

Democracy as a Foundation: A Democratic-Deliberative Constitutional Theory for the Realization of Social Rights in Brazil

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Abstract

This research investigates how understanding substantive democracy as an element that precedes and guides law can transform Brazilian constitutional interpretation and the implementation of social rights. Starting from the paradox between Brazil's significant economic growth and its modest human development indicators, this study adopts an interdisciplinary methodology combining comparative analysis of socioeconomic indicators, critical examination of political theories, and a hermeneutic-constitutional approach. The study critically analyzes liberal paradigms that prioritize negative over positive liberties, resulting in the judicialization of politics and the phenomenon of juristocracy—a regime where judicial power overrides other powers in determining major political issues. As an alternative to the predominant neoconstitutionalism, Democratic-Deliberative Constitutional Theory is proposed, based on Souza Neto's thinking and articulated with Danielle Allen's five dimensions of political equality. The most innovative aspect of this approach is the repositioning of social rights not as goals to be achieved through democracy, but as prerequisites for its very existence. The conclusion is that, after nearly four decades since the enactment of the 1988 Constitution, human development in Brazil has advanced below the country's economic potential due to a fundamental misunderstanding of what constitutes substantive democracy, whose effective promotion represents a necessary path to overcoming Brazil's structural inequalities.

Keywords

Deliberative Democracy, Social Rights, Constitutionalism, Human

1. Introduction

Much is debated about the normative force of the 1988 Federal Constitution and its transformative character in pursuing Brazilian economic and social development. Almost 40 years since its promulgation, Brazil presents a disturbing paradox: while it ranks among the largest economies in the world, occupying the seventh position in global economic rankings, its social indicators remain modest, with a Human Development Index that places it only in 89th position among 193 nations evaluated. This discrepancy demonstrates that economic growth has not translated into collective well-being, revealing fundamental limitations in the paradigms that guide our constitutional interpretation.

This research, however, does not intend to discuss the need for public policies or the legal mechanisms for their implementation, but something more fundamental. By examining the economic and legal paradigms underlying this paradox, one can perceive the existence of an element prior to the constitutional text itself, which guided its entire construction: Democracy. When Article 1 of the 1988 Federal Constitution defines Brazil as a Democratic State under the Rule of Law, the original constituent power established that Democracy precedes and guides the formation of Law. Interpreting it differently only strengthens what can be called juristocratic thinking—a phenomenon whereby judicial power overrides other powers in determining major political issues—which, supported by sophisticated arguments of formal protection, falls into argumentative self-referentiality, failing to effectively promote substantive democracy.

This study distinguishes between procedural democracy, which is confined to formal mechanisms of participation, such as individual, secret, and periodic voting, and substantive democracy, which transcends such limitations. Substantive democracy, understood herein as a foundational and guiding element of law, necessitates the guarantee of material and social conditions that enable equitable political participation and the realization of social rights as prerequisites for its very existence, as articulated by Allen's (2023) five dimensions of political equality. The neglect of this substantive dimension, coupled with the prioritization of negative liberties, has contributed to the emergence of juristocracy, defined as the phenomenon whereby judicial power overrides other branches in determining major political issues, characterized by a growing prominence of judges and courts in the decision-making process to the detriment of traditional political actors.

In this context, the central question arises: How can the understanding of substantive democracy as a foundational and guiding element of law overcome the limitations of liberal paradigms and juristocracy, transforming Brazilian constitutional interpretation and the realization of social rights as democratic foundations?

This research proposes to present a Democratic-Deliberative Constitutional Theory, based on Souza Neto's thinking (Souza Neto, 2006), as an alternative to the predominant neoconstitutionalism in Brazilian constitutional thought. The selection of Souza Neto's (2006) Democratic-Deliberative Constitutional Theory as a primary theoretical anchor stems from its explicit positioning as an alternative to the prevailing neoconstitutionalism in Brazilian constitutional thought. This framework provides the normative foundation for understanding how social rights emerge not merely as constitutional duties, but as obligations intrinsically linked to the construction of an effective and substantive democracy. Allen's (2023) scholarship, particularly her articulation of the five dimensions of political equality, complements this by offering a detailed conceptualization of what substantive democracy entails. Her work is crucial for defining social rights as fundamental prerequisites for democratic existence, thereby operationalizing the study's core argument. While this research advocates for this specific democratic-deliberative perspective, it acknowledges the significant influence of alternative frameworks within Brazil, particularly the prevalent neoconstitutionalism and its associated principled constitutionalism, which, as later discussed, have often contributed to the judicialization of politics and the phenomenon of juristocracy. From this perspective, it aims to guide the promotion of social rights not as mere constitutional duties, but as obligations arising from the construction of an effective and substantive democracy.

To achieve the proposed objectives, an interdisciplinary methodology is adopted that combines: i) bibliographic research in primary and secondary sources, covering classical and contemporary works of political philosophy, constitutional theory, and legal sociology; ii) comparative analysis of socioeconomic indicators, such as the Human Development Index and data on economic growth, to highlight the Brazilian paradox; iii) critical examination of theories that explain constitutionalization and judicial prominence, with emphasis on the evolutionary, functionalist, and institutionalist perspectives identified by Hirschl (2020); and iv) a hermeneutic-constitutional approach that reconsiders the relationship between democracy and law, positioning the former as a foundational and guiding value of the latter. This methodological path allows not only for diagnosing the limitations of predominant liberal paradigms but also for proposing theoretical alternatives that recognize social rights as prerequisites for the very existence of democracy.

The analysis unfolds in three distinct stages. In the first, the approach focuses on utilitarianism and its blind spot, which leads to conceiving democracy in a merely formal manner, thereby allowing the emergence of anti-democratic movements and overvaluing the Judiciary as an enlightened element above the other spheres of state power. The text discusses both constitutional theory and the conception of justice that, since the advent of the welfare state, grants the Judiciary a political role superior to that of a mere interpreter of legal norms. Given that Brazil presents contrasts when analyzed from a comparative perspective between economic and human development, this highlights how the gaps in liberal paradigms,

especially in the utilitarian interpretation of Rawls' (1971) theory and in the prioritization of negative liberties identified by Constant, culminate in the judicialization of politics and the erosion of the substantive political dimension of liberalism.

In the second stage, the research focuses on the critical analysis of the phenomenon of judicial self-referentiality, examining how this mechanism operates as a legitimizing element for the expansion of judicial power under the argument of democratic preservation. The text develops a well-founded critique of juristocratic tendencies, demonstrating their potentially harmful effects on the Brazilian Democratic State. This harm manifests itself both in the absence of objective and transparent interpretive parameters for constitutional hermeneutics and in the selective instrumentalization of these same parameters for the imposition of judicial views, distorting them from their original function of providing rational justification for decisions. The analysis establishes connections between this phenomenon and the historical roots of Brazilian institutional formation, highlighting how persistent social inequalities compromise the realization of substantive democracy, as discussed through the theoretical perspectives of Canfora and Allen on political and moral equality.

Finally, in the third stage, the work examines social rights as democratic foundations, exploring Souza Neto's (2006) democratic-deliberative constitutional theory in dialogue with Allen's (2023) five dimensions of political equality. It is argued that social rights should not be understood as mere objectives to be achieved by the democratic system, but as true prerequisites for its existence. This theoretical reconfiguration legitimizes judicial action in the realization of these rights, not as a substitute for substantive political choices, but as a guarantee of the minimum conditions for the democratic process itself to occur on equitable grounds, overcoming the false dichotomy between empty proceduralism and authoritarian substantialism, and recognizing the interdependence between material living conditions and effective political participation.

The structural division of this research into three distinct analytical stages is guided by a systematic methodological progression, moving from problem diagnosis to theoretical proposition. The first stage is designed to establish the core issue by critically examining the historical and theoretical limitations of liberal paradigms that underpin the observed paradox between economic growth and human development in Brazil. This diagnostic phase aims to uncover the conceptual deficiencies in current understandings of democracy. Building upon this foundational analysis, the second stage undertakes a critical scrutiny of the institutional consequences stemming from these identified limitations, specifically delving into the phenomenon of judicial self-referentiality and the challenges posed by juristocracy to democratic ideals. This analytical phase dissects how predominant interpretations manifest within the Brazilian legal system. Finally, the third stage is dedicated to a constructive theoretical contribution, re-conceptualizing social rights as fundamental democratic foundations within the framework of the proposed Democratic-Deliberative Constitutional Theory. This prescriptive phase

thus articulates the alternative framework, directly connecting the identified problems with a robust normative solution.

Thus, it is hoped to contribute to a theoretical reconfiguration that transcends both legal formalism and decontextualized judicial activism, positioning substantive democracy as a foundational and guiding value of the legal system. This perspective not only re-signifies Brazilian constitutional interpretation but also repositions social rights as indispensable preconditions for the formation of an authentic democratic will. By articulating Allen's five dimensions of political equality with the theoretical framework of deliberative democracy, this research offers a normative horizon capable of reconciling judicial prominence with democratic ideals, promoting national development that does not depend exclusively on judicial interpretation but emerges from the collective commitment to the construction of an effectively free, just, and solidary society.

2. Liberties in Conflict: How Liberal Paradigms Shaped Brazilian Social Inequality

Brazil presents contrasts when analyzed from a comparative perspective of economic and human development. To substantiate the central paradox of this study—namely, the discrepancy between Brazil's economic growth and its human development—data from highly reputable and officially recognized sources were carefully selected. The Human Development Index (HDI) for 2022, with a score of 0.760, ranking 89th out of 193 nations, was sourced from the 2024 Human Development Reports (HDR), representing the latest comprehensive evaluation available at the time of this research. Concurrently, Brazil's seventh position in global economic growth was referenced from information published by Agência Brasil (Moura, 2025), reflecting the most current assessment of the nation's economic standing. These specific data points and their respective publication years were chosen to provide the most recent and authoritative evidence illustrating the persistent gap between national wealth generation and the collective well-being of its population.

This disparity underscores Brazilian social inequality, which stems from deficiencies in liberal paradigms and the political philosophies that underpin them, which, in turn, influence the national legal system. When examining these deficiencies in liberal paradigms, Allen (2023) identifies that the dominant liberal paradigm in politics is based on two elements: welfare utilitarianism and a variation of John Rawls' Theory of Justice.

Allen (2023) explains that the utilitarian model seeks to maximize social happiness or, as economists prefer to call it, utility. Most utility maximization models focusing on preferences have disregarded contextual, social, psychological, and cultural aspects of individual economic agents. Utilitarian welfare maximization generally focuses on increasing aggregate income and wealth growth through redistribution policies to disseminate the benefits of this growth.

When John Rawls wrote *A Theory of Justice* (Rawls, 1971), he sought to chal-

lunge the utilitarian paradigm by proposing a dual structure for a just society. The first component of his structure is aimed at protecting basic liberties, which are rights designed to limit state intervention. The second component aims at social and economic structures that ensure equality of opportunity, which he calls the difference principle. This difference principle becomes relevant for income distribution policies and provides philosophical support for the utilitarian focus on economic growth when it is linked to the idea of income redistribution.

Income distribution becomes the central element of a paradigm that seeks universalization, disregarding social and regional specificities. Over time, the concept of happiness is gradually replaced by measurable elements, such as money, causing financial interests to become the primary focus of policy action within a universalized economic logic, while fundamental demographic aspects are relegated to the background (Allen, 2023: pp. 19-20). It can be said that the expression “grow the pie to divide it later,” widely disseminated by former Brazilian Finance Minister Antônio Delfim Netto, finds theoretical support in the utilitarian interpretation of Rawls’ theory, which served as a guiding basis for much of the world economy during the 20th century.

However, the practical limitations of this utilitarian paradigm became evident over time. Addressing this issue, Bercovici (2022) emphasizes that intensive strategies to attract resources or industries to less developed regions become ineffective when not accompanied by comprehensive development policies and coordinated public spending across all spheres, whose main objective is to improve the living conditions of citizens. The author highlights the insufficiency of economic measures when not accompanied by a broader vision of social well-being and the equitable distribution of the benefits of growth.

The insufficiency highlighted by Bercovici (2022) has well-defined historical roots. During the 20th century, a profound transformation occurred in the field of public policies, in which economics progressively replaced law as the main academic reference. This transition reoriented the analysis of social problems, privileging technical and quantitative methods over approaches based on principles of justice and equity. As a result, as Allen (2023) observes, legislative production began to incorporate generalizing political approaches that failed to adequately consider the social and demographic specificities of each context.

This phenomenon represents merely one of the gaps in liberal thought. Another neglected aspect is the prioritization of negative liberties (absence of interference) over positive liberties (capacity for realization), which results in the instrumentalization of political participation. This trend is especially marked in the utilitarian theories of the 20th century, where fundamental issues of a political and social nature are relegated to the background. To understand the historical roots of this dichotomy between types of freedom, it is necessary to examine the writings of Constant (2010).

In these works, a distinction is established between two types of freedom: that of the ancients and that of the moderns. The freedom of the ancients consisted of

collective and direct participation in political power—deliberating on war and peace, voting on laws, judging magistrates—but accepted the submission of the individual to the authority of the community, with severe surveillance over private life, customs, and religious beliefs. This freedom was viable in small territories, with economies based on slavery and societies oriented towards war. On the other hand, the freedom of the moderns, which Constant (2010) clearly prioritizes, consists of the peaceful enjoyment of private independence: the right to be subject only to the laws, to express opinions, to choose professions, to dispose of property, to move freely without needing permission, to associate freely, and to exercise influence over the government through representation. This freedom develops in larger states, with commercial economies, without slavery, where the individual, absorbed in their interests, can no longer constantly dedicate themselves to public affairs as the ancients did.

Constant does not reject political freedom, but considers it an indispensable guarantee of individual freedom, which is “the true modern freedom” (Constant, 2010: p. 323). He defends the representative system as the solution appropriate to modern times, allowing citizens to protect their interests without sacrificing their private independence. The author warns against two dangers: that of the ancients, who sacrificed individual rights in the name of political participation, and that of the moderns, who can easily renounce their political rights, absorbed in their private pleasures, thereby leaving open the path to despotism.

This reasoning of prioritizing negative liberties permeates the political philosophy of the 20th century, and Brazil is one of the states that suffers the consequences of the minimization of political value in favor of individual freedoms. The Brazilian Constitution of 1988 has content aimed at confronting historical social inequalities and is, therefore, frequently subject to modifications, either through formal alterations made by the Derived Constituent Power or through the interpretations conferred upon it within the scope of the Judicial Branch.

To analyze how this paradox manifests itself in the Brazilian legal system, it is necessary to examine the normative structure of the Constitution itself. The 1988 Constitution is established as a manifestation of the Constitutional State under the Rule of Law, characterized by the limits imposed on legislation for the protection of constitutionally guaranteed rights. As Ferrajoli (2012: pp. 233-234) observes, these rights operate through “primary guarantees”—the prohibitions or obligations that restrain legislation—and “secondary guarantees”—the jurisdictional mechanisms provided for cases of violation of primary guarantees. Primary guarantees manifest as prohibitions or obligations of a negative nature, preventing the impairment of rights, or of a positive nature, imposing specific provisions. In turn, secondary guarantees consist of the obligations to sanction or annul illegitimate acts that violate primary guarantees.

Although this theoretical framework is robust, its implementation in the Brazilian context faces significant challenges. The Brazilian constitutional paradigm is internationally recognized as a relevant object of analysis in the field of consti-

tutionalism. It is observed, however, that principled constitutionalism has become so consolidated that frequent collisions occur between public powers and invalidations of judicial decisions, phenomena that frequently produce legal uncertainty in the realization of justice. This situation results from the incorporation of the Jurisprudence of Values into a legal culture based on liberal individualism, a process carried out in an uncritical manner and without the necessary theoretical debates.

The evolution of liberal paradigms in Brazil, marked by the tension between negative and positive liberties and the substitution of law by economics as the main discipline, finds in the Judiciary an environment for its institutional manifestation. The prioritization of individual freedoms to the detriment of political participation, identified in Constant, combined with the incorporation of principled constitutionalism without the necessary theoretical debates, culminates in a phenomenon that represents the logical unfolding of this process of historical construction: the judicialization of politics. This directly affects the implementation of public policies of a social nature, given its major impact through judicial discretion, via the technique of weighing, on the theory of the rationality of legal discourse. This influence is evident in Brazil, where North American and German experiences exert significant impacts, especially after the promulgation of the 1988 Constitution. Consequently, a peculiar judicial activism develops, frequently presented under the guise of rights protection, applied both by the Supreme Federal Court and by the other instances of the Judiciary (Streck, 2017). This Brazilian judicial activism is not an isolated phenomenon, but part of a global trend that is the object of systematic study. The previously described phenomenon is part of a specialized literature that terms it “judicialization of politics.” This concept, developed by Tate and Vallinder (1995: p. 5), is based on the thesis that there is a global expansion of judicial power in contemporary democracies.

According to Tate and Vallinder (1995: p. 28), the judicialization of politics can be understood through two complementary meanings. The first refers to the process by which courts and judges come to develop or progressively dominate the formulation of public policies that, traditionally, were developed by other governmental instances, notably the Legislative and Executive powers. The second meaning refers to the growing incorporation of rules and procedures that are quasi-judicial (legalistic in nature) in forums for negotiation and decision-making that were originally non-judicial. According to the authors, these should not be considered equivalent by scholars who understand the expansion of judicial power—the first meaning implies that judges, supposedly non-political, exercise a “political” character; that is, they act as political agents. The second meaning suggests a transformation in which decision-makers, frequently identified as political, come to act as judges bound by rules, apparently apolitical.

This phenomenon cannot be dissociated from the paradox presented at the beginning of this study: the coexistence between economic growth and unfavorable social indicators in Brazil. The judicialization of politics manifests itself, in this

context, as a mechanism that, although it can fill gaps left by utilitarian economism in the field of public policies, reproduces, in another sphere, the same technocratic and decontextualized logic that substituted the principles of justice with quantitative metrics throughout the 20th century. Given this scenario, one observes the proliferation of **those who** defend the applicability of Social Rights, frequently developed critically given the insufficient or unsatisfactory effectiveness of these rights since the promulgation of the 1988 Federal Constitution—a fact corroborated by the data presented previously. This movement in the legal field mirrors, to a large extent, the same contradiction in the utilitarian interpretation of Rawls' theory: while the principle of difference and the need for structures that ensure equal opportunities are formally recognized, in practice the individualist logic that prioritizes negative liberties predominates. When the Judiciary assumes a leading role in the implementation of social rights through atomized decisions, frequently disconnected from a systemic vision, it reinforces the paradigm that dissociates economic growth from equitable human development.

Simultaneously, it is verified that issues related to political participation are frequently relegated to a secondary or instrumental plane, used as arguments to legitimize the self-referentiality of judicial decisions. In this context, democracy is not interpreted in its substantive dimension but reduced to a formal procedure that is exhausted in the exercise of the individual, secret, and periodic vote. This reductionist understanding of the democratic process, which converts substantive political participation into a formal procedure and transfers to judicial instances the power of arbitration over public policies, represents the apex of the process of hollowing out the political dimension of liberalism identified throughout this study.

The juristocratic culture that emerges from this scenario not only fails to resolve the crises of institutional legitimacy but also perpetuates the model that allows the coexistence between significant economic growth and persistent social inequalities, which reveals how the gaps in liberal paradigms are embedded in institutional arrangements that, although covered by a rights-protective discourse, hinder the overcoming of the Brazilian paradox initially presented.

3. From Constitutionalization to Juristocracy: Theoretical Foundations and Democratic Challenges

Returning to the commentary in the final section of the first part of this research, it becomes evident that the Judiciary, by expanding its power through constitutionalization and, consequently, the judicialization of politics, reveals a constitutional aspect frequently ignored: the origin of the phenomenon of constitutionalization. [Hirschl \(2020\)](#) examines this question and organizes the theories that seek to explain it into three main perspectives: the evolutionary, the functionalist, and the institutionalist. The evolutionary perspective understands constitutionalization as a natural and almost inevitable stage in the development of modern societies. In this view, the growing complexity of social relations and the expansion of

state functions would demand a more robust legal framework, capable of regulating the exercise of power and protecting individual rights. The functionalist perspective, in turn, emphasizes the role of constitutionalization in solving specific problems, such as political instability or the need to promote economic development. From this standpoint, the adoption of a rigid constitution and the strengthening of judicial review would be rational responses to the challenges faced by a given society. Finally, the institutionalist perspective focuses on the role of political actors and their strategic interests in the process of constitutionalization. According to this approach, the decision to adopt a new constitution or to expand the powers of the judiciary would be the result of negotiations between different groups, each seeking to maximize its own power and influence.

These three perspectives, although distinct, are not mutually exclusive. On the contrary, they can be combined to offer a more complete and nuanced understanding of the phenomenon of constitutionalization. In the Brazilian case, for example, it is possible to identify elements of all three perspectives. The 1988 Constitution can be seen as the result of a lengthy process of political and social evolution, which culminated in the redemocratization of the country after two decades of military dictatorship. At the same time, the new constitution was also a response to the specific challenges of that historical moment, such as the need to overcome the legacy of authoritarianism and to promote social and economic development. Finally, the process of constitutionalization was also marked by intense negotiations between different political and social groups, each with its own interests and agendas for the country.

However, regardless of the specific combination of factors that explain the phenomenon of constitutionalization in each case, it has had a profound impact on the functioning of contemporary democracies. By transferring a significant portion of political power to the judiciary, constitutionalization has created a new institutional arrangement, which [Hirschl \(2020\)](#) calls “juristocracy.” This new arrangement is characterized by the growing prominence of judges and courts in the decision-making process, to the detriment of traditional political actors, such as parties and parliaments. This phenomenon has generated a series of debates and controversies, which are at the center of contemporary debates on democracy and the rule of law.

One of the main criticisms of juristocracy is that it represents a threat to the principle of popular sovereignty, since it transfers the power to make fundamental political decisions from elected representatives to unelected judges. This criticism is often accompanied by the argument that judges, due to their technical training and their supposed political neutrality, are not prepared to deal with the complex and controversial issues that are at the heart of political debate. In addition, it is argued that the expansion of judicial power leads to a “judicialization of politics,” in which political conflicts are transformed into legal disputes to be resolved by the courts. This has the effect of depoliticizing public debate and weakening democratic institutions.

On the other hand, proponents of juristocracy argue that it represents a necessary and desirable evolution of the democratic model. According to this view, the expansion of judicial power is a way of protecting fundamental rights and ensuring the stability of the democratic order. In addition, it is argued that judges, due to their independence and their commitment to the law, are in a better position than politicians to make impartial and rational decisions. Finally, it is argued that the judicialization of politics is a way of civilizing political conflicts by submitting them to the rules and procedures of the legal process.

These are, in broad terms, the main arguments for and against juristocracy. As can be seen, this is a complex and multifaceted debate, which involves fundamental questions about the nature of democracy, the role of the judiciary, and the relationship between law and politics. In the Brazilian case, this debate has been particularly intense in recent years, due to the growing prominence of the Supreme Federal Court in the political scene. The court has been called upon to decide on a series of controversial issues, such as the termination of pregnancy, the rights of same sexual relationships, and the fight against corruption. This has generated a series of criticisms and controversies, which have placed the court at the center of public debate.

In this context, it is essential to reflect on the theoretical foundations and the democratic challenges of juristocracy. This is a crucial task for all those who are committed to the future of democracy in Brazil and worldwide. It is a task that requires a thorough and critical analysis of the arguments for and against the expansion of judicial power, as well as a careful examination of the concrete experiences of juristocracy in different countries. Only in this way is it possible to build a more just and democratic society, in which the power of judges is reconciled with the principle of popular sovereignty.

4. Social Rights as Democratic Foundations

In societies governed by democratic principles, the definition of the limits of the Judiciary's action remains controversial, especially when it comes to the implementation of substantive justice and the effective guarantee of social rights. The apparent paradox between popular sovereignty, expressed by elected representatives, and the mechanisms of constitutional control exercised by unelected magistrates has long been debated. Judicial interference in the competencies traditionally attributed to the Executive and Legislative Powers—those that received direct electoral endorsement—demands sophisticated and not always satisfactory theoretical justifications across all sectors of legal-political thought. It is noted that, in the realm of individual liberties and negative rights, although theoretical divergences persist, practical convergence has already been achieved: the legitimacy of the magistracy to establish checks on state excesses or violations perpetrated by private agents is widely recognized, thus protecting the essential core of individual guarantees.

Such convergence, however, does not occur when analyzing judicial action

aimed at correcting inaction or legislative insufficiencies in the realization of social rights of a welfare nature, as well as in the realization of positive liberties, since they require the provision of public services and material resources. In the discussion about the limits of the Judiciary's action, there is still no clarity on where legitimate activism ends and where undue invasion of Legislative attributions begins. This theoretical field remains characterized by considerable conceptual ambiguity and provokes heated debates, both in doctrine and among institutions. The investigation of the phenomenon demonstrates that social rights are not mere objectives to be achieved by the democratic system, but genuine prerequisites for democracy to even exist—this completely changes the way of understanding the political and operational role that the Judiciary must assume to realize them.

In this sense, [Cortina \(1995\)](#) points out the intrinsic relationship between equality, justice, and the very capacity to feel like a citizen. The absence of a minimum level of equality and justice prevents full citizenship, as discriminated individuals cannot recognize themselves as integral parts of the political community. Thus, the realization of social rights and the pursuit of greater material equity become indispensable conditions for the construction of a stable and participatory democracy, in which all members feel welcomed and valued. This understanding of social rights as democratic foundations leads to reflection on the very nature of justice in a democratic context. Following this line of thought and developing a theory of justice through democratic lenses, [Allen \(2023\)](#) argues that the balance between negative and positive liberties, without sacrificing either, combined with the commitment to political equality, constitutes a fundamental pillar for a just society. According to the author, political equality is not a monolithic concept, but unfolds into five distinct and complementary dimensions, functioning as a genuine anchor of the justice system.

The first of these facets is freedom from domination—a concept that transcends the simple absence of arbitrary interference in an individual's life or the exercise of some form of supervisory control. This type of freedom certainly encompasses the protection of those elementary rights that any person values: the choice of their faith, their party affiliation, their circle of relationships, or their professional occupation. However, upon closer examination, one perceives that such guarantees represent only the superficial layer. The truly essential aspect lies in ensuring that each citizen possesses an equivalent share of control over the structures that inevitably influence their daily existence—be they governmental institutions, legislative frameworks, political guidelines, or procedural mechanisms.

One notes that this theoretical proposition does not advocate for an anarchic scenario but problematizes specific hierarchical configurations. The examination demonstrates that restrictions, to acquire democratic legitimacy, need to move away from a logic of domination to approach a consensual arrangement among citizens. As [Maus \(2009\)](#) clarifies, only through the *pactum unionis* does the collectivity effectively assume its legislative function. From this perspective, the governmental instance is no longer subordinate to a static social contract but to the

democratically constituted normative dynamic. This pact proves to be essentially procedural, as its substance is limited to the democratic organizational principle.

Regarding the understanding of liberty, individual liberty cannot mean a total absence of dependence. On the contrary, liberal theory must distinguish liberty, which is desirable, from independence, which is impossible. An affirmative State provides the necessary preconditions for liberty, given that the Bill of Rights is a toolkit and a set of materials that citizens can only acquire through taxpayer-funded **institutions** (Holmes & Sunstein, 2019). Thus, true autonomy is facilitated by a State that, through democratically enacted laws and public services such as education, empowers individuals and groups, promoting a certain style of dependence that stimulates personal initiative, social cooperation, and self-improvement.

The second dimension of political equality, as proposed by Allen (2023), is based on the democratic system of governmental mechanisms. The principle of equitable access is essentially characterized by the establishment of impersonal institutional decision-making processes, creating collective institutions whose legitimacy derives directly from the representativeness and authorization conferred by citizens. However, such a structure necessarily requires that access to the decision-making apparatus be distributed equally among all members of society. This issue transcends the mere formal protection of the right to vote—an aspect already problematized by Canfora (2007) in his critical analysis—demanding that institutional arrangements ensure equitable participation in legislative, executive (including the regulatory sphere), and judicial decision-making processes at all levels of government.

This perspective of egalitarian accessibility particularly resonates in the judicial sphere, where Tushnet (1999) identifies significant weaknesses by questioning the supremacy of the courts. The researcher points out that constitutional interpretations made by the courts often present hermeneutic deficiencies—either due to methodological shortcomings or the biased application of existing methods—in addition to the problematic indifference of civil society to numerous judgments and, not infrequently, the deliberate omission in evaluating certain issues. Grimm (2023) contributes to this analysis by emphasizing the intrinsically political nature of judicial action, observing the striking epistemological divergence between political scientists, who recognize constitutional jurisdiction as a political institution, and jurists, who tend to reject such characterization.

The third facet proposed by Allen (2023) concerns epistemic egalitarianism. Epistemic egalitarianism is a principle that asserts that all individuals have an equal right to participate in the production and validation of knowledge, and that their perspectives and experiences should be given equal consideration in public discourse. This principle is crucial for a healthy democracy, as it ensures that decisions are made based on a wide range of information and perspectives, rather than being dominated by a select few. It also promotes a sense of inclusion and ownership among citizens, as they feel that their voices are heard and valued. In

practice, epistemic egalitarianism requires mechanisms that facilitate open dialogue, critical thinking, and respectful disagreement, allowing for the collective construction of knowledge and informed decision-making. This approach challenges traditional hierarchies of knowledge and power, advocating for a more inclusive and participatory approach to governance.

The fourth dimension of political equality, according to Allen (2023), is the principle of non-subordination. This principle asserts that no individual or group should be systematically subjected to the will or authority of another. It goes beyond formal equality before the law, addressing the underlying power imbalances that can lead to various forms of oppression and marginalization. Non-subordination requires not only the absence of direct domination but also the presence of institutional arrangements that prevent the emergence of new forms of hierarchy and control. This includes ensuring fair representation, protecting minority rights, and actively challenging discriminatory practices in all spheres of society. The goal is to create a society where all individuals can participate as equals, free from the fear of being arbitrarily controlled or exploited by others. This dimension is particularly relevant in contexts where historical injustices and structural inequalities have created entrenched patterns of subordination, requiring deliberate efforts to dismantle these systems and promote genuine equality.

Finally, the fifth dimension of political equality is the principle of civic friendship, as articulated by Allen (2023). This principle emphasizes the importance of mutual respect, trust, and solidarity among citizens, even in the face of disagreements and differences. Civic friendship is not about personal affection but about a shared commitment to the common good and a willingness to engage in constructive dialogue and cooperation. It requires citizens to recognize each other as legitimate participants in the democratic process, even when their views diverge. This dimension is essential for maintaining social cohesion and preventing political polarization, as it fosters a sense of shared identity and purpose. Civic friendship also implies a willingness to compromise and to seek common ground, rather than simply asserting one's own interests. It is a crucial element for building a resilient and inclusive democracy, where citizens can work together to address collective challenges and build a better future for all.

These five dimensions of political equality—freedom from domination, equitable access to governmental mechanisms, epistemic egalitarianism, non-subordination, and civic friendship—provide a comprehensive framework for understanding and promoting substantive democracy. They highlight the interconnectedness of various aspects of equality and freedom, demonstrating that a truly democratic society requires more than just formal rights and procedures. It demands a deep commitment to social justice, inclusive participation, and mutual respect among all citizens. By integrating these dimensions into constitutional theory and practice, it is possible to build a more robust and resilient democracy that effectively addresses the challenges of inequality and promotes the well-being of all members of society.

To illustrate the practical relevance of understanding social rights as democratic foundations, one can meticulously examine the Brazilian Supreme Federal Court's decision in Extraordinary Appeal (RE) 592.581/RS, rendered in [Brazil \(2015\)](#). The case originated from an action filed by the Public Prosecutor's Office of Rio Grande do Sul against the State of Rio Grande do Sul, seeking to compel the Public Administration to undertake emergency reforms in the Albergue Estadual de Uruguaiana. The core controversy centered on whether the Judiciary could impose an "obligation to do" upon the Executive, an intervention resisted by the State on grounds of infringement upon the separation of powers and the invocation of the "reserva do possível" (reserve of the possible) doctrine. The factual motivation behind the lawsuit was stark: the prison unit suffered from dire and subhuman conditions, including severe structural degradation, humidity, open sewers, and precarious electrical installations that had, tragically, already led to the death of an inmate by electrocution. The State Court of Justice (TJRS) had initially overturned the first-degree judgment ordering the reforms, asserting that such determinations fell outside the Judiciary's purview and into the discretionary domain of the Executive, highlighting the prevailing liberal paradigm that often separates social welfare from core judicial mandates.

The Supreme Federal Court, under the rapporteurship of Justice Ricardo Lewandowski, unanimously granted the extraordinary appeal, overturning the TJRS decision and reaffirming the first-degree judgment. The STF's pivotal legal argument established a comprehensive thesis: it is legitimate for the Judiciary to impose an "obligation to do" on the Public Administration, compelling it to promote measures or execute emergency works in correctional facilities. This is to ensure the effectiveness of the postulate of the dignity of the human person and to guarantee inmates the respect for their physical and moral integrity, as prescribed by Article 5, item XLIX, of the Federal Constitution. Crucially, the Court explicitly ruled that arguments of the "reserva do possível" or the principle of separation of powers **cannot be opposed to such decisions**. The Justices emphasized that the dignity of the human person is a supreme value, rendering programmatic norms of fundamental rights immediately applicable. They further highlighted the constitutional principle of the "inafastabilidade da jurisdição" (inviolability of judicial review), affirming the Judiciary's inherent duty to act when fundamental rights are violated due to state omission, especially when copious funds (like FUNPEN) designated for prison improvements remain unutilized.

Reanalyzing this landmark judgment through the lens of a Democratic-Deliberative Constitutional Theory, in dialogue with [Allen's \(2023\)](#) dimensions of political equality, reveals its profound resonance with the article's core argument: social rights as democratic foundations. The STF's insistence on ensuring basic, humane conditions for incarcerated individuals transcends a mere paternalistic provision of welfare or a narrow interpretation of individual liberties. Instead, it implicitly recognizes that the absolute deprivation of dignity, as evidenced by the "medieval dungeons" described in the ruling, fundamentally compromises the very possibility of democratic life and the exercise of any meaningful form of cit-

izenship, even for those temporarily deprived of liberty. This judicial intervention can be interpreted not as an arbitrary act of “juristocracy,” but as a necessary corrective against the “judicial self-referentiality” that might otherwise neglect the substantive conditions for democracy. By upholding the minimal standards of human dignity, the Court ensures “freedom from domination” and “non-subordination” for a vulnerable population, preventing their systematic subjection to inhumane conditions and preserving their inherent worth as individuals who retain the potential for future democratic participation. Thus, the decision acts as a foundational safeguard, ensuring the “minimum equitable grounds” upon which a truly deliberative and participatory democracy can eventually flourish, actively counteracting the “neglect of substantive democracy” that the article critically examines.

5. Conclusion

This research has explored the complex relationship between democracy, social rights, and constitutional interpretation in Brazil. It has highlighted the paradox of significant economic growth coexisting with persistent social inequalities, attributing this discrepancy to fundamental misunderstandings of substantive democracy and the limitations of liberal paradigms. By proposing a Democratic-Deliberative Constitutional Theory, grounded in the work of Souza Neto and Allen, this study offers an alternative framework that redefines social rights as prerequisites for, rather than mere products of, a truly democratic system.

The analysis has demonstrated how the prioritization of negative liberties and the phenomenon of juristocracy have contributed to the judicialization of politics and the erosion of substantive political participation. It has also emphasized the critical role of the Judiciary in upholding social rights, not as an overreach of power, but as a guarantor of the minimum conditions necessary for an equitable democratic process. The integration of Allen’s five dimensions of political equality provides a robust theoretical foundation for this approach, emphasizing freedom from domination, equitable access, epistemic egalitarianism, non-subordination, and civic friendship as essential components of a just and democratic society.

Ultimately, this research advocates for a reconfigured understanding of democracy that moves beyond legal formalism and decontextualized judicial activism. It calls for a collective commitment to building a society where social rights are recognized as indispensable preconditions for an authentic democratic will. By fostering a deeper appreciation for substantive democracy and its foundational role, Brazil can overcome its structural inequalities and realize its potential as a truly free, just, and cohesive nation. This theoretical framework offers a normative horizon for reconciling judicial action with democratic ideals, thereby paving the way for a more inclusive and equitable national development.

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Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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