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ASSUMPTIONS AND RISKS OF A DYSTOPIAN CONSTITUTIONALISM: REFLECTIONS BASED ON PHILIP K. DICK

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ABSTRACT: This article is based on the Law and Literature methodology. It analyzes the shortage of contemporary utopian narratives. The object of analysis are the characteristics of constitutionalism in light of literary categories from dystopian literature – especially regarding Philip K. Dick's *Minority Report*. Thus, this paper examines to what extent the contemporary paranoia – both subjective and systemic – has strengthened court decisions based on pretentious illicit conspirations, as well as institutional solutions justified by the prospective use of automated processes, supposedly neutral and efficient. This paper also discusses the incorporation of a certain time paradigm of contemporary cultures, which is linear and unidirectional, with a rigid differentiation between past, present and future. Such conception creates temporal ghettos, besides imposing a dominant social rhythm that frustrates the very protective trait of constitutionalism, regarding the life projects of vulnerable minorities. Thus, this work reflects upon the fragility of the argumentative integrity seen in certain judicial sentences which are justified by consequentialist lines of thought, and which, by projecting future catastrophic effects for possible decisions, end up legitimizing opposite outcomes. In conclusion, the need for overcoming fear as the fundamental feeling in the social, institutional power is discussed.

KEYWORDS: dystopia; constitutionalism; paranoia; temporality; consequentialism.

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1 INTRODUCTION

The twenty-first century is characterized by an ever-dimming of future alternatives. This has created a transition from the principle of hope to the principle of responsibility. Such a horizon has developed mostly due to the unsustainability of utopian thoughts from former social projects of ideologic groups, either from the left or from the right political scopes. Towards the left, the fall of the concrete Socialism in the end of the twentieth century hindered the utopian imaginary. Their denial of acknowledging Capitalism as the unavoidable future was not followed by a new emancipatory alternative proposition, which generated a suspension period. It has been marked by the refusal to advance in the dominant existent structures, due to the presence of a dated dream of social equality and to the existence of a present that, unable to give birth to experience spaces and horizons of expectative, has fractured historicity itself (Traverso, 2018, p. 36-48; Hartog, 2013, p. 37-39; Koselleck, 2011, p. 309-311). Towards the right, the recurrent economic crises of Capitalism, followed by the growing public and private indebtedness, have weakened the possibility of reaching the ideal of the self-sufficient, personally responsible individual – an echo from the protestant ethics that still inspire the middle class. It generates a paradox of people who, despite defending market freedom and tribute reduction, depend on services and benefits provided by the State. This situation makes their project less of a future alternative for society, and more of a desperate attempt to maintain the decadent past ethos (Schram, 2015, p. 38-47).

Facing this ever-dimming future, the hope of building a better society has given space to the responsibility of maintaining what we have already accomplished. It seems the object is to avoid, at the very least, our society to leave a worse legacy for the future generations than the one it received from the past. The utopia of what should be in the future has given space to the dystopia that should be avoided since the present². By

² According to Lyman Sargent (1994, p. 9), in a classic text, utopia should correspond only to the detailed description of a non-existent society, located in a given time and place. Utopia would therefore be a genre from which *eutopia* and *dystopia* should emerge – as projections, respectively, better and worse in relation to the real society in which the reader is located. Ruth Levitas (2013, p. 3), however, points out that the neologism created by Thomas More, in 1516, corresponded to a pun between *outopos* (the non-place) and *eutopos* (the good place). Thus, it seems justifiable to use the word

dystopia we mean the projection of a non-existent society, considered to be worse than the present, real one. This word appeared, unnoticeably, in the public sphere of Britain in the middle of the eighteenth century³. This late creation of the term, over two centuries after the origin of its antonymous “utopia”, may be related to the consolidation, in modernity, of fear as the main feeling for defining the political and individual bodies in society (Safatle, 2015, p. 20). When hope fades and gives space to fear, it seems that utopia gives place to dystopia as a good literary category to understand reality. An evidence for that is the double publication of the dystopian narrative *Minority report*, by Philip K. Dick (2012). This short story is used in this article as a basis to develop the legal-literary reflections proposed. It was first published in a context of legal-political fear and vigilance: the original version is from 1956, during the Cold War, when the author even came to be approached by the Federal Bureau of Investigation (FBI) to spy on suspects of Communism (Umland, 1995, p. 2). The second version was the movie adaptation directed by Steven Spielberg, in 2002, less than a year after the attack to the World Trade Center, a moment in which the government of George W. Bush focused prevention protocols against new attacks (Niles, 2010, p. 295-300).

Among the responsible institutes for managing social fear, the law has a special position. When trying to understand the disappointed reality of present times, one must establish a dialogical reflection between the law, especially constitutionalism, and literary dystopia. Methodologically, such proposition fits within the Law and Literature area. Firstly developed as analysis instrument in the 1970s with James Boyd White (1985 [1973]), Law and Literature has since broadened its investigation scope, and now covers a diverse group of topics, usually categorized under the following nomenclature (González, 2015; Karam, 2017). (I) Law of Literature, the legal analysis of the literary phenomenon in reference to artistic freedom,

utopia to refer to a positive imaginary societal construction, which is why this article considers *utopia* / *dystopia* as antonyms.

³ Although there is a widespread understanding that the term *dystopia* was coined by Stuart Mill in 1868, there are reliable indications of its use in Dublin in 1747 as well as in London in 1748, with the same meaning as today (Budakov, 2010). Before that, however, in 1714, the idea had already been used – which is proven by the appearance, in an English publication, of the term *cacotopia* as an antithesis for *eutopia* (Budakov, 2011).

author copyrights, intellectual property, hate discourse, that is, when the Law rules over the legal relations aroused within the literary field, or when this field intertwines with others via normative statements. (II) Law as Literature, an area that considers the law as a form of fiction (*Als-Ob*), making analogies, such as the comparison of jurisprudence to chain novels (Dworkin, 2005), or considering law and literature as written artifacts, symmetrical between themselves, capable of parallel and reciprocal fundamental aspects, such as, for instance, the question of authorship – as in the discussion between the relevance of knowing the original intention of authors and jurists –, besides the very narrativity aspect of real-imagined facts (Cover, 2016; González, 2010), and the current interpretation-understanding of a certain text from the past. (III) Law with Literature, investigation area that deals with the appropriation of literature by the law, which is possible because both socially share the same poetic practice; this can be seen, for example, when understanding legal writings as translation practices – when the legislator reads the concrete norm, written by other people, and rewrites it when juridically sentencing (González, 2018, p. 16). (IV) Lastly, Law in Literature, analysis of the literary representations of the law and justice, whose importance lies not only in its instructional potentiality, as ludic resource for the training of jurists, but also social, because of its capability of fostering empathy and imagination – which, according to Lynn Hunt (2009), has been fundamental for the propagation of notions on law to the general public.

This paper dwells between the second and the third research areas of Law and Literature explained above. By reading the short story *Minority Report* by Philip K. Dick, the intention is to categorically analyze, via literature, what we call dystopian constitutionalism⁴. To accomplish that, firstly it is studied as a form of individual or systemic paranoia, developed from conspiracy narratives and/or the fetish of merchandise, which is supported not only by the short story analyzed, but also by legal cases. After that, based on the comprehension of the central

⁴ The expression “dystopian constitutionalism” was firstly used by Thomas P. Crocker (2015). This article integrates the reflections of that author, especially regarding item 4, however, it differs from his ideas in seeing the existence of other elements that should compose the formulation of the concept.

character on the narratives made about the future, due to the lack of minority reports, this paper deals with the denial of multitemporality in the law. To finish, considering the possibility raised by the literary production of a unidirectional control over the future, the strategic use of the consequentialist method by the Judiciary Power in Brazil is analyzed. Thus, starting from the concepts of paranoia, temporality, and consequentialism, narratively designed by the literary work, this paper's intention is to reveal the assumptions and risks of an ever more dystopian constitutionalism.

2 PARANOIA BETWEEN TECHNOLOGICAL AUTONOMY AND CONSPIRACY NARRATIVE

The plot of *Minority report* develops in a futuristic New York City, in a time when travelling between different solar systems is a reality – however, the precise year is not stated. The central character is John Allison Anderton, who has been a police commissary for 30 years. He was responsible for creating the PreCrime Division of the Western Federal Government. Such department is capable of reducing the homicide rates almost completely, since it anticipates crimes and arrests the supposed criminals in concentration camps, before the events even happen. This is done with the help of three precognitive mutants (precogs), beings with the uncommon ability of premonition and foretelling of future crimes. The murderers are identified through a combination of different sources: the psychic abilities of the precogs, technological analysis of data, and a bureaucratic screening. Firstly, the precogs, whose foretelling ability reaches up to two weeks, mutter random syllables or words; then, these data are recorded, compared and reorganized in the form of visual symbols. These are printed into cards with holes that categorize them. Then, they are made available both for the PreCrime Division and the general quarters of the Army, for verification and control. Finally, a bureaucrat collects all the cards in order to exclude the ones related to patrimony crimes, such as robbery, tax evasion, extortion, and the ones with low offensive potential, in order to focus police actions only on the prophylactic arrest of future murderers.

The story begins with the arrival of Ed Witwer to the Division. Sent by the Senate, which supervises the security policies, Witwer had been

chosen to assist Anderton, and, in the future, substitute him when he retired. When he welcomes Witwer in his office, Anderton suspects his substitution might be immediate, and starts treating the new subordinate with distrust and animosity. When he introduces the premises where the precogs and the vision-decoding machinery, Anderton gathers, randomly, some of the cards ejected during that visit; however, for his surprise, one of them indicates himself as a future murderer. Unable to hide his hesitation, the commissary is able to hide the card from Ed Witwer. Convinced he would never be able to commit a crime, Anderton starts thinking the production of that incriminating document is fruit of some conspiracy conducted by Witwer to expel him from his job. Convinced there was a plot against him, Anderton starts to consider himself the victim of a con whose success would require the complicity of an internal agent, who could well be Lisa, his own wife, given the receptivity with which she had welcomed the newcomer (Dick, 2012, p. 127-133).

The sequence of the story is marked by two conspiracies: a false one and a true one. The first one is supposed by the central character, in which Witwer had forged the incriminating document. This makes Anderton run away, then he is induced to confirm the hypothesis of his wife being an accomplice, and he ends up accepting help from a stranger, Tod Fleming, to hide. After that, he returns to the department under cover with the objective of stealing the foretelling reports of each precog, ending a spiral of actions with the attempt to murder his wife Lisa by Fleming, the real creator of the hidden plot. In fact, the cart foretelling the homicide was true and indicated as a victim Leopold Kaplan, a retired general, war veteran. Aware of the information, through the backup copy produced by the vision decoding machinery and forwarded to the Army, Kaplan had seen in the occasion the chance to demoralize the Pre-Crime Division and revive the past golden days in which the Army responded by the general command over both the military and the civil police – which he intended to do by means of a secret plan.

Thus, conspiracy theory is an important element in the narrative. However, besides that, it establishes an intrinsic link with the category of paranoia, which the readers probably know. For Freud, Paranoia is a pathology whose main symptoms are an overinvestment in the

interpretation of someone else's unconsciousness (Freud, 1976 [1922]), as well as the production of speculative and explanatory systems (Freud, 2010 [1914]). The paranoid, in this way, is a relentless systematizing interpreter: someone whose hermeneutical process considers every detail, even the smallest one, as full of meaning and whose perspective of reality is not contingent, but, rather, ordered according to a totalizing logic that explains all and any action, every and all events. Later on, Lacan indicated the possibility of non-pathological paranoid manifestations, such as, for example, that observed in the initial phase of the subject's constitution, called the mirror stage. At such moment, the subject of early childhood, although feeling their own impotent, disconnected, unfinished and dependent body, identifies him or herself with their projected image, perceived as potency and wholeness – an alienating identification resulting from paranoid knowledge, since the self of the subject is constituted through an image perceived as belonging to another, either because it is an inverted reflection of the self, or because it corresponds to the object of the mother's desire (Lacan, 1998a, p. 96-103; 1998b, 114-115; 1998c, 181-183). Finally, the pathology of paranoia can prove to be systemic – a very common trait in everyday life. As the life of the contemporary subject comes down to an adaptation to processes based on economic risk, social conformity or biosafety rules, there is an inversion of roles whose unveiling occurs through systemic paranoia; the failure of machines, or of a traffic light or of a computer, at the exact moment in which their functioning is essential, for example, is perceived as an intentional pursuit, which reveals a suppressed desire to revolt against impersonal processes of exploitation: since the subject cannot deal with the undetermined consequences that a personal resistance generates, the machines are the ones that – as automated rebellious beings – pretentiously resist in their places (Dunker, 2018, p. 158-160).

Technological autonomy and conspiracy totalizing narratives, referred to as paranoid traits, are striking features of Philip K. Dick's work that help illuminate the present reality (Freedman, 1995), especially the political-legal sphere. The first aspect is based on an almost human willingness of stuff, which supposedly act in autonomous ways according to their own intentions – which is somewhat connected to the idea of

fetishism of goods present in historical materialism. It seems reasonable to approach such an idea with the contemporary perception that artificial intelligence and algorithms are reliable and rational instruments for indicating choice and position-taking. They are supposedly able, hence, as they are free from human passions, to choose which candidates for a job vacancy should be personally interviewed by employers, or to prevent the contracting of health plans by people at risk of abusive behavior with drugs, to identify film productions with high box-office potential, and to measure the degree of dangerousness of a defendant by the supposed probability of criminal recurrence. However, as an example, Julia Dressel and Hany Farid (2018) demonstrated that, although the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS), the US program for calculating the likelihood of criminal recidivism, does not use the ethnic-racial factor as one of its 137 criteria, it is anchored in other related elements that end up generating a biased predictive disparity. Proof of that is an analysis of cases in which the algorithmic prediction failed. Then, it was found that the most common percentage error in relation to black people was in relation to the increased projection of recurrence – whereas, in relation to white people, the most common error was concerning the increased projection of non-recurrence. The belief that algorithms are guided by neutral mathematical criteria, as if they do not correspond to human choices disguised in code, seems to reproduce the technological autonomy from pathological systemic paranoia.

The conspiratorial totalizing narrative, in turn, especially evident in *Minority report*, indicates an increasingly recurrent stance in the public and state spheres. Frequently used in the political field, conspiracy theory can have a triple function: it is fabled, by falsifying the data of empirical observation, contradicting the rules of logical reasoning and clouding the real, interposing between the truth of the facts and their representation; It is cognitive, by providing an instrument for understanding the present through a reductionist explanation that orders the complexity and chaos inherent in reality; And it is mobilizing, by transforming the powers of the repressed forces into acts of rupture, change and revolution (Girardet, 1987, p. 13). As a rhetorical strategy, the conspiracy thesis makes it difficult to counter-argument, in view of refracting a series of elements

that are not necessarily convergent, such as: a providential view to the so-called backstage of history, in which the invisible hand of evil has caused the most distinct events; A pessimistic anthropology based on two contradictory rational logics, because while the conspirators determine the course of events (Cartesian rationalism), the other men correspond to mere instruments in the process of historical development (Hegelian rationalism); An epistemological optimism, that is, a theory of knowledge based on the assumption of the existence of evident truth that needs only to be unveiled; A delegitimizing political theory of the principle of governmental transparency, since democratic institutes are supposed to serve to conceal a hidden power articulated in a network (Cassata, 2007, p. 18-21).

In legal procedural practice, conspiracy paranoia also manifests itself and in various ways. Firstly, due to distrust of the applicant's legitimate procedural interest, which, in this perspective, could act concealing a claim different from that requested or favoring non-litigating third parties – a claim made, for example, by Brazilian Minister Gilmar Mendes of the Supreme Court (STF) in ADI n. 4,650, an action that discussed the constitutionality of the financing of electoral campaigns by legal entities, when accusing the Order of Attorneys of Brazil / Brazilian Bar Association (OAB), as the plaintiff, of conspiring with the Workers' Party and acting in that process with the hidden intention of perpetuating it in power, an accusation that even deserved a public note of condemnation from the OAB (*Consultor Jurídico*, 2015). Secondly, by overvaluing the explanatory power of the judicial process, as if the judges had the innate gift of bringing to light all the hidden, real and supposed illicit elements of the investigated – while, in practice, “there are realities and lies that can never be proven, within a process, neither by the display of ‘facts’, nor by ‘revelations’, or ‘circumstantial theorems’” (Ciuffoletti, 1993, p. 109). Finally, and as a result of this previous form, due to the primacy of the hypotheses over the facts, when, for instance, a judge, bearing in mind the sentence to be given, handles only the elements confirming his / her previously formulated decision, refusing to be

influenced by the adversary argument and producing a paranoid mental picture (Cordero, 1986, p. 51).

A dystopian constitutionalism is characterized, therefore: (I) by the fetish of technology, which, although based and fed by the data provided by the jurists themselves, has an autonomy supposedly capable of overcoming the jurisdictional difficulties created by the social practices themselves, including those arising from the legal field; (II) for conspiracy hermeneutics that seeks to demonstrate the illicit aspect in every and all actions, even atypical ones (such as the possession of vinegar in public protests as a way to avoid the effects of tear gas used by the police). It also seeks to propose reductionist explanations, even if they are seemingly improbable, prior to criminal conviction, then using the process as a way to later legitimize the conspiracy narrative – a practice that seems verifiable in several of the actions linked to *Operação Lava Jato* in Brazil.

3 TIME CONTROL AND THE DENIAL OF MULTIPLE TEMPORALITIES

The Strategy of the character Leopold Kaplan to discredit the PreCrime Division was to show the world that the premonitions of the precogs had apparent divergences regarding the future, and that such divergences might lead to killing innocent people. For that reason, the incriminating card with John Anderton's name was an important part of the plot, since that man, a rigorous commissary in fulfilling his duty, would probably doubt the homicide-to-be. Thus, by making him search for the minority report that names the narrative, the intention was to shed light on the necessary proof to dismantle the pre-arresting prophylactic policies on supposed homicides and to restore the power of the army. The existence of such a minority report was due to the three precogs in activity in the Division: Donna, who was 45 years old, even if she looked much younger; Jerry, who was 24 years old, whose premonitory gift was active since his childhood; and Mike, about whom the people knew very little. Each one of them produced their vision with no contact among each other. This way, the future events were certified by the comparison of information between two of the mutants – which then generated a majority report. The minority reports, then, brought small variations, such

as the specific locations or times of the crimes. These variations are explainable considering the theory of multiple futures, since if the future was only one, it would be fruitless to attempt to alter it based on the predictions (Dick, 2012, p. 149). For Kaplan, however, the minority reports had substantial divergences, which fragilized the whole process.

John, as a fugitive, and indirectly influenced by Kaplan, returns to the Division in disguise, in order to fetch his three precog reports. The predictions by Donna and Mike, in fact, incriminated him. Jerry's report, however, brought him absolution. Comparing the majority reports and the minority report of his case, Anderton understood that, analyzing a different time stream than that of the other two precogs, Jerry had supposedly integrated the homicide prediction to a larger spectrum of actions and saw that the very access to the future crime information made Anderton not do it, which generated a new timeline and served as his own criminal prophylactic measure (Dick, 2012, p. 153). Later on, however, when he realized Kaplan had also had access to these reports and intended to make them public, John changes his mind: the only way of stopping the general's pretensions was to kill him, which would invalidate the minority report. After that, with his confidence in the system regained, the main character remakes his thesis: the reports had not been under a temporal overlapping, they were actually linear. Donna had foreseen the homicide; Being aware of that fact by accessing the card, John avoids the crime predicted by Jerry; However, when he learns that Kaplan's survival endangers the PreCrime Division itself, Anderton finally chooses the criminal behavior, at the moment foreseen by Mike. There was no divergence whatsoever: each precog had seen one of three linear events in the consecutive future.

The use of Dick's time categorization as a fundamental element in power dispute and the social configuration has been inspired by the very context in which his first literary pieces were written. After all, the Cold War was a conflict with and against time, since both blocs were competing for a temporal, military, scientific leadership as a means of obtaining political, strategic advantage. Besides, within the Western and Eastern blocs the States were in clear attempt of controlling social rhythms, the

population growth speed, the temporality of production processes, aiming at a hegemonic regimentation of time as a way to hinder revolt, in a true biopolitics of time. Philip K. Dick transports this atmosphere to his production in the 1950s, indicating, on several occasions, how the monopoly over time guarantees governments the ability to restrict future alternatives (Lanci, 2015, p. 101-102). In fact, in many of his short stories, the main objective of the government actions is to neutralize possibilities and control future events and behaviors (Lanci, 2015, p. 109). In this sense, the creation of mutant characters with precognitive powers turned out to be a very suitable stylistic resource. It serves to demonstrate the disruptive potential of time over insurgent subjects – as is the case of the precogs Cris and Floyd Jones, characters of *The golden man* and *The world Jones made*, respectively –, and serves also to show the social consequences of having a chrono-normative government, which is visible via Donna, Jerry and Mike from *Minority report*.

The importance of time categories is not restricted to the production by Dick, but seemingly present in dystopian narratives in general. Every dystopia is equally a dyschronia, a detailed projection over a time that is worse than the present days. Such overlapping of events makes it possible to experiment, in literature, and in the present, a haunting future in Lacan's terms. According to Lacan, unconscious memories do not have a prior existence, they are created later on by a process of symbolizing by and of the subject, and the organization of such symbols. Hence, when something new appears, forging the emergence of another order of the structure, there is simultaneously a new capacity of creating, retroactively, a different perspective of the past. Thus, what takes place in the subject's life narrative "is not the simple past of what it was, because it is no longer, nor even the past composed of what has been in what I am now, but the future from what I would have been to what am I becoming" (Lacan, 1992 [1953], p. 164, translated here). The understanding of this movement, which occurs, in general, in anamnesis, generates the convergence of the various "having beens" and the assumption of a recreated past. The projection of this Lacanian temporality to the empathic relationship that the reader maintains with literature can generate curious effects. The perception of a new dystopia as something possible, as the thing our

society will become in the future, could lead to the retrospective recreation of the past to this futuristic narrative. It allows the understanding of the present itself as a “having been”, an experience capable of illuminating, under a temporal-relational perspective, several current concealments. Thus, dystopian literature can play the role of alerting society, regardless of the debate about the author’s ethical intention in his or her aesthetic production.

From a literary and fictional strangeness, John Anderton’s effort to understand the successive order of the precogs’ prophecies points to the naturalization of chrono-normativity in society, as well as in the Law, when analyzing today’s constitutionalism practices. In a certain way, a theoretical development of democratic constitutionalism is based on a linear conception of time. It is as if the only time stream that matters for all social relations comes from a certain point in the past and leads – with no possible suspension, revision or overlapping – towards one single future. The concept of transitional justice, for instance, is based on a rigorous breach point between an authoritarian regime and reestablished democracy. Then, violations to human rights become not only illegal, but can also be seen as events from days gone by. A rigid discourse separating the present from the past, a characteristic of a linear view of time, is a strategical discourse, which serves even to legitimize the transitional measures adopted, so that they are not seen as self-amnesty practices. The narrative of constitutional power also depends on a temporal ground zero, a supposed moment when the present can start, unleashed from the concealment of the past, with the freedom to make choices towards the future. However, besides the official temporality of a government, there are plural social rhythms, a great diversity of temporalities that overlap – with different processes of lingering and moving forward. These many social temporalities that coexist make it impossible to see the political-legal word of today as a singular context, which is a fictitious idea, as well as the inflexible delimitation of frontiers between the past, the present, and the future (Koselleck, 2014, p. 19-25).

The imposition of a single timeline that encompasses all the people is an arbitrary choice. It is apparently neutral, but it actually serves to reinforce the hegemonic ideological temporality. Such an arbitrary choice

is usually perceived in the conventions of objective time, which can be seen in several countries regarding the hours of the day organized in time zones (Ogle, 2013), in the framework of the Coordinated Universal Time (UTC). Also, it can be perceived in countries like Brazil, when the federal government decides on establishing the daylight-saving time in Summer. However, it is highly unnoticeable when it acts on regulating the rhythm of human bodies, as in a biopolitics of time. As an example, there is civil temporality, seen in the duration of days, months and years, and in the indication of business days and rest days. Even though it seems naturalized and impartial, such choice is completely connected to majoritarian Christian ideologies. As for the other religious temporalities, of immigrant groups or divergent ethnicities, numeric minorities or vulnerable populations, they all have to deal with an intermediate sense of belonging to the hegemonic society, simultaneously with their own temporality and the official calendar (Laguerre, 2003, p. 6-27), which usually ignores their habits (such as Ramadan, Sabbath, Friday rituals for African-descendants of Candomblé etc....). Thus, social exclusions are created, forming temporal ghettos due to the hegemonic power or the resistance to it (Rosa, 2009, p. 104). Another example, taken from queer theory, is the supremacy of heterosexual temporality that imposes social rhythms through wedding and marriage of men and women towards future reproduction, and it is not restricted to individual choice, but in a governmental sphere. In this rhetoric, political and social actions favor the supposed existence of a biological child in the future, and public policies are created with this in mind, at the same time as they hinder other possibilities for couples that are not heterosexual (Edelman, 2004; Freeman, 2010).

Dystopian constitutionalism, thus, operates a controlling force over the rhythms of live that are counter-hegemonic, and it happens by establishing an official legal-political timeline, as well as by imposing a rigid, strategic separation between past and present. It is rigid because it makes it impossible for the past to invade the present, in a denial of the spectrality that, sometimes, haunts the certainties of the law – such as what derives from historical slavery and the holocaust. It is strategic because, with it, a temporal Manicheism is made possible, by putting the

blame on certain previous governments for the problems of the present one (Bevernage, 2015), and by hindering vulnerable groups to share the traits of contemporaneity, making them prisoners of another time dimension: either the past, when, for example, indigenous peoples and their lifestyles are labeled as outdated; Or the future, when society says it is not ready to deal with so-called vanguard behaviors, such as polyamory affection. Hence, constitutionalism is unable to play the temporal role it should as a mere synchronizer of different social timings (Ost, 2005, p. 36), and it becomes, as in a dystopia, a neutralizer of counter-hegemonic temporal alternatives.

4 THE AVERSION TO A NEGATIVE FUTURE AS AN ARGUMENT FOR SENTENCE DECISION

At a given moment in *Minority report*, another dystopia arises within the dystopia. It is the projection of a worse future in relation to the present of the narrative, which could happen after the extinction of the PreCrime Division and the reappearance of the homicide rates from the days before the precogs started being used by the State. The fear of such a degraded future coming to reality becomes enough to justify Anderton's actions to confirm the predictions of the mutants and kill Leopold Kaplan. However, the same fear could justify the submission of precogs to their degrading working conditions. They remain kept immobile, throughout the day, in their special chairs, connected to the wires of decoding machines, required to such an extent in their premonitory functions that they physically became deformed, with their heads swollen over weakened bodies. Interestingly, by the way, the plot twist of Spielberg's film is centered precisely on the conditions that gave rise to the exploration of a precog, while Dick's story exposes the question in a tangential way. Anyhow, deciding in the present, justified, exclusively, by the fear of a negatively projected consequence, also characterizes dystopian constitutionalism.

Kim Scheppele, in 2003, had already intuited such rhetorical practice. Aspirational constitutionalism, a constitutional construction process oriented towards the future, whose decisions consider a concrete model state that is to be reached; It opposes to aversive constitutionalism,

which is an interpretive process that, when materializing the normative statements of the Constitution, considering the past experiences of constitutional failures, national or foreign, as examples to be avoided (Scheppelle, 2003, p. 299-300). So, in that second concept, the negative parameter is considered concrete and overcome. In dystopian constitutionalism, however, the reproachable model, which does not need to be real, is projected into the future as the consequence of a supposed decision in the present, which justifies all the decisions taken towards opposite thoughts. The dystopian constitutional analysis involves, thus, three steps: first, the descriptive or imaginary indication of an alternate government, which can be factual or fictional, to which people in general reprove, or, at least, with characteristics people in general wouldn't agree, such as the violation of fundamental rights, the suppression of democratic participation, and institutional violence. The second step is to draw the practice to be avoided, which is seen as the cause of a consequent institutional state of things, such as the relation between the relativization of criminal procedural guarantees to hypo-sufficient people and the consolidation of a Criminal State (Wacquant, 2018). Lastly, after the reaction stage, comes the propositional stage, in which the actions to prevent such a negative horizon are laid out, as well as the legal-political commitment to fundamentals, objectives and principles of a certain constitutional identity is reinforced (Crocker, 2015, p. 606-609).

It is obviously hard that a certain legal practice or decision may result in a dystopian future. Thus, in such cases the arguments usually follow a chain effect logic, or, originally, a *slippery slope*, so that an initially empty and isolated fact is the starting point of a sequence of events that, in the future, could develop a negative condition with no escaping possibility. So, in order to avoid such dystopian possibility, it is necessary to suppress the potential risks, even if they are not imminent, of having an initial event of the whole process. This suppression can be

manifested in different ways: By hindering the use of analogy as a normative integration method, in order to avoid an endless chain of interpretative amplifications, which could damage the autonomy of the legal order itself; By restricting the acknowledgement of legitimate exceptions to the rule, so that specific situations do not stop the general, abstract prediction of the law; By verifying finality detours in the adoption of legal measures, which could open way for the actions of parallel legal acts by the State; By over-emphasizing the possibility of catastrophic consequences after a certain legal decision, fruit of a fear discourse that generates a legal-political paralysis; By strategically using a conservative speech about possible threats of social setbacks as a means to maintain the present structures of the *status quo* (Crocker, 2015, p. 610-612).

This aversion to a possible dystopia may well become a certain way of justifying legal decisions, as a kind of legal method, which could be dangerous since it includes behaviors such as militant consequentialism and non-comparative pragmatics. Prior to that, it is necessary to consider that consequentialism has prospered in the Brazilian jurisdiction due to certain factors, which made it possible to overcome the traditional logical-deductive method, as known as subsuntive method, and these factors are not recent. Firstly, the consolidation of a State that is, at the same time, a regulatory state (incorporating to the law certain debates that are not originally related to it), and a social welfare state, by means of public policies whose success is seen when planned targets are reached. It thus stops following only the prior regulations (government by law) and starts answering to qualitative choices and perspectives of social engineering (government by policies). Besides, the prominence of the Judiciary power after the Brazilian Constitution of 1988, especially consolidated in the 1990s, when debates on fundamental rights gradually demanded more and more legal responses due to the omission of the Executive power, especially regarding the right to healthcare, has made the judges important leaders in the implementations of public policies. Finally, the

application of the proportionality rule as a criterion for reaching solutions of quarrels has demanded, in all its stages (adequacy, necessity and proportionality in the strict sense), an analysis of empirical prospectations or, at least, of probabilistic judgements on the effects that certain norms should develop (Pargendler and Salama, 2013, p. 110-119). However, it is not always possible to accomplish an analysis of consequences, in a consistent way, in law.

Sometimes, resorting to consequences is a wild card on the table. Although expressing reverence to the Constitution, in a discourse that worries traditional normative opinions, it does not respond to any criteria of verifying its conditions of truth: “The subject who makes use of the argument cannot prove it to others; But neither will they be able to prove their denial”, which paves the way for a type of arbitrary decisionism, often called militant consequentialism (Schuartz, 2008, p. 153). However, the harmful effects of such a practice can be further magnified if the comparative-pragmatic method is not applied properly. This happens when, instead of considering the existing options, prospecting the probable consequences and comparing them in order to adopt the one that seems most pertinent, one chooses to justify the decision only by excluding the negative, dynamic projection which is characteristic of a dystopian constitutionalism. In this case, it is alleged that a given decision could generate a catastrophic future consequence – which in itself justifies taking a decision in the opposite direction, without, at least, being necessary to indicate what supposedly positive consequences may result from the new, opposite judgment. As an example, it is possible to indicate the reasoning adopted by Minister Cezar Peluso in the report of extraordinary appeal no. 407.688-8: when indicating a negative projection for tenants, who would supposedly be unable to rent a property, the judge declared constitutional the pledge of the guarantor’s family property in lease agreements, reducing the right to housing to a right to live in a place – not to own a property. Regardless of the argumentative coherence of the decision, based on a negative outlook not supported by empirical data, the aforementioned reasoning points to a

serious risk of dystopian constitutionalism, namely: that of further weakening the already weakened integrity of judicial decisions through argumentation by exclusion, which prefers to be guided by fear of what the Constitution may become in the future, to the detriment of what, in fact, it may mean in the present.

5 CONCLUSIONS

Dystopian constitutionalism is not a prospection; It is a jurisdictional practice of present times, especially based on the idealization of technology, pretentiously armored against human failures, passions and partialities, as if it acted in a non-programmed autonomy, and as if it were able to rebel against the excess of social regulation in place of the human being itself. It happens through a conspiracy narrative that, not admitting the complexity inherent in reality and the divergent understandings resulting from it, proposes a total and reductionist explanation that attributes intent, meaning and causality even to singular and insignificant actions – which, in criminal terms, for example, leads to increasing judicial criminalization of non-expressly illegal conduct and the recurrent sentence of conspiracy. Also, it happens via a linear and unidirectional conception of time, which denies different social rhythms and the overlapping of plural social classes' temporalities in the name of an alleged time line that normalizes all social relations based on a simultaneously homogeneous and hegemonic temporality and in a rigid delimitation of the past, present and future. Also, it is seen through unsubstantiated sentence justifications, based on the negative projection of the effects of a supposed possible decision, which, by itself, justifies the sentence in the opposite direction, which weakens the integrity of the jurisdictional practice. Summing up, it is a paranoid constitutionalism, chrono-normative and consequentialist, seen as such when compared to recurrent categories of dystopian literature, especially, the story by Philip K. Dick.

There is always a risk of such constitutionalism being perceived as utopian, rather than dystopian. After all, if each reader evaluates the literary work from their own points of view, beliefs and ideologies, and then decides whether the author's narrative projection creates a better or

worse environment than the context in which they are (Moylan, 2000, p. 155), the citizens may also conclude that this new constitutional trait revealed by dystopian literary categories is, in fact, a positive advance of the jurisdictional practice, indicative of a promising future. Thus, this article clearly takes a stand by reinforcing some starting points of constitutionalism, such as: respect for social plurality, protection of numerical and vulnerable minorities, observance of the due legal process, the dignity of the human person and the presumption of no-culpability, judicial obligation to assess all arguments raised by the parties, legal restraint of state powers and, in particular, the Judiciary, as well as respect for argumentative coherence based on evidence. In this sense, a constitutional practice with such premises seems not only to weaken individual freedoms, but also to legitimize authoritarian social and / or institutional actions – thus creating a future, be it near or remote, that seems more degraded than the present.

It is necessary to overcome this dystopian constitutionalism, which is ever-growing in Brazilian jurisdiction. To do that, the most probable action is to substitute fear as the main feeling of our social status, maker of political bodies and subjectivities. Alternatives are not lacking: while a left-wing ideology could defend the anger and indignation arising from class consciousness, as drivers of a destabilizing upheaval of the real factors of power, primitive Christianity would bet on unconditional and redeeming love as the key to transformative empathy. Both of them, however, would be affective changes that would require high libidinal investment. Perhaps the most fruitful path is the very melancholy resulting from the loss of great utopias. Linked to the lack of knowledge of a long-lost object or, aware of the lost object, is the lack of awareness of what the subject was effectively deprived with such a loss, so melancholy is constitutive of individuals and of modernity itself. The melancholic disenchantment of the world leaves no room for a totalizing, reductionist, time-controlled and risk-free response. The law itself, through the action of a Constituent or Legislative power, arises from the total impossibility of identification between representative and represented people, that is, from a certain absence in the identity of the constitutional subject, a constitutive loss that will always remain, despite the continuous processes

of hermeneutic construction and renovation. Perhaps this path based on the principle of reality does not reactivate utopias, but, who knows, at least it weakens the dystopias that, out of fear, have paralyzed the construction of good alternatives in the present.

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