

Moralism and Democracy in the Trial of Criminal Case N. 470 (Brazil): An Open Constitutional Challenge

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Abstract

This paper discusses the theme of the principle of morality and its application by the Brazilian Supreme Court in the trial of Criminal Case n. 470. Despite the constant claims of violations of the principle of morality in the application of defendants' penalties, the Supreme Court did not care to draw up an objective definition of this principle to substantiate its custodial sentences. This lack of objectivity corresponds to the abstract notion of this principle, which contradicts modern democratic philosophy based on the ideas of Baruch Spinoza. In doing so, without providing an objective definition of the principle, the Supreme Court has actually engaged in revelation, which can also be understood through Spinoza's philosophy.

Keywords: Criminal Case n. 470, Spinoza, morality, moralism, revelation.

There have been recurrent observations that academia does not often criticise the activities of the Supreme Court. In recent times, it has no longer been possible to think this way, especially after the Court's controversial decisions regarding abortion, stem cells, the extradition of Cesare Battisti, and the trial of Criminal Case n. 470 (better known as the "julgamento do mensalão" the judgement of politicians involved in robberies), as well as the Court's intervention in the legislative process, and proposals for constitutional amendments to limit the Supreme Court. The rapid though largely insightful profusion of texts produced by jurists and intellectuals on these and other decisions seems to have left no doubt that the "intellectual vigilance" regarding the Supreme Court has grown, which has had an impact on the discussion about the Court itself and on its members². The publication of this volume by the Courts' Magazine is evaluated as positive, as it provides a set of reflections, although brief, concerning the judgement in Criminal Action n. 470, triggering, in a full search for reason, an initial behavioural evaluation of the Supreme Court in this case. Initially, it is important to point out the distinction between the quality of the thoughts outlined in this volume and the commonplace ones arising from mere political criticism: The former arises from rationality and a combined effort to understand the trial based on the objectivity of the Constitution and laws³; the latter results much more from disingenuous appeals to politics and moralism which, in a democracy, should not comprise the environment of judicial conclusions, not only in the Supreme Court but in any level of Brazilian justice.

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² Regarding the criticism involving the decisions of the Supreme Court of the United States of America and the antagonistic reactions of its members to such criticisms: Dershowitz, Allan: *Supreme Injustice*. Oxford/New York: Oxford University Press, 2001, p. 185.

³ Regarding the normative objectivity in a democratic environment, which is not to be confused with that of the Exact Sciences, see the exceptional explanation of: Müller, Friedrich: *Metodologia do Direito Constitucional*. São Paulo: Revista dos Tribunais, 2011, pp.65ss.

A brief contribution to this debate will point in this direction. The following central question will be faced: "Is the appeal to morality as a foundation, which is present in several aspects of the votes in the trial of Criminal Case n. 470⁴, legitimate in exercising the rationality that is inherent in judicial decisions in a democracy like the Brazilian democracy?" First, the concept of morality, as defined by Article 37 of the Federal Constitution, will be identified (this was the principle relied upon for the votes in the trial); subsequently, the accumulation of the modern philosophy on morality and its role in democracy will be considered.

I.

The morality principle defined in the Constitution of the Republic cannot be understood as random data, in which everything is possible and subject to the personal convictions of the one who applies it, i.e., the judge⁵. It is necessarily linked with the concrete reasons in each society, in each case, duly explained and articulated according to the existing normativity. Simply, this operation corresponds with the republic and the rule of law, i.e., all people are equal before the law. For this reason, is it not impossible for morality to be understood, or much less, applied in the abstract, without a concrete demonstration of its principles? The following is equally simple: If legislation established a custodial sentence – the freedom of movement is first among the individual and fundamental rights – the judge must ensure, with all possible certainty, that he does not commit illegalities, judging according to his particular understanding or emotions, rather than according to the constitution and laws. The consolidated thought that doubt will benefit the defendant also follows from this statement. This operation is so well known that its application does not cause any surprise, even to the inattentive reader or citizen. If it is true that there is not, in Brazilian law, any objective definition of morality and what would be a failure of it, effectively practiced by the people who occupy positions in the public administration⁶⁷.

⁴ The argumentative use of administrative morality appears in all of the votes in Criminal Case n. 470. On the other hand, this points out the absence of what the Ministers of the Supreme Court understand about morality. Morality, as a legal right, is protected by Article 317 of the Penal Code, and the behaviour of the convicted defendants in affecting the morality of the public administration, etc., is used as argumentative resource in the text of the judgement, for example, on pp. 1437, 1497, 1529-30, 1539, 4061, 4100, 4483-85, 4509, 6190, 8193, 8325, and 8328, to mention just a few of the uses that are among those that will be highlighted here. In particular, the emotional tone of the words of Minister Celso de Mello, p. 8328 (9/10), draw more attention: "**Thereby**, Mr. President, the consummation of a *legally bizarre* situation, which is *morally unacceptable*, **and politically damaging** to constitutional values, **causing** serious social perplexity **will be avoided** because **it makes no sense** to allow *people engaged in embezzlement, corruption, and with gang members, and agents tainted by the taint of venality*, after being criminally **convicted** in a final and unappealable decision, to **continue** to practice, **under the eyes** of a rightly appalled and outraged Nation, the parliamentary mandate whose respectability was outraged **and** defiled by them" (vote of Minister Celso de Mello). This understanding of Minister Celso de Mello is noteworthy, because the same minister had already outlined an understanding of this subject that was exactly in the opposite direction of the one manifested above. Such ambiguity is just one more element that warns us about the danger to democracy posed by moral subjectivity and emotions.

⁵ Likewise, emotional expressions to substantiate judicial positions were present, as seen on p. 1786 (3): "In this house, I am a Brazilian judge, not a judge from Minas Gerais State - though I would be honored to be from Minas Gerais - I am only a server. I am happy to be from Minas Gerais. I am *mineira* (from Minas Gerais) as all *mineiros* are. That is the reason why Minas Gerais has not failed to comply and honor its commitment to Brazil in the hardest of times; Minas Gerais deserves to be remembered historically for giving rise to men like Tiradentes, Drummond, Cláudio Manoel da Costa, Bilac Pinto; for hosting Milton Campos and Guimarães Rosa, Otto Lara Rezende, and Paulo Mendes Campos; to sing today with Milton Nascimento; and I want all people to be happy and for justice to reign in my country. Because I am a citizen from Minas Gerais, I see myself as part of the contingency from this Chair committed to a democratic justice that is not done without respect for ethical values, and I have compromised to emphasise that such cares are not the practice of a State, but are encumbrances to the Country and behaviours against the State of Brazil" (vote of Minister Cármen Lúcia).

⁶ Minister Luiz Fux states that there is a "reflection" on the legal protection of morality. Based on this reflection, he pronounced his vote, p. 1530 (41/42): "The legal protection of administrative morality and probity is also affected by the infra-constitutional legislation in the characterisation of embezzlement as a criminal offense.

There is no hope that the higher Courts of Justice in any society can apply this precept in sentencing involving the deprivation of liberty if it is made according to the personal preferences of the judges and their emotional appeals⁸. If the legislature did not address the issue in its discussions, there is no reason for the judiciary to override this legislature. What are the consequences of such an omission? They are an issue of partisan politics, i.e. for the women and men who are regularly and periodically elected by Brazilians. In cases involving such omissions, the society that elected them should develop maturity, focusing on those whom they have chosen, renewing the mandates granted to them or not. In any event, this is a policy challenge, not one for the judiciary, which is responsible for enforcement. Policy choices must be made by people who have received votes. The following are some of the important democratic guarantees regarding judges: They are given stability and lifelong tenure, for the very purpose that they are not to involve themselves in policy options aimed at creating laws; rather, they are to distance themselves from such debates, accepting the decisions of the elected representatives, and subjecting them to an objective analysis when they are required to examine the practical application of the Constitution and laws, without exceeding the limits imposed by the legislature. Lênio Streck warns that the incorporation of morals in the law can operate to bring about "society's transformation". However, as this author has stated, there must be incorporation by the law.

According to the magisterium of Damásio de Jesus, the typical figure remembered constitutes a "special kind of misappropriation committed by public officials *ratione officii*. It is a crime of a subject who makes his, or arbitrarily deviates, something that he possesses due to his post for his own advantage or that of a third party, whether it is state-owned, or private, or under his custody or supervision". (JESUS, Damásio E. de, *Direito Penal*, v.4. Special part: Dos crimes contra a administração pública, 9. ed. São Paulo: Saraiva, 1999, p. 119-122). The legal good protected by the incriminating standard is the public's confidence in the flawless and impersonal performance of state functions, justifying the sentencing of those who subvert these purposes by diverting or taking ownership of money, value, or any property whose possession has been assigned by the exercise of the public *munus*. In this sense, "the crime of embezzlement is a crime against the Public Administration and not against property, and the necessary and sufficient damage resulting from its consummation is inherent in the infringement of the duty of loyalty to the same administration, whether associated or not with property" (MIRABETE, Júlio Fabbrini, *Código penal interpretado*, 6. ed. - São Paulo: Atlas, 2007, p. 2372). The same fact is also repeatedly stated by Minister Luiz Fux, p. 4100 (62): "The crime of article 317 of the Criminal Code protects the administrative morality and is consummated by the receipt, solicitation, or acceptance of the promise of an undue advantage by a public official, for himself or for another person, directly or indirectly, even outside of his function or before assuming it, but because of it".

⁷Similarly, Minister Ayres Brito, p. 4509, (11) states: "(...) V-relating to the offense of active corruption, I start by considering that the legal good specifically addressed by Article 333 of Penal Code is the Public Administration, specifically "administrative integrity and morality." The legal good is thus explained by the Magnus Text: "The direct and indirect public administration of any of the powers of the Union, the States, the Federal District, and the municipalities will follow the principles of legality, impersonality, morality, publicity, and efficiency..." (*caput* Article 37).

⁸By the time Minister Marco Aurélio took over as President of the Supreme Electoral Tribunal **before** the trial, he had recorded his vote in Criminal Case n. 470 based on his "Christian" view, which sent a "message" to Luís Inácio Lula da Silva, the president at this time, that his presence would not be interesting at the ceremony (p. 1675 (2)), "(...) because I need, in an inaugural speech, to send a message. What was the message, President [of the Supreme Court]? I will take a little more time of the Board, which I did not do in the previous parts, because I believe that we are at the end of the assessment of Criminal Case n. 470. I began, President, I acknowledge that I began with fearlessness: Unfortunately, we are experiencing very strange times, when it has become commonplace to speak of the misfortunes involving public life, which have infiltrated the Brazilian population – which is made up mostly of orderly and honest people – with a mixture of anger, contempt, and even disgust. The lies are many and very blatant, such outrageous justifications, so great a lack of scruples that you can no longer think only about a crisis of values, but a moral and ethical gulf that seems to divide the country into two watertight segments - the corruption seduced by the project of achieving power in an unlimited and lasting way, and the great mass which is commanded, and despite the bad example, struggles to survive and prosper".

In other words, it is necessary for the legislature to act, as Lênio Streck emphasises, according to the recommendations of democratic practices⁹. The recourse for an issue that has not yet been decided by the legislature under the theory of law and constitutional interpretation is nothing new. The aforementioned "expansion of the concept of interpretation on the basis of legal principles (...)" has a price: The question of how the judge can answer a legal problem when the objectivity of his reading (*Leseart*) is questionable therefore leads to a double difficulty: methodical uncertainty (...) and the degree to which a judge can distance himself from the text, without usurping the place of the legislature"¹⁰. Friedrich Müller states that the "concretisation of a right in a Democratic State of Law should endeavour to abandon the "creeds", which are guided by methodically hasty conclusions, and instead use elements of argumentation that can be examined and discussed *concretely* (in the rational sense) in the context of the Science of Law, i.e., that constitute elements of relative objectivity in a very specific way"¹¹. In conclusion, requiring rationality and objectivity from judges with greater vigour for members of the highest court in the Judiciary – amounts to a true vindication of democracy and democratic rights. Not without reason, Lênio Streck strengthens this same position again when arguing in his convincing treatise for the rationality and objectivity of interpretive activity:

"A concrete situation is the only one that serves as a parameter for a correct answer (appropriate to the Constitution)"¹².

The second point in this reflection, which was mentioned earlier, addresses the accumulation of modern philosophy on morality and its role in democracy, and this will be described in section II.

II.

For Brian Barry, supposing that "justice as impartiality" can be conceived as a self sufficient moral system is "a big mistake". Because we all have different ideas, the challenge of justice as impartiality is to know "how we live together"¹³. The philosophical thinking of modernity has also faced this challenge, similarly abandoning the moral precept as a regulatory element of community life in the *res publica*. The philosophy of Baruch Spinoza will be used as a basis for the rejection of abstract moral values and their pernicious character for the implementation of the constitution and the laws in a pluralistic and democratic society. After all, in a surprisingly current form, the assertion that the "supreme good is collectively experienced which was made by Spinoza in the Ethics, i.e., that joy is experienced not individually in solitude, but in the company of others in the City"¹⁴ reveals the deception associated with the arrival of moral values in the public sphere in the absence of a decision made by all of the people of the city, without the objectivity of the fixed laws of reason.

If the Supreme Court – in the company of almost all current constitutional courts has challenged the limits of the Constitution, there is nothing new about it, according to Spinoza's thought. The power of the crowd is the constituent power, i.e., the desire to be the city and together experience the affects that stem from the rational use of the law. Thus, an attempt to overtake the sovereign power would be a "physical impossibility" since it is impermissible for the Supreme Court (and also the legislative and executive powers) to exceed the sovereign power, although, by its decisions, it leaves no doubt that it has this intention¹⁵. Such a mechanism stems from the fact that no one should exceed the power of the *multitudo*. When this intention – of overtaking the power of the crowd – touches the world of the concrete, there is an operation similar to what Spinoza accurately defined as the power of revelation.

For Spinoza, the prophets' revelation regarding the Sacred Scriptures and their events reflects nothing more than a power struggle in the inner city. In Chapters I, II, and III of the Theological

⁹Streck, Lênio Luiz. Verdade e Consenso. São Paulo: Saraiva, 2012, pp. 229/230.

¹⁰ Müller, Friedrich u. Ralph Christensen. Juristische Methodik. Berlin: 2. Auf., Duncker&Humblot, 2007, p. 189. Translation by the author of this text.

¹¹ Müller, Friedrich. Teoria Estruturante do Direito. São Paulo: Revista dos Tribunais, 2009, p. 120.

¹² Streck, Lênio Luiz. Verdade e Consenso. São Paulo: Saraiva, 2012, p. 179.

¹³ Barry, Brian: Justice as Impartiality. New York: Oxford University Press, 1996, p. 77.

¹⁴Guimaraens, Francisco. Direito, Ética e Política em Spinoza. Rio de Janeiro: Lumen Juris, 2010, p. 168.

¹⁵Espinosa, Baruch de. Tratado Político. São Paulo: Martins Fontes, 2009, p. 38 (Cap. IV, 3). I owe my teacher and friend Francisco Guimaraens for his attention to this aspect of the philosophical system of Spinoza.

Political Treatise, Spinoza discusses the "revealed religion" as the prophets' work, and as work, therefore, concerning theology, since it is divorced from reason, and those who use reason and philosophy as servants of faith certainly "will go mad"¹⁶. The prophets dictated the revelation of the Sacred Scriptures with prophetic sureness, which "(...) obviously was not a mathematical certainty, but only a moral one, as it is also stated in the Scripture"¹⁷. The revelation brought by the prophets possessed moral certainty, which varied according to the signals received and assimilated by them, but this is eliminated inexorably due to the relativisation and personalisation of the prophecies and the interpretation of the sacred texts. Thus, according to Spinoza, the Scripture could still contain a reading according to the variations in the state of mind of each prophet, in accordance with their different temperaments: "(...) if the prophet was joyful, the victories, the peace, and everything that gives joy to men were revealed to him; (...) on the contrary, if he was moody, wars, tortures, and all evils were revealed to him; (...) if the prophet was precise, his style was also precise in apprehending the mind of God; on the contrary, if he was confused, his understanding was also confused; (...) if the prophet was a rustic man, oxen and cows appeared to him; if he was, however, a soldier, commanders and armies appeared to him"¹⁸. In claiming the final instance with the legitimacy of "erring lastly" in all cases, even if this means exceeding the power of the crowd as a political body, any constitutional court draws to itself the condition of being the revelator of the constitutional text, depending on the "moral certainty" and the temperament of its members, in accordance with the case it faces. Nobody needs to go far beyond this to realise, along with Spinoza, that this type of institutional functioning not only fails to maintain the unity of the body of society, it also removes the possibility for there to be laws to "which all are subject"¹⁹.

The appeal to the superiority of the Supreme Court in the Brazilian constitutional system to unlink it from its own former decisions and to resume the route of morality, without describing it objectively and without endorsing this use by the Constitution and the laws treats the Court as a revelator of the document of the Constitution, a place occupied, in a democracy, by the power of the crowd, as mentioned above. However, if a larger body's ability to think is superior to that of a smaller body²⁰, there is no doubt about the superiority of politics and politicians over the other powers in the city, which coexist in the same space, where it is "impossible to take from men the freedom to say what they think"²¹. The expression, "to say what the men think", for Spinoza, corresponds to the full freedom of manifestation that the sovereign power, i.e., the people, in particular, will have. One cannot even relativise the fact that Spinoza is a radical philosopher of pre Enlightenment freedom: because freedom lies in the distance between Spinoza and Hobbes. If, in Hobbes, freedom has a "negative" aspect, in Spinoza, it acquires all of its "positive" content.

There is no way to confuse the Spinoza's words with idealistic speculation. First, this is because Spinoza offers us politics as the space in which humans can conquer their freedom: This freedom will not be presupposed or fall from heaven, nor it will come through the force of prayer, but it will be a struggle in the *vita civitatis*. It cannot be forgotten that the practice of constitutional adjudication (and who exercises it, whether a court or the parliament) reflects the inherent political dispute in any society, and there is no way to forget that institutions that are moving away from their constitutional limits can only return to them under the power of democratic politics.

According to Spinoza, a passion can only be won by another greater passion! Secondly, Spinoza reveals his conviction that good and evil are real notions: "How far, however, we are from a reality in which all people could behave themselves only based on reason!"

¹⁶Espinosa, Baruch de. *Tratado Teológico-Político*. São Paulo: Martins Fontes, 2003, p. 224 (Cap. XV).

¹⁷Espinosa, Baruch de. *Tratado Teológico-Político*, p. 34 (Cap. II).

¹⁸Espinosa, Baruch de. *Tratado Teológico-Político*, pp. 35/36 (Cap. II).

¹⁹Espinosa, Baruch de. *Tratado Teológico-Político*, p.54 (Cap. III).

²⁰Chauí, Marilena. *Política em Espinosa*. São Paulo: Cia. das Letras, 2003, p. 294.

²¹Espinosa, Baruch de. *Tratado Teológico-Político*, p. 309 (Cap. XX).

Each person is carried away by his pleasure, and usually, has a mind so filled by greed, glory, envy, hatred, etc. that there is no room for reason. (...) No one is forced to respect the contracts, unless he has the hope of a greater good or the fear of a greater evil"²². This idea was also already found in the "Treatise on the Emendation of the Intellect (TdIE)" of 1662, which was published after his death. The philosopher finds, in the experience (*Experientia*) of the occurrences in ordinary life (*vita frequenter*) that is, concrete and real occurrences – that nothing either good or bad (*nihil neque boni neque mali in si habere*) happens, unless the mood (*animus afficeretur*) is moved by the same experience²³. In addition, in the "Amendment of Intellect", the relativism of good and evil can be confirmed, according to their actual circumstances, in which the same thing can be classified as good or bad. The north which provides guidance to Spinoza's formulations will be an acute appreciation of the complex and diverse conditions of their location in human thought and societies (*adeo ut una eademque res possiti dici bona et mala, secundu diversos respectos, eodem ac perfectum et imperfectum modo*)²⁴.

Chapter X of the Brief Treatise of 1660 explicitly addresses what is good and evil and the existence of their relationship, not with nature, but with human reason, i.e., with *entia ratione*. Even as the kindness of Peter and the wickedness of Judas do not stem from Peter and Judas, respectively, it is concluded that "good and evil are not things or actions that exist in nature"²⁵. It is with this firmness that Spinoza gives materiality to his philosophical system to defend the freedom and security of all people based on the fixed law, "bringing together the strengths of all people to form a single body, the body of society"²⁶. Moreover, with the rejection of Spinoza's ethics, any qualification of the "morality of good and evil", a valuable distinction for democracy and tolerance, is inaugurated – which is to be applied, of course, necessarily by those who decide about the destiny of others, i.e., judges. The aforementioned distinction is an ethical conception "founded on the immanence of lifestyles," which distinguishes "a moral perception, which is structured on a transcendent perspective of values"²⁷. Therefore, any trace of idealistic thinking does not exist, according to Spinoza's philosophy.

The few manifestations regarding the judgement votes in Criminal Action n. 470 mentioned here²⁸ leave no doubt about the direction chosen by most of the members of the Supreme Court: The production of the conclusions did not follow the path suggested by Spinoza; it was distanced, thus, from the best of Western political and constitutional thought, moving instead towards a more radical break with the superstition that "unexpected events occur out of the natural order". The central mark of *spinosistas* is that nature self moves and creates itself²⁹; and the human being, with his reason, is only a finite part of it, who is influenced and an influencer of its actions, which should not cause surprise or disenchantment; and they require, for their proper and free understanding, the perfect contemplation which is guided by reason, produced by the freedom to think, away from religious pressures and from the powerful. Far from moral certainty and from all easy certainties not grasped by the freedom of reason the Republic's Constitution should thus be analysed without the possibility of being disputed and destroyed by the very social body that intends to govern. Rather, free of metaphysical moorings, the normative text can pacify any society in the certainty of its application to all people under any circumstances. This peacekeeping means satisfaction – the *hilaritas* of Spinoza – resulting from the affections of joy, having, in society, life that is ruled in the same way for everyone. Besides its first personal and religious dimension, for Spinoza, "the moral order arises in the interval between the refusal of the common life order and the absence of the natural order, a period which, as Ethics will insist, tends to be filled by the normative discourse of the moralist and the theologian.

²²Espinosa, Baruch de. *Tratado Teológico-Político*, p. 239 (Cap. XVI).

²³Spinoza, Baruch de. *Tractatus de Intellectus Emendatione*. Darmstadt: WBG, 2008, p. 6 (1).

²⁴Spinoza, Baruch de. *Tractatus de Intellectus Emendatione*, p. 12 (12).

²⁵Espinosa. *Breve Tratado de Deus, do homen e seu bem-estar*. Belo Horizonte/São Paulo: Autêntica Editora, 2012, p. 87 (cap. X).

²⁶Espinosa, Baruch de. *Tratado Teológico-Político*, p. 53 (Cap. III).

²⁷Guimaraens, Francisco de. *Direito, Ética e Política em Spinoza*. Rio de Janeiro: Lumen Juris, 2010, p. 168.

²⁸In later studies requiring a greater time lapse, confirmations of this line of understanding on the part of the members of the Supreme Court can be identified more often.

²⁹Israel, Jonathan I. *Iluminismo Radical*. São Paulo: Madras, 2009, p. 198.

Imagining man outside of the natural order"³⁰. It is realised that the link between morality and religion – which is here refused on the basis of Spinoza's philosophy – has been proven in the trial of Criminal Case n. 470 – after its verification – but this also implies the fragility of the legal arguments developed on this basis, specifically, by distancing the objective elements from reality. There is the need – I insist – for objectivity and concreteness in constitutional and infra constitutional legislation to authorise and legitimise the use of moral appeal and enforcement which is consistently present within the judgement of Criminal Case n. 470 – for custodial sentences. The above quote summarises Spinoza's formulation confirming that, since the seventeenth century, morality has ceased occupy a prestigious place, before the claims of democracy and justice of modernity. To ignore human nature means to refuse to see reality, which is a complex social network involving different interests and internal struggles within the social body. Spinoza also identifies that the enemy of the republic lies, to a greater extent, inside, rather than outside, of it.

In his *Tractatus de Intellectus Emendatione*, Spinoza embarks on an ambitious task: to demystify the order of ideas, which is now freed from the confusion between the known things and the unknown things³¹. In his pursuit of this clarity, the philosopher states that the search should always be based on physical things or on real beings (*realibus entibus*)³², so that we do not become the victims of disordered thought; disorder "(...) is responsible for the confusion between what is in the imagination and what is in the intellect, a "daydream", which leads us to start with abstractions that confuse true axioms and "pervert the order of nature" (§ 75), putting into place universal abstracts, instead of principles or the "source and origin of Nature"³³. Abstraction is the use of the intellect looking outside of reality, devoid of its linkages with the complexity of the real, its causes, and its effects, and it is seen as the immanent cause of disorder. When approaching this abstract view of the principle of morality, as written in the Federal Constitution, the constant manifestations of the Court's members involve an external look at *realibus entibus*, or in other words: They do not capture the full complexity of the term, for example, the fact that the principle of morality, up to the present, has not been regulated to the full potential of the social range that it could have, and the suppression of this gap must come from those who have been legitimated by a political choice. If this premise of reality remains unclear, the result will also be the very distortion of democratic politics and of the Constitution, in the Brazilian case, a Constitution established by the sovereign *multitudo* gathered in a constituent assembly composed of many legislators assembled for this purpose. The philosophical and secular thoughts of the "radical Enlightenment" are based on these tools in relation to constitutionalism, and because they are arduous achievements of reason and freedom, they cannot be relativised at any time in the nation's *civitas vita*.

The strengthening of individual temperaments (*ingenium*) corresponds to the distancing of the *multitudo* from the political and social institutions. For Spinoza, this real tragedy would result in the disruption of *conatus*, the effort to build society and the state in community; Macquiavel also provided the same lesson. Therefore, "the institutions have the charge of restraining the anti political tendency of the individual *ingenium*, reinforcing its tendency towards building a common society"³⁴. In the trial of Criminal Case n. 470, with such explicit expressions of individual *ingenium* by the members of the Supreme Court, another outcome, pursuant to Spinoza's view, does not seem possible: the mistake, the error of deciding to build, apart from reason and affections, together, a democracy based on reason and freedom. This entire set of arguments finds shelter in the most advanced features found in the thought of the homeland's Constitution, and it is free of the tricks of moral voluntarism. Again, the words of Lênio Streck can be remembered, for whom "d) Law is not moral. Law is not Sociology. Law is an interpretive concept and comes from the legal institutions, and the issues relating to it necessarily find answers in laws, constitutional principles, regulations, and precedents that have a constitutional "DNA" (base) and not in the individual desire of the applicator, that is, it has (strong) elements derived from sociological, moral, etc. analyses. But these analyses.

³⁰ Chauí, Marilena. *A Nervura do Real*. São Paulo: Cia das Letras, 2000, p. 572.

³¹ Spinoza, Baruch de. *Tractatus de Intellectus Emendatione*. Darmstadt: WBG, 2008, p. 44 (59).

³² Spinoza, Baruch de. *Tractatus de Intellectus Emendatione*, p. 74 (99).

³³ Chauí, Marilena. *A Nervura do Real*, p. 576.

³⁴ Guimaraens, Francisco de. *Direito, Ética e Política em Spinoza*. Rio de Janeiro: Lumen Juris, 2010, p. 188.

After the law is established under this new perspective (the paradigm of the Democratic State of Law) cannot fix it; (e) it is true that the Law provides legitimacy to politics, understood as administrative power, and politics will ensure the coerciveness of the Law. If politics is conceived as community (polity), the Law is part of it. If the law is understood as an exercise of politics, there is a complication among the laws in the political establishment. From a partisan point of view, the law has a role in limiting policy in favour of minority rights, defining the limits of counter majoritarian decisions. Rights are essentially political, if they are considered to be a public enterprise. Hence, a policy or a politician, in the sense of what belongs to the *polis*, is synonymous with the public, with *res publica*³⁵.

This is still an open challenge that should be met by the Brazilian political society and not by an institutional political actor in an isolated way. The reason for this is clearly evident: The tasks associated with the consolidation of democracy and the appreciation of the constitutional document, which was written by everyone in the hope that it will be operative for all people, will not be the responsibility of a single sector of society. They are responsibilities that can produce as Spinoza insists the affection of joy, which is specifically produced by the passage from a lesser good to a greater good. Thus, the social vices "are not tied to the bad character of individuals, nor is virtue tied to the building of a superior moral conscience"; rather, they are supported by political institutions that are capable of exercising their duties based on an "institutional foundation of liberty by turning" against moralistic voluntarism, which implies the need to spread universal moral virtues. This, then, is our constitutional challenge, which has not yet been faced. In this confrontation, we must especially consider the civic courage of all and their institutions: the courage, finally, of those who are willing to confront the vices, the wickedness, and the partiality of false freedoms, which are ever so tempting to those who desire an empire of fear and the surrender of free reason.

³⁵Streck, Lênio Luiz. Compreender Direito. São Paulo, Revista dos Tribunais, 2013, p. 180.