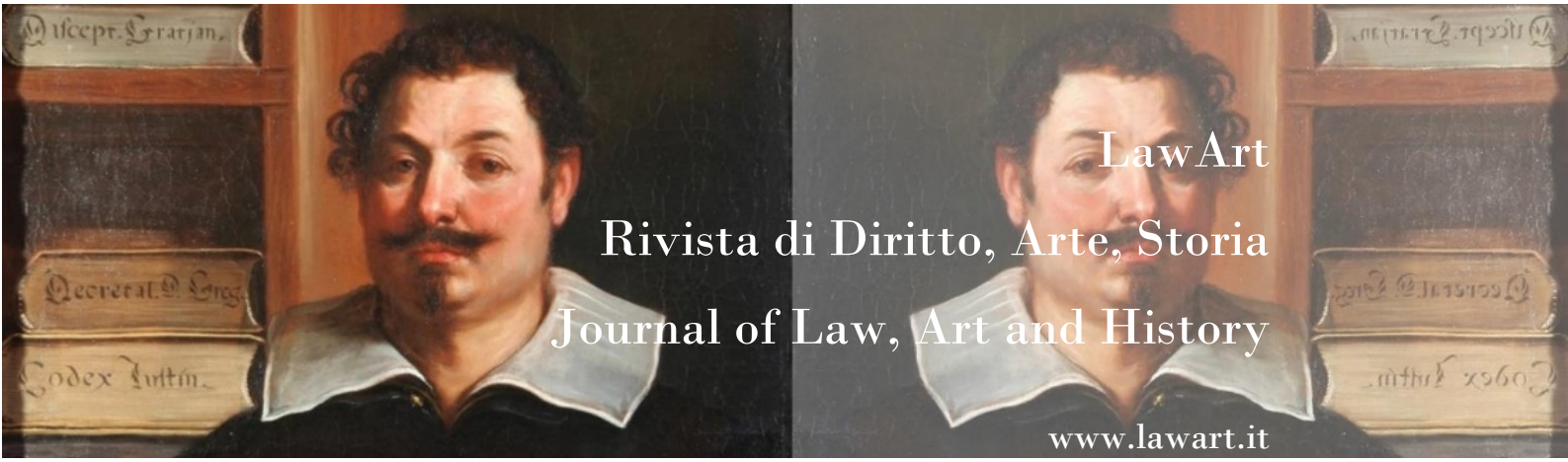

doi: 10.17473/LawArt-2022-3-4

3 (2022) 121-140

Douglas Antonio Rocha Pinheiro *

Optical Constitutionalism

Costituzionalismo ottico

* Universidade de Brasilia, darpinheiro@gmail.com

ABSTRACT. Optical constitutionalism must seek to ensure not only the mere hidden existence of the vulnerable, but also their visibility or, in other words, their right to see and be seen, to transit, to occupy public spaces. However, constitutional processes characterized by hegemonic bias often try to reinforce processes of exclusion and concealment. To think about these processes, this paper will reflect from visual categories extracted from painting, photography and cinema, in the following sequence: constitutional pentimento (the layers hidden by the process of refinement of a constitutional text), optical unconscious (the absences in the normative enunciation revealed by the technique) and inclusive parallax (the insurgency of visions that cannot be reduced to a single synthesis, which are necessary in their diversity in order to think of a plural constitutionalism).

ABSTRACT. Il costituzionalismo ottico deve cercare di assicurare non solo l'esistenza nascosta dei vulnerabili, ma anche la loro visibilità o, in altre parole, il loro diritto a vedere ed essere visti, a passare, a occupare spazi pubblici. Tuttavia, i processi costituzionali caratterizzati da pregiudizi egemonici spesso tentano di rafforzare processi di esclusione e occultamento. Al fine di esplorare questi processi, l'articolo riflette su categorie visive derivate dalla pittura, dalla fotografia e dal cinema, nel seguente ordine: il pentimento costituzionale (gli strati nascosti dal processo di rifinitura del testo costituzionale), l'inconscio ottico (le mancanze nell'enunciato normativo rivelate dalla tecnica) e la parallasse inclusiva (l'insorgere di visioni che non possono essere ridotte a una singola sintesi, che sono necessarie nella loro diversità al fine di pensare a un costituzionalismo plurale).

KEY WORDS / PAROLE CHIAVE: Visual Turn; Constitutional Pentimento; Optical Unconscious; Inclusive Parallax; LGBTQIA+ Rights / Pentimento costituzionale; inconscio ottico; parallasse inclusiva; diritti LGBTQIA+

Optical Constitutionalism

Douglas Antonio Rocha Pinheiro

1. *Introduction*

In the novel *The City and the City* written by China Miéville [1], two cities named Besźel and Ul Qoma, each with its own political-legal institutions, currency, language, and customs, occupy the same territory in an overlapping manner [2]. However, each one lives as if the other's presence did not exist. Children and foreigners need to learn to unsee the other city, its inhabitants, and its vehicles so as not to incur the serious offense of breaching, when one population interferes in the dynamics of the other – which can generate punishments for the citizens involved. Thus, for example, in everyday life, upon seeing the Other, perceptible by his or her manner, clothing, and appearance, any citizen should immediately unsee him or her, considering him or her non-existent or, at least, invisible.

Although the dystopian narrative can be considered primarily as a literary text, it is remarkable its ability to dialogue with theoretical assumptions of social sciences and to highlight situations of exclusion in the present. Walter Benjamin [3], impressed by the possibilities of cinema and photography, had already pointed out that the nature of things that speaks to our eyes is different from the nature that speaks to the camera, indicating that our visual perception is marked by a non-vision, an incapacity to perceive shadows, spectres, and projections that our own con-

[1] I thank Moreira Matagrande, author of the book *Logo atrás da aurora*, for the bright dialogues we had during the writing of this article.

[2] Miéville (2009).

[3] Benjamin (2008).

doi: 10.17473/LawArt-2022-3-4 LawArt 3 (2022) 121-140

sciousness throws into a blind spot. A blind spot, moreover, from which they are only removed by the strangeness caused by the impact of a new and unexpected image produced by the technique of art, capable of disturbing the gaze of conditioned inertia.

From the point of view of queer studies, Eve Sedgwick [4] reflected on how the hegemonic logic of concealing a sexually non-normative other, a posture that spreads to other attitudes of exclusion, such as the ethnoracial one, for example, corresponds to a regime of regulation of ways of life that she called the epistemology of the closet. Such regime is basically anchored in a political-legal binarism of public and private, which has been historically constructed by hetero-viriarchal patterns [5] and which prohibits or hinders both the access of the vulnerable to the public space (as in the case of transgender people and persons in situations of homelessness), and the access of the State and its safeguards to this same vulnerable person in the private space (as in the case of women victims of domestic violence). Thus, a double "unseeing" occurs, generated by the monopoly of the exclusionary gaze of the oppressor.

In this context, in which the visibility of minorities or vulnerable communities is restricted by hegemonic groups that aim to perpetuate their social capital, what would optical constitutionalism be? Constitutionalism [6], which is not exactly to be confused with the Constitution

[4] Sedgwick (1990).

[5] The choice of the term viriarchal over patriarchal stems from a perception that men exercise hegemonic power regardless of whether they are fathers or whether the society they belong to is patrilineal or patrilocal. On this topic, see Waters (1989) and Welzer-Lang (2000). Such a power logic that classifies society into binaries and then hierarchizes them is reinforced by compulsory heterosexuality.

[6] Constitutionalism, according to Fioravanti (2009), p. 5, is «a current of thought aimed at achieving concrete political purposes consisting, fundamentally, in the limitation of public powers and the consolidation of spheres of autonomy guaranteed by the norms». For Carlos Ruiz Miguel (2013), it was basically anchored on three pillars: the idea of the Constitution (normative foundation), the dignity of the human person (cultural foundation), and the possibility of a rights-guaranteeing order replacing the concept of the nation as an element of social cohesion (political foundation).

itself[7], originated from the attempt to impose limits on the arbitrary power. Consolidated with the Haitian, French, English, and American revolutions[8], constitutionalism was clearly built by majorities against colonial and/or absolutist governments. However, with the consolidation of democratic regimes, the logic of constitutionalism started to bias towards minorities and groups dispossessed of political-legal power, becoming a limiting force of the will of the majority so that, under the justification of legitimacy, it does not compromise the pluralism of a democratic dissensus.

This limitation of the will of the majority in defense of pluralism must, however, not only guarantee the mere hidden existence of the vulnerable, but also their visibility or, in other terms, their right to see and to be seen, to transit, to occupy public spaces. The constitutionalism that does not guarantee the free manifestation of lawful ways of life, silenced only because they do not correspond to the majority tradition, operates under the same logic as the epistemology of the closet and the rules of Beśźel and Ul Qoma. This blind constitutionalism, which serves to maintain the traditional and hegemonic projects of society, would perhaps suffice for the demands of docile bodies. However, it proves to be insufficient when black people, empowered by their history, challenge the aesthetics of straight hair and racist projects, including institutional ones, of social whitening; when transgender people, who have in their own bodies the first space of resistance, question any possibility of negotiation between

[7] The Constitution, as seen in the previous footnote, is only one of the pillars of constitutionalism. Okoth-Ogendo (1993), for example, pointed out that in some African states, the Constitution served only as an instrument for asserting the sovereignty of newly liberated countries before the international community, since, internally, it ended up legitimizing truly despotic governments.

[8] On the constitutionalism of revolutions, see Fioravanti (2009). Specifically, on the Haitian revolution, see James (1989). The mention of the Haitian revolution aims to provoke strangeness in the reader used to the classic mention of the three bourgeois revolutions. With this, we intend to highlight the existence of other constitutional processes that have been invisibilized by the hegemonic historical narrative, especially those processes marked by the protagonism of black populations and in the periphery of Europe and North America.

what can and cannot be exhibited in the square; when women reoccupy the concept of "slut", potentiating the visual shock in an intentional way to question the inversion of the burden of proof that always falls on the victims of feminicide, rape and harassment.

Optical constitutionalism, reflecting on the limits and possibilities of a visual turn in law, intends to promote critical studies that shed light on the hegemonic bias of the ways of constructing and reconstructing normative statements that are supposedly designed to protect vulnerable and minority social groups. The criterion of an optic constitutionalism is that of unveiling, of visibility, of free circulation. Judicial decisions or legislations that allow the non-normative, but restrict it to the domestic sphere, to the space of the hidden, clearly do not satisfy this criterion. Judicial decisions or legislations that guarantee any space, including the public one, as a place for the plurality of life projects, with their various shades, reinforce it. In Miéville's dystopian world, plural visuality that subverted previously defined social roles could generate the «breach infraction», with sanctions for those involved. In the present, this optical constitutionalism could perhaps deflagrate increasing processes of inclusion, consideration, and respect. The present paper intends, thus, starting from visual categories related to the binomial transparency-opacity, as well as from the Brazilian experience in the recent affirmation of LGBTQIA+[9] rights, to point out alternatives of an insurgent constitutionalism through a visual turn.

2. *Constitutional Pentimento*

Pentimento in Renaissance painting, by the very Italian etymology of the term, is usually linked to the artist's repentance, a supposed action of covering up his mistakes by adding superimposed layers of paint, mis-

[9] The acronym refers to a lesbian, gay, bisexual, transgender, travesti, two-spirit, queer, questioning, intersex, asexual, nonbinary, gender nonconforming, and non-heteronormative communities.

takes which, nowadays, could be revealed by radiography instruments or, in some cases, even perceived with the naked eye. But first and foremost, pentimento is an innovative artistic technique, whose greatest exponent was Titian [10]. At first, when the support for the paintings was still made of wood, its preparation was similar to that of frescoes, with the application of plaster, to which the sketch previously made on paper was transferred, with subsequent reinforcement of the outline, and only then the colours were applied – a method that required a certain speed and that Titian had learned from Giovanni Bellini.

Later, with Giorgione da Castelfranco, Titian changed both the support used, adopting hemp canvas, a linen of rough weaving which, treated with animal glue and calcium carbonate or sulfate, allowed a painting of deferred execution, and the technique adopted, abandoning the use of a previous drawing of contours, and making use of a gradual and spontaneous color superimposition [11]. The pentimento, in this case, corresponds to a painting technique marked by the application of successive layers on the canvas, a gradual refinement of the image, through continuous brushstrokes, but occasionally spaced by the need to wait for the drying of the paint already applied. Only with progressive superimposition does the final image take shape, because the colour nuances of the beings and objects represented are given only little by little. Of course, this process allows the artistic options abandoned in the execution of the work to be hidden by new layers of paint; however, it is not only a strategy for correcting mistakes, but the very technique of aesthetic finishing.

The process is similar to the elaboration of a constitutional text [12]. The more democratic the constituent experience, the greater the amount of overlapping paint layers, initiated by popular consultations and public hearings, refined by a first thematic committee, consolidated by another

[10] Examples of works by Titian in which the use of pentimento has already been demonstrated by radiography are *Noli me tangere* (1514) and *Portrait of Charles V on horseback* (1548).

[11] Vasari (1998), pp. 489-490.

[12] Gonçalves (2022).

systematizing committee until a last brushstroke leads to the final wording – just as the drafting of the current Constitution of Brazil was given. But, after all, in the Brazilian experience, did pentimento serve as a finishing or correction technique? This visual methodology of constitutional analysis reveals that both strategies have materialized. As the greatest Brazilian constituent democratic experience, the 1987/1988 Assembly renounced a previous basic text. Thus, although it incorporated several elements of the studies previously made by the Provisional Commission for Constitutional Studies, known as Afonso Arinos, due to the name of its then leader, the Assembly opened up to the construction of a forged text from 24 thematic subcommittees, each of which called to compute the proposal of an initial text in the matters of its competence with the contribution of constituent parliamentarians, public hearings, expert hearings, dialogues with social movements and citizen suggestions, the so-called popular amendments forwarded to the constituent through forms posted in the post offices [13].

However, the gradual process of superimposing these various partial reports, not always convergent, in order to integrate them into a single constitutional text opened the margin for the erasure of words, expressions and phrases that condensed entire processes of mobilization of certain socially invisible groups. An example of this was the articulation made by the then homosexual liberation movement, led by the representative of the Rio de Janeiro homosexual liberation group Triângulo Rosa, João Antônio de Souza Mascarenhas, for the inclusion, in the constitutional text, of an express prohibition of discrimination based on sexual orientation. Mascarenhas acted on several fronts: he encouraged other groups of the then Brazilian Homosexual Movement to exert pressure on the constituents, he requested opinions from specialists, especially anthropologists, to support the use of the term "sexual orientation", he was present at the public hearings designated by the thematic subcommissions [14]. Thus, the Triângulo Rosa group achieved a certain amount of success at first, especially consid-

[13] Barbosa (2018).

[14] Câmara (2002).

ering that the proposal of the Draft of the Sub-commission of Individual Rights and Guarantees made, on May 11, 1987, by the constituent rapporteur Darcy Pozza had the following text in its unnumbered article, item III:

> any type of discrimination will be punished as an unbreakable crime; no one will be prejudiced or privileged because of race, sex, color, marital status, age, rural or urban work, religious belief, sexual orientation, political or philosophical conviction, physical or mental disability, or social condition.

However, in the final version of the Draft, the process of pentimento began: thanks to the brushstrokes of conservative constituents, the expression "sexual orientation" was suppressed in the final version of the Draft, approved on May 23rd, 1987.

Later, there were attempts to bring back to the constitutional text the express prohibition of discrimination motivated by sexual orientation. In article 3, clause III, line f of the Draft proposed by the Rapporteur Paulo Bisol in the Commission on Sovereignty and Men's and Women's Rights and Guarantees, it was stated:

> no one shall be privileged or prejudiced on account of birth, ethnicity, race, color, age, sex, sexual orientation, marital status, nature of work, religion, political or philosophical convictions, physical or mental disability, or any other social or individual condition.

Again, the expression was deleted in the final approved version. Finally, article 12, clause III, line f of the Draft proposed by the Rapporteur Bernardo Cabral in the Systematization Committee proposed the same text formulated by Paulo Bisol and previously rejected. As the Systematization Committee integrated the preliminary drafts of the other committees, which, in turn, compiled the projects of the respective subcommissions, its actions deserved a greater media follow-up. Thus, the inclusion of the prohibition of discrimination based on sexual orientation was expressly referred to in some reports by the name that some conservative constituents attributed to it: the "faggot amendment". Thus,

despite several attempts to guarantee protection to a vulnerable group, the final text of the Brazilian Constitution of 1988 made no express mention of discrimination motivated by sexual orientation, thanks to the vigorous brushstrokes led by religious and conservative benches [15].

Pentimento is a way of seeing and then seeing again [16]. Thus, in relation to the Brazilian constituent process, for example, it manages to unveil both the democratic openness of the gradual process of drafting a text not previously imposed, and the strategies of erasure of inclusions that had only been possible through dialogic openness, but which meant intolerable advances for traditional groups with significant political capital accumulated at the expense of exclusions perpetrated by the dictatorial regime or its conservative moralist discourse. Pentimento as intentional erasure and as a technique of gradual textual construction: two possibilities for visual perception of the Constitution.

3. *Optical Unconscious*

According to Benjamin, «a different nature opens itself to the camera than opens to the naked eye» [17]. Such distinction does not result only from a refined and superior technical capacity of camera registration, but also from the fact that the human perception of the surrounding images is a first stage of oblivion. As much as memory operates a contraction of reality, it is not possible to retain the whole experience of the present, in such a way that each of the senses apprehends only what seems to be useful, apprehensions later conjugated in the constitution of the corresponding representation [18]. Thus, similar to the pulsional unconscious revealed by psychoanalysis, there would also be an optical unconscious revealed

[15] Pinheiro (2008), Vanderlei (2022).

[16] Hellman, 2000.

[17] Benjamin (2008), p. 236.

[18] Bergson (2004).

by photography [19]. On another occasion [20], I was able to demonstrate how such an optical unconscious served to disavow official narratives of the organs of repression issued during the military regime in situations that referred to the photographic paradox of the coexistence of two messages: one without code (denoted to a greater degree) and another codified (connoted to a greater degree).

While, in photography, denotation corresponds to a mechanical analogue of the real, connotation involves a plane of content, signifiers and meanings, which demand a true decipherment [21]. In the case of the images captured by the military, the connotation was produced by a modification of the real itself, obtained most often by the pose of the dead political persecuted and the surrounding objects, artificially arranged in front of the lens, composing, mainly, questionable scenes of suicide or gunfire. However, sometimes an analysis of the unintentional record made by the photograph itself brought out the truth, as in the case of the militant Lourdes Maria Wanderley Pontes, member of the Revolutionary Brazilian Communist Party, whose photographic image of her inert body leaning against the wall behind a Christmas tree with intact glass balls contradicted the official narrative of a shooting caused by alleged resistance to arrest [22].

The transposition of the concept of optical unconscious to the perspective of visual constitutionalism helps to understand the notion that the technique registers the unintentionality of the author. Such technique can reveal, later, what was supposed to be overcome or repressed by the countless layers of paint superimposed on the constitutional pentimento, an adequate instrument, therefore, to think about the processes of construction and reconstruction of the meanings of the Constitution. After all, the constitutional discourse is inevitably melancholic either because

[19] Benjamin (2008), p. 237.

[20] Pinheiro (2009).

[21] Barthes (1990), pp. 12-13.

[22] Pinheiro (2009).

it brings in itself, as a trace or symptom, the hegemonically erased pre-constitutional experiences, or because of the pretension of identifying itself with the pluralities diluted in the process of popular representation, fruit of the impossibility of the perfect mirroring between the constituents and the citizens represented by them [23]. Obviously, this melancholic moment of constitutional drafting cannot account for all the losses that operate in the constituent process. Moreover, such process is not exhausted in the enactment of the text, and it is up to the constitutional interpretation to deal with the inclusive nuances of the text when read against the grain – or to put it in visual language, when seen against the sunlight.

A constitutional text always operates a contraction of the real. However, although the presence or omission of certain words or expressions is a direct result of the intentionality of the constituents, the normative enunciations written in the light of a specific legislative technique, characterized by a generic, abstract, impartial and open writing, read together with its informing principles, end up contemplating in an expanded way the popular participatory experience in the process of drafting the Constitution and not only the strict intentionality of its representatives. With this, the constitutional interpretation that is minimally able to overcome a strict textualism will manage to reveal, as a technique of constitutional concretization, by judicial means, the vulnerable experiences protected by constitutionalism even when not expressly enumerated by the constitutional text.

Thus, although the final text of the Brazilian Constitution prohibited «prejudices of origin, race, sex, color, age and any other forms of discrimination» and treated the practice of racism as an imprescriptible and non-bailable crime, the process of construction and reconstruction [24] of the meanings related to racism has become more complex thanks to constitutional interpretation. First, in the Ellwanger case, in which a Brazilian revisionist was accused of writing, publishing and disseminating anti-

[23] Pinheiro (2020). To further explore the relationship between melancholy and law, see also Rose (1996) and Schiera (2011).

[24] Rosenfeld (1998).

Semitic books, the Constitutional Court had to dismiss the defense's argument that the crime of racism would either be impossible, considering that biologically all men would belong to the same race, or it would not apply to speeches addressed to the Jewish community, since in Brazil, both because of its history of slavery and the constituent debates, the typification would seek to punish only practices and speeches that were offensive to black populations. Thus, the Federal Supreme Court (STF) began to consider that the term racism would have a political-social content verifiable whenever there was the defense of «alleged superiority of one people over another» [25]. Later, in a judgment that ruled for the constitutionality of the criminalization of homotransphobia, broadening the previous understanding, the Court began to consider that racism also occurs when there is a manifestation of power aimed at

> ideological control, political domination, social subjugation and the denial of otherness, dignity and humanity of those who, as part of a vulnerable group (LGBTI+), [...] are exposed, as a result of odious inferiorization and perverse stigmatization, to an unjust and harmful situation of exclusion from the general system of protection of law [26].

Thus, in this case, the judicial technique of interpretation of the constitutional text brought to light what the constitutional pentimento had discreetly tried to hide: the prohibition of discrimination against people dissenting from the hegemonic sexual orientation [27].

Not without reason the criminalization of homotransphobia accomplished the real *unheimliche*. The Freudian concept is usually translated as something that at the same time seems familiar and disturbing, some-

[25] Supremo Tribunal Federal, *Autos do habeas corpus nº 82.424*. Pinheiro (2013).

[26] Supremo Tribunal Federal, *Ação Direta de Inconstitucionalidade por omissão nº 26*.

[27] From the initial insight of this article, it is worth discussing in the future which forms of judicial interpretation are more conducive to optical constitutionalism. Obviously, textualism fixes itself only on the outermost layer of the constitutional painting. However, other techniques, dealing with integrity, the usable past and the seemingly useless past, the living process of constitutional concretization may perhaps indicate more effective tools for unveiling constitutional pentimento.

thing «that should remain secret, hidden, but has come to light»[28]. Supposedly overcome social beliefs or the repressed familiar (in the sense of customary, ordinary, known) experience emerge as *unheimliche* – which in this judgment dealing with LGBTQIA+ rights generates a minimally instigating parallelism since, in English, the German term is usually translated by "uncanny", a recurrent expression in queer studies. Constitutional pentimento, then, became both limit and possibility. Limit because the exclusion in the final text of the Constitution of the express prohibition of discrimination based on sexual orientation meant the intentional erasure of rights of counter-hegemonic groups through a layer of paint superimposed by conservative groups. However, constitutional pentimento, as a critical theoretical lens, made it possible to go beyond the strict intentionality of the constituents, since it ensured sufficient registration of traces of the various successive previous brushstrokes that characterized the collective process of gradual construction of the normative enunciation. Thus, the right to sexual orientation ended up being revealed and guaranteed by a technique of constitutional interpretation handled by an independent judiciary in the context of a democratic state under the Rule of Law and capable of considering the distinct layers of the constitutional painting, even those linked to the claims of subaltern, vulnerable, or invisibilized groups.

4. *Inclusive Parallax*

The present emergence of what was repressed by hegemonic forces in the past cannot be harassed. The experiences of vulnerable minorities, fought against and at the same time remembered by the constitutional pentimento, later revealed by a technique of constitutional interpretation just as photography did with the optical unconscious, need to be taken seriously by the democratic constitutionalism that must effectively guaran-

[28] In German: «Unheimlich sei alles, was ein Geheimnis, im Verborgenen bleiben sollte und hervorgetreten ist». Freud (2020), p. 45.

tee the diversity of social points of view. To this end, we propose the third optical category of this paper: parallax, «the apparent displacement of an object (the shift of its position against a background), caused by a change in observational position that provides a new line of sight» [29]. Parallax is intrinsic to individual vision, which is perceived when the same object is observed, alternately, by each of the eyes. Such stereoscopic visual perception, arising from the integration of two distinct simultaneous gazes, is responsible for the notion of depth, an effect that Sousanis [30] calls "unflattening".

Among individuals, the parallax is even more noticeable, which does not result from subjective perceptions about the same supposedly neutral object. Subject and object are always mediated, in such a way that an epistemological change of the subject's vision results in an ontological change of the object. Thinking with Lacan, the subject's gaze is always-already inscribed in the object and perceived as its blind spot. Thus, reality is never apprehended in its completeness, which stems not only from the frame given by the eyes, but to the blind spot of his vision that indicates in the object the very inclusion of the subject [31]. In this way, if two subjects contemplate the object, there are not just two isolated points of view: there is one point of view and everything that escapes it, an excess of vision that is only complemented by the equally limited gaze of the other [32]. Thus, an asymmetry irreducible to an integrative synthesis is established: the elements that constitute the field vision with depth, unflattening, are not overcome by a finished integrative result, because they remain as indispensable factors of the mutually constitutive vision.

Transposed to the larger field of social and legal discourse, the insurmountable paralactic gap occurs in the confrontation of two points of view that are intimately linked, but which do not present a common neutral foundation capable of operating a synthesis, a reality that is increas-

[29] Žižek (2006), p. 17.

[30] Sousanis (2017).

[31] Žižek (2006), p. 17.

[32] Žižek (2006), p. 17.

ingly common in factual situations of plurality of collective life projects. Thus, the guarantee of the visibility of the Other in the public sphere, especially the one that had been repressed and emerges from the shadows of constitutional pentimento, is essential for distinct surpluses of vision to generate the greatest degree of openness of constitutional interpretation. Not without reason, Judith Butler asserts that

> "the people" are not just produced by their vocalized claims, but also by the conditions of possibility of their appearance, and so within the visual field, and by their actions, and so as part of embodied performance [33].

The right to appear, that is, «a bodily demand for a more liveable set of lives», is fundamental in necropolitical realities [34] and in countries, such as Brazil, that hold the highest level of homicide of transgender or gender non-conforming people, according to the *Transrespect versus Transphobia Worldwide* (*TvT*) project by the NGO *Transgender Europe* (*TGEU*). The construction of the people as a complex interplay between image, acoustics, and performance not only serves as a barrier to new processes of pentimento as erasure, but also ensures the complexification of parallax, which is key to ensuring an adequate inclusive perspective of constitutionalism.

An example of this: when the Constitutional Court was called upon to rule on the right of LGBTQIA+ incarcerated people to serve their sentences in conditions compatible with their gender identity, the Justice Luís Roberto Barroso decided, in a precautionary manner, for the mandatory transfer of transgender women to female prisons, where they should serve their sentences. The decision, apparently inclusive, reveals how the Justice effectively closed his eyes to reality. After all, many trans women have affective partners in male prisons or carry out activities labeled as feminine by the male prison population, but which provide them with resources to buy cigarettes, food, and hygiene material –

[33] Butler (2015), p. 19.

[34] Mbembe (2019).

products usually supplied by relatives, to which they do not have access for reasons of family abandonment. Thus, alerted in the process by the Brazilian Association of Lesbians, Gays, Bisexuals, Transvestites and Transsexuals (ALGBT), the judge ended up adjusting his decision so that transgender women could choose between serving their sentence in a female prison or in a male prison, as long as, in the latter case, they had access to a special wing capable of guaranteeing their physical integrity [35]. The consolidation of an in-depth view nuanced by different points of view was only possible through the recognition of the paralactic gap.

This process of deepening the social field of the inclusive vision presents a creative power so unexpected for law that, not infrequently, it ends up generating benefits for a much larger group than the lives of vulnerable minorities previously invisibilized. In 2019, the Brazilian Constitutional Court, considering that the right to equality without discrimination encompassed gender identity as a manifestation of the personality of the human person, and that it was up to the State to recognize it rather than to constitute it, ruled for the constitutionality of the change of prename and gender classification in the civil register by trans people, either through administrative or judicial channels, regardless of undergoing sexual reassignment surgery or presenting any kind of medical reports [36]. The guarantee that transgender and gender non-conforming people could be registered in all official documents by a social name more compatible with their self-perception made other citizens realize how arbitrary the state practice of obstructing the change of prenames of its citizens was. As a result, the Public Records Law, which initially only allowed name changes for a period of one year, a time interval that was counted from the moment of reaching civil majority (i.e., at the age of 18), was reformed in June 2022. Now, anyone over the age of 18 can change his or her first name on all official documents for once, at any time, without

[35] Supremo Tribunal Federal, *Arguição de Descumprimento de Preceito Fundamental nº 527*.

[36] Supremo Tribunal Federal, *Ação Direta de Inconstitucionalidade nº 4275*.

even being required to provide a justification. This is a good indication that law only acquires a visual depth in inclusive plural realities.

5. *Conclusion*

The access that you, the reader, have to the arguments I am presenting is probably through a printed text or an interface on the World Wide Web. The revolution brought about by Gutenberg meant that, gradually, knowledge ceased to be primarily apprehended in a culture based on hearing and began to take place in the midst of a visual culture. This event, however, corresponds to only one point in a long Western tradition that prioritized, among the five senses, vision. Plato had already described sight as divine; Aristotle, although he considered touch a prerequisite for the other senses, due to its ability to identify the properties (dry, wet, cold and hot) of the four elements, ended up establishing a hierarchy where sight was at the top [37]. The gradual loss of the importance of smell, which had been related to spiritual truth and botanical healing capacity in the medieval era, occurred especially after the sixteenth century when the cultivation of gardens became more aesthetic than medicinal [38]. In addition, the very way of contemplating sculptures, initially made also in a tactile way, was transformed, being restricted to visual observation due to the protective shields of the works that became more valuable over the years.

This supremacy of sight, although western and especially evident in English, the language in which this text is written, is not universal. In a comparative study, scientists created some sets of stimuli for each of the five sensory modalities and asked participants to describe them, in order to find out how much such stimuli were encoded in each language. The result pointed out that there is no universal hierarchy: while the English language has a predominantly visual bias, there are languages with a

[37] Jütte (2005).

[38] Classen (1993).

taste bias, such as Turkish and Farsi, others with a tactile bias, such as the Siwu spoken in Ghana. For diverse cultural reasons, each language has focused its efforts on translating the world into specific sensory domains [39].

Thus, the proposition of an optical constitutionalism may deflate an important trigger as it operates with cultural metaphorical categories sedimented in Western culture and the English language – even if occasionally the terms constitutional pentimento, optical unconscious, and inclusive parallax are seen in a certain original light in this article. The Constitution, as a written text, is likewise apprehended with a visual preponderance, except for oral transmissions and those made by sign language or Braille. Thus, the visual turn that is proposed intends only to illuminate blind spots of the hegemonic tradition, expanding the field of perception of law through an imagetic estrangement, in order to point out new possibilities for an insurgent constitutionalism.

However, a warning must be made: it will only have generated a positive result if vulnerable minorities are benefited by a larger process of inclusion that affects, in a positive and effective way, all sensorial possibilities. Beyond glimpsing a metaphorical horizon of equality, post-pandemic constitutionalism needs to return to guaranteeing housing, food, assistance, care, locomotion, health, breathing. Optical constitutionalism is only a means of correcting the myopic vision that hegemonic perception may have caused; the ultimate goal, however, will always be the full experience of vulnerable lives lived with dignity.

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