. The second mention about the misconceptions about evolution comes from a more sociological approach, but which still invokes the name of Charles Darwin: social Darwinism, which was a pseudoscience that believed that there was a superposition of cultures in which the superior cultures dominated the inferior ones, with a kind of survival of the more adapted culture and which served as a basis for the eugenics imposed by the German National Socialism in the 1930s.

Perhaps the most disseminated idea on evolutionism is the misconception that evolution necessarily implies improvement and progress of something, and this is an issue that needs to be clarified, it is, the idea of evolution should be unlinked as if it were an assortment of sequential orderings of things or facts that lead to a reality that is better than the *status quo ante*, giving a – mistaken – idea of progress [*Fortschritt*]<sup>144</sup>.

Furthermore, another consideration must be made: the evolution that will be applied here is of an interdisciplinary nature, linking concepts from biology to the social sciences without falling into biologisms.

In addition, evolution in social sciences is not a new framework. It may quote that even the classical sociologists were already working with evolutionary models, albeit in an incipient way. Evolution should be understood as a process of increasing of differentiation in society. This phenomenon can already be contemplated in other moments throughout history, but in a

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<sup>143</sup> The title of this topic, which also serves as a motto for the discussion raised here, is inspired by Niklas Luhmann's article entitled "Constitution as an evolutionary achievement" [*Verfassung als evolutionäre Errungenschaft*].

<sup>144</sup> "Progress" is also a concept susceptible to – with apologies for the redundancy – progress. To this purpose, Reinhart Koselleck traces the changes about the conceptions of "progress" and its counterpart, namely "decline". Focusing here on the concept of "progress," Koselleck points out that it is a concept that was elaborated for a perspective of modernity, in which the events of tradition are abandoned as new events emerge. For a better explanation of the concept of "progress", we recommend the reading of KOSELLECK, Reinhart. "Progresso" e "declínio": um adendo à história de dois conceitos. **Histórias dos conceitos**: estudos sobre a semântica e a pragmática da linguagem política e social. Rio de Janeiro: Contraponto, 2020, p. 169–190.

situated way. At the beginning of this chapter, for instance, it was mentioned that the reforms instituted by Clisthenes led to processes of social differentiation in classical Athenian society.

From the three sociologists considered to be the founding fathers of sociology – Karl Marx, Max Weber, and Emile Durkheim – one can draw evolutionary conclusions applied to sociological contexts, but without falling into the aforementioned misconceptions and reductionisms.

Perhaps one of the best known, Karl Marx's theory starts from an observation of society in which there were stages that were supplanted by higher stages. From a conflict perspective, pre-modern societies – which he comes to call primitive communism – were overtaken by feudalism, which in turn gave way to capitalism. Furthermore, there is a normative diapason in Karl Marx's evolutionary model because of the prognosis that has been made: through class struggle there will necessarily be the overcoming of capitalism by socialism and, later, communism.

The evolutionist model that can be extracted from Max Weber's thought is of a less mandatory character than Karl Marx's, since there are no prognostications in his analyses. Furthermore, based on the paradigm of social action, Weber does not dismiss the causal relationship that conflicts can trigger in society, but they are not the necessary motive for the impulse of history. It is through the increase of rationality that the processes of legitimization of bureaucratic forms of domination took place, supplanting the traditional forms of domination that shaped pre-modern societies.

Emile Durkheim, of the three founding fathers of sociology that we take as examples here, is the one who most explicitly makes use of evolutionist premises, making use of concepts from Charles Darwin and, above all, from Herbert Spencer. Despite the influence and use of evolutionary operational concepts, Durkheim's theoretical concern was not the evolution of society, but how it was integrated. Despite the influence and use of operational evolutionist concepts, Durkheim's theoretical concern was not the evolution of society, but how its integration took place, besides issues related to the same theme such as, for example, how this integration happened after the processes of social differentiation.

After explaining how the idea of evolution was already worked on by the founders of the discipline, we will now deal with who is considered by many sociologists as the one that served as the transition from classical sociology to the sociology that would be produced from the second half of the 20th century on. Talcott Parsons was an assiduous user of the concept of evolution, albeit these concepts only appeared in a more fruitful and accurate way in his later

works, although it was at this time that anti-evolutionary thinking was emerging as a result of the profusion of cultural relativistic studies.

It is appropriate to quote the remarks that Talcott Parsons made about his evolutionary turn:

It was in that frame of mind that I found myself, a number of years later, more and more positively concerned with evolutionary ideas. This interest led me back to biological reference points and to an attempt to understand some of the newer developments in biological sciences. Out of this I emerged strongly convinced about the basic continuity of the evolutionary development of all the classes of living systems, including a continuity between organic level and socio-cultural. One particularly important point regarding the biological and socio-cultural level may be noted immediately, though others will be developed as we go along. This is the "analogy" or functional similarity between the role of the genetic constitution in the organic world and that of the cultural system in the world of human action systems [...]<sup>145</sup>.

Mentioning Talcott Parsons is no mere invocation of authority. His works have deeply influenced the thinking of sociologists of the caliber of Niklas Luhmann, Jürgen Habermas, and Anthony Giddens.

As an example, the social systems theory developed by Niklas Luhmann is based on Parsons' theory of action systems, while Jürgen Habermas' Theory of Communicative Action also makes use of the same assumptions of Parsons' functionalism to develop his critical theory.

Parsons' research, be it of an evolutionist nature or not, affected – directly or transversally – a good part of the investigation in sociological theory in the 20th century, besides being responsible for the mass dissemination of Max Weber's thought in English-speaking countries.

Regarding the evolutionary aspect, Parsons makes use of the idea of evolution as a process of differentiation of action systems and that after this first stage the process of differentiation occurred within the action systems.

Parsons considered four action systems, where each one met the functional expectations that should be performed and that became known as the AGIL paradigm: Adaption (regard to environment); Goal Attainment (total consummation of the objective pursued by the action); Integration (relationship between the consummated action and the internal structure of the system); and Latency (or latent pattern maintenance).

Parsons' evolutionary perspective is fruitful to present research as prolegomena of what will be developed on democracy. He uses part of the main concepts of evolutionary theory

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<sup>145</sup> PARSONS, Talcott. "Comparative Studies and Evolutionary Change". In: PARSONS, Talcott. **Social systems and the evolution of action theory**. New York: The Free Press, 1977. p. 280.

in a sociological perspective and applies a semantical dimension on evolution without falling back on the fallacy that evolution equals progress.

According to Talcott Parsons:

**Socio-cultural evolution, like organic evolution, has proceeded by variation and differentiation from simple to progressively more complex forms.** Contrary to some early conceptions in the field, however, it has not proceeded in a single neatly definable line, but every level has included a rather wide variety of different forms and types”<sup>146</sup>. (Our emphasis)

Variation and differentiation are some of the used concepts in evolution theory, mainly in theory of social systems developed by Niklas Luhmann, whose theoretical framework will be used in the present work.

By complex forms here, in the sociological realm, one must consider social systems or, more directly, society. To this purpose, Parsons makes use of a tripartite division of society over time: primitive, intermediate and modern societies. We must remember that, although the nomenclature implies this, we are not evaluating qualitatively, but rather the level of complexity of these societies.

Having made these first considerations, we will work out in more detail how evolution takes place on a social level, but not only on a conceptual level, but also taking into account the processes that can trigger evolutionary impulses.

### 3.3.2 Evolution and society

“Because everything is evolution, evolution is a quasi-transcendental fact that is constitutive for the reflexive knowledge of evolution that is itself part of evolution”<sup>147</sup>.

The above quote appears to be taken from the most prolific scholars in the natural sciences in favor of the theory of evolution. One might even speculate that it is taken from the *Origin of Species*, Charles Darwin's magnum opus. However, the quote was coined by a political sociologist. Hauke Brunkhorst, in his seminal work that evaluates the legal revolutions under the diapason of evolution, was very categorical in establishing that evolution is an inevitable prism when one wants to observe society.

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<sup>146</sup> PARSONS, Talcott. **Societies: Evolutionary and comparative perspectives**. Englewood Cliff: Prentice-Hall, 1966, p. 2.

<sup>147</sup> BRUNKHORST, Hauke. **Critical Theory of Legal Revolutions: Evolutionary perspectives**. London: Bloomsbury, 2014, p 11.

Knowing the need and the importance that an evolutionist perspective has for the social sciences, after all that has already been mentioned, we will now explain how the evolutionary mechanism occurs according to the systemic paradigm developed by Niklas Luhmann.

First of all, it should be noted that Luhmann starts from a neo-Darwinian model, that is, he does not keep himself completely strict to Darwin's operational concepts, acting in a heterodox way. In this way, we start from the scheme of **variation**, **selection**, and **restabilization**<sup>148-149</sup>.

It is understood that “variation” enables the modification of the elements that constitute the systems, that is, the communications, as well as is responsible for the reproduction of deviant elements, that is, an unexpected communication.

In turn, “selection” refers to the structures of the system that are enforcers of the expectations that guide communications. They are responsible for choosing new communications that emerge throughout the variations. If the variation is usable for the structure and reproducibility of the system, it is selected; if not, it is discarded.

At the end, the “restabilization” process occurs, in which the system has just gone through the selection of communications that, if they have passed the selection criteria, now become part of the structure of the system under observation<sup>150</sup>.

Because they are social systems, the operations that make up their activities are communicative in nature. Thus, the relations of variation, selection, and stabilization occur through the communicative operations that are typical of social systems.

Luhmann invokes a lot of responsibility for social systems theory, since, resembling Brunkhorst's quote, he asserts that society is the outcome of evolution and, although it does not

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<sup>148</sup> Luhmann makes clarifications about the distinction between variation, selection, and restabilization. According to him the current “distinction explains that and how it is possible to use temporary and passing constellations. It serves to unfold the paradox of the probability of the improbable with the aid of another distinction”. In LUHMANN, Niklas. **Theory of Society**: Volume 1. Stanford University Press: Stanford, 2012, p. 258.

<sup>149</sup> Fábio Almeida, in his thesis entitled “Constitution: The Evolution of a Societal Structure”, raises important questions about the difference between the neo-Darwinian model proposed by Luhmann and Charles Darwin's original model: Reading Luhmann through the lenses of Darwin is an odd enterprise because – as I will attempt to demonstrate – autopoietic theory and Darwinism seem to be somehow contradictory and, despite that, Luhmann tries to build his theory on both theoretical accounts. In this section, I will highlight two major features on which Luhmann's autopoiesis and Darwinism seem to be incompatible evolutionary approaches, based on three major points: (i) what is the role of Luhmann's concept of restabilization in Darwinian theory? This questions brings a related point – (ii) the absence of a fitness-like concept in Luhmannian theory, which is replaced by the very concept of restabilization, is a problematic one when seen through the lenses of Darwinism; and (iii) how can autopoiesis be compatible with a variation-inheritance-differential fitness style of explanation if it lacks population thinking? ALMEIDA, Fábio Portela Lopes de. **Constitution: the evolution of a societal structure**. 2016. 480 f. Tese (Doutorado) - Curso de Doutorado em Direito, Unb, Brasília, 2016. Retrieved from: <https://repositorio.unb.br/handle/10482/21212>. Accessed at: 01 Feb. 2022.

<sup>150</sup> LUHMANN, Niklas. **Theory of Society**: Volume 1. Stanford University Press: Stanford, 2012, p. 273-274.

yet present satisfactory results regarding predictive and explanatory aspects about causal events, for now, it is still the only theory capable of explaining the establishment and reproduction of the structures that make up the system that is society<sup>151</sup>.

These definitional considerations have consequences for the explanatory goal of evolution theory. **Evolution theory provides no interpretation of the future. It enables no predictions. It presupposes no teleology of history** – with regard to either a good or a bad end to it. It is not a control theory, which could help in deciding whether we should let evolution be or correct it. **It is concerned solely with how we explain that more complex systems develop in a world that always offers and retains other possibilities**; and perhaps why such systems fail. In very simple terms, it is concerned with explaining structural changes<sup>152</sup>. (Our emphasis)

It is in this way that one can establish that from the multiple and infinite possibilities of an event occurring, and even of not occurring, one can trace the ones that have been established.

Evolution theory shifts the problem to time and attempts to explain how it is possible that ever more demanding and ever more improbable structures develop and function as normal. **The basic proposition is that evolution transforms low probability of origination into high probability of maintenance.**<sup>153</sup> (Our emphasis)

That is, evolution arises from a paradox that evaluates the probability of the improbable. From a range of events that could occur and do occur, albeit quickly, what is evaluated are the events that remain stabilized and preserved.

However, maintenance is not perennial, nor is it to be believed that evolution ceases when stabilization takes place. It is an infinite process that stems from the many variables that arise in complex systems.

[...] stability is also required for the start, as precondition for varying something. The third factor of evolution is therefore both beginning and end, a concept of its unity, which, because it amounts to structural change, can be described as dynamic stability. In a temporally abstract model, evolution theory describes a circular relationship. It thus also indicates that and how time intervenes as an asymmetricizing factor. From a superficial point of view—which, however, completely suppresses the initial paradox—it appears for this very reason to be a process<sup>154</sup>.

In analyzing social systems, evolution deals with the transition from less complex societies – pre-modern or traditional societies – to modern society, whose peculiar character is its hyper-complexity. These new communications that arise with increasing complexity are explained as a result of evolutionary processes.

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<sup>151</sup> LUHMANN, Niklas. **Theory of Society**: Volume 1. Stanford University Press: Stanford, 2012, p. 251.

<sup>152</sup> LUHMANN, Niklas. **Theory of Society**: Volume 1. Stanford University Press: Stanford, 2012, p. 260.

<sup>153</sup> LUHMANN, Niklas. **Theory of Society**: Volume 1. Stanford University Press: Stanford, 2012, p. 251-252.

<sup>154</sup> LUHMANN, Niklas. **Theory of Society**: Volume 1. Stanford University Press: Stanford, 2012, p. 260.

It is interesting to note how evolutionary processes took place in pre-modern societies. Whereas in modern society there is the presence of high complexity and therefore the three evolutionary mechanisms – variation, selection and restabilization – are present. However, the same does not occur in less complex forms of society.

This is mainly since two of the constitutive mechanisms are mixed up – variation and selection – because there is not yet a clear distinction between their structures, resulting in an overlapping of expectations and communications<sup>155</sup>. Societies with differentiation into segments, not by functions, therefore, are not able to maintain evolutionary processes in a more affine way.

If we consider societies that have differentiation due to hierarchies, we can already see a distinction between elements and structures and, consequently, the existence of the evolutionary mechanisms of variation and selection is already possible<sup>156</sup>.

For its parts, modern society are no longer based on strata, segments or hierarchies but in functions. With transformation of structures come another way to established organization of society, it is, in system functionally differentiate with codes with rules and coordinate its operations according to its inherent function as is the case of law, politic, science, religion, economic and so on.

Moreover, although the function differentiation been the current way of arrangement of modern society, others form of differentiation keep acting, but in a residually way, as is the case of India, which still has a caste system.

It is also possible to propose other forms of differentiation, as is the case of Karl Marx, who proposed a class-based social division. However, it is understood that this division is not fruitful for sociological analysis, since class, especially nowadays, as a macro-social subject, is something that does not resemble the way it was conjectured in the nineteenth century.

Working on evolutionary processes in relation to functional differentiation also requires a form of temporal perception, since evolution implies a relationship between past and future, and this perception was only developed at the end of the Middle Ages. This occurs because of the fact that in pre-modernity there was not a possibility of an opening to an uncertain future, due to the presence of the dominant Christian theological thought that already had a

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<sup>155</sup> NEVES, Marcelo. **Entre Têmis e Leviatã: uma relação difícil**. O Estado Democrático de Direito a partir e além de Luhmann e Habermas. São Paulo: WMF Martins Fontes, 2013, p 7-8.

<sup>156</sup> NEVES, Marcelo. **Entre Têmis e Leviatã: uma relação difícil**. O Estado Democrático de Direito a partir e além de Luhmann e Habermas. São Paulo: WMF Martins Fontes, 2013, p 7-8.

determining expectation about what awaited humanity in the future – the end of time – and relevant decisions were made taking this event into consideration<sup>157</sup>.

In the same context, Reinhart Koselleck talks about the reactions made to the temporal question about the future, as was the case with Martin Luther, who believed that an eventual shortening of time would be a divine sign for mankind to come closer to God more briefly on the day of the Last Judgment. The Catholic Church also reacted on the subject, conditioning the predictions of the future to its ecclesiastical authorization, by decision of the Lateran Council (1512-1517)<sup>158</sup>.

In fact, even eminently modern authors, such as Hegel, believed in a finality of history, as well as its end. The difference is that, despite the exceptions, **this openness to the uncertain is a phenomenon of modernity, and this makes evolutionary assessments possible** or, in Niklas Luhmann's words: "It seems as if the temporal self-description of modern society and increasing complexity only leave us with the certainty of the uncertainty"<sup>159</sup>. This question of "the certainty of uncertainty" leads us to reinforce that there can be no planning or prediction of the effects that evolutionary mechanisms will bring to the structures of the system under observation.

Having made the necessary considerations for the due understanding of evolutionary processes, even if propaedeutically, we will now address the main problem of the topic, that is, whether democracy is an evolutionary result of the processes of variation and selection developed by the systems of politics and law. In short, is democracy an evolutionary achievement?

### 3.3.3 Democracy and evolution

According to what has already been explained at the beginning of this chapter, the idea and concept of democracy have experienced profound changes over the centuries. While in ancient Athens democracy was an unfolding of the exercise of public life in the polis, after a long hiatus, the 13 British Colonies, newly independent, feared the establishment of democracy

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<sup>157</sup> KOSELLECK, Reinhart. *Futuro Passado dos tempos modernos. Futuro Passado: Contribuição à semântica dos tempos históricos*. Rio de Janeiro: Contraponto/PUC-Rio, 2006, p. 24.

<sup>158</sup> KOSELLECK, Reinhart. *Futuro Passado dos tempos modernos. Futuro Passado: Contribuição à semântica dos tempos históricos*. Rio de Janeiro: Contraponto/PUC-Rio, 2006, p. 25

<sup>159</sup> LUHMANN, Niklas. *The Direction of Evolution*. In: HAFERKAMP, Hans; SMELSER, Neil J. (ed.). *Social Change and Modernity*. Berkeley: University of California Press, 1992. p. 287.

because they understood that, if implemented, it would not be viable due to the large population and vast territory. In turn, those who overthrew the *Ancien Régime* in France understood the potential that democracy had for the purposes that guided the revolutionaries, especially because of its representative character.

As far as the research has been carried out, democracy has been treated on a theoretical conceptual level in certain historical perspectives. In the present everything there will be a more practical turn, but without letting go of theoretical guidelines, especially with regard to social systems theory and evolutionary theory.

Furthermore, the theme of democracy will also undergo more extensive approaches, relating it to issues that dialogue directly or indirectly, as is the case of constitutionalism and rule of law.

### 3.3.3.1 Cooperation and conflict

Much is said about how cooperation is of fundamental importance for development and evolution, whether in the sociological or biological realm. In fact, by cooperating, the chances of success of a certain event become more viable, and this, besides seeming obvious, has been proven in other areas of knowledge, such as Game Theory.

However, one must consider its counterpart: the conflict. Through structurable differences one can obtain many advantages that contribute to the stabilization of the systems involved.

Thus, cooperation and conflict are interdependent – or two sides of the same coin – and necessary for evolutionary processes. Not that the Red Queen hypothesis is taken to its ultimate consequences, but the importance of the two factors under discussion is undeniable, indeed, “It takes all the running you can do, to keep in the same place”<sup>160</sup>.

As far as cooperation in the socio-cultural field is concerned, Hauke Brunkhorst – quoting Karl Marx and Friedrich Engels’ *German Ideology* – is very emphatic in his consideration of contribution and solidarity actions:

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<sup>160</sup> The highlighted sentence is a line from the Red Queen character in Lewis Carroll's "Alice Through the Looking Glass. The hypothesis in question, named after the character, was elaborated by Leigh Van Valen and “emphasized the primacy of biotic conflict over abiotic forces in driving selection. Species must continually evolve to survive in the face of their evolving enemies”. For further clarification: BROCKHURST, Michael A.; CHAPMAN, Tracey; KING, Kayla C.; MANK, Judith E.; PATERSON, Steve; HURST, Gregory D. D. Running with the Red Queen: the role of biotic conflicts in evolution. **Proceedings of the Royal Society B: Biological Sciences**, [S.L.], v. 281, n. 1797, p. 20141382, 22 Dec. 2014. The Royal Society. <http://dx.doi.org/10.1098/rspb.2014.1382>.

**Social evolution begins with the socially learned cooperative use of instruments:** ‘The production of life ... as a social relationship’ consists in ‘the co-operation of several individuals, no matter under what conditions, in what manner and to what end’. Co-original with the social production of life is the production of communicative variation (consisting in the symbolic distinction between old and new needs) that finally leads to the take-off of social evolution<sup>161</sup>. (Our emphasis)

Indeed, it is impossible to trace evolutionary developments without claim aspects on cooperation and conflict, whether in biological or socio-cultural aspects.

To defense the cooperative way in biological realm, for instance, “In highly egalitarian species, individual dominance and submission behaviors can be all but absent, along with food and mating competition and coalition behavior”<sup>162</sup>. This means, in short, that cooperative practices are found in non-human species and, moreover, that such practices bring gains to the bands.

In turn, in the socio-cultural scope, which is what interests us for the research that is being developed here, some aspects must be highlighted. If we take evolution as a basis without taking into account non-Luhmannian bases, reproductions of behavior in groups are based on the structure between selective imitation, cultural inheritance, and differential aptitude.

Fábio Almeida has developed a substantial work about constitutions as a form of evolution of the social structure, and in it there is a significant explanation about the forms of socio-cultural evolution and cooperation.

In this sense, **the evolution of cooperation in large-scale societies is not just a side effect of moralistic punishment, but a bio-cultural adaptation to an evolutionary problem posed in the Pleistocene to our ancestors.** The “cultural” side of this adaptation refers to group-cultural fitness because it increases the odds that the frequency of that group’s memes rises over time. Its “biological” side refers to the coevolution between our innate psychology and culture<sup>163</sup>. (Our emphasis)

Although here the exploration of the topic has been briefing, vast is the literature on the subject of cooperation, and certain biases indicate what theory confirms: cooperation is a fruitful evolutionary mechanism that contributes significantly to the maintenance and survival of human and non-human species.

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<sup>161</sup> BRUNKHORST, Hauke. **Critical Theory of Legal Revolutions:** Evolutionary perspectives. London: Bloomsbury, 2014, p. 12.

<sup>162</sup> BOEHM, Christopher. **Hierarchy in the Forest:** The Evolution of Egalitarian Behavior. Cambridge: Harvard University Press, 2001, p. 126.

<sup>163</sup> ALMEIDA, Fábio Portela Lopes de. **Constitution:** the evolution of a societal structure. 2016. 480 f. Tese (Doutorado) - Curso de Doutorado em Direito, Unb, Brasília, 2016. Retrieved from: <https://repositorio.unb.br/handle/10482/21212>. Accessed at: 01 Feb. 2022, p. 92.

However, not much is said or remembered regarding the conflict that is so fundamental to evolutionary processes, since only the destructive potentials that conflicts can bring to the society that is being analyzed are considered.

Regarding conflict, the Red Queen hypothesis has been mentioned before, which brings to light how relationships in which there is a kind of "arms race" can bring evolutionary gains for the stabilization and maintenance of the species, which was something revolutionary for evolutionary studies.

By bringing the hypothesis that biotic interferences, and not only the action of abiotic forces, i.e., related to the environment, are the drivers of the evolutionary process, the author Leigh Van Valen brought other variables to the studies on biology and evolution that, until then, had attributed part of the evolutionary process to the question of adaptation to the environment in which species live. In Van Valen's word: "The Red Queen does not need changes in the physical environment, although she can accommodate them. Biotic forces provide the basis for a self-driving (at this level) perpetual motion of the effective environment and so of the evolution of the species affected by it"<sup>164</sup>.

Bringing this hypothesis into the socio-cultural realm, one can see that there is a certain degree of provenance and that it has already been taken into consideration. Daron Acemoglu and James Robinson summarize the Red Queen hypothesis: "The Red Queen effect refers to a situation where you have to keep on running just to maintain your position, like the state and society running fast to maintain the balance between them"<sup>165</sup>.

In a much more practical dimension, the Red Queen hypothesis, in a sociological framework – at least by the way it is approached by Acemoglu and Robinson – is a relationship of tension between state and society, in a broad sense.

Society must be aware of the implications and consequences that granting power to the State can lead to an autocratic and/or despotic situation. In turn, the State also must act as a conduct regulator that transforms the environment into a healthy atmosphere of competition aimed at stabilizing expectations. This relationship of tension and concession, given that there is no perfect equilibrium, is what can promote, progress to society – and here one can speak of progress without conceptual inadequacy.

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<sup>164</sup> VAN VALEN, Leigh. A new evolutionary law. *Evol Theory*, [S.L.], v. 1, n. 1, p. 1-30, 1973. Retrieved from: <https://www.mn.uio.no/cees/english/services/van-valen/evolutionary-theory/volume-1/vol-1-no-1-pages-1-30-1-van-valen-a-new-evolutionary-law.pdf>. Accessed at: 4 Feb. 2022.

<sup>165</sup> ACEMOGLU, Daron; ROBINSON, James A. *The Narrow corridor: states, societies and the fate of liberty*. New York: Penguin Press, 2019, p. 50.

It is in this context that the issue of democracy comes to light in the mediation of the tension between state and society, more specifically due to normative constraints, as will be seen in the following topic.

#### *4.3.3.2 Normative constraints*

At the moment when the importance of the tension relations existing between society and the State becomes evident, a new structure will appear, if this relationship takes place in parameters where there is not a zero-sum game.

When democracy, therefore, becomes a form of constraint and acts as a filtering mechanism in the realms of law, politics, economics, in short, in social systems, it can be seen that there is a change in the structure that used to be more oriented toward bureaucratic parameters. With the assumption of political modernity, the theme of democracy gained more dominance over the years and soon became part of the political game – even if it was sometimes used as a rhetorical artifice<sup>166</sup>.

When democracy appears among the operations of political and juridical systems, it starts to be replicated in the evolutionary structure of variation, selection and restabilization. Once democracy becomes an acceptable communication and becomes part of the structure that makes up the system, the next operations that will reproduce and select the communications will pass through the scrutiny of the criteria established by democracy, which has already been assimilated before.

This change in the role that democracy plays within systems, in an evolutionary aspect, is what we call normative constraints. The change brought about by the insertion of democracy is not an improvement in the adaptive capacities of the system, but rather in the constraints that adaptation will have. In Hauke Brunkhorst's words: “Evolutionary change’ in these cases is ‘**channeled**’ ‘by developmental constraints’. Therefore, the ‘limitation of possibilities rather than adaptive honing to perfection becomes a dominant theme in evolution’”<sup>167</sup>.

By acting as a channel for communications, or, in evolutionary terms, with the function of normatively restricting the communications that become part of social systems, democracy

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<sup>166</sup> For further clarification on the rhetorical use of law we suggest reading: NEVES, Marcelo. **A Constitucionalização Simbólica**. São Paulo: WMF Martins Fontes, 2011.

<sup>167</sup> BRUNKHORST, Hauke. **Critical Theory of Legal Revolutions: Evolutionary perspectives**. London: Bloomsbury, 2014, p 34. Our emphasis in bold.

blocks possibilities that go against democratic premises and, therefore, opens a new chain of possibilities for the future, but always in accordance with what is compatible with democracy.

It should also be said that the perspective adopted in the ongoing present work is focused on the development of democracy, which may appear to be failing to contemplate other significantly relevant developments but which, for methodological reasons, are not addressed. However, one corroborates Hauke Brunkhorst when he mentions the four most important revolutions that affect the legal field and modified the structures for a new evolutionary path, especially regarding the process of functional differentiation:

As we will see, already (1) the **Papal Revolution** of the twelfth century had the unintended side effect of the functional differentiation and self-referential closure of the legal system. (2) The **Protestant Revolution** 400 years later had the unintended side effect of the functional differentiation and self-referential closure of the political system. (3) The **Atlantic Revolution** of the eighteenth century had the unintended side effect of the functional differentiation and self-referential closure of the economic system and (4) the **Egalitarian Revolution** of the twentieth century had the unintended side effect of the functional differentiation and self-referential closure of the global educational system and the globalization of all functional systems<sup>168</sup>. (Our emphasis)

Without explaining with due attention how these revolutions contributed to the emergence of functional differentiation, as Hauke Brunkhorst did well, it should be mentioned that, as far as democracy is concerned, the two historical events that have been mentioned in this chapter – the French Revolution and the independence of the 13 British colonies – contributed more acutely than the four revolutions above.

Not that, by way of example, the Atlantic Revolution did not bring – directly or indirectly – guidelines that shared with the democratic ideal, but for the purposes discussed here, the ideals of liberty, equality, and fraternity, as well as constitutionalism and the federative pact, among others, brought normative constraints to the political and legal systems than any other occurrence.

In bringing up the question of democracy being a normative constraint mechanism for political and legal systems, it is necessary for this hypothesis to be tested in order to escape narratives. Albeit the research that is conducted here does not have quantitative methodology, bringing in works that do quantitative analysis helps us to corroborate the hypotheses raised here.

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<sup>168</sup> BRUNKHORST, Hauke. **Critical Theory of Legal Revolutions: Evolutionary perspectives**. London: Bloomsbury, 2014, p 86.

Perhaps one researcher who has dedicated himself to studying, albeit in the economic realm, the phenomenon of democracy is Daron Acemoglu together with James A. Robinson. In one of their articles, they make a connection between democratization and the decrease of inequality.

With attention to the changes that occurred in the 19th century in the West, especially the concessions related to the right to vote, albeit instrumentally, to avoid further insurrections: “Political transition, rather than redistribution under existing political institutions, occurs because current transfers do not ensure future transfers, while the extension of the franchise changes future political equilibria and acts as a commitment to redistribution”<sup>169</sup>.

It can be inferred that there was a normative constraint for more democratic measures to be adopted in order to avoid new revolutions to emerge and, therefore, to undermine the rights that the elite had established for themselves. In this way, according to the article, it was preferred to give up some rights or privileges – the most common case analyzed was the right to vote – having a greater stabilization, even if there were certain setbacks on the part of the elite, such as an increase in taxation in the future.

In another study that analyzes the relationship between democracy and economic growth, the same authors, together with Suresh Naidu and Pascual Restrepo, bring to light the evidence that there is a causality between the establishment of democracy and economic growth<sup>170</sup>.

It is interesting to highlight one point of this research: one of the objectives, albeit informal, is to dispel the idea that there is a negative relationship between democracy and economic growth that, until then, had been widespread in the literature<sup>171</sup>. While the widespread understanding until then was that there was virtually no relationship between democracy and economic growth, Daron Acemoglu's article has gathered data from 175 countries encompassing a time interval ranging from 1960 to 2010.

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<sup>169</sup> ACEMOGLU, Daron; ROBINSON, James A. Why Did the West Extend the Franchise? Democracy, Inequality, and Growth in Historical Perspective. **The Quarterly Journal of Economics**, [S.L.], v. 115, n. 4, p. 1167-1199, 1 Nov. 2000. Retrieved from: [https://scholar.harvard.edu/jrobinson/files/jr\\_west.pdf](https://scholar.harvard.edu/jrobinson/files/jr_west.pdf). Accessed at: 07 feb. 2022, p. 1194.

<sup>170</sup> ACEMOGLU, Daron; NAIDU, Suresh; RESTREPO, Pascual; ROBINSON, James A. Democracy Does Cause Growth. **Journal of Political Economy**, [S.L.], v. 127, n. 1, p. 47-100, feb. 2019. Retrieved from: <https://economics.mit.edu/files/16686#:~:text=The%20evidence%20suggests%20that%20democracy,try%20th at%20remains%20a%20nondemocracy>. Accessed at: 07 Feb. 2022.

<sup>171</sup> The study in question that the article under review seeks to contradict is: GERRING, John; BOND, Philip; BARNDT, William T.; MORENO, Carola. Democracy and Economic Growth: a historical perspective. **World Politics**, [S.L.], v. 57, n. 3, p. 323-364, Apr. 2005. Cambridge University Press (CUP).

The paper's conclusions are in line with what is proposed in this topic: a democratic environment causes an increase in GDP per capita. Furthermore, it was verified that, besides the increase in income, other variables were also affected by the institution of democracy: "democracy fosters higher GDP by enacting economic reforms, improving fiscal capacity and the provision of schooling and health care, and perhaps also by inducing greater investment and lower social unrest"<sup>172</sup>.

Returning to the issue of normative constraints, it is clear from the research that has been brought forward that democracy does play a role in economic growth and related issues, such as the institutional environment, public health, education levels, etc.

In order to close the argument about democracy as a normative constraint, it is necessary to explore the counterpart of the situation studied, that is, does a non-democratic environment also have the capacity to restrict actions that are prejudicial to the structure of the system? If our hypothesis is correct, the communications channeled by the selective pressure of the non-democratic environment may also bring normative constraints, but within an evolutionary framework.

What we see, however, is that with the assumption of modernity, even at times when democracy is supplanted by periods when authoritarianism reigns, there is a kind of rebound effect in which there is pressure to return to democratic structures, even if different from those that existed before the autocracy.

The question of modernity and democracy comes up again: when systems began to be differentiated by reason of their function, together the Spirit of Liberty pierced through their functionalities imbuing them with democratic bias, and it is these biases that act as a form of selective pressure.

Selective pressure comes as a result of an evolutionary process that we call evolutionary achievement and which according to Niklas Luhmann has the following consequences.

**Evolutionary advances tend to reinforce the results of evolution**<sup>173</sup>. They cannot be got rid of. New possibilities for dealing with complexity are gained and other

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<sup>172</sup> ACEMOGLU, Daron; NAIDU, Suresh; RESTREPO, Pascual; ROBINSON, James A. Democracy Does Cause Growth. *Journal of Political Economy*, [S.L.], v. 127, n. 1, p. 47-100, feb. 2019. Retrieved from: <https://economics.mit.edu/files/16686#:~:text=The%20evidence%20suggests%20that%20democracy,try%20that%20remains%20a%20nondemocracy>. Accessed at: 07 Feb. 2022, p. 96.

<sup>173</sup> The official translation of *Die Gesellschaft der Gesellschaft* has chosen to translate *evolutionäre Errungenschaft* as "evolutionary advances", however, we have taken the liberty of using the expression "evolutionary achievement" as it is more appropriate.

societal institutions adapt to them. Eliminating them would have far-reaching, destructive effects and is hence as good as excluded<sup>174</sup>. (Our emphasis)

If one takes democracy as an evolutionary acquisition – and that is what is argued here – it implies that it is not a means by which it was chosen to solve certain problems, but that it began to solve problems when it took on its evolutionary preponderance in systems, after all, “Only when there is magic does one see what it can be used for. Only when municipal offices are established to get rid of kings does filling them have to be politicized and do conditions have to be created that will later be celebrated as ‘democracy’”.<sup>175</sup>

In this way, it can be concluded that democracy acts as a channel for the communications of the systems in which it is present, acting as an instrument of selective pressure. In fact, one can conclude, albeit preliminarily, that democracy is an evolutionary achievement of legal and political systems.

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<sup>174</sup> LUHMANN, Niklas. **Theory of Society**: Volume 1. Stanford University Press: Stanford, 2012, p. 308-309.

<sup>175</sup> LUHMANN, Niklas. **Theory of Society**: Volume 1. Stanford University Press: Stanford, 2012, p. 307.

#### 4 THE DEMOCRACY OF PERIPHERAL MODERNITY

The argumentative path followed so far is justifiable when considering the main objective of the research under development. When we are faced with a concept of democracy whose main argument is the distinction between government and opposition, we see that there is a conceptual insufficiency when we intend to observe the countries that belong to peripheral modernity.

For this purpose, the first topic described modern society, even though focusing on the political and legal systems. By assuming modernity as a paradigm, the theory of social systems was chosen as a theoretical apparatus to better observe the communications that exist in the partial systems that integrate it. Thus, a good understanding of systems theory implies knowing modern society and, consequently, assuming the theoretical assumptions that derive from it.

Due to the thematic delimitation, law and politics were the systems chosen to be analyzed with more accuracy, especially due to the investigative proposition that was assumed: studying democracy.

It is from this premise that we came across the concept of democracy elaborated by Niklas Luhmann: democracy should be conceived as "splitting of the summit [*Spaltung der Spitze*]: the splitting of the summit of the differentiated political system through the distinction between government and opposition"<sup>176</sup>. However, it is argued that this concept is not sufficient to describe the social conjuncture of countries that are inserted in a context of peripheral modernity.

Furthermore, today there is a resurgence of authoritarian and populist aspects that compromise the internal distinction of the political system, no longer guided by the government/opposition criterion, but by friend/enemy relations.

The hypothesis of under-democracy sustained here acts as a distortion in the secondary codification that the legal system makes on the political, as a result of allopoietic influxes in such systems. In other words: the legal and political systems, when inserted in a full process of functional differentiation – what Luhmann comes to call primacy – internal operations occur according to the prescription of the preference codes of the respective systems. In turn, the same cannot be said when observing countries that are inserted in a context of peripheral modernity, since there is a relation of under-democracy that acts on the operations of the systems under observation. It is not a lack of functional differentiation, but a relation that selects

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<sup>176</sup> LUHMANN, Niklas. The Future of Democracy. **Thesis Eleven**, v. 26, n. 1, p. 47, 1990.

communications whose content is not directly related to the structure of the system, but that goes against the idea of democracy as an evolutionary achievement of modernity because, as demonstrated in the previous chapter, democracy acts as a normative constraint.

By assuming these premises, it is necessary to indicate concrete and specific cases in which the hypothesis of under-democracy can be observed. To this end, the phenomena of populism, state of exception, and authoritarianism were chosen to be addressed in this chapter.

The spatial and temporal delimitation is the context of contemporary Brazil, especially after the impeachment of former President Dilma Rousseff, but other historical facts and circumstances regarding other countries and times will not be disregarded since the research agenda around democracy has grown significantly after what we call the Trump's Effect.

#### 4.1 ON PERIPHERAL MODERNITY

At the beginning of the first chapter of this work, modernity was explained, giving special emphasis to the perspective of social systems theory to observe modern society, due to its peculiarities: complexity, polycontextural, and functionally differentiated.

World society becomes an inevitable consequence of the modernization process, that is, a new step in the evolutionary process in which society constantly is involved. Functional differentiation becomes the way in which partial systems emerge and take on their own criteria for an organization.

Assuming such premises, however, implies a monochromatic vision of world society because, although there are regional peculiarities – regionalizations – that work as exceptions to the world society paradigm, but do not refute it, there are specific contexts that are particular to world society that does not fit into the regionalization exception.

A possible solution to this problem was developed by Marcelo Neves when he developed the concept of peripheral modernity. Under the adjective "peripheral" lies the distinction of the form center and periphery, which is often used in an economic context, especially in the various contexts in which capitalism emerged. Furthermore, Neves points out that one should not incur simplifications about the concept of periphery, since this distinction can be found even in central and peripheral countries<sup>177</sup>.

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<sup>177</sup> NEVES, Marcelo. **Constituição e direito na modernidade periférica**: uma abordagem teórica e uma interpretação do caso brasileiro. São Paulo: WMF Martins Fontes, 2018, p. 102-103.

The justification for developing the concept of peripheral modernity is due to the perspective from which the authors who work on the theories of modernity – in a wide sense – are embedded in their own experiences related to the context of central modernity, and the systemic-theoretical paradigm is found in this same circumstance. Observations from these theoretical perspectives, therefore, would not bring correct results about the explanation and observation of society<sup>178</sup>.

Another misconception that must be dispelled about the idea of peripheral modernity is that it does not invoke a hierarchical differentiation in which the center would be equivalent to something good and developed, and the periphery would be something bad and underdeveloped. When one speaks of center and periphery, one is asserting a functional division of world society. That said, Neves defines peripheral modernization as a “subordinate integration of a country into world society under the protection of the respective regional political-legal system”<sup>179</sup>.

This distinction between central and peripheral modernity, therefore, brings theoretical gains in the observation of world society because it takes into consideration the regional particularities that countries in the periphery present. This is not to say that there is a singularity of the peripheral countries, but rather a “structural asymmetry”<sup>180</sup>, whether central or peripheral, all countries are inserted into a hyper-complex world society.

When one is inserted in a context of peripheral modernity, as is the case of Brazil, a country lacks in structuring its complexity, and we are not talking about a natural unevenness that arises from the difference between system and environment, but an indeterminacy that compromises the system’s own functionality. In the case of the systems of law and politics, for example, the stabilization of normative expectations and the obedience to binding decisions, respectively, would be compromised.

The process of functional dedifferentiation, therefore, becomes one of the main problems faced by the regions of the periphery, resulting in a structural asymmetry between the center and the periphery.

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<sup>178</sup> NEVES, Marcelo. Os Estados no centro e os Estados na periferia: alguns problemas com a concepção de Estados da sociedade mundial em Niklas Luhmann. **Revista de Informação Legislativa**, [S.L], v. 2, n. 206, p. 112-113, Apr. 2015.

<sup>179</sup> NEVES, Marcelo. **Constituição e direito na modernidade periférica**: uma abordagem teórica e uma interpretação do caso brasileiro. São Paulo: WMF Martins Fontes, 2018, p. 104-105.

<sup>180</sup> NEVES, Marcelo. Posfácio à edição brasileira: constitucionalismo periférico 26 anos depois. In: NEVES, Marcelo. **Constituição e Direito na Modernidade Periférica**: uma abordagem teórica e uma interpretação do caso brasileiro. São Paulo: WMF Martins Fontes, 2018. p. 380.

Based on this diagnosis, it is necessary to explain how functional dedifferentiation occurs, as well as its consequences.

#### 4.1.1 Functional dedifferentiation and systemic corruption

“The differentiation concept enabled modern society to admire and criticize itself”<sup>181</sup>. This quote serves as the epigraph that opens the topic of functional differentiation in the first chapter. The repetition – purposeful – of the quote serves to highlight how the differentiation of society is an extremely relevant mechanism, especially when it comes to modern society.

On functional differentiation, what needed to be explained was already done in the first chapter. What we propose here is to analyze when the process of functional differentiation is damaged by unwanted infiltration from the environment. In fact, systemic irritations coming from the environment will always occur, since it is impossible for a system to function perfectly without any interferences. What is being postulated here is when the very structure of the system is compromised by the environment.

When system and environment cease to have their distinction defined, this is what we call functional dedifferentiation. In this case, not even structural couplings and other filtering and selection mechanisms are able to distinguish external communications from the environment, as well as reproduce internal communications.

A relevant concept of the systemic paradigm has been left aside, so far, but not neglected, in the present research. When we say that a system is autonomous, we are stating that it is capable of determining its own rules of operation and that the system is built by the operations that build it. This relationship of self-production is what we call autopoiesis<sup>182</sup>.

However, the idea of autopoiesis cannot be taken to its ultimate consequences in world society because of the structural asymmetry in which the countries of peripheral modernity are

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<sup>181</sup> LUHMANN, Niklas. **Theory of Society**: Volume 2. Stanford University Press: Stanford, 2013, p. 2.

<sup>182</sup> Originally developed in the context of biology – specifically for biological systems – by Humberto Maturana and Francisco Varela (*A árvore do conhecimento: as bases biológicas da compreensão humana*. São Paulo: Palas Athena, 2011), the idea of autopoiesis was brought to social systems by Niklas Luhmann. However, the reception of the concept was modified in order to be applied in the sociological context. Thus, systems were divided between those constituted of meaning (psychic and social systems) and those that were not constituted of meaning (organic and neurophysiological). While in the biological perspective of autopoiesis there is a radical closure between the system and the environment, with the need for an external observer, in the systems constituting meaning, self-observation is an indispensable element for autopoietic reproduction. In NEVES, Marcelo. From the Autopoiesis to the Allopoiesis of Law. **Journal of Law and Society**, [S.L.], v. 28, n. 2, p. 244, Jun. 2001.

inserted. With special reference to the law system, Neves states that in most of the world society law is not an autopoietic system, but an allopoietic one<sup>183</sup>.

Unlike autopoiesis, in which a system makes use of reflexive criteria for its reproduction, allopoiesis uses the communications of the environment to reproduce the system, without considering internal criteria or even structural couplings. The operability of the system, therefore, is compromised.

When a system ceases to operate according to its preferred codes, it begins to produce forms of rationality from other systems, which, in this case, are its environment. The political system, for example, when its structure is compromised to the point that it is no longer guided by the distinction between government and opposition, becomes influenced by the codes of other systems, such as the economy<sup>184</sup>.

This overlapping of codes is not unusual, since there is not a perfect and symmetrical relationship between system and environment. One cannot expect that the whole structure and structural couplings will respond with fullness to all the stimuli that the environment causes in the system. The problem is when this phenomenon of overlapping of one system over another occurs not in an occasional or punctual way, but perennially, compromising the functional differentiation of the system.

When a system is expected to behave in one way, generating one expectation, but ends up responding in another way, the function of complexity reduction is not being fulfilled. If modernity arises under functional differentiation, resulting in autonomous systems; when one system begins to mischaracterize the autonomy of another, we call this functional dedifferentiation.

When one speaks of a process of functional dedifferentiation, one is necessarily implying a case of systemic corruption, which here should be understood not in its everyday

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<sup>183</sup> “Derived etymologically from the Greek words *állos* (‘other’) and *poiesis* (‘creation’, ‘production’), this word designates the (re)production of a system through the criteria, programmes, and codes of its environment”. NEVES, Marcelo. From the Autopoiesis to the Allopoiesis of Law. **Journal of Law and Society**, [S.L.], v. 28, n. 2, p. 254, Jun. 2001.

<sup>184</sup> Marcelo Neves is emphatic in highlighting the superposition of the economic system code – he even calls it “**imperial hypertrophy** of the economic code” (our emphasis) – in relation to the other systems, especially the legal and political ones. On the one hand, it is understandable that a symbolically generalized means of communication, such as money, can easily replicate itself in world society. The problem, on the other hand, is when the rationality of the economic system is hypertrophied and starts to guide and corrupt other social systems. In NEVES, Marcelo. Os Estados no centro e os Estados na periferia: alguns problemas com a concepção de Estados da sociedade mundial em Niklas Luhmann. **Revista de Informação Legislativa**, [S.L.], v. 2, n. 206, p. 121, Apr. 2015; NEVES, Marcelo. **Entre Têmis e Leviatã**: uma relação difícil. O Estado Democrático de Direito a partir e além de Luhmann e Habermas. São Paulo: WMF Martins Fontes, 2013, p. 245.

sense, as a kind of exchange of favours, but as the overlapping of codes of one system to the detriment of another.

In countries that are inserted in the central modernity, systemic corruption exists, but it does not imply a process of functional dedifferentiation<sup>185</sup>. However, in peripheral countries, according to Neves, there was not a satisfactory fulfillment of the requirements for the autonomy of a system due to its functional differentiation<sup>186</sup>.

Thus, while modernity in central countries, by supplanting tradition, resulted in the formation of functional systems that have a preference for systemic integration, in peripheral countries what is verified is a kind of hypermodernity – not in the same sense of Gilles Lipovetsky – that "disintegrating hyper-complexity of the hierarchical moralism"<sup>187</sup>.

That being said, it is quite verifiable how the systems of law and politics can be corrupted – systemically – by the economic system. Buying court decisions or illegal lobbying are commonplace examples of the everyday life of these areas. However, a question must arise from the debate about functional dedifferentiation: What about when mechanisms internal to the system turn against it – like an autoimmune disease – and start acting in ways that compromise its structure?

It is at this point that democracy returns to the proscenium of the discussion, since it, by acting as a normative constraint of the systems, should immunize – as much as possible – those destructive communications that could be reproduced inside the systems.

The hypothesis of under-democracy – supported here – manages to absorb this incapacity of democracy, insofar as it has a necessary deficit that does not compromise the structure of the system, but keeps the normative horizon that is to reach standards of Rule of Law, accountability, respect for human and fundamental rights, etc.

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<sup>185</sup> For illustrative purposes, it is appropriate to cite a survey conducted by Transparency International, which interviewed more than 40,000 residents of the European Union, in 27 countries and questioned their perception of corruption in the member countries. According to the survey "[...] less than a third of people (30 per cent) think their government takes their views into account when making decisions. Around half think that bribes or connections are commonly used by businesses to secure profitable government contracts and that big companies often avoid paying their taxes. It is not surprising, then, that more than half of people in the EU think their government is run by private interests". In TRANSPARENCY INTERNATIONAL. **Global Corruption Barometer EU: people worried about unchecked abuses of power.** People worried about unchecked abuses of power. Retrieved from: <https://www.transparency.org/en/news/gcb-eu-2021-survey-people-worry-corruption-unchecked-impunity-business-politics>. Accessed at: 20 Apr. 2022.

<sup>186</sup> NEVES, Marcelo. Os Estados no centro e os Estados na periferia: alguns problemas com a concepção de Estados da sociedade mundial em Niklas Luhmann. **Revista de Informação Legislativa**, [S.L], v. 2, n. 206, p. 121, Apr. 2015.

<sup>187</sup> NEVES, Marcelo. Os Estados no centro e os Estados na periferia: alguns problemas com a concepção de Estados da sociedade mundial em Niklas Luhmann. **Revista de Informação Legislativa**, [S.L], v. 2, n. 206, p. 121, Apr. 2015.

However, what we have seen in recent years – and with special reference to the Trump's Effect – is that the authoritarian discourse has come to occupy a privileged place in the public sphere, whether qualified or not. Even if it is in the discursive sphere, direct and indirect attacks on democracy, which have the function of compromising it, have left the history books and started to gain strength in the streets and in the elections.

The authoritarian aspect, under the guise of establishing itself against the traditional political system – which in Brazil often receives the epithet of "old politics" – begins to modify the way one expects to distinguish the internal difference of the political, through the government/opposition code.

By denying the institutional existence of the opposition – a necessary condition for the existence of democracy, according to Niklas Luhmann – it consequently denies the alternation of power and the peaceful succession of power – a requirement proposed by Adam Przeworski to characterize a democracy.

The fact is that an interruption of democratic politics has not yet occurred, however, what thrives are massive attacks on democratic institutions. Not accepting the results of elections<sup>188</sup> or undermining the credibility of the voting system<sup>189</sup> are increasingly recurrent resources of those who go against the basic premises of any model or concept of democracy.

The authoritarian outbursts that have been proliferating in recent years have a background that can be explained through systems theory: an attempt to reconfigure the political system. In this way, the idea of government and opposition gives way to an orientation whose criteria are that of friend and enemy.

Starting from this premise, it is necessary to work out how this new configuration comes about, as well as its causes and consequences, in addition to approaching how political science, sociology, and law deal with this modification.

#### 4.1.2 Return to Enmity: recodification of political system

Before the existence of a hyper-complex society, a polycontextural society in which systems were formed from the differentiation based on functions, the social organization was

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<sup>188</sup> BBC NEWS. **Capitol riots timeline:** what happened on 6 Jan. one year ago? Retrieved from: <https://www.bbc.com/news/world-us-canada-56004916>. Accessed at: 20 Apr. 2022.

<sup>189</sup> NEW YORK TIMES. **Bolsonaro prompts fears of a power grab with attacks on Brazil's voting system:** President Jair Bolsonaro's attacks on Brazil's voting system as his standing in the polls slips is drawing comparisons to the messy 2020 election in the United States. Retrieved from: <https://www.nytimes.com/2021/08/10/world/americas/brazil-vote-bolsonaro.html>. Accessed at: 20 Apr. 2022.

based on diffuse criteria that were related in such a way that it was not possible to separate or distinguish the functions that were performed.

The social amalgam that was characteristic of pre-modern society was giving way to a society where new forms of orientation were taking place. In the political sphere, the Democratic Revolutions applied too much selective pressure on the systems of law and politics to adopt new forms of arrangement.

The political social differentiation that was organized by strata and guided by the idea of superior and inferior power gave way to a new code of preference that guides political operations by the idea of government and opposition, and it is by this new reference that democracy manages to establish itself in modernity.

However, as already pointed out, the operational closure of the political system occurs through the people, who can recursively reaffirm a democratic political orientation or implode the assumptions of a truly democratic organization, with separation of powers and maintenance of the difference between government and opposition.

One form of rearrangement of the political system, therefore, is the adoption of a new code that will modify the system's own communications. The idea of opposition will undergo a forced decharacterization by those with authoritarian impulses, becoming an enemy of those who detracts from it.

The most usual theoretical expression about the distinction between friend and enemy was made by Carl Schmitt, especially in its relation to politics.

The specific political distinction to which political actions and motives can be reduced is that between friend and enemy. This provides a definition in the sense of a criterion and not as an exhaustive definition or one indicative of substantial content. [...] **The distinction of friend and enemy denotes the utmost degree of intensity of a union or separation, of an association or dissociation.** It can exist theoretically and practically, without having simultaneously to draw upon all those moral, aesthetic, economic, or other distinctions. The political enemy need not be morally evil or aesthetically ugly; he need not appear as an economic competitor, and it may even be advantageous to engage with him in business transactions. **But he is, nevertheless, the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible.** These can neither be decided by a previously determined general norm nor by the judgment of a disinterested and therefore neutral third party<sup>190</sup>. (Our emphasis)

The existence of someone outside the relations of friendship already deserves the distrust of those who share the same particularities. And this should not be taken figuratively:

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<sup>190</sup> SCHMITT, Carl. *The Concept of the Political*. Chicago: The University of Chicago Press, 2007, p. 26-27.

Carl Schmitt is emphatic when he affirms that one should take friend and enemy relations as concrete, and not as metaphors<sup>191</sup>.

In the same vein, but in a contemporary context, Chantal Mouffe makes use of Schmitt's distinction to justify the idea of friend and enemy as one of the possible forms of antagonism in politics. It seems that Chantal Mouffe makes use of a narrative about post-politics that, according to her, is embedded in a cosmopolitanism that results in the very negation of the political<sup>192</sup>.

Mouffe's criticism of Ulrich Beck and Anthony Giddens lacks feasibility, especially when analyzing the international political scene. What we see is not a denial of the Political, as she asserts, but a denial of what can be called the political mainstream, and the best ratifying example is the increase in outsider candidacies in the last elections<sup>193</sup>. Politics, therefore, continues to have its role as a social system, but, contrary to what Mouffe argues, what we see is the increase of speeches against an alleged political establishment – a kind of straw man fallacy.

Part of the criticism that Carl Schmitt develops on the relationship between the idea of friend and enemy is directed towards liberalism, which, for him, would be a form of denial of the political. However, it is not necessary to be an apologist for liberalism to show that Schmitt's diagnosis was wrong, besides the consequences that would come with the rise of National Socialism in Germany.

The totalitarian experiences of the 20th century make us confront the results and consequences of what occurs when the government/opposition schema is exchanged for the friend/enemy idea, which is arranged in an us/them form.

The negative counterpart of this distinction – them/enemies – in the 20th century was the Jews, blacks, gays, etc. Today, with the rise of the authoritarian aspect, foreigners, refugees, LGBTQIA+ and political opponents are the enemies that must be eliminated, either physically or institutionally, excluding them from the benefits of social systems.

Indeed, political minorities have always been persecuted – and, with the pardon of obviousness, that is why they are considered minorities. However, even with the development

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<sup>191</sup> “The friend and enemy concepts are to be understood in their concrete and existential sense, not as metaphors or symbols, not mixed and weakened by economic, moral, and other conceptions, least of all in a private-individualistic sense as a psychological expression of private emotions and tendencies”. SCHMITT, Carl. **The Concept of the Political**. Chicago: The University of Chicago Press, 2007, p. 27-28.

<sup>192</sup> MOUFFE, Chantal. **Sobre o Político**. São Paulo: WMF Martins Fontes, 2015, p. 15.

<sup>193</sup> RICHARDS, Steve. **The Rise of Outsiders: how mainstream politics lost its way**. London: Atlantic Books, 2017.

of an institutional framework that attempts to bar advances that go against the so-called enemies, what we see is that today, even consolidated democracies suffer from an increase in discrimination against minorities.

When comparing some international indexes, it is verified that this is a global phenomenon, which results in concern. According to the Democracy Report 2022 prepared by the V-Dem Institute:

A record of 35 countries suffered significant deteriorations in freedom of expression at the hands of governments – an increase from only 5 countries ten years ago. A signal of toxic polarization, respect for counterarguments and associated aspects of the deliberative component of democracy got worse in more than 32 countries – another increase from only 5 nations in 2011. Autonomy for the electoral management body (EMB) – a critical precondition for democratic elections – has been severely undermined by governments in 25 countries<sup>194</sup>.

The growth of the autocratic spectrum has also increased. According to the Democracy Report 2022, 33 countries (home to 36% of the world's population, which equals 2.8 billion people) are experiencing autocratization, and 20% of the members of the European Union are in the same state (6 of the 27 EU members are in the process of autocratization). As a correlating factor, political parties that raise anti-pluralist flags are the ones that drive autocratization the most: "Anti-pluralist parties drive autocratization in at least 6 of the top 10 autocratizers – Brazil, Hungary, India, Poland, Serbia, and Turkey"<sup>195</sup>.

When a political party chooses to adhere to a program oriented by authoritarian biases, there is an erosion of the institutional reserve that the political system relies on for its own maintenance. Many times, the credibility of the institutional reserves is put in doubt by the leaders that dare to go against the precepts instituted by democracy.

To evaluate the risks that a country runs when its democracy is under threat, Steven Levitsky and Daniel Ziblatt elaborated – based on a study by Juan Linz – four indicators that indicate authoritarian behavior<sup>196</sup>.

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<sup>194</sup> V-DEM INSTITUTE. **Democracy Report 2022**: autocratization changing nature? Retrieved from: [https://v-dem.net/media/publications/dr\\_2022.pdf](https://v-dem.net/media/publications/dr_2022.pdf). Accessed at: 20 Apr. 2022, p. 16.

<sup>195</sup> V-DEM INSTITUTE. **Democracy Report 2022**: autocratization changing nature? Retrieved from: [https://v-dem.net/media/publications/dr\\_2022.pdf](https://v-dem.net/media/publications/dr_2022.pdf). Accessed at: 20 Apr. 2022, p. 7.

<sup>196</sup> LEVITSKY, Steven; ZIBLATT, Daniel. **How democracies die**. New York: Crown Publishing, 2018, p. 24-25.

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|-------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><b>1. Rejection of (or weak commitment to) democratic rules of the game</b></p>  | <p>1.1 Do they reject the Constitution or express a willingness to violate it?</p> <p>1.2 Do they suggest a need for antidemocratic measures, such as canceling elections, violating or suspending the Constitution, banning certain organizations, or restricting basic civil or political rights?</p> <p>1.3 Do they seek to use (or endorse the use of) extraconstitutional means to change the government, such as military coups, violent insurrections, or mass protests aimed at forcing a change in the government?</p> <p>1.4 Do they attempt to undermine the legitimacy of elections, for example, by refusing to accept credible electoral results?</p> |
| <p><b>2. Denial of the legitimacy of political opponents</b></p>                    | <p>2.1 Do they describe their rivals as subversive, or opposed to the existing constitutional order?</p> <p>2.2 Do they claim that their rivals constitute an existential threat, either to national security or to the prevailing way of life?</p> <p>2.3 Do they baselessly describe their partisan rivals as criminals, whose supposed violation of the law (or potential to do so) disqualifies them from full participation in the political arena?</p> <p>2.4 Do they baselessly suggest that their rivals are foreign agents, in that they are secretly working in alliance with (or the employ of) a foreign government—usually an enemy one?</p>           |
| <p><b>3. Toleration or encouragement of violence</b></p>                            | <p>3.1 Do they have any ties to armed gangs, paramilitary forces, militias, guerrillas, or other organizations that engage in illicit violence?</p> <p>3.2 Have they or their partisan allies sponsored or encouraged mob attacks on opponents?</p> <p>3.3 Have they tacitly endorsed violence by their supporters by refusing to unambiguously condemn it and punish it?</p> <p>3.4 Have they praised (or refused to condemn) other significant acts of political violence, either in the past or elsewhere in the world?</p>                                                                                                                                      |
| <p><b>4. Readiness to curtail civil liberties of opponents, including media</b></p> | <p>4.1 Have they supported laws or policies that restrict civil liberties, such as expanded libel or defamation laws, or laws restricting protest, criticism of the government, or certain civic or political organizations?</p> <p>4.2 Have they threatened to take legal or other punitive action against critics in rival parties, civil society, or the media?</p> <p>4.3 Have they praised repressive measures taken by other governments, either in the past or elsewhere in the world?</p>                                                                                                                                                                   |

Knowing that the criteria listed above are not exhaustive for a particular regime to be considered a threat to democracy, it is necessary to face part of the topics with the current Brazilian political situation, to make some diagnoses that enable conclusions.

Therefore, the election of Jair Bolsonaro in 2018, as well as his performance as a congressman and president will be evaluated according to the indicators defined by Levitsky and Ziblatt.

The first point raised is whether the politician under evaluation rejects the rules of the democratic game. It is not a new fact that Jair Bolsonaro has a total appreciation for the dictatorial period led by the military that Brazil went through between 1964 and 1985<sup>197</sup>. As he is a captain in the Brazilian Army Reserve, he acted as a defender of the interests of the Armed Forces when he was a parliamentarian. During the impeachment process of former President Dilma Rousseff, he even dedicated his vote against the then president to the memory of the man who tortured her during the military dictatorship<sup>198</sup>.

In addition to the affection for the Brazilian dictatorial period, another example that goes against the democratic system and is in line with the fourth point raised by Levitsky and Ziblatt is the criticisms made of the electoral system. Several times Bolsonaro discredited the electronic ballot box, in addition to declaring that the 2018 elections, in which he had been elected, were rigged<sup>199</sup>.

The recurrence of praise, by Jair Bolsonaro, to the Brazilian military regime, characterized by numerous acts of censorship, torture, and political persecution, makes the first indicator of authoritarian behavior is in accordance with the first indicator of authoritarian behavior. To disregard the rules of the democratic game is equivalent to disregarding "the only game in town"<sup>200</sup>.

The second indicator lists as symptomatic of authoritarian behavior the "denial of the legitimacy of political opponents". This topic directly corroborates what is being argued in this

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<sup>197</sup> FOLHA DE SÃO PAULO. **Bolsonaro praises the military and says that Brazil under the dictatorship was not too different from today**: Bolsonaro made declarations in Alcântara (MA), where the president handed over land titles. Retrieved from: <https://www1.folha.uol.com.br/internacional/en/brazil/2021/02/bolsonaro-praises-the-military-and-says-that-brazil-under-the-dictatorship-was-not-too-different-from-today.shtml>. Accessed at: 20 Apr. 2022.

<sup>198</sup> BBC NEWS. **Brazilian vote-pledge stirs memories of military rule**. Retrieved from: <https://www.bbc.com/news/world-latin-america-36093338>. Accessed at: 20 Apr. 2022.

<sup>199</sup> THE NEW YORK TIMES. **Bolsonaro prompts fears of a power grab with attacks on Brazil's voting system**: President Jair Bolsonaro's attacks on Brazil's voting system as his standing in the polls slips is drawing comparisons to the messy 2020 election in the United States. Retrieved from: <https://www.nytimes.com/2021/08/10/world/americas/brazil-vote-bolsonaro.html>. Accessed at: 20 Apr. 2022.

<sup>200</sup> PRZEWORSKI, Adam. Democracy as an equilibrium. *Public Choice*, [S.L.], v. 123, n. 3-4, p. 269, Jun. 2005.

topic: the change of orientation of the political system, which is no longer governed by the government/opposition relationship and starts taking into account the friend/enemy distinction.

During the 2018 election campaign, Jair Bolsonaro even called out to the crowd watching him that he would shoot the supporters of the main party running for president in the same election. "Let's shoot the petralhada here" were the words used by the then candidate<sup>201</sup>.

In another circumstance, still, during his campaign for president, in a video directed to his supporters, he even declared that "These red outlaws will be banished from our homeland. It will be a cleanup the likes of which has never been seen in Brazilian history"<sup>202</sup>. One can see that there is an intention, albeit rhetorical, of eliminating political opponents.

Thus, it could be observed above, Jair Bolsonaro behaves in a way to treat his political opponents as if they were enemies who deserve to be eliminated or excluded from the political scene, fitting the second constant item in the relations of authoritarian behaviors that compromise the democratic order.

The third indication of anti-democratic posture is "Toleration or encouragement of violence". As a reserve captain in the Brazilian Army, Bolsonaro entered public life as a defender of the interests of the members of the Armed Forces. This political action began to extend to the issue of public security, also allying himself with members of the state and federal police.

However, the close relationship that he and his sons – also members of Congress – have with members of paramilitary or militia groups raises suspicions about his activities in the field of public security<sup>203</sup>. Furthermore, during his time as a federal congressman, he even declared that the mistake of the Brazilian military dictatorship was to have tortured, not killed,

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<sup>201</sup> THE INTERCEPT. **Political violence surges in Brazil as far-right strongman Jair Bolsonaro inches closer to the presidency**: the far-right politician has repeatedly encouraged violence, but says he has no influence over supporters's actions. Retrieved from: <https://theintercept.com/2018/10/16/jair-bolsonaros-brazil-political-violence/>. Accessed at: 20 Apr. 2022.

<sup>202</sup> THE GUARDIAN. **Brazil's Jair Bolsonaro threatens purge of leftwing 'outlaws'**: presidential frontrunner says rivals will "go overseas, or to jail" in video address to supporters. Retrieved from: <https://www.theguardian.com/world/2018/oct/22/brazils-jair-bolsonaro-says-he-would-put-army-on-streets-to-fight>. Accessed at: 20 Apr. 2022.

<sup>203</sup> THE ECONOMIST. **Jair Bolsonaro will not defeat crime in Brazil by tolerating militias**: like Rodrigo Duterte in the Philippines, he thinks more violence is the answer. Retrieved from: <https://www.economist.com/leaders/2019/05/30/jair-bolsonaro-will-not-defeat-crime-in-brazil-by-tolerating-militias>. Accessed at: 21 Apr. 2022; THE INTERCEPT. **Video: as Brazil's Jair Bolsonaro prepares to meet Donald Trump, his family's close ties to notorious paramilitary gangs draw scrutiny and outrage**: One of the largest and most important countries in the world is now in the hands of a family closely linked to mafiosos, death squads, and murder. Retrieved from: <https://theintercept.com/2019/03/18/jair-bolsonaro-family-militias-gangs-brazil/>. Accessed at: 21 Apr. 2022; THE NEW YORK TIMES. **The Rise of the Milícia State**: Just how deep do the connections between Brazil's paramilitary "death squads" and the government run? Retrieved from: <https://www.nytimes.com/2019/04/10/opinion/brazil-bolsonaro-militias.html>. Accessed at: 21 Apr. 2022.

the opponents of the regime. Even today he is still a defender of the death penalty, which is forbidden by the Brazilian Constitution<sup>204</sup>.

Jair Bolsonaro represents the threats listed in the third topic explained by Levitsky and Ziblatt, since he endorses violent behavior and supports paramilitary groups – directly or indirectly, through his sons –, besides maintaining an anti-democratic institutional posture.

The last indicator of authoritarian behavior listed is related to the "Readiness to curtail civil liberties of opponents, including media". At this point, it is worth highlighting the relationship that Jair Bolsonaro has with the press when he is questioned about his actions as a congressman and as president.

As examples of his stance against the media, one can cite the occasion when, when questioned about the suspected fraud in the purchase of vaccines against Covid-19, he said to the journalist who asked the question to "go back to university, to high school, then to nursery and then you can be reborn"<sup>205</sup>.

In another context, still during the Covid-19 pandemic, Bolsonaro was asked about not wearing a mask in public events, due to the sanitary control required by the pandemic. In response the President said:

Shut up. You are scoundrels. You do a scoundrel journalism. Scoundrels, that don't help anything. You don't help anything. You destroy the Brazilian family. You destroy the Brazilian religion. You are no good. Rede Globo [largest Brazilian media agency] is no good. It's a terrible information agency<sup>206</sup>. (Our translation)

It is unquestionable the role that the press, as well as its free exercise, plays in the effectiveness of the Rule of Law institutions. The aggressions made by Bolsonaro toward news agencies that question his performance demonstrate his incompatible posture toward the rules of the democratic game, as well as the mutual respect for his political opponents.

Accordingly, President Jair Bolsonaro has fulfilled all four requirements exposed by Steven Levitsky and Daniel Ziblatt that describe authoritarian political behavior. Part of the

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<sup>204</sup> Art. 5º XLVII, a: "there shall be no punishment of death, save in case of declared war, under the terms of article 84, XIX In BRAZIL. **Constitution of the Federative Republic of Brazil**. Retrieved from: [https://www2.senado.leg.br/bdsf/bitstream/handle/id/243334/Constitution\\_2013.pdf?sequence=11](https://www2.senado.leg.br/bdsf/bitstream/handle/id/243334/Constitution_2013.pdf?sequence=11). Accessed at: 21 Apr. 2022.

<sup>205</sup> G1. **Bolsonaro volta a insultar a imprensa ao ser questionado sobre vacinas**: presidente também se defendeu de acusações sobre corrupção nas negociações, alegando que a vacina não foi comprada e que houve apenas um erro em um documento. Retrieved from: <https://g1.globo.com/sp/sorocaba-jundiai/noticia/2021/06/25/presidente-jair-bolsonaro-visita-sorocaba-sp.ghtml>. Accessed at: 21 Apr. 2022.

<sup>206</sup> METRÓPOLES. **Bolsonaro é questionado sobre máscara e manda repórter "calar a boca"**: durante evento em Guaratinguetá (SP), presidente não usou o acessório. em 12 de junho, ele foi multado por não usar a proteção em motociata. Retrieved from: <https://www.metropoles.com/brasil/politica-brasil/bolsonaro-e-questionado-sobre-mascara-e-manda-reporter-calar-a-boca>. Accessed at: 21 Apr. 2022.

examples that were exposed occurred during the 2018 presidential campaign, which indicates that Bolsonaro's voters identify with the ideas he uttered.

Returning to the purpose of this topic, namely, the change in the codification of the political system, what is perceived is that, based on what has been reported, the political flag raised by Jair Bolsonaro and his political allies goes against the orientation of the democratic political system.

However, even due to the authoritarian outbursts proffered by the then President and his political base, it cannot be said that Brazil is not a democratic country. According to the Freedom House indices, Brazil is still considered a free country, although it has suffered a decline in the indicators listed.

Freedom in the World – Brazil

| Year | Global Freedom Score | Political Rights | Civil Liberties |
|------|----------------------|------------------|-----------------|
| 2017 | 79/100 (free)        | 31/40            | 48/60           |
| 2018 | 78/100               | 31/40            | 47/60           |
| 2019 | 75/100               | 30/40            | 45/60           |
| 2020 | 75/100               | 31/40            | 44/60           |
| 2021 | 74/100               | 31/40            | 43/60           |
| 2022 | 73/100               | 31/40            | 42/60           |

Retrieved from: Freedom House<sup>207</sup>

In particular reference to the 2022 survey, which takes into account previous years, the way the Federal Government has handled public health policies due to the Covid-19 pandemic, the various declarations of distrust against the Brazilian electoral system, and attacks on

<sup>207</sup> FREEDOM HOUSE. **Freedom in the World: Brazil 2017.** Retrieved from: <https://freedomhouse.org/country/brazil/freedom-world/2017>. Accessed at: 21 Apr. 2022; FREEDOM HOUSE. **Freedom in the World: Brazil 2018.** Retrieved from: <https://freedomhouse.org/country/brazil/freedom-world/2018>. Accessed at: 21 Apr. 2022; FREEDOM HOUSE. **Freedom in the World: Brazil 2019.** Retrieved from: <https://freedomhouse.org/country/brazil/freedom-world/2019>. Accessed at: 21 Apr. 2022; FREEDOM HOUSE. **Freedom in the World: Brazil 2020.** Retrieved from: <https://freedomhouse.org/country/brazil/freedom-world/2020>. Accessed at: 21 Apr. 2022; FREEDOM HOUSE. **Freedom in the World: Brazil 2021.** Retrieved from: <https://freedomhouse.org/country/brazil/freedom-world/2021>. Accessed at: 21 Apr. 2022; FREEDOM HOUSE. **Freedom in the World: Brazil 2022.** Retrieved from: <https://freedomhouse.org/country/brazil/freedom-world/2022>. Accessed at: 21 Apr. 2022.

Supreme Court justices, are factors that contributed to the decrease in the score of political freedom indexes in Brazil.

However, despite all the threats, statements, and the way Jair Bolsonaro conducts public policy, Brazil remains an under-democracy. This pressure for change in codification is still restrained by what can be called institutional brakes. In evolutionary terms, as explored in the previous chapter, democracy, when it had its semantics re-signified in modernity, began to act as normative constraints on the communications produced in the systems.

This implies a circular relationship of influence between the legal and political systems, shared by democracy. The positivization of law, and consequently its formation as a system, only occurs because of democracy, which develops as a political foundation based on values of freedom and equality<sup>208</sup>. In turn, the political system undergoes what Luhmann calls "legal coding of power" and acts as secondary codification<sup>209</sup>.

[...] political power itself can be subject to the law, so that it can assert its own means of coercion only if it is in the right and can amend the law itself only if this takes place under conditions that are provided for in the legal system. The prevailing term for these achievements is the "rule of law," the *Rechtsstaat*. Only through this self-referential juridification of power does the political medium of power become a self-inclusive medium of world construction—quite independently of the liberal ideology that had initially launched the concept as a condition of freedom, earning snide comments in the process<sup>210</sup>.

It is verified, therefore, how law and politics have an interdependent relationship, and this link is made through democracy. Themis – embedded in the semantics of democracy – acts as an instance of delimitation and demarcation for Leviathan's acts, preventing him from loosening his shackles and attacking other social systems.

However, the issue is when the very legitimate elements determined by Themis begin to corrupt the establishment of the boundaries of the Rule of Law. According to the conceptions of people elaborated by Friedrich Müller, it was verified that besides being a means for the operational closure of the political system – active people and people as a global instance of the attribution of legitimacy –, the people can also be invoked in its purely instrumental or rhetorical character – people as icon –, being able to compromise the foundations of democracy through mechanisms developed for the exercise of political citizenship in the Rule of Law<sup>211</sup>.

<sup>208</sup> LUHMANN, Niklas. **Contigência y derecho**: la teoría del derecho em um contexto interdisciplinario. Madrid: Editorial Trotta, 2019, p. 95.

<sup>209</sup> LUHMANN, Niklas. **Theory of Society**: Volume 1. Stanford University Press: Stanford, 2012, p. 213.

<sup>210</sup> LUHMANN, Niklas. **Theory of Society**: Volume 1. Stanford University Press: Stanford, 2012, p. 213.

<sup>211</sup> MÜLLER, Friedrich. **Quem é o Povo?**: a questão fundamental da democracia. São Paulo: Editora Revista dos Tribunais, 2011, p. 51-59.

That being said, it is necessary to understand some phenomena that arise legitimately in the context of democracy, but that can compromise the institutional arrangement established for the continuous march towards the normative horizon that guides a democratic system.

Populism, therefore, will be the first event to be explored, to verify how its expansion acts in the communications produced by politics and law, especially in more recent social contexts.

## 4.2 POPULISM

The term "people", as previously mentioned, has a semantic amplitude that deserves due attention. We made use of Friedrich Müller's classifications because we considered them appropriate for a delimitation of operational terms. The active people, that is, the people with the capacity to vote, and the people as a resource to attribute legitimacy to binding decisions taken at the state level, is what condition the operational closure of the political system, as provided by Luhmann.

Commonly, political constitutions invoke the people as the substance of their legitimacy and the addressee of the normative prescriptions that will be exposed throughout the constitutional text<sup>212</sup>. At least in the etymological scope, this is nothing but the fullness of the concept of people's power (*demos* and *kratos*, in Greek).

However, although the people can be used as an instrument of justification for various political interests, there can also be the invocation of the people in an artificial way as a form of leveraging political discourses, and this has a difference from the recursive use as justification.

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<sup>212</sup> Perhaps the most notable example is the preamble of the Constitution of the United States: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America". In the Brazilian Constitution, the legitimacy of popular power is in the Article 1, Sole paragraph: "All power emanates from the people, who exercise it by means of elected representatives or directly, as provided by this Constitution". In turn, the Basic Law of Germany determines, in its Article 20, 2: "All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies". In UNITED STATES OF AMERICA. **Constitution of the United States**. Retrieved from: [https://www.senate.gov/civics/constitution\\_item/constitution.htm](https://www.senate.gov/civics/constitution_item/constitution.htm). Accessed at: 22 Apr. 2022.; BRAZIL. **Constitution of the Federative Republic of Brazil**. Retrieved from: [https://www2.senado.leg.br/bdsf/bitstream/handle/id/243334/Constitution\\_2013.pdf?sequence=11](https://www2.senado.leg.br/bdsf/bitstream/handle/id/243334/Constitution_2013.pdf?sequence=11). Accessed at: 21 Apr. 2022; GERMANY. **Basic Law for the Federal Republic of Germany**. Retrieved from: [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0014](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0014). Accessed at: 22 Apr. 2022.

What Friedrich Müller called "people as icon" makes it possible to develop political evaluations about the phenomenon of populism, although there is no express correlation between the concepts. This topic, therefore, bases its motivation on what can be called the "populist moment" as described by Chantal Mouffe – albeit here our justification differs from her<sup>213</sup>.

In any case, working on the theme of populism, whether in a contextual framework or as an operational concept, brings us some research problems that we need to overcome in advance to achieve the core of this research.

The first problem to be faced in the present topic is the semantic dimension that the concept of populism brings with it. Like democracy, populism has a wide range of meanings that deserve to be detailed in order not to incur conceptual misunderstandings, which would lead to wrong conclusions<sup>214</sup>.

Chantal Mouffe, for instance, is clear in stating that populism is not an ideology, nor can it be assigned a programmatic content within its political agenda. Populism should also not be understood as a political regime<sup>215</sup>. In his words, populism "It is a way of doing politics that can take various forms according to times and places, and is compatible with a variety of institutional forms"<sup>216</sup>.

To avoid conceptual and theoretical errors, at least in principle, we will use the ideas, as well as the way, just as Ralf Dahrendorf elaborated on populism. Although made briefly, his considerations are very fruitful to preambulate a subject of such relevance.

As previously pointed out, the semantic amplitude of the concept of populism is already the first difficulty to be faced, and this does not go unnoticed in Dahrendorf's eyes, after

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<sup>213</sup> MOUFFE, Chantal. **The populist challenge**: does the fight against post-democracy require a populist political intervention? Retrieved from: <https://www.opendemocracy.net/en/democraciaabierta/populist-challenge/>. Accessed at: 10 May 2022.

<sup>214</sup> For a history of the word "populism," we recommend reading: ROSANVALLON, Pierre. **The Populist Century**: History, theory, critique. Cambridge: Polity Press, 2021, p. 160-171.

<sup>215</sup> According to Nadia Urbinati: "Populism is not a regime of its own. Its style and tenor are derivative of democracy: a type of democracy that is grounded on representation and the constitution; that uses elections along with, occasionally, direct forms of popular vote, such as the referendum and the plebiscite; and whose political arena is made of issue-based associations and partisan affiliations, not solely individual actors and elections. Populism emerges within the domain of opinion and questions all of these features of democracy". In: URBINATI, Nadia. Political Theory of Populism. **Annual Review of Political Science**, [S.L.], v. 22, n. 1, p. 113, 11 May 2019.

<sup>216</sup> MOUFFE, Chantal. **The populist challenge**: does the fight against post-democracy require a populist political intervention? Retrieved from: <https://www.opendemocracy.net/en/democraciaabierta/populist-challenge/>. Accessed at: 10 May 2022.

all, "[...] Accusations of populism can themselves be populist, a demagogic substitute for proper argument"<sup>217</sup>.

If we take the United States context as illustration, the word "populism" has an association with the left-wing that invokes an egalitarian left-wing political stance that runs counter to the Democratic Party which, according to the populists' conception, has taken centrist positions, and not genuinely pro-people<sup>218</sup>.

Another point that should be highlighted is the expressed association of populist movements with the right-wing specter. Today the political movements that incorporate populist precepts are aligned with the agendas that are traditionally linked to the right-wing. However, it should be noted that populism is not exclusive to right-wing movements and may very well be invoked by left-wing governments, as is the case today in Venezuela<sup>219</sup>.

The third point raised by Dahrendorf helps us identify a populist government: "[...] populists are apparently incapable of governing. The advantage they have over democrats in the heat of the election campaign is soon lost when their success catapults them into a cabinet position"<sup>220</sup>.

Such an assertion proves readily true when confronted with the Brazilian political context since the 2018 presidential elections. Brazil has been experiencing a kind of "criminalization of politics," that is, the way of doing politics became the target of more massive attacks by outsiders and politicians who claimed – in rhetoric bias – to be anti-establishment. However, to participate in politics, the candidates elected under this baton disregarded the very rules of the qualified public sphere, which is what we have in a representative democracy.

Forming a base in the National Congress, seeking support for the approval of new laws, and discussing relevant issues in specialized commissions are some of the basic tasks of a politician, but this is not what happens when populist leaders are in power.

They [Populist right-wing leaders] are marginal figures whose attraction lies in their quirkiness. It is partly because they are so different that they are elected. In addition, such populists usually do not create sustainable organisations around themselves.

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<sup>217</sup> DAHRENDORF, Ralf. **Acht Anmerkungen zum Populismus/ Eight remarks on populism**. Retrieved from: [https://www.aspeninstitute.de/wp-content/uploads/A4\\_FNF\\_DAHRENDORF\\_lay.pdf](https://www.aspeninstitute.de/wp-content/uploads/A4_FNF_DAHRENDORF_lay.pdf). Accessed at: 02 May 2022.

<sup>218</sup> MÜLLER, Jan-Werner. **What Is Populism?** Philadelphia: University of Pennsylvania Press, 2016, p. 15.

<sup>219</sup> Ralf Dahrendorf expounds on leftist populism in his Fourth Remark: "Not all areas of populist action are reserved for the right. Against the backdrop of what is usually called globalisation, there is also such a thing as left-wing populism." In **Acht Anmerkungen zum Populismus/ Eight remarks on populism**. Retrieved from: [https://www.aspeninstitute.de/wp-content/uploads/A4\\_FNF\\_DAHRENDORF\\_lay.pdf](https://www.aspeninstitute.de/wp-content/uploads/A4_FNF_DAHRENDORF_lay.pdf). Accessed at: 02 May 2022.

<sup>220</sup> DAHRENDORF, Ralf. **Acht Anmerkungen zum Populismus/ Eight remarks on populism**. Retrieved from: [https://www.aspeninstitute.de/wp-content/uploads/A4\\_FNF\\_DAHRENDORF\\_lay.pdf](https://www.aspeninstitute.de/wp-content/uploads/A4_FNF_DAHRENDORF_lay.pdf). Accessed at: 02 May 2022.

Their parties are loose conglomerates made up of other ambitious marginal figures, but lacking a programmatic core as well as organisational discipline. In a way, they show what political parties are good for<sup>221</sup>.

The political disorganization that surrounds populist governments is worrisome because, besides diverting the focus of analysis from issues relevant to society – or the people to whom it is addressed, according to Friedrich Müller – this dysfunctionality of political activities compromises the very execution of fundamental tasks for the administration of a country's political functions.

Another point about populism is how populist politicians relate to the people when facing their daily tasks and solving the problems that arise daily in the political arena, and almost always are problems of high complexity. What is expected from a politician in a consolidated democracy is that serious evaluations are made to enable responsible decision-making.

This does not happen with the populist: simplistically and crudely, decisions are taken many times of symbolic character, either as a way to confirm the social values of his political base and supporters; as an alibi, to mitigate the effects of some political pressure that the politician has been suffering; or as a formula of dilatory compromise, in which the politician, employing an agreement with his support base, takes a decision that has the intention of postponing the confrontation of the problem, delegating such responsibility to an undetermined future<sup>222</sup>.

The sixth remark about populism made by Dahrendorf touches on a delicate point: the use of direct choice mechanisms in a representative democracy, that is, referendums and plebiscites. It is not being said that such mechanisms are incompatible with democracy, quite the contrary. It is a way for the addressees of political power to make their own decisions about relevant issues for the state, and its constitutional provision ratifies this idea<sup>223</sup>. Dahrendorf's concern is about the circumstances in which these mechanisms of direct choice may be used against democratic institutions themselves.

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<sup>221</sup> DAHRENDORF, Ralf. **Acht Anmerkungen zum Populismus/ Eight remarks on populism**. Retrieved from: [https://www.aspeninstitute.de/wp-content/uploads/A4\\_FNF\\_DAHRENDORF\\_lay.pdf](https://www.aspeninstitute.de/wp-content/uploads/A4_FNF_DAHRENDORF_lay.pdf). Accessed at: 02 May 2022.

<sup>222</sup> The classifications used here were developed by Marcelo Neves in the book **A Constitucionalização Simbólica**. São Paulo: WMF Martins Fontes, 2011, p. 31-42.

<sup>223</sup> **Constitution of the Federative Republic of Brazil**, Article 14. The sovereignty of the people shall be exercised by universal suffrage and by the direct and secret voting, with equal value for all, and, according to the law, by means of: I – plebiscite; II – referendum; III – people's initiative.

In the context of the Brazilian political organization, two plebiscites have already been held, deciding on the form of government that would be in force in the country. In 1963, the Brazilian population chose Presidential System over the parliamentary system<sup>224</sup>. In 1993, following the provisions of the Temporary Constitutional Provisions Act, Brazilian voters had to decide which form of government (republic or constitutional monarchy) and system of government (parliamentary or presidential) would be in force in Brazil under the 1988 Constitution. As a result, today we live under a presidential republic, although there is an urge to modify, through inadequate mechanisms, the decision taken by the Brazilian people<sup>225</sup>.

Going back to Dahrendorf's concern, plebiscites and referenda can be invoked by populists as a rhetorical resource to give the idea that the power to decide the directions of the country is being given back to its rightful owner, the people. One cannot sustain an elitist idea that giving the power of decision to the people is "a 'weapon of massive frustration,' an instrument turned over to 'the meteorology of humors and qualms,' a vector of 'the whims of an instant,' a procedure that could have unintended consequences"<sup>226</sup>. However, caution must be exercised when popular choices can compromise the institutions that make the existence of democracy possible.

The best example of how a popular choice can be damaging to a democratic constitutional order occurred in Germany in 1934, shortly after the death of then-President Paul von Hindenburg. The question asked to German voters at the time of the referendum was as follows:

The office of the President of the Reich is unified with the office of the Chancellor. Consequently all former powers of the President of the Reich are demised to the Führer and Chancellor of the Reich Adolf Hitler. He himself nominates his substitute. Do you, German man and German woman, approve of this regulation provided by this Law?<sup>227</sup>

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<sup>224</sup> It is not convenient to detail all the aspects and the political context at the time of the 1963 plebiscite, since this would go beyond the purposes of this research. For more information about the political conjuncture of this period, we recommend the reading of FIGUEIREDO, Marcus. Os plebiscitos de 1963 e 1993 e a participação eleitoral. *Opinião Pública*, Campinas, v. 1, n. 1, p. 1-8, Jul. 1993. Retrieved from: [https://www.cesop.unicamp.br/vw/1IErOMDM\\_MDA\\_e1154\\_v1n1a01.pdf](https://www.cesop.unicamp.br/vw/1IErOMDM_MDA_e1154_v1n1a01.pdf). Accessed at: 02 May 2022.

<sup>225</sup> NEVES, Marcelo. *Semipresidencialismo é desastre constitucional*: Introduzir elementos parlamentaristas sem consulta popular é inadmissível. Retrieved from: <https://www1.folha.uol.com.br/opiniaio/2022/04/semipresidencialismo-e-desastre-constitucional.shtml>. Accessed at: 02 May 2022.

<sup>226</sup> ROSANVALLON, Pierre. *The Populist Century*: History, theory, critique. Cambridge: Polity Press, 2021, p. 110.

<sup>227</sup> CENTRE FOR RESEARCH ON DIRECT DEMOCRACY - C2D. *Adolf Hitler as President and Chancellor of the Reich*. Retrieved from <https://c2d.ch/referendum/DE/5bbbe29d92a21351232de555>. Accessed at: 02 May 2022.

The approval of the unification of the offices of Führer and Chancellor of the Reich was accompanied by a significant difference in votes. 88.1% were in favor of the unification proposal, while only 9.9% were against it. The consequences of such a choice are already widely known and are marked as a deep scar in world history.

The content of what is decided in plebiscites and referendums must be limited so that the fundamental rights of a democracy are not put to the test. Because it is a relation of tension in the dispute of political space, democracy is already tested daily in its own space of dissent, which does not mean that it is flawed because of this, but that is part of its constitutive nature. What cannot be conceived, and should be avoided at all costs, is to test the institutional limits and demarcations that a democratic regime determines, and this is what populist politicians claim.

Populists do not seek greater popular participation as a way of granting and bestowing political responsibilities to the people. The people are an icon that is invoked for instrumental purposes to ratify the decisions that the populist has already conjured up within his political agenda.

Yet, one might object, don't populists often demand more referenda? Yes. But one needs to be clear about what the meaning of a referendum for populists really is. They do not want people to participate continuously in politics. A referendum isn't meant to start an open-ended process of deliberation among actual citizens to generate a range of well-considered popular judgments; rather, **the referendum serves to ratify what the populist leader has already discerned to be the genuine popular interest as a matter of identity**, not as a matter of aggregating empirically verifiable interests<sup>228</sup>. (Our emphasis)

In this way, the mechanisms of direct participation, when used in the wrong way, as is the political claim of a populist, have more of a disintegrating function than a way to establish greater political participation of the population.

Moreover, the invocation, by populist politicians, of forms of direct participation still has a personalist appeal in which the people go to meet their leader. The people, exercising their sovereignty through referenda, legitimize their leader who, for his part, has granted his people the opportunity to decide on the political destiny of the nation. This is where the risks of a populist politician invoking upon himself the task of taking care of his people and defending them from their enemies are<sup>229</sup>.

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<sup>228</sup> MÜLLER, Jan-Werner. **What Is Populism?** Philadelphia: University of Pennsylvania Press, 2016, p. 29.

<sup>229</sup> ROSANVALLON, Pierre. **The Populist Century**: History, theory, critique. Cambridge: Polity Press, 2021, p. 123.

Having said this about referendums and plebiscites, let us return to the considerations of Ralf Dahrendorf, who calls parliament a "shield of democracy against populism"<sup>230</sup>. A duly elected parliamentarian is inserted in a space where dissent has the power to be resolved and becomes a concrete decision, neutralizing populist impulses. Therefore, populist politicians always seek political power, often using spurious and artificial anti-establishment discourses that seek to weaken the very organization of indirect democracy mediated by representatives in parliament.

Populists are not in favor of parliaments, they are against experts, they fight against traditional media and the news communicated by the media, they prefer unitary interests to 'interest groups', they favor referenda over other forms of decision-making, and usually do not like administrations and autonomous expert organizations<sup>231</sup>.

The last consideration is a continuity of the defense of the institution of parliament as a mechanism to prevent populist impulses. The reflection made by Dahrendorf leads us to face the deficits that democracy allows to arise: because there is a gap between citizens and those in power, populists make use of this vacuum to reproduce their ideas to reach political positions.

Those who stand firm in the defense of democracy have a lot to do in order not to let the simplistic speeches that enchant a crowd, often tired and disappointed with the political system, prosper.

Understanding the phenomenon of populism, especially in the current context, the populist moment, according to Chantal Mouffe, helps us to diagnose the idea of democracy that we are surrounding. The first institutional erosions of the political system are due to the diffusion and reproduction of the specter of populism.

Such authoritarian impulses can be understood from the mechanisms of circulation [*Kreislauf*] and counter-circulation [*Gegenkreislauf*] of power. In the explanation of the political system, it was seen that it can be subdivided into bureaucratic administration, politics (in narrow sense), and audience. The process of circulation of power occurs as the audience chooses leaders and political programs; the politicians elected by the audience condense the propositions to be taken as binding decisions that, in turn, are those decisions that will be taken

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<sup>230</sup> DAHRENDORF, Ralf. **Acht Anmerkungen zum Populismus/ Eight remarks on populism**. Retrieved from: [https://www.aspeninstitute.de/wp-content/uploads/A4\\_FNF\\_DAHRENDORF\\_lay.pdf](https://www.aspeninstitute.de/wp-content/uploads/A4_FNF_DAHRENDORF_lay.pdf). Accessed at: 02 May 2022.

<sup>231</sup> STICHWEH, Rudolf; AHLERS, Anna L. The Bipolarity of Democracy and Authoritarianism and Its Societal Origins. In: AHLERS, Anna L.; KRICHEWSKY, Damien; MOSER, Evelyn; STICHWEH, Rudolf (org.). **Democratic and Authoritarian Political Systems in 21st Century World Society**: Differentiation, inclusion, responsiveness. Bielefeld: transcript Verlag, 2021. p. 231.

within the public administration, whose addresses are the members of the audience. The audience may react in various ways to the binding decisions so that these decisions will serve as a reference for the public to choose new leaders and political programs<sup>232</sup>.

In turn, the process of counter-circulation, which is induced by the circulation of power and which implies the self-reference of the political system, involves a dependency flow of the three subdivisions: politics (in the strict sense) can hardly function without the projects coming from the public administration. The audience depends on the pre-selection of people (eventual candidates) and political programs that are provided by politics. As far as public administration is concerned, as it expands, it needs the voluntary participation of the public<sup>233</sup>.

In populism what occurs is an implosion of the processes of circulation and counter-circulation of power, eroding the flows and, consequently, the self-reference of the political system. Law, as a secondary codification, is left aside so that populist forms of governance can prosper.

Under-democracy can help us understand that the normative constraints acquired during the maturation of the political system in modernity, although mitigated, continue to operate. Functional differentiation is still maintained, but there is a direct impact of cross-coding that influences the selection of communications in social systems. Although the focus of the present research is politics and law as systems, we maintain that in modernity, the idea of democracy comes to the forefront and thus directly influences other social systems.

Populism is not an exclusivity of the political system and can spread in other systemic contexts, changing its content, but maintaining its procedure of wearing out the structure of reproduction of the communications of a social system<sup>234</sup>. However, populism is the first expression of the deterioration of the democratic resources that are the mainstay of the Rule of Law.

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<sup>232</sup> LUHMANN, Niklas. Machtkreislauf und Recht in Demokratien. *Zeitschrift für Rechtssoziologie*, [s. l.], v. 1, n. 2, p. 164, 1981.

<sup>233</sup> LUHMANN, Niklas. Machtkreislauf und Recht in Demokratien. *Zeitschrift für Rechtssoziologie*, [s. l.], v. 1, n. 2, p. 164, 1981.

<sup>234</sup> Marcelo Neves uses the expression "sociological populism" to describe the fact that a social scientist values the reach and success of his writings by making use of gross simplifications, distortions of ideas, creation of false polemics, and deformation of the theses of classical authors, all with the pretension of presenting himself as something innovative. In: NEVES, Marcelo. Posfácio à edição brasileira: constitucionalismo periférico 26 anos depois. In: NEVES, Marcelo. **Constituição e Direito na Modernidade Periférica**: uma abordagem teórica e uma interpretação do caso brasileiro. São Paulo: WMF Martins Fontes, 2018. p. 378-379, footnote 29.

Once the means of populism profusion are understood, and when assuming its risks, a new stage of the process of decomposition of the political and legal systems will be explored in the next point: the state of exception.

#### 4.3 STATE OF EXCEPTION

In the definition of the state of exception, Giorgio Agamben makes a precise consideration about the relation of anomie established during the exception.

In truth, the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or **a zone of indifference, where inside and outside do not exclude each other but rather blur with each other**. The suspension of the norm does not mean its abolition, and the zone of anomie that it establishes is not (or at least claims not to be) unrelated to the juridical order<sup>235</sup>. (Our emphasis)

If we take into consideration that in the exception what is in force is a situation of legal indetermination, in which it is not known where by which norm the communications should be based and, within this indeterminate space resides, at least in Agamben, the core of the state of exception.

When working on the concept of the state of exception, it is inevitable that the phrase "Sovereign is he who decides on the exception" does not come up. Carl Schmitt's famous assertion already shows how he will deal with the theme of sovereignty in his essays on Political Theology. The conclusion is simple but elegant: if there is an unpredictable context in which there is no finding in the legal order and this can still compromise the existence of the state, then someone must assume the role of sovereign so that the state and all other institutions linked to it do not collapse.

The period in Weimar Germany was a time when Europe was a barrel of gunpowder and, therefore, legal resources had to be thought of to protect itself in case of another great war. Even the system of checks and balances would be left aside in a situation of exception, as Schmitt points out. What matters is to eliminate that which causes the exception<sup>236</sup>.

The interpretation and application of Article 48 of the Weimar Constitution and its consequences are already widely known<sup>237</sup>. When the constitution of a country allows the

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<sup>235</sup> AGAMBEN, Giorgio. **State of Exception**. Chicago: The University of Chicago Press, 2005, p. 23.

<sup>236</sup> SCHMITT, Carl. **Political Theology**: four chapters on the concept of sovereignty. Chicago: The University of Chicago Press, 1985, p. 7.

<sup>237</sup> Constitution of Weimar, Art. 48.2: In the event that the public order and security are seriously disturbed or endangered, the Reich President may take the measures necessary for their restoration, intervening, if necessary,

suspension of fundamental rights, as was the case, one cannot expect anything different from what happened in the 1930s and 1940s.

Giorgio Agamben's considerations about what happened after the use of Article 48 by the one who declared himself the guardian of the constitution are worth quoting:

The state of exception in which Germany found itself during the Hindenburg presidency was justified by Schmitt on a constitutional level by the idea that the president acted as the “guardian of the constitution” (Schmitt 1931); but the end of the Weimar Republic clearly demonstrates that, on the contrary, a “protected democracy” is not a democracy at all, and that the paradigm of constitutional dictatorship functions instead as a transitional phase that leads inevitably to the establishment of a totalitarian regime<sup>238</sup>.

One could conjecture that no legal institute for the exception was ever used after World War II. Even with all the tension during the Cold War, there was not a situation that required the use of state resources for a situation of exception.

As the exception is not expected, decades after the end of the Cold War, exception measures were declared by what claims to be the largest democracy in the world. The attacks suffered by the United States on September 11 led to the enactment of the USA Patriot Act in October 2001 "To deter and punish terrorist acts in the United States and around the world to enhance law enforcement investigative tools"<sup>239-240</sup>.

What happened in Brazil during the years from 1964 to 1985 does not fit into the context of a state of exception. In truth, it was a dictatorial/authoritarian period, which will be adequately explained in a later topic.

Without going into further historical clarifications<sup>241</sup>, the heuristic pretension sustained here is to evaluate how the relationship between the state of exception occurs in a

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with the aid of the armed forces. For this purpose he may temporarily abrogate, wholly or in part, the fundamental principles laid down in Articles 114, 115, 117, 118, 123, 124, and 153.

<sup>238</sup> AGAMBEN, Giorgio. **State of Exception**. Chicago: The University of Chicago Press, 2005, p. 15.

<sup>239</sup> UNITED STATES OF AMERICA. **Uniting and strengthening America by providing appropriate tools required to intercept and obstruct terrorism (USA Patriot Act) Act of 2001**. Retrieved from: <https://www.congress.gov/107/plaws/publ56/PLAW-107publ56.pdf>. Accessed at: 4 May. 2022.

<sup>240</sup> Some sociologists already envision the exhaustion of much sociological theory after the September 11 attacks as well as the economic crises of 2008 and 2016: “The theories of late modernity (Giddens, Beck, and Bauman, but also Castells, Boltanski, and Sassen) that succeeded it have themselves largely been superseded by accelerating, intersecting processes of social destructure, deconstruction, deinstitutionalization, desocialization, and individualization – to the point that we do not know anymore if the concepts of society, the social, the individual, and socialization are still valid after 2001, 2008, and 2016. If one takes them away from the sociological arsenal, domination possibly remains as the only contender”. In VANDENBERGHE, Frédéric; FUCHS, Stephan. On the coming end of Sociology. **Canadian Review of Sociology/Revue Canadienne de Sociologie**, [S.L.], v. 1, n. 1, p. 2, 6 Feb. 2019.

<sup>241</sup> For a historical analysis of the arising of the state of exception, we recommend the reading of: AGAMBEN, Giorgio. **State of Exception**. Chicago: The University of Chicago Press, 2005, p. 11-22.

situation in which the legal and the political have democracy as their normative orientation. Of course, it is not intended to infer that situations of exception are possible and existent. As argued above, the exception can be the next step when populist practices enter into the communications of social systems.

In terms pertaining to social systems theory, the state of exception represents the next step in a process of functional dedifferentiation of the relationship between political and legal systems. In it, it is expected that the domain of the political can encompass the social demands for the preservation of the constitutional state.

Moreover, it should be noted that an eventual constitutional rupture – the structural coupling that mediates the communications between law and politics – does not fit the conjectures of the state of exception, which, according to Gilberto Bercovici, is a partial suspension or derogation of the constitutional order, not having a permanent character<sup>242</sup>.

If we take into consideration the argumentation that was unfolded about populism, it can be inferred that the state of exception can arise from the political management drawn by politicians who make use of the populist mechanisms mentioned above. Although populism can be performed in several ways, it is only when it is exercised by those who take the lead in political power decisions – a necessary redundancy – that the alert for some invocation that can be characterized as an exception is lit.

Such circumstances lead to the situation that Günter Frankenberg called the "hour of the executive branch"<sup>243</sup>. A populist can always take advantage of his own dysfunctionality as a ruler to implement exceptional measures while in office. Frankenberg, on the same occasion, explains that when German politicians in the 1960s suggested adopting exceptional measures, they were stopped by the fear of returning to the tragedy of previous decades.

It is in this context that the theories about the state of exception must be rediscussed in the context in which democracy becomes the rule for the exercise of politics and law. Carl Schmitt drew a conjunctural scenario to present his thesis on the state of exception. One of the points has already been discussed: the distinction of the political system from friend/enemy

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<sup>242</sup> BERCOVICI, Gilberto. **Soberania e Constituição**: para uma crítica do constitucionalismo. São Paulo: Quartier Latin do Brasil, 2013, p. 42.

<sup>243</sup> The expression used by Frankenberg was spoken in 1960 by the then Interior Minister Gerhard Schröder when he presented a state of necessity initiative to the German Parliament [*Bundestag*], which was not seen in a kindly light. In FRANKENBERG, Günter. **Técnicas de Estado**: perspectivas sobre o Estado de direito e o estado de exceção. São Paulo: Editora Unesp, 2018, p. 141.

criteria<sup>244</sup>. However, the factual situation raised by Schmitt leads to a context in which fear for the stranger becomes a condition of possibility for his model of sovereignty-exception-decision.

Driven by a vicious, in places paranoid, anti-Semitism and guided by his militant anti-democratic mindset, Carl Schmitt crusaded passionately against all consequences of revolution and secularization – liberalism, law-rule, parliamentarianism, socialism, ‘anti-Roman attitudes’, the ‘age of bourgeois security’, etc. With this campaign, Schmitt made his name as the main inspirator of preferences for the state of exception grounded on a normatively unleashed political technology<sup>245</sup>.

These are the enemies for which Schmitt raises his theory of the state of exception and that, if it is reused in his molds, it is enough to change the title of the enemy to have a new politics of exception.

Adding to this, one can invoke a decline of the juridical order that functioned as a defense mechanism of state sovereignty, that is, the fragmentation and weakening of Statehood [*Staatslichkeit*], due to jurists elaborating the *jus publicum Europæum* that now attended to a state reason that had a preference for neutrality<sup>246</sup>.

It is undeniable that the State still has predominance in the communications of the political system, but significant criticisms that Schmitt made, and are followed by populists of the left and right, do not deserve to prosper when looking at society. The inflation of the political, to the detriment of other systems, should not be a reaction to a decline of the political, since there has not been a twilight of the political, but rather its modification.

In a pessimistic tone, one can allege that it is the economic system that has been inflated due to the market economy and, therefore, corrupts the other social systems. Gilberto Bercovici sustains that economic globalization is causing the reduction of political spaces, substituting political reasons for technical reasons<sup>247</sup>.

To disagree with this consideration, we corroborate with Andreas Fischer-Lescano and Gunther Teubner in the following:

A first conception that must be dispensed with is the widespread assumption that global legal fragmentation is primarily a result of the internationalization of the economy. The economic steering mechanisms of the Nation-State have supposedly been unable to keep pace with the creation of distinct global markets; instead, a variety of competing global regulation regimes have been established, each with their own legal decisional instances globalization can, however, be termed "polycentric globalization. The primary motor for this development is an accelerated differentiation of society into autonomous social systems, each of which springs

<sup>244</sup> See the topic “Return to Enmity: recodification of political system”.

<sup>245</sup> FRANKENBERG, Günter. **Political Thecnology and the erosion of the Rule of Law: normalizing the State of Exception**. Cheltenham: Edward Elgar Publishing, 2014, p. 104-105.

<sup>246</sup> SCHMITT, Carl. **O Conceito do Político**. Lisboa: Edições 70, 2015, p. 38. (Foreword to 1963’s edition)

<sup>247</sup> BERCOVICI, Gilberto. **Soberania e Constituição: para uma crítica do constitucionalismo**. São Paulo: Quartier Latin do Brasil, 2013, p. 334.

territorial confines and constitutes itself globally. This process is not confined to markets alone but also encompasses science, culture, technology, health, the military, transport, tourism and sport, as well as, albeit in a clearly somewhat retarded form, politics, law and welfare; each of whose current developmental logic has today carved out an autonomous global system<sup>248</sup>.

Indeed, the economy has facilities to spread globally, but one cannot attribute to it a directing role for all social systems, just as one cannot attribute to law a function of mediation between systems and the Lifeworld [*Lebenswelt*] as Jürgen Habermas does.

Returning to Bercovici's criticism, he calls optimists those who maintain that there has been a modification of state power without compromising statehood and that a process of replacing governments with private management structure models that invoke the label of neutral agents in their governance policies is underway<sup>249</sup>.

The neutrality of governance policies can be questioned, but their existence, as well as that of transnational organizations, only proves that there has been a change in the way power is exercised. The Statehood remains; what does not remain is the State model that was in force 100 years ago, when Schmitt developed his theory of the state of exception to protect Germany's sovereignty and Statehood<sup>250</sup>.

Today a World Statehood [*Weltstaatlichkeit*]<sup>251</sup> is already in sight, and it is because the lack of understanding of this new configuration that populist politicians invoke an external

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<sup>248</sup> FISCHER-LESCANO, Andreas; TEUBNER, Gunther. Regime-Collisions: the vain search for legal unity in the fragmentation of global law. *Michigan Journal of International Law*, Michigan, v. 25, n. 4, p. 1005-1006, Jul. 2004. Retrieved from: <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1282&context=mjil>. Accessed at: 11 May 2022.

<sup>249</sup> BERCOVICI, Gilberto. *Soberania e Constituição: para uma crítica do constitucionalismo*. São Paulo: Quartier Latin do Brasil, 2013, p. 334.

<sup>250</sup> Hauke Brunkhorst argues that throughout history have developed – co-evolution, in his terms – various forms of Statehood: In the 12th and 13th centuries, the old cosmopolitan ideas were embodied in a societal grand experiment – and with enormous historical effects – for the first time in history. The most important was that universal and plural statehood since the earliest beginnings of a modern society in Europe are emerging in *co-evolution*. This co-evolution was activated by the *universal legal state of the church*. Only a short time later, however, did the powerful European kingdoms start copying the path-breaking administrative and legal innovations of Canon Law (Schilling 1999: 387; Strayer, 1970: 22; see Hollister and Baldwin, 1978). The universal state of the Church, the new and renewed kingdoms, the Empire and the predominantly new republican city states are socially integrated by a kind of *universal constitutional law*. As opposed to the standard reading of the emergence of modern statehood through absolutism and Protestantism since the 16th century, on the basis of studies of Berman, Moore, Brundage, Strayer, Tierney, Fried and others attempted to develop an alternative thesis that *modern statehood emerged from the cooriginality of the cosmopolitan or universal state and the territorial state, which first became the modern nation state much later*. (Author's emphasis). In BRUNKHORST, Hauke. The co-evolution of cosmopolitan and national statehood – Preliminary theoretical considerations on the historical evolution of constitutionalism. *Cooperation And Conflict*, [S.L.], v. 47, n. 2, p. 186, Jun. 2012.

<sup>251</sup> ALBERT, Mathias. Einleitung: Weltstaat und Weltstaatlichkeit: Neubestimmungen des Politischen in der Weltgesellschaft. In: ALBERT, Mathias; STICHWEH, Rudolf (org.). *Weltstaat und Weltstaatlichkeit: Beobachtungen globaler politischer Strukturbildung*. Wiesbaden: VS Verlag für Sozialwissenschaften, 2007. p. 9-23.

enemy and make the argument that a "globalist order" conspires against their governments and ways of doing politics.

In the same aspect, still rooted in a friend/enemy relationship, economic arguments are used to defend alleged sovereignty, demonstrating how populist rhetoric makes use of nationalist bases to promote its way of conducting politics. Perhaps the best example of this is the Brexit, which relied on a narrative around defending England's interests but failed to see how economic integration was beneficial to the English.

One notices that there is a kind of link between the way the populist acts while exercising his public function and the defense of his populist way of doing politics, which can result in its use to justify the application and use of mechanisms of exception.

Thus, a lot of care must be taken when clamoring for inflation of the political system, within its attribution as the Executive Branch, so that its function of making binding decisions does not compromise the mechanisms of checks and balances, which are assured by the constitution and by the legal system, as a secondary codification of the political system.

The disruption of order during the exception leads us to a situation that may be unsustainable for the recovery of the democratic structures of the system, going from a state of exception to an authoritarian relationship in which the political begins to dominate most of the communications of society and that may be a point of no return for the maintenance of civilizational acquisitions won over the years.

#### 4.4 AN ADDENDUM: LAWFARE

As an unfolding of the articulation we made around populism and the state of exception, it is necessary to fulfill an investigative demand, even if made as a brief excerpt, which relates to contemporary politics, especially in the Brazilian case, which is the spatial delimitation of the research in development.

The discussions that address Lawfare have gained evidence, especially since the trial of the former president of Brazil, Luiz Inácio Lula da Silva – Lula when he was accused of corruption. Although the theme is not new, research on the subject gained momentum with the event.

Before the Brazilian case, Lawfare was spoken of in a context more related to international relations since it was understood as a mechanism or "weapon of war"<sup>252</sup>. Today, a domestic perspective has been adopted in relation to the procedure understood as Lawfare.

The justification for raising an excerpt on Lawfare in a thesis on democracy is supported by the argumentative path that involves the weakening of the normative constraints – evolutionary achievements of the systems – which suffer with the reinforcement of movements of a populist spectrum that may become, or aggregate, authoritarian characteristics, and compromise, in an irremediable way, the structures of the systems that are guided according to democratic criteria.

When we speak of Lawfare, the function of stabilization of normative expectations is left aside to assert its instrumental use, which does not necessarily imply that the instrumentality of law is something new or unnecessary – see procedural law, in which the forms are means to guarantee the right.

Once explored the relationship between the recodification of the political system, which is no longer guided, in a democratic environment, by a government/opposition relationship, and starts to consider criteria around friend/enemy, due to the upsurge of antidemocratic movements, one may adopt the concept of Lawfare as being "the strategic use of the law with the purpose of delegitimizing, harming or annihilating the Enemy"<sup>253</sup>.

Once again, the relationship with the stranger causes measures to be taken that go against the premises of what may be considered "the only game in town"<sup>254</sup>. In the political dimension it is easier to understand the friend/enemy relationship because, generally, but not exclusively, the nationalist character ends up establishing the form between nationals and

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<sup>252</sup> It is worth mentioning the origin of Lawfare as a concept: "In recognition of law's increasing utility as a weapon of war, Dunlap, then a colonel in the U.S. Air Force Judge Advocate General's Corps, in November 2001 introduced the term 'lawfare' into the mainstream legal and international relations literature. He ultimately defined "lawfare" as the strategy of 'using—or misusing—law as a substitute for traditional military means to achieve an operational objective.' Despite the term having been coined by a U.S. government official, the U.S. government has only sporadically engaged with the concept of lawfare. It has no lawfare strategy or doctrine, and no office or interagency mechanism that systematically develops or coordinates U.S. offensive lawfare or U.S. defenses against lawfare". "In contrast with the concept of law as a weapon of war, the word "lawfare" seems to have first appeared in 1975 in a paper on mediation by John Carlson and Neville Yeomans. Expressing concern that the Western legal system had become too adversarial, Carlson and Yeomans wrote that 'Lawfare replaces warfare and the duel is with words rather than swords.' For Carlson and Yeomans, lawfare was clearly a portmanteau of—that is, a word whose form and meaning are derived from a blending of—the two distinct words 'law' and 'warfare'" In KITTRIE, Orde F. **Lawfare: law as a weapon of war**. Oxford: Oxford University Press, 2016, p. 2-3; 6.

<sup>253</sup> ZANIN, Cristiano; MARTINS, Valeska; VALIM, Rafael. **Lawfare: waging war through law**. Oxon: Routledge, 2022, p. 7.

<sup>254</sup> PRZEWORSKI, Adam. Democracy as an equilibrium. **Public Choice**, [S.L.], v. 123, n. 3-4, p. 269, Jun. 2005.

foreigners. In turn, when it comes to the legal sphere, the enemy is inserted in domestic relations and now a symbolic resource is necessary for the elimination of the so-called enemy.

Lawfare meets this demand for a mechanism to eradicate the enemy by institutional means. With the end of the Second World War, a system of protection of fundamental rights began to be elaborated to avoid another event of the same dimension to happen again. Lawfare circumvents these guarantees instituted within a civilizing process, seeking elimination of the enemy.

The risks of inflation of the political system without the secondary codification of the law have already been exposed in the previous topic. Now we must pay attention to when the political repercussion of legal acts is inflated, and it is in this line that Lawfare unfolds. It is not mere domination of the political over the legal, as Roberto Gargarella<sup>255</sup> states, but a distortion of what was democratically established – on a political level, such as the promulgation of law – to be placed to political use.

Added to this is a popular movement that incurs the anti-establishment discourses that populist politicians use to gain support. The judiciary, which should have a counter-majoritarian role, begins to respond to popular desires, orienting itself by any criteria other than the law.

One can also return to the words of Roberto Gargarella when he said that Lawfare, at least in Latin America, is a fiction created to justify the corruption scandals practiced by those who for years was at the head of the government. But it is urgent to ask Gargarella what name should be given when is exposed collusion between members of the Public Prosecutor's Office and the Judiciary to secure the sentence of a defendant who has become a political enemy or, within the theoretical parameters that we have established here, an enemy<sup>256</sup>?

One can give the benefit of the doubt to other countries of Latin America – by not being part of the geographical delimitation of this thesis, we cannot comment on their political situation – but one can pay attention to what happened in Brazil during a lawsuit that had the purpose of removing from the dispute of the elections for President the candidate who was in

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<sup>255</sup> INFOBAE. **Roberto Gargarella: “No hay lawfare, sino una burda y patética historia de dominio del poder sobre la Justicia”**: En su nuevo libro, el jurista ensaya siete tesis para analizar el malestar con el sistema político en América Latina. “Las elites dirigentes tienen esa capacidad de decidir y pactar lo que más le conviene para la preservación de sus privilegios”, sostuvo en una entrevista con Infobae. Retrieved from: <https://www.infobae.com/politica/2021/01/17/roberto-gargarella-no-hay-lawfare-sino-una-burda-y-patetica-historia-de-dominio-del-poder-sobre-la-justicia/>. Accessed at: 17 May 2022.

<sup>256</sup> THE INTERCEPT. **Breach of Ethics: Leaked Chats between Brazilian judge and prosecutor who imprisoned Lula reveal prohibited collaboration and doubts over evidence**. Retrieved from: <https://theintercept.com/2019/06/09/brazil-lula-operation-car-wash-sergio-moro/>. Accessed at: 17 May 2022.

first place in the polls so that, soon after, the candidate who was in second place, and wins the election, invite the judge who conducted the lawsuit to participate in his government.

The "sentimental jurisprudence"<sup>257</sup> used by the then judge, who assumes the defendant as his disaffected, denounces how the friend/enemy relationship occurs in law, especially in the circumstances of Lawfare, exposed here.

This excerpt, therefore, has its justification in relating how the law, which albeit is in a relationship of tension, still has its form of secondary codification over the political, and when this relationship is distorted or even masked, one can incur in an institutional disaster or, making use of the language of the theoretical matrix we have adopted, systemic dysfunctions.

When exposing how populist policies can trigger regimes of exception, the Lawfare ends up appearing as one of the consequences that this agenda can incur on the institutions that establish the Rule of Law.

As already mentioned, Niklas Luhmann understands democracy as being "the splitting of the summit"<sup>258</sup> and, for such reason, to cultivate the opposition is to cultivate the democratic structure itself.

It now remains for us to address the last step when one is walking in the wake of populism. The political is inflated and there is an enemy to be fought. Therefore, the chains that try to keep Leviathan in check are broken... but at what cost?

#### 4.5 AUTHORITARIANISM

The lack of opposition necessarily implies the absence of democracy. When establishing the predominance of the orientation of the political system by friend/enemy criteria, it is assumed that there is a disregard for the communicative structure that gives form to the political system with democratic bases.

Moreover, the opposition must have the structural conditions to be able to play its role in raising objections to binding decisions made by those in power. Consequently, those who find themselves in the circumstances of the opposition must also have the possibility, through elections, of assuming the positions contested in each electoral cycle.

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<sup>257</sup> NEVES, Marcelo. Jurisprudência Sentimental e Medieval: condenação com base em suspeição e na animosidade ao "inimigo da sociedade". In: PRONER, Carol; CITTADINO, Gisele; RICOBOM, Gisele; DORNELLES, João Ricardo (org.). **Comentários a uma sentença anunciada: o Processo Lula**. Bauru: Editorial Praxis, 2017. p. 408.

<sup>258</sup> LUHMANN, Niklas. The Future of Democracy, **Thesis Eleven**, v. 26, n. 1, p. 47, 1990.

What seems obvious, if one takes civilizational achievements as parameters, finds no support when it comes to authoritarian practices. The mitigation of the opposition is always the first point to be praised when authoritarian propensities begin to surface during the term of an anti-democratic government.

Alongside the undermining of political opposition is the right to suffrage. Today it is expected that the institutional reserve that democracy carries can bar such challenges to the right to vote, which is plausible. However, the authoritarian politician will not use criticism of the right to vote – after all, he was elected – but of the electoral system that coordinates the counting procedures.

If we understand that in modernity the political system is no longer guided by a hierarchical relationship of power but considers the distinction between government and opposition, it becomes easier to understand how this reorientation of codes affects the operability of the system.

Nevertheless, a distinction should be made: if in a pre-modern context, the differentiation of the political system took place through hierarchical relations, the eventual decharacterization of democracy as a guide of the political system in modernity does not imply its return to hierarchical stratification. What actually occurs, due to functional differentiation, is a recodification, leaving aside the idea of government/opposition to give way to friend/enemy relations.

This is relevant because the structural modifications arising from the process of functional differentiation in modernity make it difficult – but not impossible – to return to pre-modern situations, except in the circumstances of regionalization. Thus, differentiation would remain, but with another orientation than that of democracy.

Nevertheless, after having understood the path that political and legal systems take when entering populist practices, which have great possibilities of incurring in regimes of exception, it remains for us to speculate on the fatality of the total disregard of democracy, as well as its systemic implication.

Autocracy arises within circumstances of regionalization, bearing in mind that in world society what prevails is functional differentiation. In autocratic regimes, the political system may still differentiate itself hierarchically, since what is expected in an autocracy is the permanence of the domination of a certain group or leadership over the population at large.

If we take as an example the residual regionalizations of the formation process of modernity, the pre-modern characters in force are more noticeable. However, if we observe the

discarding of the democratic orientation, we see residual elements of democracy remaining as a form of legitimation and perpetuation of the authority that now assumes power.

The elites of authoritarian countries mostly accept, indeed must accept, an inclusive collectivity of all others (all those who are dominated by the elite). Thus, these countries often have elections, parties, parliaments and other institutional aspects characteristic of democracies. However, there are always sharply drawn boundaries that demarcate the space where the domination by the elite begins and limits the participation and potential influence of all others<sup>259</sup>.

Therefore, democracy, during the validity of an authoritarian regime, is converted into an instrumental resource for the legitimation of autocracy. While in pre-modernity there was an intact summit and in democracy, this summit goes through a process of division, in political authoritarianism in modernity it would be equivalent to a summit with cracks.

It is interesting to remark how authoritarianism implies a necessary pretension of political inclusion which is based on the populist way of conducting power. The integrality of the upper stratum is maintained under the rhetoric that the binding decisions made are so made for the benefit of the people – as an icon.

Political inclusion in this case should not be seen as access to the benefits of the political system, but only as a justification for binding decisions. Due to functional differentiation having "structural asymmetries"<sup>260</sup> in world society, it cannot be stated that "all the function systems are based on universal inclusion"<sup>261</sup>. What in fact occurs on the periphery of world society, if we consider Marcelo Neves' proposal, is a denial of the inclusive benefits of the system, while there would be a permanent imposition of bureaucratic measures, on which the people become dependent, allied to punitive institutions<sup>262</sup>.

In modernity, therefore, it is verified that the form of establishment of autocratic regimes develops in a different way compared to pre-modern societies, since world society, in which autocracies are inserted, ends up limiting their binding decisions.

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<sup>259</sup> STICHWEH, Rudolf; AHLERS, Anna L. The Bipolarity of Democracy and Authoritarianism and Its Societal Origins. In: AHLERS, Anna L.; KRICHEWSKY, Damien; MOSER, Evelyn; STICHWEH, Rudolf (org.). **Democratic and Authoritarian Political Systems in 21st Century World Society**: Differentiation, inclusion, responsiveness. Bielefeld: Transcript Verlag, 2021. p. 214.

<sup>260</sup> NEVES, Marcelo. Posfácio à edição brasileira: constitucionalismo periférico 26 anos depois. In: NEVES, Marcelo. **Constituição e Direito na Modernidade Periférica**: uma abordagem teórica e uma interpretação do caso brasileiro. São Paulo: WMF Martins Fontes, 2018. p. 380.

<sup>261</sup> STICHWEH, Rudolf; AHLERS, Anna L. The Bipolarity of Democracy and Authoritarianism and Its Societal Origins. In: AHLERS, Anna L.; KRICHEWSKY, Damien; MOSER, Evelyn; STICHWEH, Rudolf (org.). **Democratic and Authoritarian Political Systems in 21st Century World Society**: Differentiation, inclusion, responsiveness. Bielefeld: transcript Verlag, 2021. p. 213.

<sup>262</sup> NEVES, Marcelo. Between Under-Integration and Over-Integration: Not Taking Citizenship Seriously. In: SOUZA, Jessé; SINDER, Valter. **Imagining Brazil**. Lanham: Lexington Books, 2005, p. 68-69.

It is a Herculean task to contradict the occurrences of human rights violations committed by Saudi Arabia, China, South Sudan, and Syria, for instance. In the case of China, it is interesting to note its ambivalent performance: just as currently it is one of the largest economic powers in the world and, as a result, submits to the common practices of the market economy; there is no formal opposition established since the same political party (Chinese Communist Party) dominates the political scene since 1949. This relation between the ambivalence of democracy and authoritarianism in modernity is what Rudolf Stichweh and Anna L. Ahlers call bipolarity<sup>263</sup>.

It is from this bipolar relation between authoritarianism and democracy in modernity that the hypothesis of under-democracy can be raised and sustained. However, before that, one must consider how authoritarianism is maintained in a world society. If we continue with Stichweh and Ahlers' proposal, and assuming it to be valid, the Parsonsian AGIL model should be used to qualify the variants of authoritarianism<sup>264</sup>.

The first function (A-function) is related to adaptation. To be successful, an authoritarian policy makes use of the adaptive capacity and, for such, invests in types of knowledge that will provide safeguards for the adaptation of political capacities and,

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<sup>263</sup> STICHWEH, Rudolf; AHLERS, Anna L. The Bipolarity of Democracy and Authoritarianism and Its Societal Origins. In: AHLERS, Anna L.; KRICHEWSKY, Damien; MOSER, Evelyn; STICHWEH, Rudolf (org.). **Democratic and Authoritarian Political Systems in 21st Century World Society**: Differentiation, inclusion, responsiveness. Bielefeld: transcript Verlag, 2021. p. 218.

<sup>264</sup> The AGIL Paradigm has already been mentioned when dealing with the evolution from a sociological perspective (see Evolution: a sociological approach), but it was not properly explained. It is not our purpose to study Parsonsian functionalism but to examine its use, as Stichweh and Ahlers have done when dealing with the issue of authoritarianism. However, to avoid any doubts about the use of the Paradigm AGIL, we present the explanation made by Jeffrey Alexander: "This AGIL model describes the social system as divided into four different dimensions, none of which corresponds completely to any given institution and each of which relates both to stability and change. The four dimensions represent different degrees of proximity to ideal and material concerns, and the model's intention is to synthesize the idealist and materialist traditions in the most effective possible way. '**Adaptation**' (A) is a dimension that represents the forces in the social system closest to the material world, i.e., the coercive, 'conditional' forces which must be faced and adapted to whether people like it or not. The economy is the sphere most closely connected to the adaptive sphere. '**Goal-attainment**' (G) represents forces which while still heavily influenced by material, adaptive concerns are more subject to ideal control. Organization is the key to this subsystem; it seeks to control the impact of external forces in order to achieve carefully delimited goals. Politics and government are the spheres of society most clearly associated with 'G'. '**Integration**' (I) represents forces that emerge from the inherent thrust toward solidarity. Solidarity is the feeling of 'we-ness' which develops within groups. Because it is group specific, it is regulated by norms rather than broader values. Thus, though much less influenced by objective and material considerations than either adaptation or goal attainment, integration is governed less by purely subjective considerations than one might initially conceive. '**Pattern maintenance**' ('latency' or 'L') represents the most purely subjective forces in society. It is the sphere of general values, though these are values which bear sufficient relation to objective concerns to be institutionalized. Even 'L', after all, is a dimension of the social rather than the cultural system, so it is still subject to material constraints". In ALEXANDER, Jeffrey C. **Parsons' Later Theory** In: ALEXANDER, Jeffrey C. **Twenty Lectures: Sociological Theory since World War II**. New York: Columbia University Press, 1987. p. 92-93. (Our emphasis)

consequently, establish itself in power. According to the authors, "The knowledge systems favored by adaptive autocracies are diverse but there is a certain preference for forms of scholarship/learning and science, especially for the knowledge systems of engineers and economists"<sup>265</sup>, although autocracies do not always resort to scientific knowledge as an adaptive mechanism. If we consider the current Brazilian context, what is most verified is the emptying of the science system.

When one considers of Goal-attainment (G-function), by reason of its differentiation in a hierarchical relation, authoritarianism does not need the approval and confluence of political majorities and minorities to determine its binding decisions. When inserted in an authoritarian context, the leader does not need to provide clarifications about his decisions but also has the reversibility of the decision compromised, since it may give the impression that his authority is weakened<sup>266</sup>.

The integration function (I-function) is linked to the idea of solidarity ("the feeling of 'we-ness'"<sup>267</sup>) in a determined group. In a democracy, one finds an environment in which structurable dissent that results from multicultural integration in the same space prevails. However, Stichweh and Ahlers argue that within this coexistence between different people in a democracy, a hierarchical division may result on the basis of differences, whether linguistic, religious, ethnic, etc.<sup>268</sup> This hierarchical division due to (dis)integration may function as a motive to strengthen an authoritarian regime.

For the maintenance of latent patterns (L-function), democracy makes use of its Eigenvalues, which are mainly based on "self-organization and self-determination of the democratic political collectivity, which is based on the universal inclusion of all the members of the people/nation"<sup>269</sup>. However, in autocracy the values that can be claimed may be based on

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<sup>265</sup> STICHWEH, Rudolf; AHLERS, Anna L. The Bipolarity of Democracy and Authoritarianism and Its Societal Origins. In: AHLERS, Anna L.; KRICHEWSKY, Damien; MOSER, Evelyn; STICHWEH, Rudolf (org.). **Democratic and Authoritarian Political Systems in 21st Century World Society**: Differentiation, inclusion, responsiveness. Bielefeld: transcript Verlag, 2021. p. 234.

<sup>266</sup> STICHWEH, Rudolf; AHLERS, Anna L. The Bipolarity of Democracy and Authoritarianism and Its Societal Origins. In: AHLERS, Anna L.; KRICHEWSKY, Damien; MOSER, Evelyn; STICHWEH, Rudolf (org.). **Democratic and Authoritarian Political Systems in 21st Century World Society**: Differentiation, inclusion, responsiveness. Bielefeld: transcript Verlag, 2021. p. 232; 234.

<sup>267</sup> ALEXANDER, Jeffrey C. Parsons' Later Theory In: ALEXANDER, Jeffrey C. **Twenty Lectures**: Sociological Theory since World War II. New York: Columbia University Press, 1987. p. 92.

<sup>268</sup> STICHWEH, Rudolf; AHLERS, Anna L. The Bipolarity of Democracy and Authoritarianism and Its Societal Origins. In: AHLERS, Anna L.; KRICHEWSKY, Damien; MOSER, Evelyn; STICHWEH, Rudolf (org.). **Democratic and Authoritarian Political Systems in 21st Century World Society**: Differentiation, inclusion, responsiveness. Bielefeld: transcript Verlag, 2021. p. 235.

<sup>269</sup> STICHWEH, Rudolf; AHLERS, Anna L. The Bipolarity of Democracy and Authoritarianism and Its Societal Origins. In: AHLERS, Anna L.; KRICHEWSKY, Damien; MOSER, Evelyn; STICHWEH, Rudolf (org.).

"religions and ideologies that serve as teleological interpretations of the world" which, in turn, would enable the predominance of influence and domination over the communications produced in the social systems<sup>270</sup>.

Regardless of the particularities of specific authoritarian regimes, the appeal to religion has been growing, especially in the timeframe we call Trump's Effect. For its part, in the 2018 elections for the Brazilian National Assembly, around 16% of the seats are occupied by parliamentarians who identify themselves in some way with religious agendas, while in the Senate the representation of politicians with religious agendas is 8.5%<sup>271</sup>. The growing association of politicians linked to religious agendas with populist governments can corroborate the maintenance of latent structures of an authoritarian government, as demonstrated above.

In analyzing the framing of authoritarianism in modernity according to the AGIL Paradigm, Stichweh and Ahlers conclude that there is a close balance in the number of democracies and autocracies in the current conjuncture of world society, as well as the world population living under an autocracy is close to the number of people living under a democratic regime – China contributes to the high number of people under autocracy while India with democracy<sup>272</sup>.

Knowing how populism, state of exception, and, in a more severe way, authoritarianism behave in modernity, especially in world society, helps us to understand the democratic deficits that a country may be submitted to by being inserted in a peripheral modernity context.

The present chapter, therefore, had the scope of exploring what peripheral modernity is, as well as justifying why Brazil finds itself in this context. Furthermore, we have explained how the process of functional dedifferentiation occurs in peripheral modernity and how a

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**Democratic and Authoritarian Political Systems in 21st Century World Society:** Differentiation, inclusion, responsiveness. Bielefeld: transcript Verlag, 2021. p. 223.

<sup>270</sup> STICHWEH, Rudolf; AHLERS, Anna L. The Bipolarity of Democracy and Authoritarianism and Its Societal Origins. In: AHLERS, Anna L.; KRICHEWSKY, Damien; MOSER, Evelyn; STICHWEH, Rudolf (org.). **Democratic and Authoritarian Political Systems in 21st Century World Society:** Differentiation, inclusion, responsiveness. Bielefeld: transcript Verlag, 2021. p. 235.

<sup>271</sup> DEPARTAMENTO INTERSINDICAL DE ASSESSORIA PARLAMENTAR. **Eleições 2018:** bancada evangélica cresce na Câmara e no Senado. Retrieved from: <https://www.diap.org.br/index.php/noticias/noticias/88900-eleicoes-2018-bancada-evangelica-cresce-na-camara-e-no-senado>. Accessed at: 19 May 2022.

<sup>272</sup> STICHWEH, Rudolf; AHLERS, Anna L. The Bipolarity of Democracy and Authoritarianism and Its Societal Origins. In: AHLERS, Anna L.; KRICHEWSKY, Damien; MOSER, Evelyn; STICHWEH, Rudolf (org.). **Democratic and Authoritarian Political Systems in 21st Century World Society:** Differentiation, inclusion, responsiveness. Bielefeld: transcript Verlag, 2021. p. 235-236.

change in the codification of the political system communicates with this process of dedifferentiation.

Within the spatial and temporal boundaries determined for the conduct of this research, what is perceived is an increase in the populist form of conducting politics which, added to the change in the codification that guides the political system, which is no longer democratic – government/opposition relationship – and becomes authoritarian, guided by criteria of friend/enemy, can lead to situations of exception and autocracy.

When working on the relations of authoritarianism in modernity, which were analyzed by Stichweh and Ahlers, it was noticed that there is a bipolar relation between democracy and authoritarianism if we consider the context in which we live. What is verified is a tensioned compatibility – at least in the international scenario – between authoritarian and democratic regimes, in which differences and similarities are contrasted and coexistent. According to Roberto Dutra and Marcos Ribeiro, “Modern politics cannot be reduced to democracy. The so-called “recess of democracy” is not a body alien to political modernity”<sup>273</sup>.

However, some nuances must be detailed when analyzing the relationship between democracy and autocracy in world society within a regional context. Within the circumstances of peripheral modernity, there is no perfect adherence to the Eigenvalues required of a democratic regime, but this does not make it anti-democratic. This ambivalence will be dealt with in the following chapter when we deepen into the concept of under-democracy.

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<sup>273</sup> DUTRA, Roberto; RIBEIRO, Marcos Abraão Fernandes. Existe um autoritarismo brasileiro? **Revista Brasileira de Sociologia – RBS**, [S.L.], v. 9, n. 22, p. 269, 1 Sep. 2021. Sociedade Brasileira de Sociologia.

## 5 UNDER-DEMOCRACY: A PROPOSAL

The conception of democracy proposed by Niklas Luhmann was repeatedly cited in this work: in the political system, when understood as democratic, it is assumed that there is a "splitting of the summit" and for its effectiveness, besides the orientation of structures and communications towards the government/opposition code, the assumptions of the systems theory are assumed that there must be the division of powers, systemic inclusion, structural couplings that are functional and operative – in the case of the systems of law and politics, the Constitution has this function.

However, in adopting the Luhmannian paradigm, one realizes that there is a series of observations that are made from the central perspective and that do not take into account the particularities – which are not equivalent to singularities – those regions that are not at the center of world society possess.

In this sense, we make use of the distinction made by Marcelo Neves between what he called central modernity and peripheral modernity. In world society, due to regionalization, states are still the main delimiter of the political system and, therefore, may be subject to one of these two contexts of modernity. However, when we speak of peripheral modernity, it is recognized that there is a "subordinate integration of a country into world society under the protection of the respective regional political-legal system"<sup>274</sup>.

This chain of "subordinate integration" expresses that there is a functional-systemic relationship different from the communicative operations that take place in the central countries. There is a "structural asymmetry"<sup>275</sup> between the center and periphery that requires consideration when making observations from other systems, as is the case of the scientific system when doing a thesis on democracy in peripheral modernity.

This question brings us back to the theme of democracy: how should it be observed when situated in a context of peripheral modernity? At this point, we propose the hypothesis of the idea of under-democracy as distortion of a secondary coding that the legal system operates over the political system.

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<sup>274</sup> NEVES, Marcelo. **Constituição e direito na modernidade periférica**: uma abordagem teórica e uma interpretação do caso brasileiro. São Paulo: WMF Martins Fontes, 2018, p. 104-105.

<sup>275</sup> NEVES, Marcelo. Posfácio à edição brasileira: constitucionalismo periférico 26 anos depois. In: NEVES, Marcelo. **Constituição e Direito na Modernidade Periférica**: uma abordagem teórica e uma interpretação do caso brasileiro. São Paulo: WMF Martins Fontes, 2018. p. 380.

To sustain such hypothesis, we resume the line of the previous chapter, in which it was seen how democracy and autocracy are statuted in countries that are inserted in the world society. Thus, based on the idea of bipolarity, we will verify the dual relation that occurs between the two extremes mentioned above – democracy and authoritarianism – to arrive at a proposal that can assimilate the peculiarities of both political spectrums.

For this purpose, some intermediate concepts will be explored, and we will see if they fit or not with the proposal raised for this work: the conception of under-democracy to describe the political scenario of countries that are inserted in the peripheral modernity, focusing on the Brazilian case.

Following this path, the first point to be treated refers to the hypothesis that world society has passed through waves of democracy, as will be seen below.

## 5.1 DEMOCRATIZATION IN WAVES

The idea that world society has gone through a series of waves of democracy was raised by Samuel Huntington in 1991 and sustained that during the 20th century three moments were experienced in which the democratization of the political process was predominant. Although modernity had already experienced its Democratic Revolutions – the French and American Revolutions – three temporal spaces, according to Huntington, would have accommodated one of change from a non-democratic state to a democratic institution.

In this passage from non-democracy to democracy a type-ideal called waves of democratization was developed and can be understood as follows:

A wave of democratization is a group of transitions from nondemocratic to democratic regimes that occur within a specified period of time and that significantly outnumber transitions in the opposite direction during that period of time. **A wave also usually involves liberalization or partial democratization in political systems that do not become fully democratic.** Three waves of democratization have occurred in the modern world. Each wave affected a relatively small number of countries, and during each wave some regime transitions occurred in a nondemocratic direction. In addition, not all transitions to democracy occurred during democratic waves<sup>276</sup>. (Our emphasis)

Therefore, by assuming this hypothesis, the author detected three waves of democratization, with reverse waves – like a rebound effect – having also occurred in the face of the first two waves:

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<sup>276</sup> HUNTINGTON, Samuel P. **The Third Wave**: Democratization in the Late Twentieth Century. Norman: University of Oklahoma Press, 1991, p 15.

### Waves of democratization

|                                |         |           |
|--------------------------------|---------|-----------|
| First wave of democratization  | Long    | 1828-1926 |
| First reverse wave             | Short   | 1922-1942 |
| Second wave of democratization | Short   | 1943-1962 |
| Second reverse wave            | Short   | 1958-1975 |
| Third wave of democratization  | Ongoing | 1974 -    |

Retrieved from: Samuel P Huntington<sup>277</sup>

The first wave of democratization occurred still in virtue of the winds of the two Democratic Revolutions we previously mentioned. The first guarantees of political freedom that were established by several countries gradually took their rightful place in the political space because it is known that there was still a hierarchical division of political power, and each new right won was often obtained through much bloodshed.

To avoid incurring anachronisms due to the dimension that democracy took during the period of the first wave, the main right that was conquered was suffrage, which, although limited, reached its first acceptable levels for a nascent and developing democratic political system. Along with the right to vote, which was also expanding to the electoral system as a whole, principles of institutional responsibility were being established for politicians assuming elective offices, such as prime ministers and parliamentarians<sup>278</sup>.

This long first wave of democratization had its apex and decline in the 1920s: The zenith was in 1926, in which – according to Samuel Huntington's survey – 29 countries cultivated basic principles of democracy, while the rebound effect had its culmination in 1922 with the rise of Benito Mussolini as Prime Minister of Italy. It is estimated that in 1942, during the Second World War, only 12 countries in the world could be considered democratic<sup>279</sup>.

The second great wave of democratization began in 1943, since some countries became democratic even before the end of World War II, as was the case of Uruguay in 1942.

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<sup>277</sup> HUNTINGTON, Samuel P. **The Third Wave: Democratization in the Late Twentieth Century**. Norman: University of Oklahoma Press, 1991, p 16.

<sup>278</sup> HUNTINGTON, Samuel P. **The Third Wave: Democratization in the Late Twentieth Century**. Norman: University of Oklahoma Press, 1991, p 17.

<sup>279</sup> HUNTINGTON, Samuel. P. Democracy's Third Wave. **Journal Of Democracy**, [s. l.], v. 2, n. 2, p. 12-34, Apr. 1991. Retrieved from: <https://www.ned.org/docs/Samuel-P-Huntington-Democracy-Third-Wave.pdf>. Accessed at: 23 May 2022.

The conclusion of the War in 1945 spurred the second wave, which culminated in 1962, with 36 countries being governed democratically<sup>280</sup>.

The reactive backlash to the second wave occurred in the 1960s, in which the transitional regimes that had taken hold during the second wave began to adopt an authoritarian tone. This reverse wave spread widely across the globe, beginning in 1958 with the decree of martial law by the military in Pakistan. In Latin American countries this period was strongly felt, with Peru, in 1962, inaugurating this period of coups d'état, in which the Armed Forces were the main promoters of these acts against democracy<sup>281</sup>.

According to Huntington's estimates, the oscillation of countries that ceased to be a democracy and started to be ruled by autocrats calls attention: while in 1962 13 governments were the result of coups, in 1975 the number increased to 38. In another estimate, on the other hand, one-third of the 32 functioning democracies in the world in 1958 had become autocracies by the 1970s<sup>282</sup>.

When the third wave of democratization was inaugurated, Huntington supported some conjunctural attributes to explain this passage from authoritarian to democratic regimes:

(1) the deepening legitimacy problems of authoritarian systems in a world where democratic values were widely accepted, the dependence of those regimes on performance legitimacy, and the undermining of that legitimacy by military defeats, economic failures, and the oil shocks of 1973-74 and 1978-79; (2) the unprecedented global economic growth of the 1960s, which raised living standards, increased education, and greatly expanded the urban middle class in many countries; (3) the striking changes in the doctrine and activities of the Catholic Church manifested in the Second Vatican Council in 1963-65 and the transformation of national churches from defenders of the status quo to opponents of authoritarianism and proponents of social, economic, and political reform; (4) changes in the policies of external actors, including in the late 1960s the new attitude of the European Community toward expanding its membership, the major shift in U.S. policies beginning in 1974 toward the promotion of human rights and democracy in other countries, and Gorbachev's dramatic change in the late 1980s in Soviet policy toward maintaining the Soviet empire; and (5) "snowballing" or demonstration effects, enhanced by new means of international communication, of the first transitions to democracy in the third wave in stimulating and providing models for subsequent efforts at regime change in other countries<sup>283</sup>. (Author's emphasis)

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<sup>280</sup> HUNTINGTON, Samuel P. Democracy's Third Wave. *Journal Of Democracy*, [s. l.], v. 2, n. 2, p. 12-34, Apr. 1991. Retrieved from: <https://www.ned.org/docs/Samuel-P-Huntington-Democracy-Third-Wave.pdf>. Accessed at: 23 May 2022.

<sup>281</sup> HUNTINGTON, Samuel P. **The Third Wave: Democratization in the Late Twentieth Century**. Norman: University of Oklahoma Press, 1991, p 19-20.

<sup>282</sup> HUNTINGTON, Samuel P. **The Third Wave: Democratization in the Late Twentieth Century**. Norman: University of Oklahoma Press, 1991, p 21.

<sup>283</sup> HUNTINGTON, Samuel P. **The Third Wave: Democratization in the Late Twentieth Century**. Norman: University of Oklahoma Press, 1991, p. 45-46.

Perhaps two conjunctural changes call more attention: one for its obviousness and its resonance and the other for its subtlety. The Cold War dominated much of the political dynamics in the second half of the 20th century and, by changing its ways of conduct – the USA in 1974 with the discourse of promoting human rights and the change of political approach by the USSR at the end of the 1980s – it triggered an institutional change in which democratic Eigenvalues were once again considered. The conjunctural change that sometimes goes unnoticed, but that was well highlighted by Huntington, was the Second Vatican Council which resulted in changes in the doctrine of the Catholic Church and that, when invoked by social and political movements in Latin America, had a relevant role in opposing authoritarian regimes<sup>284</sup>.

We can see that democracy is no longer something replaceable and has become a condition of possibility for the development of other capabilities that are not directly related to the political system, such as the economy and the expansion of the quality of education.

Having said this, and assuming it to be valid, some criticisms of the model developed by Samuel Huntington deserve to be raised to discuss the proposal of under-democracy.

### 5.1.1 Discussing the framework

When comprehending what the theoretical proposition elaborated by Samuel Huntington is about, some considerations must be made to make more accurate evaluations.

Firstly, the concept of democracy that the author elected to support his hypothesis must be addressed, which, in this case, is based on the idea of expansion between political participation and competition elaborated by Robert Dahl, besides other institutional requirements for a regime to become democratic, as is the case of "Elections, open, free, and fair"<sup>285</sup>.

On the other hand, it should be emphasized that Huntington's investigative purpose is not to conceptualize democracy, but to understand the phenomenon of democratization, which, roughly speaking, can be understood as the passage from an authoritarian state to a democratic reality.

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<sup>284</sup> In the Brazilian case, it is worth highlighting the Brasil Nunca Mais project – Brazil Never Again, in free translation –, which congregated leaders from diverse religious beliefs and had the purpose of denouncing the abuses committed against human rights by the Brazilian State during the military dictatorship: BRASIL NUNCA MAIS. *História* (1979-1985). Retrieved from: <http://bnmdigital.mpf.mp.br/pt-br/historia.html>. Accessed at: 23 May 2022.

<sup>285</sup> HUNTINGTON, Samuel P. **The Third Wave: Democratization in the Late Twentieth Century**. Norman: University of Oklahoma Press, 1991, p. 9.

Accepting these warnings, one should realize that Huntington's proposition is based on an electoral conception of what democracy is – even knowing the difficulties of working with an operational concept with significant semantic amplitude. Thus, to link the democratization process only to electoral issues can lead to inaccuracies regarding the accounting and verification of whether a country is democratic or not since it is based on a restricted criterion for something that requires the evaluation of other aspects.

In this sense, it is worth highlighting Doh Chull Shin's position:

To overcome these limitations of the formal and minimalist conceptions of electoral democracy, scholars have proposed a number of alternative conceptions, using terms such as *complete democracy*, *liberal democracy*, and *full democracy* (...). All such alternative notions extend beyond the elements of electoral democracy to matters of accountability, constitutionalism, pluralism, and the separation of powers. Electoral democracy advances to liberal democracy when the law constrains political authority while protecting individual citizens so that they can exercise political rights and civil liberties (...). Incomplete democracy becomes complete when the institutions of elections, accountability, civil society, and the rule of law all have a firm hold (...) <sup>286</sup>. (Author's emphasis)

In order to remedy some of Huntington's mistaken observations, among the classifications that have been developed, as seen above, the concept of "minimal democracies", advocated by Renske Doorenspleet<sup>287</sup>, can be highlighted, which bases its institutional establishment on the existence of competitions – in Robert Dahl's sense – in which citizens can effectively express themselves about the political decisions that have been adopted by the current government.

Another aspect that supports the concept of minimal democracy is universal suffrage at the national level, with the possibility of accepting partial restrictions, such as age criteria, for instance. By ensuring the fulfillment of these two requirements, a country can be classified as a minimal democracy.

Intermediary concepts, such as the one we are working on here, are useful for the improvement of the observations made and, based on the conceptual redesignation proposed by Doorenspleet, Huntington's theoretical proposition can be reevaluated. By leaving aside a classification that only allows for two aspects – democratic/non-democratic – it is verified that there were waves of minimal democracy, which changes part of the surveys of the three waves.

<sup>286</sup> SHIN, Doh Chull. **Democratization: Perspectives from Global Citizenries**. Retrieved from: [https://escholarship.org/content/qt5b49k5rc/qt5b49k5rc\\_noSplash\\_311f8894a8308634e9685c7a27c3131e.pdf?t=lnq76n](https://escholarship.org/content/qt5b49k5rc/qt5b49k5rc_noSplash_311f8894a8308634e9685c7a27c3131e.pdf?t=lnq76n). Accessed at: 23 May 2022.

<sup>287</sup> DOORENSPLEET, Renske. Reassessing the Three Waves of Democratization. **World Politics**, [S.L], v. 1, n. 52, p. 390ss, Apr. 2000. Retrieved from: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.605.5637&rep=rep1&type=pdf>. Accessed at: 23 May 2022.

Differently from what had been proposed in the original model of the waves of democratization, by assuming the criterion of minimal democracy, the first wave ceases to occur only at the end of the 19th century, when women began to be included in the right to suffrage - almost 70 years after Huntington had proposed it.

A factor that calls attention is that, if the criteria of minimal democracy are taken into account until 1890 no country fulfilled all the requirements to be classified as such, but in 1923 almost a quarter of the countries already reached the status of minimal democracy, which corroborates one of Huntington's theses: the snowball effect, that is, the rise of a democracy can stimulate the transition of regimes – from autocracies to democracies – in other countries<sup>288-289</sup>.

Summarizing Renske Doorenspleet's proposal and comparing it with Huntington's classification we have a new temporal designation:

#### Waves of democratization

|                                | Huntington | Doorenspleet |
|--------------------------------|------------|--------------|
| First wave of democratization  | 1828-1926  | 1893-1924    |
| First reverse wave             | 1922-1942  | 1924-1944    |
| Second wave of democratization | 1943-1962  | 1944-1957    |
| Second reverse wave            | 1958-1975  | 1957-1976    |
| Third wave of democratization  | 1974 -     | 1976-1989    |

Retrieved from: Samuel P Huntington and Renske Doorenspleet<sup>290</sup>

It can be seen, therefore, that although the most significant change occurred from the emergence of the first great wave, the other waves, in terms of their course, had small intervals. However, Doorenspleet's merit lies in the improved classification of the transition processes of countries, leaving aside a binomial model to take into account conjunctural particularities that had been neglected until then, to better evaluate the establishment of democracy.

<sup>288</sup> DOORENSPLEET, Renske. Reassessing the Three Waves of Democratization. **World Politics**, [S.L], v. 1, n. 52, p. 393, Apr. 2000. Retrieved from: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.605.5637&rep=rep1&type=pdf>. Accessed at: 23 May 2022.

<sup>289</sup> HUNTINGTON, Samuel P. **The Third Wave: Democratization in the Late Twentieth Century**. Norman: University of Oklahoma Press, 1991, p. 46.

<sup>290</sup> HUNTINGTON, Samuel P. **The Third Wave: Democratization in the Late Twentieth Century**. Norman: University of Oklahoma Press, 1991, p. 16 and DOORENSPLEET, Renske. Reassessing the Three Waves of Democratization. **World Politics**, [S.L], v. 1, n. 52, p. 397, Apr. 2000. Retrieved from: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.605.5637&rep=rep1&type=pdf>. Accessed at: 23 May 2022.

### 5.1.2 Brazil between waves

Having explained Samuel Huntington's model and the reconsiderations provided by Renske Doorenspleet, it remains to situate Brazil within both exposed contexts.

In the first wave of democratization, if we adopt the suffragist criteria for the primary characterization of political rights, Brazil would be left behind in both classifications. If we take as an initial parameter the granting of the Constitution of 1824, in which Brazil was already independent of Portugal, the first general elections were governed by the Decree of 26 March 1824<sup>291</sup>, which, among other attributions, did not adopt partial exclusion, making use of the censitary criterion to limit the number of voters (Cap. 1, §7, n. 5), as had been established in the constitution.

Furthermore, the electoral system inaugurated by the aforementioned decree designated the conduction of the process of choosing representatives to an electoral board composed of the outside judge (or the ordinary one, or someone acting on their behalf), the parish priest, two secretaries, and two examiners (Cap. 1, §§ 2-3).

In Victor Nunes Leal's evaluation:

This system, in which the electoral board was the key to the election, lasted until 1842 with **deplorable results**. The composition of the electoral boards continued to be of fundamental importance until the electoral code of 1932, because they had the precious duty of checking the votes<sup>292</sup>. (Our emphasis)

Many attempts were made to solidify the electoral system during the Brazilian Empire, although many measures had an excluding character. The Saraiva Law (Decree No. 3.029, January 9, 1881)<sup>293</sup>, for instance, instituted the right to vote (Art. 1) and determined measures to ensure the confidentiality of the vote (Art. 15, § 19), but maintained the prohibition of the right to vote for the illiterate and for those who had an annual income lower than the amount determined, in terms of the current Constitution.

Corroborating with Victor Nunes Leal, it was only in the 1930s that Brazil managed, through suffragist criteria, to enter the first wave of democratization. Samuel Huntington makes

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<sup>291</sup> BRAZIL. **Decreto de 26 de Março de 1824**: Manda proceder à eleição dos Deputadas e Senadores da Assembléa Geral Legislativa e dos Membros dos Conselhos Geraes das Províncias. Retrieved from: <http://www.ibrade.org/wp-content/uploads/2018/03/Decreto-de-26-de-mar%C3%A7o-de-1824.compressed.pdf>. Accessed at: 23 May 2022.

<sup>292</sup> LEAL, Victor Nunes. **Coronelismo**: the municipality and representative government in Brazil. Cambridge: Cambridge University Press, 1977, p. 118.

<sup>293</sup> BRAZIL. **Decreto N° 3.029, de 9 de Janeiro de 1881**. Retrieved from: <https://www2.camara.leg.br/legin/fed/decret/1824-1899/decreto-3029-9-janeiro-1881-546079-publicacaooriginal-59786-pl.html>. Accessed at: 23 May 2022.

use of the criteria established by Jonathan Sunshine to characterize a democracy in the 19th century: "(1) 50 percent of adult males are eligible to vote; and (2) a responsible executive who either must maintain majority support in an elected parliament or is chosen in periodic popular elections"<sup>294</sup>. If we consider the 1872 Census<sup>295</sup>, we see that only 1.5% of the Brazilian population had electoral capacity, far from the parameters set for a democracy in the 19th century. For its part, the Constitution of 1891, governing the Republic that had been proclaimed two years earlier, excluded the censitary vote but continued to prohibit illiterate people, women, and minors from voting. In total, only 4.1% of the adult population had electoral capacity<sup>296</sup>.

Thus, it was only with the effectiveness of Decree No. 21,076 of February 24, 1932, that Brazil abruptly entered the first wave of democratization or the criteria required to be listed as a minimal democracy. From this decree the prohibition of the censitary vote that had been provided for in the Constitution of 1891 was maintained and extended to women the right to vote, although illiterate persons were still excluded (Art. 4)<sup>297</sup>.

In the backlash of the first wave, Brazil is misplaced within the temporal space determined by Huntington and Doorenspleet that, during the authoritarian period known as Estado Novo, strongly influenced by political flows coming from Europe, as well as from World War II. Authoritarian practices can be determined as the beginning of the National Security Law (Law No. 38, dated April 4, 1935) and its consolidation with the 1937 Constitution, which remained in force until 1945.

Concerning the second wave of democratization, Huntington includes Brazil in the resumption of democracy in 1946, while Doorenspleet categorizes 1945 as a period of transition/interruption/interregnum of the previous conjuncture and, in 1946, when the new Constitution came into force, classifies Brazil as autocratic, which is a fallacy because, although it was a troubled period, it managed to maintain democratic institutions.

The second reverse wave is agreed upon by both authors, although it is an easy period to identify in world history. In 1964 there was the military coup, which is classified by

<sup>294</sup> HUNTINGTON, Samuel P. **The Third Wave: Democratization in the Late Twentieth Century**. Norman: University of Oklahoma Press, 1991, p. 16.

<sup>295</sup> BRAZIL. **Recenseamento do Brasil em 1872**. Retrieved from: [https://biblioteca.ibge.gov.br/visualizacao/livros/liv25477\\_v1\\_br.pdf](https://biblioteca.ibge.gov.br/visualizacao/livros/liv25477_v1_br.pdf). Accessed at: 23 May 2022.

<sup>296</sup> FGV/CPDOC. **Atlas Histórico do Brasil: Os votos da primeira eleição presidencial, Eleitores excluídos do voto na Constituição de 1881 e A trajetória de Rui Barbosa**. Retrieved from: <https://atlas.fgv.br/marcos/da-proclamacao-constituicao-de-1891/mapas/os-votos-da-primeira-eleicao-presidencial-eleitores>. Accessed at: 23 May 2022.

<sup>297</sup> BRAZIL. **Decreto N° 21.076, de 24 de Fevereiro de 1932**. Retrieved from: <https://www2.camara.leg.br/legin/fed/decret/1930-1939/decreto-21076-24-fevereiro-1932-507583-publicacaooriginal-1-pe.html>. Accessed at: 23 May 2022.

Doorenspleet as a period of transition/interruption/interregnum, and which became authoritarian from 1965 onwards, only becoming democratic again, or with minimal democratic conditions, when the third wave of democratization took place, which in Brazil occurred with the end of the military regime in 1985 and was consolidated with the promulgation of the 1988 Constitution.

### **5.1.3 Waves, reverse waves, and under-democracy**

After the detailing of the approach of the waves of democracy, as well as a reassessment that aims at its better accuracy, it is necessary to spend some consideration on the concept of under-democracy and its relation to the theoretical interpellations that have been woven so far.

It has already been said that under-democracy, in the parameters that have already been sustained, is a distortion in the secondary codification that the legal system makes on the political. This hypothesis is proposed to the extent that countries that are inserted in a context of peripheral modernity are not able to fulfill their proper functions but still rely on the conditions of possibility that make a system democratic – considering the definition proposed by Niklas Luhmann.

Thus, when analyzing the model of waves of democratization provided by Samuel Huntington, the relation between democratic/non-democratic becomes pernicious to accurately observe the occurrences in a country that is in the process of formation and maturation of its institutions that maintain the "split of the summit".

In the occurrence of reverse waves, Huntington's analysis is most affected, and we are not questioning the existence or not of inclusion waves – our argument is based on the acceptance that they occurred – but we are questioning the effectiveness of the proposed model for a more detailed analysis of a given regional context. The reverse waves, therefore, show a penumbra that the democratic/non-democratic categorization does not become viable. If one accepts the proposal of understanding these vagueness moments as under-democratic, one maintains the foundations of what is considered democratic, that is, the orientation of the political system by the government/opposition criteria, as well as the provision of structural conditions for the existence of the opposition.

In the same line of the waves of inclusion, but with a new perspective, Renske Doorenspleet proposes that there would be waves of minimal democracy makes the debate more

fruitful, since it leaves aside a model that excludes half terms and therefore does not allow for good forms of observation.

The projection of minimum criteria for a regime to be considered democratic is a great advance and may commune with the idea of under-democracy, but it is wrong to attribute basically – although not exclusively – suffragist criteria for a country to achieve the label of minimal democracy. Besides an electoral system that accommodates the powers of choice and control of the head of State and Government, there are still other requirements that must be demanded to establish a minimal democracy, such as the Rule of Law.

During the validity of the 1946 Constitution, for instance, Renske Doorenspleet categorizes Brazil as an authoritarian country, that is, one that did not even reach the basic requirements to be considered a minimal democracy. Far from being a full democracy, by listing the 20 years that Brazil stayed under the aforementioned Constitution as an under-democratic country, one can better describe a scenario that, although turbulent, was still struggling to maintain the institutional reserves of democracy.

In turn, from the moment the military left power in 1985, the process of transition/interruption/interregnum described by Renske Doorenspleet should last until the 1988 Constitution was promulgated. However, the structural asymmetries that differentiate world society between center and periphery still drive strong tears in the constitutional program that, until then, could be treated as democratic, but lacks effectiveness in several aspects. Thus, the classificatory proposal of under-democracy is useful to address this situation of institutional deficits.

That said, in the next topic we will discuss the definitions of hybrid regimes and bipolarity so that they can be related to the under-democracy hypothesis.

## 5.2 BIPOLARITY OF DEMOCRACY

The diachronic evaluation of the evolution of the political system through the categorization of democracy as "bipolar" was already mentioned previously when it was explained how authoritarianism develops in world society. Now, we will discuss the limits and possibilities of applying the criterion of classification between democracy and authoritarianism as proposed by Rudolf Stichweh and Anna L. Ahlers, as well as the introduction of the concept of under-democracy which can improve the sharpness of the sociological observation made.

Thus, to detail the idea of bipolarity it is necessary to return to the concept of functional differentiation, since the rise of regimes considered authoritarian or democratic occurs within a process that, unlike the pre-modern circumstances, which guided society by hierarchical criteria, now prizes specialization concerning primary functions.

These differentiating processes give rise to modernity and, consequently, to world society. In turn, although democracy has established guiding criteria for the political system – especially through the codification government/opposition, to detriment of the pre-modern configuration that was based on superior/inferior power – and has desirable practical effects within a civilizing project, the existence of the antithesis of democracy in modernity cannot be denied.

Authoritarianism in modernity, therefore, should be understood differently from its arrangement when located in pre-modern circumstances and this gives rise to the bipolarity proposal developed by Rudolf Stichweh and Anna L. Ahlers, considering that the social transformations that result from the process of functional differentiation are what makes the bipolarity of democracy and authoritarianism possible<sup>298</sup>.

Assuming that there is no inert stability of political regimes and that they undergo perturbations and oscillations - although it is a truism, it deserves to be highlighted - the relation of bipolarity is useful to understand these mutabilities that can allocate to one of the structural poles.

Unlike the proposal of Samuel P. Huntington, who developed his evaluative model based on the democratic/non-democratic difference, Stichweh and Ahlers assume that, at the current conjuncture, the analytical category of "totalitarian regime" no longer has any practical application, except for North Korea. In the other countries, nonconformity with democracy implies autocracies that, in modernity, unfold differently from previous contexts.

To better understand the concept of bipolarity one must therefore assume the following considerations:

We agree with the observation that in today's world society we can basically distinguish between democratic and non-democratic/authoritarian political regimes. But for us authoritarianism is not a residue, nor a negative category primarily defined by those elements that are absent. It is instead a distinct category of political regimes.

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<sup>298</sup> STICHWEH, Rudolf; AHLERS, Anna L. The Bipolarity of Democracy and Authoritarianism and Its Societal Origins. In: AHLERS, Anna L.; KRICHEWSKY, Damien; MOSER, Evelyn; STICHWEH, Rudolf (org.). **Democratic and Authoritarian Political Systems in 21st Century World Society**: Differentiation, inclusion, responsiveness. Bielefeld: transcript Verlag, 2021. p. 213.

**Democracy and authoritarianism thus become the two poles on a continuum of political alternatives<sup>299</sup>. (Our emphasis)**

The first task is to understand how this distinction affects the sociological analyses derived from the theoretical perspective raised. By stating that there are no longer totalitarian regimes – as seen above – and that the political distinction in world society oscillates between democracy and autocracies, it is implicitly assumed that any other existing possibility should be excluded.

This brings us to a problem of sociological observation: when one stipulates binary relations, as is the case with systemic codification, one intends to exclude the third option (excluded third party) so that the opposite form can also be operationalized in the system's programming.

However, the binary form does not exclude the existence of internal levels within the binary codification, according to the initial proposal of Marcelo Neves, who perceived the existence of levels of integration when the citizenship of a country in peripheral modernity is under analysis, which would result in relations of under-integration and over-integration<sup>300</sup>.

The same applicability is valid when it comes to democracy and the political system: by drawing the distinction between democracy/authoritarianism, as Stichweh and Ahlers do, they end up not perceiving the levels of democracy that can become constitutive of a certain political reality, such as the Brazilian one.

The non-conformity of all the Eigenvalues inherent to democracy does not disqualify the labeling of a country as democratic, but it deserves an analytical addendum in order not to create heuristic vacuums in its classification. Thus, including the under-democratic level within the possibilities of analysis can make observations and classifications of political regimes more fruitful, or less opaque.

More assertively, the inclusion of a level of analysis may make the distinction between democracies and autocracies in modernity more achievable, mainly under their institutional arrangements:

Although values are different, at the level of the institutional structure and internal differentiation of the political system, **modern authoritarian regimes often look quite like modern democratic regimes**, featuring presidents, prime ministers, governors and mayors, governmental cabinets, parliaments, elections, parties, and

<sup>299</sup> AHLERS, Anna L.; STICHWEH, Rudolf. The Bipolarity of Democracy and Authoritarianism: value patterns, inclusion roles and forms of internal differentiation of political systems. *Sociologia & Antropologia*, [S.L.], v. 9, n. 3, p. 824, Dec. 2019. FapUNIFESP (SciELO)

<sup>300</sup> NEVES, Marcelo. Between Under-Integration and Over-Integration: Not Taking Citizenship Seriously. In: SOUZA, Jessé; SINDER, Valter. *Imagining Brazil*. Lanham: Lexington Books, 2005, p. 68-69.

associations. But these autocracies do not grant institutions and processes the ultimate autonomy to bring about just any imaginable result – a result that in a democracy will be accepted so long as it is produced by means of the representative and direct democratic processes institutionalized within the respective system<sup>301</sup>.

This institutional mimicry by which modern authoritarianism enforces itself corroborates the complexity by which the analysis of a regime demands a leveling of the antagonistic poles in dispute. Although Stichweh and Ahlers' descriptions of autocracy - according to the Parsonian AGIL Paradigm - recognize new aspects of legitimation, since they have adapted to circumvent the selective pressure that world society imposes when facing structural asymmetries in peripheral modernity, the clarity regarding the bipolar classification is undermined, and this is justified from the very model under analysis and its conception of democracy.

The democratic polity is completely derived from the **self-organization** and **self-determination** of the democratic political collectivity, which is based on the **universal inclusion** of all the members of the people/nation. These terms are probably the central political Eigenvalues and it is this claim of social universality that dominates politics instead of the self-absorbed immersion into political life as a total way of life<sup>302</sup>. (Our emphasis)

Although there is a pretense of inclusion as a normative horizon to be pursued, one cannot attribute full systemic inclusion as a condition of possibility for the existence of democracy, precisely because there are oscillations that can vary between levels of democracy and can even reach the classificatory level as being authoritarian.

The variation between levels of democracy can also be useful when we take into consideration the derivation of the political system from the "self-organization and self-determination of the democratic political collectivity". Again, the question of the structural asymmetries of peripheral modernity is returned, which compromises the process of functional differentiation of partial systems that make it impossible – or are made impossible – to achieve a "universal inclusion"<sup>303</sup>.

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<sup>301</sup> AHLERS, Anna L.; STICHWEH, Rudolf. The Bipolarity of Democracy and Authoritarianism: value patterns, inclusion roles and forms of internal differentiation of political systems. **Sociologia & Antropologia**, [S.L.], v. 9, n. 3, p. 826, Dec. 2019. FapUNIFESP (SciELO)

<sup>302</sup> STICHWEH, Rudolf; AHLERS, Anna L. The Bipolarity of Democracy and Authoritarianism and Its Societal Origins. In: AHLERS, Anna L.; KRICHEWSKY, Damien; MOSER, Evelyn; STICHWEH, Rudolf (org.). **Democratic and Authoritarian Political Systems in 21st Century World Society**: Differentiation, inclusion, responsiveness. Bielefeld: transcript Verlag, 2021. p. 223.

<sup>303</sup> STICHWEH, Rudolf; AHLERS, Anna L. The Bipolarity of Democracy and Authoritarianism and Its Societal Origins. In: AHLERS, Anna L.; KRICHEWSKY, Damien; MOSER, Evelyn; STICHWEH, Rudolf (org.). **Democratic and Authoritarian Political Systems in 21st Century World Society**: Differentiation, inclusion, responsiveness. Bielefeld: transcript Verlag, 2021. p. 223.

This has already been taken into account by Marcelo Neves when discussing the issue of citizenship in peripheral countries, in which citizens experience a difference in levels of inclusion in society that distinguishes them between over-citizens and under-citizens<sup>304</sup>. This leads to the conclusion that universal inclusion may function as a normative horizon, but in practice, it suffers from complications in its applicability.

Albeit the distinction arising from the bipolar relationship has analytical deficits, it also proves assertive when comparing the paradoxical domestic and international relations of the same country, when one is considering issues linked to democracy, such as human rights. Stichweh and Ahlers point out that "There may exist authoritarian enclaves in an otherwise democratic polity and islands of democracy in an authoritarian environment"<sup>305</sup>.

From this statement, it is easy to understand how secondary codification can be corrupted by allopoietic influxes during oscillations between the poles. In the remnants of democracy that barely surface amid authoritarianism lie whatever emancipatory ideals one can conjure up when one is suffocated by the pressure of Leviathan. Likewise, from authoritarian enclaves that are embedded in a democracy, it is hoped that they will succumb to the institutional reserve that has been developed, lest there be an abrupt change of poles.

Under-democracy lies at a polar level where several enclaves are finessed and these entrenchments are filled today, especially, by the conduct of populist policies that seek a change in the primary codification of the political system and employ contempt for the juridical unless it is used as an instance of legitimation for the developing populist practices.

Populism makes use of the Eigenvalues of democracy to sediment its space among the oscillation processes that are inherent to any historical moment. This happens because the political processes that are conjured up amid a democratic organization are susceptible to contestation, or even reversal, of the decisions that are taken. The dynamics of social change are observed and used as justification for possible changes in the sphere of bureaucracy – here understood as the set of bodies that issue binding decisions of political power, such as governments, parliament, and the organs of public administration.

In under-democracy relations, what can be perceived is that there is a predominance of populist practices that arise from the very conditions provided by democracy and that often

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<sup>304</sup> NEVES, Marcelo. Between Under-Integration and Over-Integration: Not Taking Citizenship Seriously. In: SOUZA, Jessé; SINDER, Valter. **Imagining Brazil**. Lanham: Lexington Books, 2005, p. 68-69.

<sup>305</sup> AHLERS, Anna L.; STICHWEH, Rudolf. The Bipolarity of Democracy and Authoritarianism: value patterns, inclusion roles and forms of internal differentiation of political systems. **Sociologia & Antropologia**, [S.L.], v. 9, n. 3, p. 821, Dec. 2019. FapUNIFESP (SciELO)

cannot be reversed. In this case, what is verified is a "process of endogenous value production, a political system can overstep its bounds and encroach on the terrain of another function system"<sup>306</sup>.

In the explanations about populism and authoritarianism, it was discussed how communications from other systems enter the political system and, in this way, through the circulation of power, produce binding decisions that go against the founding principles of the Rule of Law, as well as fundamental rights, checks and balances, etc. By assuming the proposal of under-democracy as valid, one realizes that there is a reflexive perniciousness in the function of democracy itself, which maintains conditions that can compromise its functional structure.

As partial considerations about the hypothesis raised, we verify that the model of bipolarity between democracy and authoritarianism developed by Rudolf Stichweh and Anna L. Ahlers helps the understanding of the phenomenon of authoritarianism in modernity and incorporates the analysis of some functional deficits within the dynamics of oscillation between the poles, besides providing conditions for an analysis of the paradoxes of nation-states that act in an antagonistic way when comparing the domestic context with the international one.

However, the model in question suffers from not taking into consideration the structural asymmetries in world society that result in the difference between the center and the periphery and that, as a result, produce functional deficits due to allopoietic influxes, as is the case of the inflation of the legal system to the detriment of the political system.

By making use of the concept of under-democracy as corruption of secondary codification, a more fruitful descriptive possibility is opened to describe this relationship of levels of democracy that was disregarded in the bipolar model.

That said, the next topic will address the dynamics of hybrid regimes, as well as their confluences and limits when related to the investigative proposal presented here.

### 5.3 HYBRID REGIMES

As has been argued throughout this chapter, dichotomous classifications lack or disregard intermediate leveling that evaluates a democratic regime, especially when there are functional deficits in a country due to structural asymmetries.

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<sup>306</sup> AHLERS, Anna L.; STICHWEH, Rudolf. The Bipolarity of Democracy and Authoritarianism: value patterns, inclusion roles and forms of internal differentiation of political systems. *Sociologia & Antropologia*, [S.L.], v. 9, n. 3, p. 825, Dec. 2019. FapUNIFESP (SciELO)

In the proposal that has been developed, under-democracy is considered as a distortion of the secondary codification that the legal system makes on the political, due to allopoietic influxes, implying in dedifferentiating consequences in the structures of the respective systems.

This topic will analyze some considerations about the hybrid regimes hypothesis and why they are an evaluative and classificatory mechanism of political regimes that accurately observes – or not – modern society, exposing its obstacles and potentials.

Firstly, it is necessary to face the semantic dimensions that the term "hybrid regimes" carries, considering that the allocations of intermediate concepts, although necessary, can often be vague. However, the treatment of the definition of the operational concept under analysis is widely publicized as being a combination of democratic and authoritarian elements.

One of the main factors that incur in the hybridization process is the transition flows between authoritarianism and democracy – which is not the same as the oscillation discussed in the bipolar model. The overcoming of structures of domination and legitimation does not happen abruptly, and even with a long period of transition, many autocratic remnants are maintained, which makes it difficult to evaluate and classify the regime that one is willing to analyze concretely.

One of the most seminal intermediate classifications dealing with mixed political regimes was given by Guillermo O'Donnell and Philippe C. Schmitter<sup>307</sup> when they proposed to introduce "uncertain" or the existence of "something else" in the studies on political regime transitions, especially those that occurred during the second half of the 20th century when, using Samuel P. Huntington's category, the world was going through the second reverse wave and entered the third wave of democratization.

While most researchers focused on states that were in a consolidated political situation, O'Donnell and Schmitter dedicated themselves to observing the processes of regime transition, which resulted, until then, in inconclusive or unsatisfactory evaluations from the methodological point of view.

With special attention to the process of transition from authoritarian to democratic regimes – except for the transitions that took place during the reverse waves – the studies of this gray zone have reached two partial conclusions. The first one is that, during the transition, authoritarian governments can change their way of conducting politics and start promoting a political opening with the inclusion of certain individual rights and guarantees in order to relieve

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<sup>307</sup> O'DONNELL, Guillermo; SCHMITTER, Philippe C. **Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies**. Baltimore: Johns Hopkins University Press, 1986, p. 3.

the pressure that the people – as the addressee of binding decisions – put on the rulers. This kind of concession has been called "liberalized authoritarianism (dictablandas)"<sup>308</sup>.

In turn, the second conclusion argues that, during the democratization process, those who are leading this change may fear the occurrence of adverse consequences because they are making decisions that may be considered controversial and, to prevent this from happening, they choose to maintain some determinations of the authoritarian regime or even create other mechanisms of freedom restriction because they consider that some groups or individuals are "deemed insufficiently prepared or sufficiently dangerous to enjoy full citizenship status". This second conclusion was called "limited democracy" (democraduras)<sup>309</sup>.

The conceptual propositions elaborated by Guillermo O'Donnell and Philippe C. Schmitter illuminated a theme that, until then, there had been little effort to explore. From them, new classifications were developed in order to understand more precisely the establishment and development of democracy during the passage of an autocratic period.

The classification of hybrid regimes was first developed by Terry Karl when he evaluated the democratic transitions in Central America that began in the 1980s. According to his survey, in the 1990s all countries on the continent were ruled by civilian presidents and had already experienced some form of power rotation. According to the conjuncture analyzed, it was detected that the mere existence of constant electoral procedures, even though they were a great advance in face of the authoritarian period in which they lived, still did not imply an established democracy.

The concept of hybrid regimes was first established as follows:

By "hybrid regime," I mean **a certain functional and territorial political mix** that exist, at least in broad outline, in every Central American country but democratic Costa Rica. The other Central American polities are characterized by **an uneven acquisition of the procedural requisites of democracy**. Gains in the electoral arena have not been accompanied by the establishment of civilian control over the military or the rule of law. Elections are often free and fair, yet important sectors remain politically and economically disenfranchised. Militaries support civilian presidents, but they resist efforts by civilians to control internal military affairs, dictate security policy, make officers subject to the judgment of civil courts, or weaken their role as the ultimate arbiters of politics. Impunity is condemned, yet judiciaries remain weak, rights are violated, and contracts are broken<sup>310</sup>. (Our emphasis)

<sup>308</sup> O'DONNELL, Guillermo; SCHMITTER, Philippe C. **Transitions from Authoritarian Rule**: Tentative Conclusions about Uncertain Democracies. Baltimore: Johns Hopkins University Press, 1986, p. 9.

<sup>309</sup> O'DONNELL, Guillermo; SCHMITTER, Philippe C. **Transitions from Authoritarian Rule**: Tentative Conclusions about Uncertain Democracies. Baltimore: Johns Hopkins University Press, 1986, p. 9.

<sup>310</sup> KARL, Terry. The Hybrid Regimes of Central America. **Journal Of Democracy**, [s. l.], v. 3, n. 6, p. 79, Jul. 1995.

Within this transitional context, Terry Karl predicted that the Central American countries, except for Costa Rica, found themselves in unfavorable conditions for the establishment of a democratic regime, what would occur was the constitution of hybrid regimes that could combine authoritarian and democratic elements. The author concludes by affirming that the hybrid regimes, at least in the Central American context, should not be characterized as democracies because they "represent a genuine advance from the past and a significant step in the long-range process of building democracy"<sup>311</sup>.

One can see that the electoralist criteria, such as the one followed by Samuel Huntington and Renske Doorenspleet, should be used with reservations to evaluate democracies when one is inserted in a context in which there are unfavorable conditions for the solid establishment of democracies, although the achievement of solid electoral procedures is one of the necessary conditions for the consolidation of democracy.

In this way, it is not only electoral criteria that make a democracy, and the way authoritarianism is established in modernity, as observed by Rudolf Stichweh and Anna L. Ahlers, corroborates the verification that contemporary autocratic regimes express, even if partially, democratic characteristics and that this can be diagnosed as an "exhaustion of the 'third wave' of democratic transition"<sup>312</sup>.

The existence of electoral democracies, therefore, enters the gray zone of hybrid regimes that was first raised by Terry Karl and shows the problem that exists in transitional regimes. According to Thomas Carothers' survey<sup>313</sup>, among the 100 countries that could be considered transitional regimes coming from the third wave, probably less than 20 of them would be enjoying well-functioning democratic institutions that go beyond the electoral perspective. Brazil is situated among these countries but, according to the author, has made more modest progress in consolidating democracy.

Contrary to the idea defended here that only the electoral criterion is not enough, Heidrun Zinecker states "a non-functioning democracy is not a democracy. Only the largely

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<sup>311</sup> KARL, Terry. The Hybrid Regimes of Central America. **Journal Of Democracy**, [s. l], v. 3, n. 6, p. 74, Jul. 1995.

<sup>312</sup> DIAMOND, Larry Jay. Thinking About Hybrid Regimes. **Journal Of Democracy**, [S.L.], v. 13, n. 2, p. 21-35, 2002.

<sup>313</sup> CAROTHERS, Thomas. The end of the transition paradigm. **Journal Of Democracy**, [s. l], v. 13, n. 1, p. 9, 2002.

functioning democratic electoral regime is, according to this concept, a defining attribute of democracies"<sup>314</sup>.

Although this statement is problematic at first sight, Heidrun Zinecker<sup>315</sup> provides a series of strict parameters for qualifying democratic regimes that go beyond the electoralist perspective and that can be useful for understanding transitions and hybrid regimes:

- (a) Exclusion of military rule partial regime and established of a civilian rule regime;
- (b) Exclusion of civilian authoritarian partial regime by the establishment of polyarchical regime segments and/or a democratically representative regime;
- (c) Exclusion of illiberal partial regime and/or partial regime not based on the rule of law;
- (d) Exclusion of violent non-state partial regime through establishment of the state's monopoly over the use of force;
- (e) Exclusion of politically exclusionary partial regime and enabling of the unlimited and non-violent participation of all-also alternative-constitutional political power, that is, of a democratically participative regime and an autonomous civil society.

Once exposed to the checklists that Zinecker developed to improve the classification of democracies, it is necessary to clarify the topics and evaluate them according to the current Brazilian political conjuncture.

The first criterion has more clarity for evaluative practices due to its proposal, that is, the exclusion of the military from the government boards, either during the transition process or under the circumstances of the establishment of democracy. The express mention of military personnel (non-civils) is sensitive in the Latin American context because the second reverse wave that ravaged the continent was headed by military juntas that deposed legitimate civilian governments.

In Brazil, what can be verified is the exponential increase of military personnel occupying positions in politics, but it must be emphasized that this occurs in two ways: the first is by military personnel who legitimately run for and participate in electoral processes. Armed with a discourse in which they claim to defend public safety, there is already a composition of

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<sup>314</sup> ZINECKER, Heidrun. Regime-Hybridity in Developing Countries: achievements and limitations of new research on transitions. *International Studies Review*, [s. l], v. 2, n. 11, p. 306, 2009.

<sup>315</sup> ZINECKER, Heidrun. Regime-Hybridity in Developing Countries: achievements and limitations of new research on transitions. *International Studies Review*, [s. l], v. 2, n. 11, p. 310-312, 2009.

military personnel in parliament and state assemblies that is informally called the "Countertop of bullet". During the 2018 elections, following the flow of Jair Bolsonaro's presidential campaign, candidates affiliated with the public safety discourse increased from 35 to 61, while in the Federal Senate there were nine candidates elected<sup>316</sup>.

The second strand has more links to the justification of this work because, since 2018, with the election of Jair Bolsonaro, there has been a severe increase in military appointments to occupy positions in the Federal Administration. According to the survey conducted by William Nozak<sup>317</sup>, in 2018 the number of military officers who had been assigned to occupy positions in the Federal Government was 2765, while in 2020, almost two years into the presidential mandate, the number increased to 6157. The massive presence of military officers in bureaucratic positions has led to the diagnosis that a "militarization of the public administration in Brazil" is taking place.

In dealing with the exclusion of the military from the state bureaucracy, Zinecker traced as one of the sub-criteria the delegation of administrative tasks to the Armed Forces, which, because of the data exposed above, already classifies Brazil as a partial regime.

The second criterion deals with the exclusion of authoritarian-looking civil authorities employing a polyarchic<sup>318</sup> regime or a properly democratic representative regime. While the first point dealt with the exclusion of military officers, this one deals with the exclusion of civilians who have authoritarian approaches. To this aim, Zinecker makes use, fundamentally, of the seven institutions that Robert Dahl established for a government to be characterized as polyarchic and, therefore, all of them must exist concomitantly – Numerus Clausus.

The institutional requirements for the configuration of polyarchy are closely linked to the notions of citizenship and public life since they express necessary premises for accessing the basic benefits of the democratic regime.

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<sup>316</sup> DEPARTAMENTO INTERSINDICAL DE ASSESSORIA PARLAMENTAR. **Bancada da segurança pública cresce na Câmara e no Senado**. Retrieved from: <https://www.diap.org.br/index.php/noticias/agencia-diap/88899-eleicoes-2018-bancada-linha-dura-da-seguranca-publica-cresce-na-camara-e-no-senado>. Accessed at: 25 May 2022.

<sup>317</sup> NOZAKI, William. **A Militarização da Administração Pública no Brasil: projeto de nação ou projeto de poder?** Retrieved from: <https://fpabramo.org.br/observabr/wp-content/uploads/sites/9/2021/05/Cadernos-Reforma-Administrativa-20-V4.pdf>. Accessed at: 25 May 2022.

<sup>318</sup> Despite having already been mentioned a few times in this work, the concept of polyarchy has not been duly examined, but, because it is a specificity to enable a more precise evaluation of the criterion under analysis, we quote the definition elaborated by Robert Dahl: "Polyarchy is a political order that, more generally, is distinguished by two broad characteristics: citizenship is extended to a relatively high number of adults, and citizenship rights include not only the opportunity to oppose the highest government officials but also the opportunity to remove them from office by voting". (our translation) In DAHL, Robert A. **A democracia e seus críticos**. São Paulo: WMF Martins Fontes, 2012, p. 350.

Since these are exhaustive requirements, it is necessary to indicate all seven demands to evaluate more precisely the Brazilian conjuncture. Thus, the polyarchic subcriteria that Zinecker expresses – drawing on Dahl – are the following<sup>319</sup>:

- a) Are the policy decisions of the government controlled by elected officials?
- b) Do regular free and fair elections take place, and are elections free from coercion of the constituency?
- c) Do all adults have the right and possibility to participate in these elections?
- d) Do all adults have the right and possibility to run for office in these elections?
- e) Do the citizens have the right and the possibility to express themselves freely – without the fear of a punishment – in all political matters, and to criticize the government, the regime, the socioeconomic order, and the prevailing order?
- f) Do the citizens have the right and the possibility to seek alternative sources of information; do such sources exist generally and are they protected by law?
- g) Do the citizens have the right and the possibility to establish independent organizations, including independent parties and interest groups?

Turning to the Brazilian case – at least in the legal sphere and without entering the realm of the effectiveness of some basic fulfillments – all the listed points are satisfactorily fulfilled, especially since the enactment of the Constitution of 1988. Although Brazil has declined a few points in the index<sup>320</sup> of civil liberty and political rights since 2018, the year of Jair Bolsonaro's election, what is noticeable is that, albeit – still – not so significant, the losses of freedom and citizenship deserve due attention so that there is no compromise of the aforementioned polyarchic institutions.

Despite the concept of polyarchy developed by Dahl indicates a partial moment in the development of democratic institutions because, according to him, democracy would be the ideal type to be pursued, the weakening or denial of any of the criteria listed above demonstrates an intermediate stage in classifications about democracy.

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<sup>319</sup> ZINECKER, Heidrun. Regime-Hybridity in Developing Countries: achievements and limitations of new research on transitions. *International Studies Review*, [s. l], v. 2, n. 11, p. 311, 2009. DAHL, Robert A. **A democracia e seus críticos**. São Paulo: WMF Martins Fontes, 2012, p. 350-351.

<sup>320</sup> See the Freedom House survey – Freedom in the World – in the item “Return to Enmity: recodification of political system”.

By conceptually operating with the idea of polyarchy, which, roughly speaking, would be an intermediate stage between democracy and authoritarianism, one could speculate that under-democracy would be within the polyarchic space. However, Dahl states that "polyarchy offers a wide range of human rights and freedoms that no other real-world alternative can provide"<sup>321</sup> and this is not in line with the proposal of under-democracy because it is the result of environmental pressures that aim at systemic corruption. Thus, even though polyarchy recognizes the limitations to reaching the status of true democracy in the concrete case, it cannot be seen as an intermediary means of classification, nor in the dictates of functional dedifferentiation.

Returning to the discussion around Heidrun Zinecker's criteria, the third partial regime deals with the Rule of Law issue in which regimes that do not follow precepts established by this legal condition should be excluded.

The sub-criteria relate to requirements connected to fundamental rights and checks and balances such as respect for institutions, independence of the judiciary, control mechanisms over the executive and legislative powers, and access to justice. All these prescriptions are already assured in the Brazilian Federal Constitution and the sparse legislation, although there are always variations in the sufficient and satisfactory provision of the established rights.

One could resort to the thesis of Symbolic Constitutionalization to justify the partial fulfillment of the provisions and guidelines of the Rule of Law, but what we see today in the Brazilian conjuncture goes beyond the symbolic forms of use of the legal and legislative activity named by Marcelo Neves<sup>322</sup>.

With the rise of populist governance that the country has experienced in recent years, the opacity in the verification of some circumstances that go against the Rule of Law has now become clear. This is made apparent not only when we analyze the issue of Lawfare – already discussed in the previous chapter – but also when the President of the Republic endorses practices that compromise basic principles for a sustainable democracy, such as apology for

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<sup>321</sup> DAHL, Robert A. **A democracia e seus críticos**. São Paulo: WMF Martins Fontes, 2012, p. 352.

<sup>322</sup> It can be classified as 1) a way to confirm the social values of his political base and supporters; 2) an alibi, to mitigate the effects of some political pressure that the politician has been suffering; 3) a formula of dilatory compromise, in which the politician, employing an agreement with his support base, takes a decision that has the intention of postponing the confrontation of the problem, delegating such responsibility to an undetermined future. In NEVES, Marcelo. **A Constitucionalização Simbólica**. São Paulo: WMF Martins Fontes, 2011, p. 31-42.

torture<sup>323</sup>, exacerbated criticism of the Justices of the Supreme Court<sup>324</sup>, mitigation of the laws of access to information and administrative transparency<sup>325</sup>, change in the direction of the Federal Police in order to obtain personal advantages<sup>326</sup>, etc.

Adding to all the occurrences mentioned above, one can highlight the World Justice Project's survey on the levels of Rule of Law in Brazil over the years.

WJP Rule of Law Index – Brazil

| Year      | Index Score | Regional Ranking/ Surveyed Countries | Position/Surveyed Countries |
|-----------|-------------|--------------------------------------|-----------------------------|
| 2015      | 0.54        | 5/19                                 | 46/102                      |
| 2016      | 0.55        | 15/30                                | 52/113                      |
| 2017/2018 | 0.54        | 15/30                                | 52/113                      |
| 2019      | 0.53        | 15/30                                | 59/126                      |
| 2020      | 0.52        | 16/30                                | 67/128                      |
| 2021      | 0.50        | 16/32                                | 77/139                      |

Retrieved from: World Justice Project<sup>327</sup>

Although there has been an increase in the number of countries surveyed in recent years, which explains part of the loss of positions in the global ranking, when looking at the general index that evaluates the Rule of Law, Brazil has been declining since the surveys of the

<sup>323</sup> THE INTERCEPT. **Jair Bolsonaro's first 53 days as President of Brazil have been a resounding, scandalous failure.** Retrieved from: <https://theintercept.com/2019/02/22/jair-bolsonaro-presidency-brazil/>. Accessed at: 26 May 2022.

<sup>324</sup> THE BRAZILIAN REPORT. **Bolsonaro asks Prosecutor General to investigate Supreme Court justice.** Retrieved from: <https://brazilian.report/liveblog/2022/05/19/prosecutor-general-supreme-court-justice/>. Accessed at: 26 May 2022.

<sup>325</sup> FOLHA DE SÃO PAULO. **Bolsonaro Administration pushes hard to reduce official transparency.** Retrieved from: <https://www1.folha.uol.com.br/internacional/en/brazil/2020/06/bolsonaro-administration-pushes-hard-to-reduce-official-transparency.shtml>. Accessed at: 26 May 2022.

<sup>326</sup> FOLHA DE SÃO PAULO. **New Federal Police Director decides to change sector command that investigates Bolsonaro.** Retrieved from: <https://www1.folha.uol.com.br/internacional/en/brazil/2022/03/new-federal-police-director-decides-to-change-sector-command-that-investigates-bolsonaro.shtml>. Accessed at: 26 May 2022.

<sup>327</sup> The World Justice Project uses eight factors and 44 sub-factors to elaborate its indices and rankings. The eight factors are: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, criminal justice. WORLD JUSTICE PROJECT. **WJP Rule of Law Index 2015.** Retrieved from: <https://worldjusticeproject.org/rule-of-law-index/factors/2015/Brazil/>. Accessed at: 27 May 2022; WORLD JUSTICE PROJECT. **WJP Rule of Law Index 2016.** Retrieved from: <https://worldjusticeproject.org/rule-of-law-index/factors/2016/Brazil/>. Accessed at: 27 May 2022; WORLD JUSTICE PROJECT. **WJP Rule of Law Index 2017/2018.** Retrieved from: <https://worldjusticeproject.org/rule-of-law-index/factors/2017-18/Brazil/>. Accessed at: 27 May 2022; WORLD JUSTICE PROJECT. **WJP Rule of Law Index 2019.** Retrieved from: <https://worldjusticeproject.org/rule-of-law-index/factors/2019/Brazil/>. Accessed at: 27 May 2022; WORLD JUSTICE PROJECT. **WJP Rule of Law Index 2020.** Retrieved from: <https://worldjusticeproject.org/rule-of-law-index/factors/2020/Brazil/>. Accessed at: 27 May 2022; WORLD JUSTICE PROJECT. **WJP Rule of Law Index 2021.** Retrieved from: <https://worldjusticeproject.org/rule-of-law-index/factors/2021/Brazil/>. Accessed at: 27 May 2022.

years 2017/2018. Taking as a parameter the election of Jair Bolsonaro, who began his presidency in 2019, there has been a compromise of Brazilian legal institutions, which puts the stability of national democracy on alert.

When questioning whether or not there is Rule of Law in the regime under analysis, one should take into account that the law should always be taken into perspective when adopting binding decisions by the political system that, mainly through its structural coupling – the constitution – provides the necessary exchanges of information so that there is this normative guidance.

The disrespect for the Rule of Law, in the manner that has been highlighted, introduces into the political and legal system unfiltered external elements that have disruptive tendencies to the operational closure of the respective systems. That said, the condition of under-democracy explains these conjunctural circumstances.

After this issue, the fourth criterion raised by Heidrun Zinecker refers to the (re)assertion of the monopoly of force by the State, and for this purpose, non-state violent regimes should be excluded.

The State as holder of the monopoly of force is one of the conditions of possibility for the functional differentiation of the system because it eliminates the uncertainty about who will decide and how it will be decided. Brazil, being among the 10 countries with the highest crime rates<sup>328</sup>, has two factors that contribute to the deviation of the monopoly of force: parallel police forces (militias) and organized crime (especially narco-trafficking) that have functional equivalents to the political organization and courts that dominate large areas in Brazilian urban centers.

The agenda concerning public security, driven by the factors exposed above, elects politicians who often corroborate the existence of power parallel in relation to the State, especially on the issue of militias<sup>329</sup>. The politicians who compose the Countertop of bullet, and who gained strength in the 2018 elections, endorse policies of extermination by military groups that act unofficially without respecting any human rights provisions.

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<sup>328</sup> WORLD POULATION REVIEW. **Crime Rate by Country 2022**. Retrieved from: <https://worldpopulationreview.com/country-rankings/crime-rate-by-country>. Accessed at: 26 May 2022.

<sup>329</sup> THE ECONOMIST. **Jair Bolsonaro will not defeat crime in Brazil by tolerating militias**: like Rodrigo Duterte in the Philippines, he thinks more violence is the answer. Retrieved from: <https://www.economist.com/leaders/2019/05/30/jair-bolsonaro-will-not-defeat-crime-in-brazil-by-tolerating-militias>. Accessed at: 21 Apr. 2022.

The main concern regarding forces parallel to the State is that when they associate with politicians, it promotes an irruption of the operational closure of the political system as those who draft the binding decisions foster de-differentiating activities.

Whether or not the fourth criterion is fulfilled depends on how one evaluates the existence and dominance of non-state forces in Brazilian localities that, almost in their entirety, are composed of poor and marginalized inhabitants who are excluded from a good part of the State's services. Because of this, since it is not the main scope of this research, it would be risky to make such a definitive diagnosis regarding the presence of non-monopoly of force – at least unofficially – on the part of the State that, in the Brazilian case, due to its territorial extension and the problems of exclusion (or under-inclusion) cannot be present in all the spaces in which it should be fulfilling its function.

Finally, the last criterion proposed by Heidrun Zinecker results in the tautology of exclusion from exclusion, that is, exclusivist policies and regimes should be excluded, and this should be read in a broad sense. Inclusion, as the opposite of exclusion, in the dictates proposed by Zinecker, ranges from political rights to economic issues, to citizenship issues.

Perhaps this is the most difficult criterion to comply with, not only because of its amplitude and number of subcriteria but also because of the matter it addresses. At first, one can agree that Brazil is in line with what is proposed, as is the case of free expression and political manifestation.

It is also questioned whether political parties are able to represent all the interests of the Brazilian population, making an articulation between civil society and the State. Although political parties have one of the tripartite functions of the political system in the process of circulation and counter-circulation of power since they are the ones who present to the audience the ideas and political agenda that should be chosen in the elections, in Brazil some parties operate as a mechanism to make someone eligible, without worrying about the connection between state and civil society.

Another problem is the practice of caciquism [*“bossism”/caciquismo*] in which party leaders provide barriers that compromise the freedom of political activity within the parties. Finally, although there is always the possibility of broad representation, due to the Brazilian social diversity, it will always fall short of a massive representation of the population.

Moving into a more sensitive field, Zinecker also questions whether practices of clientelism, corruption, and corporativism have a determining influence on politics. To enter

this area would imply a deviation from the objectives of the intended research, but it is impossible not to make some considerations about the theme.

Several authors in Brazilian political thought describe the occurrences of power-grabbing and governance practices that aim more at self-benefit than the public sphere. It can be argued that this is a pre-modern remnant that persisted in peripheral modernity because those in the upper stratum were concerned about staying in power. However, that one cannot fall into culturalist theses about complex problems of modernity. The periphery is as modern as the center but suffers from functional deficits.

In the Brazilian case, the political differentiation of friend/enemy, which today is strengthened due to populism, occurred long ago. Still in 1949, Victor Nunes Leal, in his study on the problems related to the municipality in the First Brazilian Republic (1889-1930) inferred the following:

The other face of patronage is the arbitrary use of personal power, employed in the persecution of political opponents: 'bread for his friends, a stick for his enemies'. [The saying is more forceful in the original, play being made with the closeness of the words *pão* (bread) and *pau* (a stick) — *Translator*.] The relations between the local chief and his opponents are rarely cordial, and **the normal state is one of open hostility**. Aside from this, there is obviously the systematic refusal to grant any favours to political opponents who, for the most part, would consider it humiliating to ask for them<sup>330</sup>.

These practices of political hostility, as described by Victor Nunes Leal, derive from patronage relations that permeate until today, since the Brazilian Republic "was born without people and oligarchic"<sup>331</sup>. Independently of the meanderings about the classification and designation of these exclusion mechanisms, it can be affirmed that Brazil still suffers from these conjunctural problems that compromise the process of solidification of democracy.

The tautological measure of exclusion from exclusion is repeated in other Zinecker subcriteria when the political regime is determined to de-oligarchize, not only in the political sphere, per se, but also in the social and economic spheres, even encouraging political initiatives such as land reform to de-oligarchize the economic system.

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<sup>330</sup> LEAL, Victor Nunes. **Coronelismo: the municipality and representative government in Brazil**. Cambridge: Cambridge University Press, 1977, p. 14-15.

<sup>331</sup> ABRANCHES, Sérgio. **Presidencialismo de Coalizão: raízes e evolução do modelo político brasileiro**. São Paulo: Companhia das Letras, 2018, p. 21.

If all five of the above criteria are fulfilled, one has a political context in which "democracy is the civilian ruled, non-authoritarian, polyarchic regime, a democratic-representative regime subject to the rule of law, civilizedness (non violence) and inclusion"<sup>332</sup>.

By taking Heidrun Zinecker's model as a parameter, one realizes that Brazil does not fit the proposed model of democracy. Today it is no longer appropriate to locate Brazil as a country in the process of transition from authoritarianism to democracy, but in the process of consolidating the conduction of democratic structures.

The hypothesis that we live in an under-democracy becomes more solid when faced with the partial fulfillment of Zinecker's criteria because, although it does not stick to the full concept, Brazil keeps its course guided by democratic horizons, although it suffers from allopoietic influxes.

In the next topic, we will look at other intermediate concepts that have been developed to explain these relations of what can be called "partial democracy".

#### 5.4 PSEUDODEMOCRACY

General forms of hybrid regimes have already been explained, as well as their derivatives or consequences, such as waves of democratization and bipolarity of democracy. These operational concepts are useful to understand intermediate forms of categorization of democracy in world society as a function of structural asymmetries between the center and periphery.

Having said this, the next topics will address other forms of classification and description of democracy, especially when it comes to transitional regimes and processes of consolidation of democracy to then confront them with the proposal of under-democracy that has been developed throughout this work.

In this topic, the concept under analysis is pseudodemocracy, which appears in the same classificatory context of hybrid regimes that have as a result of their hybridization the combination of democratic and authoritarian elements. However, throughout this thesis, we have already seen that democracy provides "normative constraints" on the political system that have the function of filtering the entrance of non-democratic forms into the system. Democracy appears in modernity as a lighthouse that guides expectations: "Everything which comes later

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<sup>332</sup> ZINECKER, Heidrun. Regime-Hybridity in Developing Countries: achievements and limitations of new research on transitions. *International Studies Review*, [s. l.], v. 2, n. 11, p. 312, 2009.

must adapt to the structures or seek to alter the structures in a specific respect through measures which adapt to the structures or seek to alter them in a specific respect"<sup>333</sup>.

In turn, Anna L Ahlers and Rudolf Stichweh have shown us that authoritarianism adopts new facets to thrive in modernity, and it is in this diapason that pseudodemocracies emerge.

**Virtually all hybrid regimes in the world today are quite deliberately pseudodemocratic, "in that the existence of formally democratic political institutions, such as multiparty electoral competition, masks (often, in part, to legitimate) the reality of authoritarian domination."** All such regimes lack an arena of contestation sufficiently open, free, and fair so that the ruling party can readily be turned out of power if it is no longer preferred by a plurality of the electorate. While an opposition victory is not impossible in a hybrid regime, it requires a level of opposition mobilization, unity, skill, and heroism far beyond what would normally be required for victory in a democracy<sup>334</sup>. (Our emphasis in bold) (Author's emphasis in italic)

The way Larry Diamond suggests the use of the term "pseudodemocracy" indicates that it meets the definition of hybrid regimes already described here. The "false democracy" would be, therefore, a way of adhering to the minimum criteria that can be attributed to democracy, but in a way that legitimizes, as a mimetic resource, that one is living in an authoritarian reality. It is with great certainty that Diamond affirms that almost all current hybrid regimes are pseudodemocratic.

One must, therefore, question this intrusion of authoritarianism in any form of democracy, because often what one sees are not remnants of authoritarian elements, but rather the superimposition of codes from other systems to the detriment of law and politics. This does not occur because of authoritarianism, which is a reflection of the political system, but because of dysfunctional inflows.

By working with the idea of under-democracy it becomes more understandable how this systemic disruption occurs, which is most often, but not exclusively, found in countries of peripheral modernity. Under-democracy comprises this overlapping of codes but does not exclude the conditions of possibility for functional differentiation. What occurs is the modification of the secondary codification of the political, which should be given by the juridical, but ends up taking itself by criteria of economy, religion, and even a change in the

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<sup>333</sup> LUHMANN, Niklas. The Future of Democracy. **Thesis Eleven**, v. 26, n. 1, p. 50, 1990.

<sup>334</sup> DIAMOND, Larry Jay. Thinking About Hybrid Regimes. **Journal Of Democracy**, [S.L.], v. 13, n. 2, p. 24, 2002.

codification of the political, ceasing to be guided by the government/opposition relation and starting to take into account the idea of friend/enemy.

Developing the idea of pseudodemocracy, Larry Diamond states that there has been a growth of hybrid regimes, that is, regimes that fit neither autocracies nor democracies, during the late period of the third wave of democratization. Perhaps the greatest political phenomenon encompassing these hybrid regimes is the classification of "illiberal democracies".

This classification leads us to new relationships that have had significant advancement in the 21st century. Somewhat redundantly, liberal democracy is a political system that "both protects individual rights and translates popular opinion into public policy"<sup>335</sup>. The counterpart of this regime is illiberal democracies, which occur in "places where the majority chooses to subordinate independent institutions to the whims of the executive or to restrict the rights of minorities that displease it"<sup>336</sup>. At the same time, it should be noted that "liberal regimes can be undemocratic, "despite having regular, competitive elections"<sup>337</sup>.

Liberal undemocratic regimes incur in what Diamond comes to classify as "electoral authoritarian regimes," that is, there is the continued presence of electoral procedures, but no other guarantees – or Eigenvalues – that can name the regime under analysis as democratic. We have already raised some criticisms about the purely electoralist conception of democracy and how it can be harmful in terms of classification. One does not disqualify the occurrence of elections for the existence of a democracy, considering that they are conditions of possibility for the existence of democracy, but one cannot take into account only suffrage as a circumstance under analysis.

When contrasting the idea of pseudodemocracy developed with the perspective of the increase of illiberal democracies elaborated by Yascha Mounk, one can see that there are different premises, although they share the same semantics. Diamond still advocates for authoritarian remnants coming from transition periods in the democratization process. Mounk, in turn, starts from a diagnosis of the weakening of liberal democracy that incurs its variations: illiberal democracy and antidemocratic liberalism, which, in our view, seem to obtain more factual robustness.

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<sup>335</sup> MOUNK, Yasha. **O povo contra a democracia**: por que nossa liberdade corre perigo e como salvá-la. São Paulo: Companhia das Letras, 2018, p. 44.

<sup>336</sup> MOUNK, Yasha. **O povo contra a democracia**: por que nossa liberdade corre perigo e como salvá-la. São Paulo: Companhia das Letras, 2018, p. 45.

<sup>337</sup> MOUNK, Yasha. **O povo contra a democracia**: por que nossa liberdade corre perigo e como salvá-la. São Paulo: Companhia das Letras, 2018, p. 45.

Although the diagnoses were elaborated with a period of little more than 15 years difference<sup>338</sup> – and this should be considered – what is under analysis are the classificatory viabilities elaborated by both. Diamond invests in a hypothesis of the permanence of autocratic elements in the hybrid regimes arising from the third wave. Mounk has a perspective on the erosion of the institutions that maintain the credibility and functionality of a democratic regime.

Although both are part of a general global context, we must focus on the Brazilian case. With the promulgation of the 1988 Constitution, a series of rights was, at least in the formal sphere, ensured and went through a process of enforcement, which would categorize Brazil as a country in a process of democratization. Once they were put into effect, at least part of them, Brazilian democracy would begin to operate as democratic, but always to establish and strengthen democratic institutions.

Taking into consideration the thesis of pseudodemocracy, the argument of the permanence of autocratic elements during the Constituent Assembly would prosper. Although the Assembly wanted to supplant the authoritarianism that plagued Brazil between 1964 and 1985, it succumbed, albeit occasionally, to the influences of military and civilian supporters of the dictatorship. Jorge Zaverucha, for example, states that "the final outcome was a victory of the conservative coalition that was built inside the Constituent Assembly with external support of President Sarney [then president] and the armed forces"<sup>339</sup>.

Brazilian democracy, even though it suffered some setbacks during the Constituent Assembly and the following years after the promulgation of the Constitution of 1988, managed to stand on its own feet, although a little limping. The passage of the years also helped it to acquire institutional robustness, and authoritarian elements gradually faded from the horizon, but it still suffered from democratic apathy.

Thus, the thesis of pseudodemocracy cannot explain, or even observe, how the institutional situation is in a country that goes far beyond an electoral authoritarianism – a circumstance in which Brazil was inserted, at least in some states, during the Military Dictatorship – but also does not conform to the precepts required for an electoral democracy.

Working with under-democracy as an operational concept helps us to overcome part of this evaluative deficit because it is possible to assume the democratic pendencies of a

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<sup>338</sup> Larry Diamond published his paper "Elections Without Democracy: Thinking About Hybrid Regimes" in April 2002, while Yascha Mounk published "The people vs. democracy: why our freedom is in danger and how to save it" in 2018.

<sup>339</sup> ZAVERUCHA, Jorge. The 1988 Brazilian Constitution and its authoritarian legacy: formalizing democracy while gutting its essence. *Journal Of Third World Studies*, [s. l.], v. 15, n. 1, p. 116, Apr. 1998.

peripheral country based on dysfunctional criteria, not attributing only to authoritarian remnants the elemental problems of a democratic regime.

Furthermore, Diamond affirms that even the most consolidated democracies are still in constant struggle with antidemocratic practices in their daily lives, exhibiting "pervasive imperfections of responsiveness" that would also lead them to be considered as "'mixed' forms of government"<sup>340</sup>. This is difficult to sustain because, in the way it was put, all the countries of the world would be framed in mixed forms, although the existence of antidemocratic conducts in central countries is not denied.

However, we corroborate with Larry Diamond when he concludes "that most regimes are 'mixed' to one degree or another"<sup>341</sup>, which is in line with our proposal of under-democracy, although we do not agree at all with the hypothesis developed about pseudodemocracy.

Having made these considerations, we will move on to the analysis of the next classificatory resource, that is, semidemocracy, so that we can evaluate its accuracy concerning the current Brazilian conjuncture, as well as its relation to the under-democracy proposal we are discussing.

## 5.5 SEMIDEMOCRACY

The concept of semidemocracy that we will work with is based primarily on the work elaborated by Scott Mainwaring, Daniel Brinks, and Aníbal Pérez-Liñán. They developed a trichotomous conception of classification, dividing the countries under analysis into democratic, semidemocratic, and authoritarian ones. At first reading, one can already see that they go against the intermediate classifications and hybrid regimes that we have already worked on throughout this chapter.

Indeed, much has been discussed how dichotomous classifications do not understand the complexity of the phenomenon of democracy in modernity, because they end up disregarding nuances that are of fundamental importance for an accurate analysis of society.

The authors use four criteria that, according to them, define a democratic regime. The first of these criteria is based on the occurrence of free and fair elections for legislative and executive positions. There would be, therefore, a serious violation of this requirement when

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<sup>340</sup> DIAMOND, Larry Jay. Thinking About Hybrid Regimes. **Journal Of Democracy**, [S.L.], v. 13, n. 2, p. 34, 2002.

<sup>341</sup> DIAMOND, Larry Jay. Thinking About Hybrid Regimes. **Journal Of Democracy**, [S.L.], v. 13, n. 2, p. 33, 2002.

those who assume representative positions do not do so through elections, or when there are parallel pressures that force voters to vote for a particular candidate. In turn, there would be a partial violation when there is consistent evidence of fraud or persecution of the opposition, although there is still the possibility that the government may not form a majority in congress. There is also a partial violation when the electoral frauds, although influential, do not affect the completeness of the electoral result<sup>342</sup>.

The second criterion raised by Mainwaring, Brinks, and Pérez-Liñán deals with the right to vote and its inclusiveness. Being a condition of possibility for the existence of elections and, consequently, of the first criterion cited, the right to vote is seriously violated when a significant portion of the adult population is deprived of its active electoral capacity due to "ethnicity, class, gender, or level of education". A partial violation occurs "when the deprivation of the right to vote to some social groups occurs under conditions that are not likely to influence significantly the electoral results"<sup>343</sup>.

Then, the third criterion goes into the area of respect for civil liberties in a broad sense, ranging from freedom of association to the guaranteeing of constitutional rights and human rights. It is understood as a serious violation of this principle as the "flagrant violation of human rights or censorship of the mass media" or the curtailment of freedom of organization manifested mainly by political parties. Partial violations, in turn, follow the same practices cited, but intermittently<sup>344</sup>.

The fourth and last criterion deals with the real conditions for the exercise of power by those who are elected, and should not be constrained by organizations, especially the Armed Forces, and this influence should be "insignificant or negligible in policy areas". Thus, there is a serious violation when there is a significant influence of external bodies on the process of making binding decisions that are external to the processes of circulation and counter-circulation of power, and the Armed Forces deserve attention when it comes to this violation. A partial violation can also occur "when military leaders or the Armed Forces as an institution

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<sup>342</sup> MAINWARING, Scott; BRINKS, Daniel; PÉREZ-LIÑÁN, Aníbal. *Classificando Regimes Políticos na América Latina, 1945-1999. Dados*, [S.L.], v. 44, n. 4, p. 658, 2001. FapUNIFESP (SciELO).

<sup>343</sup> MAINWARING, Scott; BRINKS, Daniel; PÉREZ-LIÑÁN, Aníbal. *Classificando Regimes Políticos na América Latina, 1945-1999. Dados*, [S.L.], v. 44, n. 4, p. 659, 2001. FapUNIFESP (SciELO).

<sup>344</sup> MAINWARING, Scott; BRINKS, Daniel; PÉREZ-LIÑÁN, Aníbal. *Classificando Regimes Políticos na América Latina, 1945-1999. Dados*, [S.L.], v. 44, n. 4, p. 659, 2001. FapUNIFESP (SciELO).

have veto power over important policies in some areas not related to strictly military matters”<sup>345</sup>.

After the explanations of the four criteria developed by Mainwaring, Brinks, and Pérez-Liñán, according to the survey that covered the years 1945 to 1999, Brazil was never considered semidemocratic. The authoritarian periods include the years 1945 – end of the period known as Estado Novo and the year the survey started – and the interval 1964-1984, which comprise the period in which the country lived through its Military Dictatorship, excluding the last year (1985) for considering it already in a transition phase. In turn, the authors included the years 1946-1963 as democratic, as well as 1985-1999 (the last year taken into consideration in the survey)<sup>346</sup>.

One notices that, although the authors advocate for a trichotomic conception (democracy, semidemocracy and non-democracy), which would reduce the opacity of the political analyses about the regimes under analysis, Brazil is not categorized as a semidemocracy in any of the conjunctures analyzed so far.

It is not necessary to go too deeply into the analysis of the four criteria exposed, as well as their violations, be they serious or partial, to conclude that Brazil does not perfectly comply with what is established in the requirements proposed by Mainwaring, Brinks, and Pérez-Liñán.

Twenty years after the surveys on the Brazilian conjuncture, keeping in mind the time frame established for the development of the present work, it is convenient to reevaluate the criteria exposed above.

In the first aspect, the electoral system remains consolidated, despite suffering from some partial violations since the year in which the authors started considering Brazil to be democratic. However, today there is an addendum that deserves attention: although there were some constraints of the Armed Forces in the Constituent Assembly, as already mentioned, this ended up manifestly occurring until the year 2018. On that occasion, an Army General published on a social network, in a threatening tone, that the Armed Forces intended to

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<sup>345</sup> MAINWARING, Scott; BRINKS, Daniel; PÉREZ-LIÑÁN, Anibal. *Classificando Regimes Políticos na América Latina, 1945-1999*. **Dados**, [S.L.], v. 44, n. 4, p. 660, 2001. FapUNIFESP (SciELO).

<sup>346</sup> MAINWARING, Scott; BRINKS, Daniel; PÉREZ-LIÑÁN, Anibal. *Classificando Regimes Políticos na América Latina, 1945-1999*. **Dados**, [S.L.], v. 44, n. 4, p. 662, 2001. FapUNIFESP (SciELO).

"intervene" if the Supreme Court granted habeas corpus to former President Lula, who was in prison<sup>347</sup>.

Since then, with the election of Jair Bolsonaro, as well as the appointment of several military personnel to occupy bureaucratic positions in the federal government, the Armed Forces have come to occupy the proscenium of Brazilian politics in a way that can only be paralleled with the period of 1964 and 1985, and several statements that can be read as threats to democracy have already been made and have drawn the attention of international observers<sup>348</sup>.

Concerning the right to vote, Brazil can be considered to have few restrictions, limited to specific issues such as age criteria or the suspension of political rights due to a final criminal conviction. In this way, it ratified the idea that Brazil, at least in terms of the right to suffrage, is a democracy.

The third requirement for a country to be considered democratic, according to the authors under analysis, is the violation of human rights, with partial violations occurring intermittently.

It is well known that Brazil still has many unresolved issues concerning human rights. The years under an authoritarian regime have contributed to the fact that there has always been a gap between the needs and the humanitarian benefits.

When analyzing the indices of human rights protection<sup>349</sup> between the years 1985, the year in which Mainwaring, Brinks, and Pérez-Liñán consider that Brazil became democratic, and 2019, there has been little evolution.

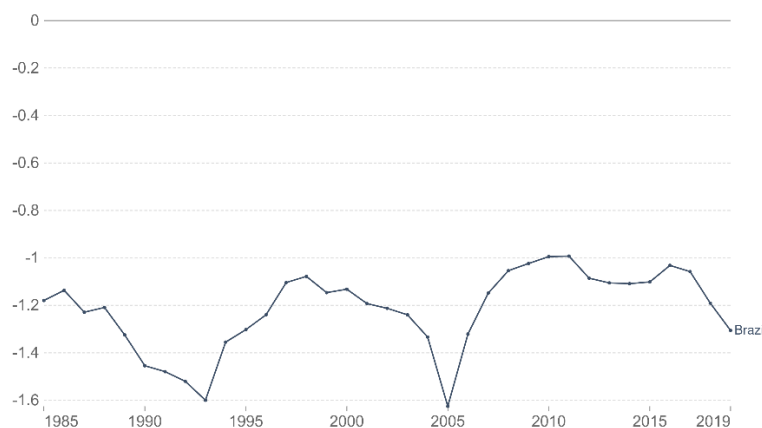
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<sup>347</sup> CONSULTOR JURÍDICO. **General Villas Bôas diz que calculou "intervir" caso STF desse HC a Lula.** Retrieved from: <https://www.conjur.com.br/2018-nov-11/villas-boas-calculou-intervir-stf-hc-lula>. Accessed at: 30 May 2022.

<sup>348</sup> ESTRADA, Gaspard. **El dilema de los militares brasileños: apoyar a Bolsonaro o a la democracia.** Retrieved from: <https://www.nytimes.com/es/2021/07/22/espanol/opinion/bolsonaro-ejercito-brasil-democracia.html>. Accessed at: 30 May 2022.

<sup>349</sup> "The scores capture the extent to which citizens' physical integrity is protected from government killings, torture, political imprisonments, extrajudicial executions, mass killings and disappearances. Higher scores mean fewer such abuses". In OUR WORLD IN DATA. **Human Rights.** Retrieved from: <https://ourworldindata.org/human-rights>. Accessed at: 30 May 2022.

Human rights protection in Brazil (1985-2019)



Retrieved from: Fariss, Kenwick and Reuning<sup>350</sup>

Based on the above data, years such as 1993 and 2005 proved to be disastrous when it comes to human rights protection. However, significant improvement can be seen after the last decline, reaching its highest point in the years 2010 and 2011 which, in turn, began to decline in the following years. Attending to the time frame delimited by us, the years 2018 and 2019 were years of vertiginous decline, which may correlate, but not conclude definitively, with the result of the 2018 elections.

Thus, intermittent human rights violations have been found in Brazil for a long time, partially incurring non-compliance with the third democratic criterion established by the authors in question.

The last criterion deals with the actual conditions of the exercise of government by the one who is elected, and this depends on the insignificant interference of the Armed Forces, which, especially in Latin America, played a predominant role in the coups against democracy in the 20th century.

This theme communicates directly with the partial violations of the first criterion that were exposed earlier: due to the inflation of the number of military personnel in the federal public administration since the beginning of Jair Bolsonaro's mandate, the Armed Forces have ceased to be a means to ensure national sovereignty and have begun to influence the binding decisions of the state bureaucracy.

Indeed, when Mainwaring, Brinks, and Pérez-Liñán elaborated the partial violations of the fourth criterion, they were referring to the interference of the military through legally

<sup>350</sup> FARISS, Christopher J; KENWICK, Michael R; REUNING, Kevin. Estimating one-sided-killings from a robust measurement model of human rights. *Journal of Peace Research*, [S.L.], v. 57, n. 6, p. 801-814, Nov. 2020. The condensed data is extracted from the Our World in Data website.

provided institutional mechanisms, even though they were not healthy for the establishment of a democratic environment. Thus, what occurs today in Brazil is a serious violation, since "military leaders or the military as an institution openly dominate areas of public policy not strictly related to the Armed Forces"<sup>351</sup>.

That said, it is perceptible that, at least in the 1985-1999 timeframe, as well as in the current conjuncture, Brazil would conform, according to the criteria raised, to what is stipulated for democracy and, due to some violations, should be framed as a semidemocracy.

However, some problems should be raised about this classification and contrast it with other theoretical aspects.

Much has been said about the gray zones of political regimes and why most countries find themselves in a situation that demands an analytical classification that goes beyond bipolar relations. In this sense, the proposition of an intermediate level between democracy and authoritarianism brings gains for investigative analysis but fails by considering too few variables in its observation.

The major flaw of the semidemocracy proposal is the non-inclusion of legal categories in its criteria. The stability of the system of checks and balances, as well as the Rule of Law, with all the amplitude of requirements it demands, are conditions of possibility for the existence of a democratic regime, and partial violations of the law would necessarily incur in the existence of a semidemocracy, in the dictates of the proposal under analysis.

However, one must realize that one cannot attribute all democratic insufficiencies to authoritarian irruptions. When assuming that the political system depends on law for the establishment of democracy, and not only by suffragist means, as supporters of minimalist conceptions usually adopt, but also as a means to contain the power, one necessarily incurs the possibility of interferences that compromise secondary codification, resulting in deficits that imply in the condition of under-democracy.

Working with the concept of under-democracy helps to understand a factorial diversity for the compromise of the secondary codification of law over politics that is not explored by the idea of semidemocracy. At the current juncture, what we see is an attempt to modify the political system by external means, such as religion and economics, or an implosion of the processes of circulation and counter-circulation of power due to the populist rise.

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<sup>351</sup> MAINWARING, Scott; BRINKS, Daniel; PÉREZ-LIÑÁN, Aníbal. Classifying Political Regimes in Latin America, 1945-1999. *Dados*, [S.L.], v. 44, n. 4, p. 660, 2001. FapUNIFESP (SciELO).

Attending more specifically to the Brazilian case, although it fits into the semidemocracy category, it is not sufficient for an evaluation of the structural asymmetries in world society, and for this reason, the concept of under-democracy can diminish the evaluative difference, since it holds within itself the capacity to understand the interferences that the environment can cause in the system.

Having made the considerations about semi-democracy, the last point to be evaluated is about the concept of anocracy.

## 5.6 ANOCRACY

We have already discussed a lot about intermediate forms of classification of political regimes based on opposite poles between democracy and authoritarianism. It has also been observed that, depending on the criteria followed, democracy is an unachievable ideal concept, and one should work with the idea of polyarchies, as proposed by Robert Dahl.

Within the models analyzed, there is an inflation of electoralist criteria that, although very relevant, has low analytical value, unless one considers minimalist conceptions of democracy. However, not much has been observed about the stability of democratic regimes, either when they are inserted in a transitional context or when they have already established a democratic but deficient *modus operandi*.

It is in this scope that the concept of anocracy arises to evaluate this condition of stability of political regimes. In the literature, the term had one of its first appearances in a paper authored by Ted Gurr and appears as an intermediate form between autocratic and democratic politics and can also be compared to an "uninstitutionalized state" or, more precisely, a state which has minimal functions, an uninstitutionalized pattern of political competition, and executive leaders constantly imperiled by rival leaders"<sup>352</sup>.

In this context, Gurr established three concepts for each category of the political regime to define his analysis of the changes in political systems between 1800 and 1971:

- (1) The essential quality of the "autocratic polity" is the institutionalized monopolization of power and political activity by the state.
- (2) The essential quality of the "democratic polity" is the presence of multiple institutionalized centers of power, some of which are open to widespread citizen participation.

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<sup>352</sup> GURR, Ted Robert. Persistence and Change in Political Systems, 1800–1971. **American Political Science Review**, [S.L.], v. 68, n. 4, p. 1487, Dec. 1974. Cambridge University Press (CUP)

(3) The essential quality of the "**anocratic polity**" is its relative lack of political power and institutionalization<sup>353</sup>. (Our emphasis)

From this definition, one can infer that the concept of anocracy, at least in a first reading, goes along with the proposal of under-democracy because it assesses dysfunctionalizing effects in the exercise of the capabilities of democracy. Moreover, Gurr understands that there can be levels of autocracy, democracy, and anocracy, which also corroborates the hypothesis sustained here.

Another point worth mentioning is that, since this is a historical survey, it was identified that there were more hybrid and anocratic regimes than regimes classified as democratic or autocratic, which corroborates other surveys of studies already cited in this chapter.

Ted Gurr's works also became a reference in other research, such as that of Bruce Russett, who defines anocracy as states "with a mixture of democratic and autocratic characteristics or a low concentration of power". In another moment Russett defines anocratic states as being "those near the middle of the scale from democracy to autocracy. They are frequently unstable regimes in transition; an adversary has incomplete information about what kind of regime it is facing"<sup>354</sup>.

This quote reveals a lot about how anocracies are seen in academia because, although it is a classification of intermediate regimes, its evaluation is done through the instability of transitional regimes, and because of this anocratic regimes are usually inserted in a context of the existence of wars or autocracies.

It is worth noting that Bruce Russett cites, with some reservations, a survey that classifies Brazil as an anocratic country between the years 1946-1964 and 1974-1986, considering the years 1965-1973 as autocratic<sup>355</sup>. Although one can question the Brazilian classification in this period concerning the years referred to as anocratic, the survey can be useful to illustrate, even if with limitations, how a country is classified as an anocracy.

In a more recent context, the concept of anocracy was brought up by Edward Mansfield and Jack Snyder to label "those regimes with dual executives, in which a hereditary ruler shares

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<sup>353</sup> GURR, Ted Robert. Persistence and Change in Political Systems, 1800–1971. **American Political Science Review**, [S.L.], v. 68, n. 4, p. 1487, Dec. 1974. Cambridge University Press (CUP)

<sup>354</sup> RUSSETT, Bruce. **Grasping the Democratic Peace**: principles for a post-Cold War world. Princeton: Princeton University Press, 1993, p. 77-78.

<sup>355</sup> RUSSETT, Bruce. **Grasping the Democratic Peace**: principles for a post-Cold War world. Princeton: Princeton University Press, 1993, p. 94.

authority with an appointed or elected governing minister”<sup>356</sup>. This new concept, which deviates from what was first proposed by Ted Gurr, is closer to a model of transitional regimes than a kind of dysfunctional democracy.

In this way, anocracies, as they have been treated, are conceived as a division of the concentration of legitimated authority, which results in governance between the authority that they call traditional and the authority that has been instituted by a provisional government that will lead the transition process so that there will not be an abrupt institutional rupture.

It should be noted that the classifications of political regimes around the concepts of democracy, anocracy, and autocracy make use of indices determined by other criteria. The most usual is done through POLITY scores, in which “‘Autocracies’ include all regimes with POLITY scores from -10 to -6; ‘Anocracies’ are those with POLITY scores between -5 and +5 (including -88 ‘transitional,’ -77 ‘interregnum,’ and -66 ‘occupied’ polities); ‘Democracies’ include all regimes with POLITY scores between +6 and +10”<sup>357</sup>.

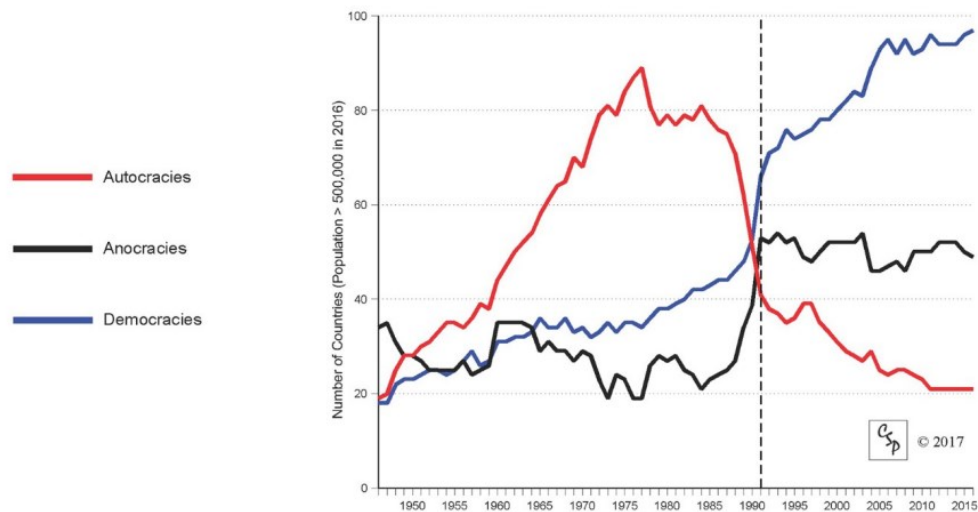
Based on these parameters, one can correlate them with the perspective of the waves of democratization, which does not deal with the idea of anocracy, to understand how the transition regimes take place over the years.

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<sup>356</sup> MANSFIELD, Edward D.; SNYDER, Jack. **Electing To Fight**: why emerging democracies go to war. Cambridge: MIT Press, 2005, p. 76.

<sup>357</sup> CENTER FOR SYSTEMIC PEACE. **Global Report 2017**: conflict, governance, and state fragility. Research conducted by Monty G. Marshall and Gabrielle C. Elzinga-Marshall. Retrieved from: <http://www.systemicpeace.org/vlibrary/GlobalReport2017.pdf>. Accessed at: 06 Jun. 2022, p. 31.

## Global Trends in Governance (1946-2016)



Retrieved from: Center for Systemic Peace<sup>358</sup>

In analyzing this graphic, a certain convergence with Samuel Huntington's waves of democratization and the re-reading proposed by Renske Doorenspleet is perceptible, although these authors have not included the concept of anocracy in their analyses. However, the relevant fact that should be noted is that while regimes classified as anocratic had a significant increase from the year 1983, this also includes countries that were classified as transitional regimes that were leaving their status as autocratic regimes.

Another relevant point, and one that is highlighted in the graphic, is the year 1990 as a landmark of stabilization – although still with some deviations – of the anocratic regimes, while the countries classified as democratic continue to rise and the autocratic ones maintain a decline that began in 1975. This is in line with the third wave of democratization, according to both Huntington's parameter, which establishes 1974 as the starting date of the third wave and Doorenspleet's, which established 1976 as the starting date.

However, as already mentioned, the semantic scope that the concept of anocracy has been modified and used over the years is today closer to the idea of transitional regimes, and the classification indexes themselves allocate the two types of regimes under the same conditions as the index above.

<sup>358</sup> CENTER FOR SYSTEMIC PEACE. **Global Report 2017**: conflict, governance, and state fragility. Research conducted by Monty G. Marshall and Gabrielle C. Elzinga-Marshall. Retrieved from: <http://www.systemicpeace.org/vlibrary/GlobalReport2017.pdf>. Accessed at: 06 Jun. 2022, p. 31.

If the concept of anocracy first developed by Ted Gurr were to be maintained, without including the transitional regimes, but rather the unstable and dysfunctional ones, it would be a more adequate way of classifying the social complexity in which we live.

Thus, it is understood that the classification of anocracy is not fruitful when one intends to analyze the structural asymmetries that are characteristic of world society. Going in a different direction, the proposal of under-democracy is capable of assimilating the dysfunctionalities of a political regime due to the allopoietic influxes that permeate it. Moreover, under-democracy takes into consideration legal issues that are often left aside in political indicators, especially because they are guided by electoralist criteria.

By bringing to the discussion not only formalist arguments but also arguments related to the content of systemic operations that are taken into consideration, especially by the secondary codification of law by politics, the idea of under-democracy emerges as an intermediary resource to this overlapping due to the democracy that guides political regimes in modernity.

Consequently, throughout this chapter, several forms of intermediary classification and observation around the concept of democracy were analyzed and it was found that other elements that are not, for the most part, belonging to an idea of minimal democracy are not taken into consideration.

Even in models like that of Heidrun Zinecker, which captures several points that are significant and substantial for full adherence to democracy, it is difficult to achieve because, according to him, “a non-functioning democracy is not a democracy”<sup>359</sup>.

We follow, in part, Zinecker's conclusion, but with a different argumentative path from the ones we have explored in this chapter: it is not a semidemocracy, hybrid regime, pseudodemocracy, or even anocracy. Particularly in the Brazilian case, according to the data provided and the arguments raised, this is under-democracy.

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<sup>359</sup> ZINECKER, Heidrun. Regime-Hybridity in Developing Countries: achievements and limitations of new research on transitions. *International Studies Review*, [s. l], v. 2, n. 11, p. 306, 2009.

## 6 CONCLUDING REMARKS

*Peoples, like planets, possess the right to an eclipse. And all is well, provided that the light returns and that the eclipse does not degenerate into night. Dawn and resurrection are synonymous. The reappearance of the light is identical with the persistence of the I.*  
Victor Hugo<sup>360</sup>

In the introduction to the present research, the so-called "Trump's effect" was determined as a time frame, which served as a trigger for numerous recent research studies on the risks that democracy suffers when under the rule of a regime that makes use of populist discourses to conduct its political agenda.

In the factual circumstances in which the specific objectives of this thesis were unfolded, some speculations can be made that are directly related to what was worked on and developed throughout this research.

The first of these speculations is to inquire about whether we are inserted in a reverse wave in reaction to the third wave of democratization. Although the number of democracies has been increasing over time, the current flirtations with ultra-nationalist, xenophobic policies that violate human rights and compromise the Rule of Law raise the alarm about the risks that democracies that are in the process of consolidation, or even being consolidated, may suffer.

Another heuristic way lies in establishing that we are inserted in the fourth wave of democratization and that, although there were no schisms that resulted in the last two reverse waves, the democratization processes took different directions from the ones that occurred throughout the 20th century.

In assuming the fourth wave, we could establish as a significant point for its beginning the Arab Spring that during the years 2010 and 2011 and which occasioned the deposition of several autocratic regimes in North Africa and the Middle East, although the succeeding regimes, depending on the country in question, resulted in political conditions as critical, if not worse, than before the protests, as is the case of the civil war in Syria. In this sense, it is already argued that the Arab Spring is a "fourth regional wave of democratization that shares some

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<sup>360</sup> HUGO, Victor. **Les Misérables**. New York: Thomas Y. Crowell & Co., 1887, Vol. 5, Book 1<sup>st</sup>, Chapter XX, p. 1427. Retrieved from: <https://giove.isti.cnr.it/demo/eread/Libri/sad/LesMiserables.pdf>. Accessed at: 08 Jun. 2022.

facets with the third global wave in terms of causative factors, features, and democratic transitions”<sup>361</sup>.

Once these two argumentative paths are established, one can conclude that, if we are in the fourth wave, it has only occurred regionally and has had very acute reverse effects, and that it is necessary to wait for the unfolding events to ascertain its consolidation, or not. In turn, to assume that we are in a third reverse wave, in the meantime, seems to be a very harsh diagnosis, the uncertainty that the future holds may always surprise us.

In any case, it seems to us that the winds of a third reverse wave are getting stronger, and this deserves the attention of all those who sail through the waves of democracy.

When it was established that the main problem of this research would be around the concept of democracy, many theoretical and methodological implications instantly emerged. The first one is of semantic character, due to the amplitude that the word "democracy" carries. Next is the methodological delimitation due to the justification of the choice of using social systems theory as a means of observation of modern society.

Throughout the research, it was verified that democracy acts as an evolutionary form that resulted in a means of normative constraints that filters communications of an authoritarian character that enter the structure of the political system. However, when new populist impulses emerge strengthened, there is an implosion of the mechanisms of circulation and counter-circulation of power that imply the alteration of the codification of the political system, no longer guided by the criteria of government/opposition to consider the relations of friend/enemy.

In this case, when we work with the speculation that we are facing the third reverse wave, it is understood that normative constraints may enter an erosion process, which would be the collapse of a democratic regime. However, what has already been said remains: at least for now, to speak of a reverse wave in a global context is still too precipitate.

But then how to evaluate the political disturbance in which we are living? It is in this environment that the concept of under-democracy has been proposed, which seeks to encompass the processes of institutional turbulence that cannot fit into the usual intermediate classifications, such as anocracy and semidemocracy.

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<sup>361</sup> ABUSHOUK, Ahmed Ibrahim. The Arab Spring: a fourth wave of democratization? **Digest of Middle East Studies**, [S.L.], v. 25, n. 1, p. 66, 24 Feb. 2016. Wiley.

Thus, under-democracy appears as a corruption of secondary codification that the law makes over politics, limiting the State's action, but suffering from the allopoietic influxes that occur in countries that are inserted in a context of peripheral modernity.

By focusing only to the Brazilian case, it has been noticed that although many of the requirements elected to constitute a democracy were fulfilled, other relevant requirements were disregarded and, in recent years, have started to be, at least verbally, ignored. This does not mean that Brazil is an autocracy or that authoritarian remnants from the time of the Military Dictatorship subsist, as the main classifications want to sustain. Neither should it be said that there is a "Brazilian democracy", and that the peculiarities of the country incur an institutional change of what should be understood as democracy.

To operate conceptually with the idea of under-democracy implies meeting the real analytical demands of the political and legal sphere without disregarding that one lives in a democracy, but that one is not inserted in an autocratic environment, and the understanding of autocracies in modernity is fundamental to understand how this process occurs.

Without entering into a strictly binary perspective, the proposal of the concept of under-democracy as corruption of the secondary codification helps in the understanding of how populism acts in the systemic sphere and how, in the long run, it can result in an autocratic regime. Under-democracy supports populism but does not support its extreme consequences, because there is no more split of the summit.

Having made these considerations about under-democracy, some partial limitations to its development and application should be exposed. The first of these is that, although it is a concept that has the pretension of applicability to world society, the fact that it has only been explored in the current Brazilian context can lead to problems that may be encountered in future and diverse applications.

Another factor that deserves attention is related to the data brought to support the arguments raised, especially the forms of classification worked on in the last chapter. Although this is not a quantitative research – and it is far from being considered as such – making use of empirical findings strengthens the analyses made and avoids incurring narratives. However, as we saw in the last chapter, the classifications themselves bring problems, and it was based on these analytical deficits that we developed the under-democracy proposal. Nevertheless, nothing prevents new surveys from undermining the theoretical effort employed here, contesting the data on which we are based and refuting the concept developed.

Attesting to these limitations in these final remarks, although it may seem a sign of failure, in fact, shows the confidence that is placed in the hypothesis raised for the present research, considering that, by stating its limits, it also defines its theoretical possibility and heuristic gains. From what was raised, especially in the last chapter, one can clearly see the potential that the concept of under-democracy carries to the detriment of the others exposed.

The entire investigative course traced, from the conception of modern society, the foundations of the theory of social systems, the conceptual delimitation of the term "democracy", as well as its development in modernity were justified in order to be able to explore the operational concepts with the necessary accuracy. In turn, the topics that dealt with the idea of evolution in the social sciences, which later led to the development of democracy itself as normative constraints, explain how the political system went through structural changes that were motivated by the semantics that democracy came to have in modernity.

This deserves to be highlighted because it gives new contours to what was said by Adam Przeworski: democracy is "the only game in town"<sup>362</sup>, and although the institutional mechanisms that evolved to restrain autocratic excesses still remain stable, and the proof of this is that we are not definitely in a third regressive wave, but only speculating about its possibility, we cannot expect the total erosion of the means that serve as a breakwater to these waves.

Moving towards the end, one should reflect on the epigraph that introjects these final remarks. Should it be pointed out that democracy is a kind of bet and that, until then, it is on it that all the chips of the game should be credited. And because it is a bet, we must also take into consideration that in some rounds we may lose something, after all, "Peoples, like planets, possess the right to an eclipse. And all is well, provided that the light returns and that the eclipse does not degenerate into night". What cannot be tolerated is that shadows remain and become normality.

Against an eclipse of the planets, there is not much that can be done, but against the eclipse of democracy, inertia cannot prevail. David Runciman, one of the authors who paid attention to Trump's Effect stated that "The threat to democracy is not manipulation. It is mindlessness"<sup>363</sup>. However, in the reality in which we find ourselves, manipulation and indifference go hand in hand so that autocratic outbursts take on greater proportions and compromise democratic institutions.

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<sup>362</sup> PRZEWORSKI, Adam. Democracy as an equilibrium. *Public Choice*, [S.L.], v. 123, n. 3-4, p. 269, Jun. 2005.

<sup>363</sup> RUNCIMAN, David. *How Democracy Ends*. London: Basic Books, 2018, p. 103.

The present thesis hopes to contribute by alerting us to some aspects of authoritarianism in modernity, focusing on the development of an operational concept that aims at improving observations of the legal and political conjuncture in peripheral countries. The idea of under-democracy, therefore, departs from a purpose that, by committing to remedy some analytical deficits, also emerges as a new research agenda that can yield new projects that seek the strengthening of democracy.

Reconciling with what was said at the beginning of this research, “The future as such gives cause for concern. That is its meaning and naturally this applies also to the future of democracy”<sup>364</sup>, and this should always be taken into consideration, whether by researchers, politicians, jurists. The eclipse that democracy experienced in the 20th century serves as a warning to us about the regressions that social and political life can bring about.

Thus, it is hoped that this thesis has fulfilled its objectives, even if partially, its role of discussing the (under)democracy and its future, as well as providing new discussions about the theme in the field of legal sociology.

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<sup>364</sup> LUHMANN, Niklas. The Future of Democracy, *Thesis Eleven*, v. 26, n. 1, p. 46, 1990.

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