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Questioning the Fundamental Right to the Material Equality: Do the Exceptional Cases Justify the Ultraliberal Meritocracy?

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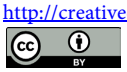

Abstract

The research that originated this article started from the premise according to which there are affirmative actions in the general society, that is, public measures applied in order to reduce the inequality affecting the so-called minorities, which regards the egalitarian ideology. Despite this presupposition and these generalized public measures, worldwide created, there is also a meritocratic discourse that diminishes the necessity of the affirmative actions, preaching that if there are certain persons that belonged to minority groups that could surpass their difficulties, does not remain any justification for the affirmative actions, because supposedly the respective same efforts could be taken by all minorities' members. Better explaining, it was intended to comprehend if the speech of resilience taken by the most successful part of individuals belonged to minoritarian groups is able to crash the affirmative actions destined to mitigate the typical obstacles and the inequality faced by respective minorities. In other words, it was aimed to answer this question: "do the exceptional cases justify the meritocracy?". Therefore, it was investigated the following points, conceived as fundamentals and as presuppositions to truly understand the described problematic: 1) the concepts of the egalitarian and the meritocratic ideologies; 2) the concept, the social function and the objective of the affirmative actions, including the analysis of some Brazilian examples, regarding specific law provisions; 3) the concept of minority, considering objectively defined criteria. Thus, in a nutshell, it was concluded that exceptional cases risen from minorities do not build an argument strong enough to shatter the affirmative actions, neither to sustain the ultraliberal meritocracy branch. Moreover, it consisted on a research that belongs to the exploratory and to the descriptive natures, also that used the inductive-observatory method, by a bibliographical technical procedure, done through a database collection.

Keywords

Egalitarian Ideology, Meritocratic Ideology, Affirmative Actions, Minorities

1. Introduction

First of all, it must be said that the right to equality is undoubtedly included in the range of fundamental rights. It is that, at least taking into account the Brazilian Federal Constitution, due to the fact that equality is inserted in it, it is possible to assign it the label of a fundamental right (Simão & Rodovalho, 2014).

Thus, it is immediately clear that the article 5° of the said Political Charter, a device that sets out most of its fundamental rights, mentions equality in its *caput* (Brazil, 1988).

It so happens that, given the breadth of the meaning of equality, this fundamental right can take on various features, obviously varying according to the theoretical lineage of the author who addresses it. Incidentally, it is readily possible to highlight its *formal* and *material* facets, to be dissected in due course in this work.

Facing these findings, a clear divergence of opinions regarding equality is observed at the phenomenological level, although it is difficult to overturn the argument that it is a fundamental right. Therefore, roughly speaking, two major ideological currents can be identified that address equality in a central way, either giving it strong relevance or offering it little legitimacy and practical repercussions in the legal system. They are, respectively, 1) the *egalitarian ideologies* and 2) the *meritocratic ideologies*.

Summarizing their concepts, for now (considering they will be better outlined in the first topic), the first one, as suggested, emphasizes the importance of *the fundamental right of equality*, a rationality that is materialized and concretely applied in society through the so-called affirmative actions, due to diminish the common social obstacles; and, in the other hand, the second one praises the relevance of private autonomy, arguing, at least in its most radical branches, that individuals must be able to carry their own burden all by themselves throughout the path of life, which means that there should not be a state's severe intervention.

In the view of this consideration, the great problem that promoted the research corresponding to this article is outlined. It is that, if, on the one hand, the existence of inequalities is recognized, that is to say, of circumstances that place social groups in positions of disadvantage in relation to others (groups commonly called *minorities*), on the other hand it is at the same time possible identify individuals who were able to overcome such underprivileged conditions and achieve success of the most diverse orders, especially in economic terms and social status.

In this sense, the research problem to be explored at this moment is: the existence of such individuals, even if they are exceptions, is enough to circumvent,

to deconstruct public policies with an egalitarian guidelines, that is, the affirmative actions, a position that would validate the meritocratic argument (at least from a more rigorous lineage perspective); or should these exceptional cases just be treated as such?

It is precisely in the light of this question that the rhetoric of the ideologies of equality and meritocracy emerges, each with its own point of view.

In order to elucidate the aforementioned problem, the research used the observatory-inductive method of approach, through investigation of a bibliographical nature (by reviewing the relevant bibliography), in addition to having used qualitative analysis for the treatment of the collected information.

At the same that, in order to illustrate the idea of affirmative actions and of inequality situations generally found in society, two Brazilian major and traditional cases of affirmative actions will be explored, regarding two specific national laws, which create provisions designed to reduce the range of the respective attacked sorts of inequalities.

Also, it will be investigated and dragged from the pertinent literature the best concept of minority, which is absolutely necessary to properly comprehend the research problem now drawn.

Therefore, this explanation starts right ahead to explore the institutes and main concepts raised in the introduction.

2. Egalitarian and Meritocratic Ideologies: Main Shapes

A strategy for investigating and understanding obscure expressions and concepts is to dissect them into parts. With that said, when talking about egalitarian ideology and meritocratic ideology, it is essential to define, first of all, the concept of ideology by itself, in the pure sense.

It turns out that this is a term imbued with profound theoretical disagreement. However, Geovany Cardoso Jeveaux, in his work "Direito e ideologia", helps to explain it.

What seems free of doubt is the idea that the approach to this concept is always linked to Marxist theory, since Karl Marx was one of the theorists who made the greatest contributions in this regard (Machado Júnior & Constantino, 2012). However, Marx's definition does not seem the most adequate, since he conceives ideology as a product only of the ruling class, owner of the capital and the means of production, which applies it to the detriment of the dominated class, the working class. Therefore, this notion can easily be deconstructed or considered obsolete and insufficient when taking into account the existence of ideologies authored precisely by the dominated classes (at least when under a capitalist system of production), such as Marxism itself or other socialist branches.

Meanwhile, Jeveaux contributes to the elucidation of certain attributes of ideology that contribute to its faithful understanding. According to him, based on Paul Ricoeur, ideology would be a "false representation of reality tending to disguise the belonging of individuals" (Jeveaux, 2018: p. 3). In other words, it is

possible to define ideology as a strategically idealized ideology with a view to manipulation and alienation through discourses that mask reality, of an integrative, dominating and deforming nature.

In this sense, it is possible to point out the three major functions that characterize ideology: 1) *integration*; 2) *domination*; and 3) *deformation*.

The first one is basically identified by qualities that promote multiplication and social interaction around the ideals belonging to the respective ideology. The purpose is to grant identity to alienated social groups, reinforcing their sense of belonging to that ideology and even offering them a false sense of satisfaction of their personal interests and desires. To this end, it is customary to recurrently spread discourses that encourage a return to the original act that identifies the respective ideology, such as a revolution (Jeveaux, 2018).

Domination, on the other hand, takes care of justifying the system of authority introduced by the ideology, thus legitimizing it. The objective is precisely to perpetuate the ideology over time and make the dominant political body capable of making decisions using alienated groups as an instrument (Jeveaux, 2018).

In turn, the *deformation* translates into the dissimulation of reality, in order to distort the world and the phenomena around individuals alienated by ideology, preventing them from becoming aware of this situation. For example, the very duality heaven/hell for Christian doctrine is seen, by ideologues, as a deforming aspect (Jeveaux, 2018).

The alienation resulting from these ideological techniques is usually so serious that only deep individual reflection is capable of freeing the alienated mass from false the convictions, from the domination and from the integration (Jeveaux, 2018).

Based on this conceptual introduction, it is understood that it is possible to approach the notion of egalitarian ideology.

First, it is necessary to establish the notion that egalitarianism, that is, the core of the thought of an egalitarian ideology, has equality as its main foundation. But, after all, what does equality mean?

It consists of a fundamental right, that is, a normative precept with constitutional density, prominently provided in the article 5˚, *caput* and item I, of the Brazilian Federal Constitution[1], whose matter is dedicated to dealing precisely with fundamental rights and guarantees.

In addition to these provisions, it also finds shelter, although implicitly, that is, it must be extracted by an adequate normative exegesis, in the article 3˚, items III and IV, also of the Brazilian Political Charter[2], devices which establish ways

[1]"Art. 5˚ All are equal before the law, without distinction of any kind, guaranteeing Brazilians and foreigners residing in the country the inviolability of the right to life, freedom, equality, security and property, in the following terms".

2"Art. 3 The fundamental objectives of the Federative Republic of Brazil are:

(...)

III—eradicate poverty and marginalization and reduce social and regional inequalities;

IV—promote the good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination".

of achieving equality as fundamental objectives of the Brazilian Republic.

Furthermore, it is also present in the matter concerning fundamental rights of labor nature, as a social right, precisely in article 7˚, items XXX and XXXI, also of the Brazilian Federal Constitution[3].

In addition to carrying general connotations such as those deduced from these provisions, the applicability of equality is also highlighted in very precise areas and amidst of several specific circumstances and individuals, such as the following: 1) gender equality; 2) jurisdictional equality; 3) equality before taxation; 4) equality in the scope of criminal prosecution; 5) equality of sexual orientation, which involves all members of the "LGBTQI+" community; 6) equality of origin, color and race; 7) age equality, not neglecting the affirmative actions in favor of the elderly; 8) religious equality; 9) equality for philosophical and political convictions.

In terms of content, Aristotle's lesson according to which equality is linked to the idea of justice is pertinent, that is, achieving equality is nothing more than doing justice. It is about achieving the Latin proverb *suum cuique tribueri*, that is to say, "give each one what is due to them" and "treat unequals according to their inequality" (Silva, 2020: p. 215).

Still, the concept of equality can be said to be identical to that of isonomy, from which the two main facets of this right are: 1) *formal equality/isonomy*; and 2) *material equality/isonomy* (Silva, 2020).

The first one concerns the merely formal and generic plan, that is, only the law (conceived here in a broad sense). In other words, *formal equality* simply means the equality of all before the law, without any discrimination and without the creation of normative privileges.

It turns out that this depth of conception is insufficient to actually promote equality, considering that, taking Brazil as an example, despite the *caput* of the article 5˚ of the Federal Constitution, already mentioned, stipulates that all are equal before the law, it is known that inequalities are eloquent, of the most diverse orders.

In the view of this, the concept of *material equality* becomes relevant, according to which it is understood that it is precisely through circumstantial inequality, objectively and allegedly promoted by the State, applied to specific contexts, that true equality is achieved.

Not only that, but *material equality* also advocates and imposes the need for interventions and punctual providences, material, factual measures, so that the discussion of this fundamental right does not remain simply on the legal level, but on a practical level as well. It is exactly from this conception that the various

[3]"Art. 7˚ These are rights of urban and rural workers, in addition to others aimed at improving their social condition:

(...)

XXX—prohibition of differences in wages, performance of duties and admission criteria based on sex, age, color or marital status;

XXXI—prohibition of any discrimination with regard to wages and admission criteria for disabled workers".

kinds of equality mentioned, circumstantially characterized, were created.

In face of these clarifications, the notion of an egalitarian ideology can finally be refined.

It is an ideological current that vindicates justice, and here it is necessary to highlight the link between the concept of equality and that one of justice, given by Aristotle, under a distributive perspective, which leads to the definition of the notion of *distributive justice* (Nogueira Júnior, 2012).

Basically, this ideological branch recognizes the existence of inequalities among groups, which are materially helpless for various potential reasons (such as historical, ethnic, economic, classy, religious, of gender) and, consequently, advocates the need to mitigate *individual freedom*, conceived within the scope of juridic post-modernity as *private autonomy*, in favor of the distribution of conditions and tools that promote a mitigation of the said disparity (Nogueira Júnior, 2012).

It is, therefore, a conception that opposes the ideal of *private autonomy* as a maximum and untouchable value, whose understanding (about *private autonomy*) became much more relevant and applicable within the state paradigm of the Liberal State, typically from the 19th century (Bolesina & Gervasoni, 2016). Quite the contrary, that refered conception emphasizes that freedom can only be conceived under the binomial *freedom-equality*, that is, it cannot be thought of in a way that is far from equality.

Moreover, it should be noted that this intervention of equalizing and isonomic dictates in the sphere of *private autonomy* varies precisely according to the circumstances and according to the type of inequality addressed.

In any case, what is right to say is the fact that the measures, the egalitarian impositions are usually revealed normatively, that is, in the legal system, through the so-called *affirmative actions*. These, in their turn, will be analyzed in more detail in the third topic (Nogueira Júnior, 2012). Meanwhile, it is possible to advance the point that they consist of manifestations of *positive freedom* considering the link between freedom and equality already mentioned, usually through positive actions taken by the State.

On this occasion, it is pointed out right away that the purpose of *material equality* is exactly to produce inequality, but as the precise desideratum of balancing the factual inequalities that affect the beneficiary groups of the respective state measures.

Brazil, as a special case of a country where the application of *affirmative actions* has a special and relevant stage, offers several examples, which will be better explored later.

In this regard, Iuri Bolesina and Tássia Aparecida Gervasoni affirm the existence of a constitutional principle of *solidarity*, which should help in the interpretation and operate in parallel with that of equality, characterizing essential predicates of a so-called democratic state of law. It is the way to honor diversity and to combat inequality (Bolesina & Gervasoni, 2016).

They complement indicating the presence of this principle in the article 3˚, item I, of the Brazilian Federal Constitution (Brazil, 1988), which helps to compose one of its republican objectives. It is in the *third dimension of fundamental rights* and, having its own normative force, it helps in the interpretation and application of other fundamental rights (Bolesina & Gervasoni, 2016).

In addition, although its proper definition proves to be difficult, these authors state that

> the constitutional principle of solidarity imposes rights/duties that unite in a third way the generally opposed positions of exacerbated individualism and, on the other hand, of social hegemony. This is what is recognized academically as "legal solidarity".
> (...)
> It means, therefore, that equality as solidarity unites the perspectives of diversity and reciprocity, aiming at the synergistic construction of society (Bolesina & Gervasoni, 2016).

Finally, in these observations consist, roughly speaking, the ideals and purpose of an egalitarian ideological current, notwithstanding that it is known that there are several of them, whose main differences among them are characterized precisely by the degree of public intrusion in the dimension of *private autonomy* in favor of the promotion of greater equality, that is to say, through *affirmative actions*.

Meritocracy, in its turn, privileges the *private autonomy*, a value, a legal good, exactly the opposite, at least theoretically, to egalitarianism.

This is an ideological current closely linked to the concept of *poverty*, which can be defined as a structural problem marked by an unequal and uneven allocation of economic resources among the individuals that are part of a society, which causes insufficient access to basic needs, such as food, housing, infrastructure in general, schooling, health and working conditions. In the meantime, it is emphasized that *poverty* cannot be generalized as a single phenomenon and always of the same depth and degree, insofar as it varies according to the severity of the scarcity of the aforementioned factors (Wachelke, Guarato, Silva, & Vieira, 2020).

Meanwhile, the literature explains that meritocracy, at least its most extreme version, tries to justify poverty on the grounds that the material conditions enjoyed by an individual are deserved by him and compatible and corresponding to his levels of merit, effort and of skill undertaken in obtaining such conditions (Wachelke, Guarato, Silva, & Vieira, 2020). Thus, following the same line, it can be defined as "a set of values that postulates that the positions of individuals in society should be a consequence of the merit of each one, that is, the public recognition of the quality of individual achievements" (Wachelke, Guarato, Silva, & Vieira, 2020: p. 4).

Due to this type of justification, supporters of a meritocratic ideology tend to be more conniving and tolerant of social inequality, since it is supposedly justi-

fiable by individual effort, an orientation that, by the way, is in line with an individualist conception of poverty and it is based on the difference among individuals, exactly the opposite of what egalitarianism preaches, which tends to a socializing and structuring interpretation of *poverty* (Wachelke, Guarato, Silva, & Vieira, 2020).

However, as suggested, the commonly propagated, and lay, view that meritocracy preaches the maximum independence of individuals, so that each one would be responsible for their own condition and that individual reality would necessarily be the product of their own effort and merit, corresponds, in reality, to the *meritocratic ultraliberal strand* (Daza, 2020).

Furthermore and clarifying the theme, as well as egalitarianism, meritocracy has several currents, some more extreme and tending to the indicated orientation, which could be called *radical*, and others more equalizing, which could be called *mild*. Those advocate a maximum valuation of *private autonomy*, from an anti-social and anti-welfare perspective of the State, sustaining its distance from social issues; while the latter tend towards a kind of conciliation between *private autonomy* and *equality*, that is, valuing this fundamental right as well (Daza, 2020).

Better clarifying, the so-called radical branches preach a distance from the State, a low interventionism, in order to refrain from promoting equalizing measures, that is, affirmative actions. Thus, each individual, insofar as he is responsible for his own condition, if he wants to emancipate himself and overcome obstacles, as well as mitigate inequalities, should do so on his own, using his own merit and his specific skills, without or with very little state support (Danner, 2015).

It turns out that this orientation does not seem to be the most appropriate, at least not according to the scientific opinion shared in this article. It simply cannot be expected that all subjects suffering from some degree of poverty, bearing in mind the various levels of poverty already mentioned, will be able to overcome all the respective difficulties. One cannot completely believe in this type of possibility, since it constitutes an exception, a hypothesis that will be better explored in the forth topic of this work. Incidentally, this criticism is justified by a very simple reason: one cannot expect the same performance from all people, even because skills and aptitudes vary from person to person, with those endowed with higher degrees of these attributes (Daza, 2020).

Thus, the option for the so-called *isonomic meritocracy*, as nicknamed by Javier Duque Daza, stands out. It is about a fairer branch of meritocracy under the perspective of egalitarianism. According to it, affirmative actions should indeed exist, exactly as a tool for promoting *equal opportunities* (Daza, 2020).

The existence of *opportunities* is the key and the most important factor for understanding and reaching conclusions about any theory of justice.

With this, under the dictates of *isonomic meritocracy*, it is up to the State to assume firm social responsibility, in the sense of promoting isonomy or at least balancing opportunities of the most diverse nature (economic, educational,

health, structural, etc.), guaranteeing the so-called relative equality, that is, a situation in which subjects are riddled with minimum starting conditions for achieving their goals. In other words, the State must not exactly make people equal, but provide sufficient conditions to help them overcome their own difficulties (Daza, 2020).

Meanwhile, it is essential to highlight that this current, unlike the more radical ones, does not pay attention to the result, but to the means, to the circumstances that interfere with its reach. It is precisely the circumstances, the context and the conditions to which each person is subject that give them a greater or lesser chance of success. Therefore, once this premise is fixed, the purpose of *isonomic meritocracy* becomes precisely to correct or at least minimize circumstantial vicissitudes.

From this, the same author argues that any result achieved will be fair and legitimate, since it is finally guided by meritocratic criteria, that is, by individual effort. Now, once differences and inequalities have been mitigated, it must be up to each individual to seek and achieve their goals (Daza, 2020).

By the way, this is the same orientation applied to *affirmative actions* in Brazil. Quotas for access to vacancies created by public exams are a great example. Although the dissection of this issue occurs in a more profound way in the second topic, it is not too much to say for now that the logic of quotas is explained by the following: from the moment that special conditions are created and individuals with a deficit of opportunities are separated or socially harmed by other factors (such as due to their ethnicity), the result obtained within the scope of the respective competition cannot be other than based on the dispute among these same deficit subjects, that is, based on merit, on effort or, in other words, on the score of each one (Danner, 2015).

Furthermore, although the dictates that guide the ideology of *isonomic meritocracy* may seem pleasant from the point of view of justice, the same perception does not exist when taking into account the *radical* branches.

It is not a matter of chance and justly because of the ideological inclination of the latter one that theorists who normally assimilate them negatively tend to argue that they are elitist rhetoric, employed by the ruling class, especially the largest holders of capital and means of production, in addition to usually being white, as a way to support a society in capitalist and convenient ways for them. Thus, arguing in favor of a life driven essentially by work and by the production of wealth, as factors arising from a supposed need to search for merit and the constant exercise of skills and the best possible performance at work, the ruling class, applying this sort of discourse, is able to sustain its condition and, at the same time, keep the dominated classes in an alienated position, which generally consist of black and brown people (Danner, 2015).

Better explaining and approaching criticisms of meritocracy in general terms, what is argued is that the elites themselves, beneficiaries of meritocratic social functioning, create their own criteria that benefit and select individuals, especially based on economic parameters, social status, gender, sexual orientation,

ethnicity, education, etc. With this, they manage to monopolize power and exercise social control, creating spaces and bonds in which only a limited number of groups can participate, in order to exclude those who do not fit the profile and who do not fulfill the required criteria (Daza, 2020).

In any case and despite the countless differences among the ramifications of meritocracy, it seems right to state that, while this ideological niche gives more importance to *private autonomy*, conceived as a fundamental right, egalitarianism defends in a greater extent the fundamental right to *equality*.

Moreover, another point that denotes a crucial difference between egalitarianism and meritocracy, both conceived at this moment in general connotations, is the idea that, while the first lineage aims to make subjects truly equal, in factual terms, the second great current, by at least in its milder and more measured form (like the *isonomic meritocracy*), simply intends to provide the conditions and the oportunities, under proportional and circumstantially adequate measures regarding each individual, in order to make them able to reach, by themselves, their goals and produce their own merit (Daza, 2020).

With that said, the *isonomic meritocracy* appears to be a intersection between egalitarianism and meritocracy (now conceived in its more radical branch), in the sense that it tends to unite their main characteristics (the *equality*, regarding the first one; and *private autonomy*, regarding the second one) and create a midterm, able to conciliate those two ideologies, which is clearly the rationality adopted in the Brazilian affirmative actions, as be seen in the following topic.

3. Affirmative Actions and Classic Brazilian Examples

3.1. The Social Function and Purpose of Affirmative Action: Scrutinizing the Concept

Entering, at this moment, deeper into the theme of the *affirmative actions*, preliminarily it is necessary to point out, resuming the reasoning already begun, that this institute stems from the recognition of inequalities in the social environment, held by disadvantaged groups in the most diverse senses, such as in educational terms, healthy, sanitary, housing, structural, among others.

With that, already under the aegis of the state's paradigmatic phase of the Welfare State, it was concluded that the dictates of an ultraliberal society had no more space and that they lost their meaning, especially in the face of the raising of demands and clamors for the realization of social fundamental rights and positive benefits from the State. It was no longer possible to live with total indifference towards poverty and lack of access to basic fundamental rights, such as those concerning the types of inequalities raised.

Truth be told, the existence of inequalities in a worldwide level is mainly related to the World's Second Industrial Revolution, about which it can be said that took place from the middle of the 19th century to the beginning of the 20th century, till about its second decade, surely not disregarding the fact that a big event as this does not occur equally in terms of time and space around the world

(Lima, 2020).

At the same time, this revolution went on, the *globalization*, as an increasing contemporary phenomenon, rose, not avoiding the fact that the next industrial revolutions potentialized it even more, as the world became more and more capitalist along the years.

Now, about this last concept, it must be said that it has several sorts of backgrounds and influences, but primarily economical. What is meant to clarify is that *globalization* increases the contact and the influence among all the countries, as least it does to those open to international relations, which are the big majority, as well as it reduces the distance among those, evidently in a metaphorical way of speaking, specially because of the ultimate informational and communicational technology, that allows people and all kinds of human activities around the world (mainly benefiting the big companies) to get in touch at any time wanted (Lima, 2020).

Nevertheless, despite initially globalization would sound good, it also produces a consequence related to this paper's issue, which is inequality.

Basically, the increase of inequality around the world is eminently observed in comparison among countries positioned in different production conditions, which is the same to say that the countries, and by "countries" it is meant their respective people, who are the ones that suffer the economical consequences, that hold the big and billionaire companies that rule the world's economical environment are more likely to gather good economical results from globalization rather than the ones known as being the world's factory fields, which most times are underdeveloped countries (Lima, 2020).

In other words, *globalization* lead to a global situation in which the world works as if it was a big factory, in the sense that the most developed countries would be the directories, where, metaphorically speaking, are the people/managers who make more money, while in the less developed countries are located the handymen people/low level employees. This global conjuncture is usually called *world factory* (Lima, 2020).

Even though, it must be asserted that this is a very generic metaphor, that can only be taken into account under a global perspective, because inequality, as already said, can also be strongly found internally in all countries.

Well, with that said and retaking the thought concerning the Welfare State turning point, from the identification of the positive feature of freedom and the intervening role of the State through a positive action, the notion of *affirmative actions* emerges, which, as suggested, are nothing more than State measures taken with the objective of mitigating inequities and vicissitudes that block access to basic rights. The logic employed is the one of *positive discrimination*, that is, it is exactly by treating unequals in an unequal way that it is possible to minimize their differences.

They reveal themselves as a way of doing justice to groups historically and socially harmed and discriminated against, insofar as, placed at disadvantage for a

significant period of time, the consequences of this marginalization produce harmful consequences until the present day, which makes these groups hostages of their past.

In the view of this, it is noted that the birthplace of this institute is found in the United States of America, a pioneering state in taking *affirmative actions* of an educational glance, since, having recognized the condition of segregation of its black population, given its slave-owning past, took measures to minimize the socioeconomic gap among whites and blacks, promoting broader access to the educational system (Angnes, Ichikawa, Klozovski, & Freitas, 2020).

The fact is that, as the United States lived in a true racial apartment, in the strict sense of the term, at least until the 1960s, its Government was forced to promote public policies to expand access to civil rights, which were deeply denied to the black population until then, given its slave ancestry. In this context, that is, in the Civil Rights era in that country, the black movement was vehemently active, claiming above all equal opportunities in the labor market and in schools/universities.

Due to this conjuncture, once the Civil Rights Act was approved in 1964, the United States served as a parameter for the rest of the world in the issue of *affirmative actions*, which gradually conquered space from that historical moment.

Finally, they are, in short, instruments destined to compensate for the past and to promote diversity (Bolesina & Gervasoni, 2016).

Under the same guideline, Geziela Iensue argues that

> Affirmative actions are effective instruments for eliminating and reducing the persistent effects of past discrimination, as they aim to eliminate or reduce situations of vulnerability based on situations of social inequality or past or present discrimination, guaranteeing equality, reducing undesirable asymmetries and improving economic redistribution and recognition (Iensue, 2021: pp. 22-23).

In the light of an equivalent perspective, it is also possible to point out that

> The affirmative action aims to remove formal and informal barriers, that prevent certain groups from accessing the job market, universities, leadership positions. Better explaining, in practical terms, affirmative actions encourage organizations to act positively, in order to favor people from discriminated social segments to have the opportunity to ascend to leadership positions (Angnes, Ichikawa, Klozovski, & Freitas, 2020: pp. 6-7).

In the view of this institute's function, now clarified, it is concluded that the *affirmative actions* aim to improve the social capital in general of their beneficiary groups, as well as to increase their cohesion and social inclusion in previously distant niches, such as in professional categories that require a high level of educational specialization, a notion that is especially pertinent to the hypotheses of reserving vacancies for specific minority groups (Iensue, 2021: pp. 22-23).

Well, then. Once achieved these findings, a juridical analysis will be made in sequence, that is, in the view of the current normative discipline, of two practical and classic examples of affirmative actions applied in Brazil.

3.2. Some Relevant Brazilian Cases

As indicated in the "Introduction", Brazil is widely known as a country of enormous inequalities, of several kinds, especially concerning the following natures: economical, educational, ethnical, of health, of genre and of sexual orientation. Either way, it can be said that all of them are attached to the economical one, which means *poverty*, a structural problem, as already explained (Santos, Mota, & Silva, 2013).

Truth be told, as well as it happens everywhere, a place's present situation is a reflection of its past, that determinates it, in a good or in a bad way.

That's why the explanation for Brazil's current conjucture is mainly related to three major factors, that together produce the nowadays seen circumstances: 1) its colonial past, that lasted over 300 years, ranging from 1500 to 1815 (according to the Gregorian calendar); 2) its imperial past, which came right after the end of the colonial period; and 3) its slavery past, that lasted about 388 years, because started justly in the beginning of the colonization and formally ended in 1888 (also considering the Gregorian Calendar) (França, Abdala, Veiga, Abreu, & Pereira, 2018).

Also, it is to be pointed out that all of the slave population back in Brazil's slavery era was black, as a result of the approximated 4,8 million black slaves brought from Africa to Brazil (Alencastro, 2018).

All of these considerations help to understand why the black and the brown (the last one resulted of an ethnical blend basically between white and black people, between black and indigenous or between white and indigenous) population in Brazil is generally in a significantly worse condition than the white one.

Thus, that is the so justification for one of the most important *affirmative actions* applied in Brazil, the so-called "Quota's Law", that will be investigated in the following topic.

Besides, when talking about minorities and about *affirmative actions*, a very relevant example, that progressively becomes more and more discussed, is the cause regarding the people with disabilities.

Better explaining, since Brazil's infrastructure is not well developed mainly due to the economical and classy issue (already pointed), but also due to the indifference given to this minority, it can be observed a deep gap between non-handicapped people and people with any sort of disability, who suffer daily difficulties (Cunha, 2021).

Not by chance, this situation lead to the creation of The Statute of Person with Disability, which will be also explored ahead.

3.2.1. Federal Law No. 12.711/2012—The "Quota's Law"

This approach could not be made without taking into account the case, already

quoted, of the "Quota's Law", which intends, among other desideratums, to fill vacancies in federal universities based on ethnic criteria.

It is about the Federal Law No. 12.711/2012. It is a pioneering legal affirmative action in Brazil, given that, before, although reservations of vacancies for ethnic minorities already existed, federal universities created them administratively, that is, according to their own discretion, and not by legal determination, which is why it was identified small numbers of vacancies offered according to this criteria, at least when compared to the percentages established by the legal diploma now discussed. Still, evidently, by force of this Law, the quota system had greater repercussion, since, before it, less than half of the federal universities implemented reservation of vacancies in this sense, while already in the year of 2013, that is to say, in the year following the beginning of the Law's validity, all universities in this administrative scope had already adopted this system (Marinho & Carvalho, 2018).

Considering this and in compliance with the terms of the Law, it is noted that, despite defining other measures, the reservation of vacancies for black, brown, indigenous or disabled candidates in selection processes for graduation courses at federal institutions is one of the points that stand out. It is the intelligence that can be produced from the combined interpretation between the *caputs* of its articles 1˚[4] and 3˚[5], despite the confusing wording of the latter.

In first place, it is observed that 50% of the vacancies, by graduation course and by shift, from federal institutions, universities or not, were destined to students who have completed high school in public schools. In addition, and if this parameter is mixed with the ethnic one, it is also evident the rule according to which there will be a specific reservation of vacancies designated to self-declared black, brown, indigenous and disabled candidates, whose percentage will be equal to the respective population percentages of said ethnic identities, considering that this data will be based on the latest census by the Brazilian Institute of Geography and Statistics Foundation (IBGE).

Therefore, it can be seen that the legal discipline under discussion merges two different selective parameters with the aim of creating a specific vacancy reserve: 1) the candidate's educational background; and 2) self-declaration of being black, brown or indigenous. By the way, the mere adoption of a criterion founded on the nature of the second requirement already confesses the deficiency of the Brazilian public secondary education, which is why it is possible to say that the *affirmative*

[4]"Art. 1˚ The federal institutions of higher education linked to the Ministry of Education will reserve, in each selective contest for admission to graduation courses, by course and shift, at least 50% (fifty percent) of their vacancies for students who have completed full-time education medium in public schools".

[5]"Art. 3˚ In each federal institution of higher education, the vacancies referred to in the art. 1˚ of this Law will be filled, by course and shift, by self-declared blacks, browns and indigenous people and by people with disabilities, under the terms of the legislation, in proportion to the total number of vacancies at least equal to the respective proportion of blacks, browns, indigenous peoples and people with disability in the population of the Federation unit where the institution is located, according to the latest census by the Brazilian Institute of Geography and Statistics Foundation, IBGE".

action now discussed has the purpose of correcting not only ethnic inequalities, but also educational ones.

Furthermore, another noteworthy point of the debated normative dogmatics is the express consideration, by the article 3˚, of the subjectivity of the candidate for the purpose of defining his ethnicity, that is, self-declaration is taken into account. By the way, this is a highly questioned aspect, because, since the enactment of the Law, several frauds have been verified (Marinho & Carvalho, 2018), which, in addition to preventing access to the respective vacancies by those who legitimately deserve them, depreciates the image of the Law in the social environment, as well as demean the institute of the *affirmative actions* in the overall. However, today, the possibility of fraud is curbed due to the performance of a commission that usually operates within the sectors of federal universities in charge of carrying out the enrollment of approved candidates, which has the task of investigating, in the view of the physical characteristics and physiognomy, the veracity of the self-declaration.

Besides all, it urges to demonstrate that, in fact, the results of the Federal Law no. 12.711/2012 were manifest. It is no coincidence that the Institute for Applied Economic Research (Ipea) has already released data according to which there was a 25% increase, between 2009 and 2015, in the black student body in Brazilian higher education. Specifically in the case of public graduation, when comparing the years 2001 and 2017, there was an increase from 31.5% to 45.1% of self-declared black or brown students (Iensue, 2021).

3.2.2. Federal Law No. 13.146/2015—The Statute of Person with Disability

Despite the fact that the Quota Law itself already establishes, as seen, the obligation to reserve vacancies for people with disabilities, it does not compare to the dimension of the normative protection offered to this type of minority by the Statute of the Person with Disabilities, established by the Federal Law no. 13.146/2015.

Before making considerations about it, it is necessary to clarify the condition of the person with disability as a type of minority group.

First, there are several criteria identifying disability, with no conceptual unanimity in the literature. However, the *medical* and the *social* stand out.

The first one places the disabled person as an isolated incident, as a biological failure resulting from an individual problem, which must be the target of an attempt to "normalize" towards society. With that, it is seen that this parameter contributes little to the solution of the vicissitudes involving this group (Rostelato, 2010).

On the other hand, the *social* model of definition exalts the diversity among people, as well as advocates the idea that disability should not be a concern only for its respective holder or his family, but constitutes an environmental and social issue, in the sense that "the difficulties faced by people with disabilities are the result of the way in which society deals with the limitations of each individu-

al" (Rostelato, 2010: p. 174), that is, what characterizes disability is the difficulty in relationships and social integration. Therefore, it is observed that this model's perspective is more comprehensive and focuses on the circumstances as a whole, and not on the disabled person himself (Rostelato, 2010).

In the same sense, Telma Aparecida Rostelato explains that

> the duty to remove the obstacles, which people with disabilities face, to practice their daily intentions, is equally incumbent on the State, in addition to their families, as well as the society itself (Rostelato, 2010: p. 190).

Meanwhile, the assertion that the Statute of the Person with Disabilities revolutionized the normative discipline of treatment of this minority in Brazil is beyond doubt.

Immediately, there is the concept of person with disability, inserted in the article 2˚, which seems to have adopted the *social* conception indicated above, given the very comprehensive definition criteria:

> Art. 2˚ A person with disability is considered to be someone who has a long-term physical, mental, intellectual or sensory impairment, which, in interaction with one or more barriers, may hinder their full and effective participation in society on an equal basis with other people (Brazil, 2015).

Furthermore, it is relevant to note the adoption of very well defined and detailed concepts and institutes in the article 3˚, for purposes of interpretation and application of the Law (considering its mention in the other devices), all of which have the purpose, in short, to promote an attempt of equality for this minority group, through factors, resources and instruments that are inclusive and that expand and facilitate the performance of all its rights specifically established in the Law. These are the concepts of: accessibility; universal design; assistive technology or technical help; barriers; communication; reasonable accommodations; element of urbanization; urban furniture; person with reduced mobility; inclusive residences; housing for independent living of people with disabilities; personal attendant; school support professional; escort.

Basically, the Law aims to promote equality and non-discrimination of this group, in order to offer it, to the maximum extent possible, equal opportunities and access to rights held by individuals not affected by any type of disability. In the meantime, the Law takes care, still in its Preliminary Provisions, of the civil capacity of the disabled people and of the priority assistance, to which he is entitled, in public and private services.

When it comes to the fundamental rights covered by the Diploma, in its title II, there are specific disciplines related to the following rights: to life; to habilitation and rehabilitation; to health; to education; to housing; to work; to social assistance; to social security; to culture, to sport, to tourism and to leisure; to transport and to mobility. It is that, although these fundamental rights are already due to all people, they require special and minute treatment in the case of holders with some kind of disability.

Besides, it is important to observe how the Law also offers a peculiar approach to issues related to accessibility for people with disabilities. In this area, special disciplines related to access to information and communication are included; to assistive technology; and the right to participate in public and political life.

Moreover, despite the fact that the Law presents other measures, the singular treatment, also offered to this group of people, is highlighted in terms of access to justice, inasmuch as, mainly, it determines a series of duties for justice servants, a concept in which the notarial and the registration areas are included, when assisting people with disabilities.

In reality, most of the normative statements of the Law produces programmatic norms, that is, they do not have immediate effectiveness in the sense of directly producing concrete effects, insofar as they depend on actions, on interventions by the Public Power as a whole, mostly by the Public Administration, to produce practical results. With this, Luiz Alberto David Araújo and Waldir Macieira da Costa Filho emphasize the idea that, since the respective norms direct duties to public administrators entrusted with their observance, from the moment they are not complied with, such public agents must be subject to the sufficient investigation of the commission of administrative impropriety by the appropriate procedural instrument (Araújo & Costa Filho, 2016).

At the same time, these authors also called attention to the fact that a good part of the provisions of the Law were nothing more than repetitions of the Federal Legislative Decree no. 186/2008 and of the Federal Decree no. 6.949/2009, which endorsed the International Convention of People with Disabilities. Nevertheless, it is to be inferred that, inasmuch as that law must be conceived as an instrument and as a technology, a more meticulous and well-detailed normative discipline cannot be said to be negligible (Araújo & Costa Filho, 2016).

4. Minorities: Concept and General Identification Criteria

As well as most of the concepts related to the science of law, the minority one is also not immune from doctrinal divergences.

Faced with this finding, despite the impossibility of outlining perfect and capable criteria that suit all hypotheses appropriately, the research resorted to some authors who were considered sufficient in presenting satisfactory parameters for identifying minorities.

Historically, it can be seen that, in first place, attempts were made to define minorities according to numerical, quantitative criteria. However, over time this foundation proved to be insufficient, perhaps untenable, since a good part of the minorities are not even considered as such, due to their existence in smaller numbers, if not due to other factors that put them at a disadvantage. An example of this is the *apartheid* in South Africa, where, despite blacks being the numerical majority, they constituted precisely the target group of prejudice and discrimination (Silveira & Freitas, 2017).

At the same time, it is dangerous from the perspective of scientific rigor to

create a universalizing minority concept, since, considering that local circumstances are exactly the factors that configure minorities, one cannot universalize and apply the same concept indistinctly resistant to all social contexts. This differentiation is due to the fact that each society, individually conceived, which forms specific minorities, carries a baggage, a diverse historical repertoire, with regard to cultural, linguistic, religious and ethnic aspects.

Therefore, this concern led to the need to choose objective criteria, but without previously defined content, which all minority groups anywhere would share. Thus, once the respective hypotheses are met, the analyzed groups could indeed be considered minorities (Silveira & Freitas, 2017).

Parallelly, a warning must be issued. When selecting identifying criteria, it is considered prudent that the epistemological opening of the hypotheses be as wide as possible. The purpose is not to create a watertight and rigid criterion capable of curbing the scope of new species in the future, given that, as is obvious, social transformations do not cease and are increasingly rapid, which favors the appearance of groups hitherto non-existent.

Finally, Rebeca Costa Gadelha da Silveira and Raquel Coelho de Freitas preach the existence of a *minimum objective criterion*, that is, the existence of discrimination to the detriment of the supposed minority. With this, it is also important to unravel the notion of discriminating (Silveira & Freitas, 2017).

It is about acting by which its active subject treats others with subordination, even creating a negative axiological judgment in relation to the discriminated subject, which may end up causing a restriction of rights and an impediment for the respective group to take advantage of the same opportunities, as well as exercising its capabilities and potential. Furthermore, according to these authors:

> Discriminating implies the notion of segregating, denying rights unjustifiably, of diminishing the condition of a human being of a certain person for the simple fact of belonging to groups other than those called normal or dominant. To discriminate is to treat your fellow man in a prejudiced, non-egalitarian, unfair, disproportionate and undemocratic way (Silveira & Freitas, 2017: p. 103).

What is meant is that, once it is verified that the analyzed group suffers this type of depreciation, it becomes possible to say that it is the target of discrimination (*minimum objective criterion*) and, consequently, that it constitutes a kind of minority.

On the other hand, Bárbara Lucchesi Ramacciotti and Gerson Amauri Calgaro accept the aforementioned conclusion that the numerical criterion is not relevant in this analysis. On the other hand, this authorial duo takes into account the foundations of *subjugation* and *vulnerability*, as they appear to be the most common in literature (Ramacciotti & Calgaro, 2021).

According to them, however, the term vulnerability still has a very dubious, vague and abstract connotation, since it has not been thoroughly conceptualized by the relevant literature. With that, these authors elect the criterion of *subjuga-*

tion as the most appropriate to identify a minority, which refers to a "situation of dependence or non-dominance in relation to another majority group" (Silveira & Freitas, 2017: p. 8).

In addition, their doctrine also draws attention to the *difference-diversity* binomial. Although it is not exactly a formal criterion for identifying minorities, such as the idea of *subjugation*, it is noted that this is a characteristic that is often raised when studying minorities in general (Silveira & Freitas, 2017).

Better explaining, when Anthropology evolved, which had the aim of detaching sociological analysis from the traditional Eurocentric perspective, it began to analyze hitherto neglected groups, such as black and indigenous peoples, which is why the relativist view of human characteristics gained relief, given the numerous social differences (in general terms) among different peoples around the world.

This understanding led the debate to the concept of *multiculturalism*, whose thesis basically states that

> The idea of differentiation is key to defining minorities in relation to the rest of the majority society, being complemented by the element of diversity, as this involves the right to be different both in relation to groups and in relation to individuals (Ramacciotti & Calgaro, 2021: p. 11).

As can be seen, then, these analytical prisms, once compared to different literary lineages, are complementary to each other, and not self-excluding. In any case, it seems correct to state that, if one aims to delimit an universalizing identity to minorities, it is prudent to follow the concepts and theoretical currents outlined, since they helped to understand the theme and are very close.

5. After All, Are Exceptionalities Capable of Deconstructing Affirmative Actions?

In the light of all the clarifications made throughout the work, as well as the concepts unveiled, the next step is to try to answer the problem proposed by the research.

First, it is necessary to reveal that there was great difficulty in selecting bibliographic material for the collection of content concerning this point of the research, including when it comes to all the databases used. Thus, the most plausible explanation for this is the idea that the Brazilian legal literature has not yet addressed this problem, that is, the scientific question raised has not yet been specifically used as an object of research, at least not that it has been noticed.

In any case, one can round off the question by saying no. Exceptional cases cannot validly be used (from the perspective of the seriousness and ethics of scientific discourse) as an argument enough to refute affirmative actions.

This assertion is explained by the redundant idea that exceptional cases are, indeed, exceptions. Thus, it is possible to refute that mistaken argument based on formal logic and the general theory of law.

Now, if it is about affirmative actions, that is, normative commands (conveyed

in diplomas and legal provisions) of *general* (applicable to the entire community, and not to a specific and predetermined individual) and *abstract* natures (indivisible into an endless number of future cases, that is, whose events have not yet occurred), its inapplicability or its unnecessary application to a specific and individualized subject does not dismantle its validity as a rule.

This is the *deontological counterargument*, which concerns the scope of the duty of law.

Moreover, another argument of the same nature that seems relevant to resolve the issue concerns exactly to the concept and to the identification of the *addressee* of the norm corresponding to affirmative action (Daza, 2020).

This is because, if the respective normative determination supposedly does not fit and does not serve the subject to whom it would theoretically be applied, it means that, in this case, he does not actually appear as an authentic *addressee* of the norm. Therefore, the understanding deferred to it is not extensible to all the minority collectivity to which the norm is generally directed, even because it is not even possible to objectively measure or quantify all the addressees of a public policy of the amplitude of an *affirmative action*, given that every one of these measures targets a specific minority as a whole (Paula, 2004).

In the *ontological universe*, that is, of being, it is equally possible to combat the aforementioned *ultraliberal meritocratic argument*. The idea is that, in the case of egalitarian public policy, in view of the recognition and identification of a niche of needy subjects and targets of the respective equalizing provision of rights, conditions and opportunities, its dismantling by force of an individualized and isolated argument would not help to solve the corresponding problem of inequality that it would aim to face.

In effect, already from the perspective of social effectiveness, which is one of the analysis plans of the deontology of Law itself, if one aims to confer instrumental efficacy to the law in relation to society, that is, once one considers the law a technology, an instrument destined to make people's lives better (*axiological argument*), it would lose its usefulness if a normative measure of wide repercussion, as affirmative actions tend to be, were emptied.

Besides, the *ultraliberal meritocratic argument* is also weakened when it is conceived that people are not equal in terms of individual qualities, which involves capacities, abilities and skills (Daza, 2020). Thus, what is meant is that a measure that is suitable for a person or a group of people may not fit or not be useful for another in particular, although this does not matter in the annulment of its usefulness (*utilitarian view*), mainly because the inapplicability of a juridical norm in a *concrete* case does not cause its *abstract* invalidity, that is, for all further cases.

In addition to the differences between the individual qualities of each subject, one cannot forget the fact that affirmative actions, however meticulous and detailed their instituting normative diplomas are, are not capable of foreseeing all the singularities of each of their *addressees* neither all the social circumstances endured by them, which may, to a greater or lesser extent, compromise their

personal success and their dependence on the respective affirmative action.

Not by chance, a research based on data from the Basic Education Assessment System (Saeb) and made available by Inep (Instituto Nacional de Estudos e Pesquisas Educacionais Anísio Teixeira) reveals relevant conclusions about the issue discussed here. Better explaining, although such research is restricted to the educational scope and specifically to high school, some of its notes are pertinent and extendable to the present work (Castro & Tavares Júnior, 2016).

According to it, which basically analyzes the scholar success of groups of students categorized based on similar personal profiles, it is noted that several factors significantly condition the respective data and percentages, many of which are usually neglected by affirmative actions. These are some of them: the location, the surroundings of the subject's residence, with a significant difference among the results regarding residents of rural areas and those living in urban areas, as well as among the regions of the country; the family background in general, especially the mother's level of education and her presence, since it is proven that she is the family member most responsible for the individual's scholar success; the level of access to the internet and information technologies in general; the attendance shift at school (Castro & Tavares Júnior, 2016).

Faced with these findings and in the view of affirmative actions, including the concrete examples explored in this work, it is clear that the factors mentioned are not even taken into account, or at the utmost, sparsely are, to measure the level of aid, of state intervention that the *addressees* of these measures lack. Thus, it must be concluded that the generalizing argument now questioned, of an *ultraliberal meritocratic* nature, is increasingly falling apart, since its alleged generalization does not seem to be applicable in the practice of affirmative actions (Castro & Tavares Júnior, 2016).

6. Final Considerations

Finally, some conclusions can be drawn from this research, which are expected to serve as a contribution to further work, in addition to which the most relevant of them will be displayed in sequence.

First, it turns out that the attempt to categorize ideologies of justice among egalitarian and meritocratic lineages is too general and broad. As it has been seen, there are several subcurrents, each with its own particularities, in such a way that many times they even mix characteristics generally deferred to the supposedly antithetical ideological lineage. Therefore, it becomes evident that, when formulating personal critical judgments, one should not jump to conclusions about a given topic without first trying to get to know it well, mainly in order to respect the scientific rigor.

Secondly, the fundamental character of affirmative actions is also registered, which seem to be the only way of mass, collective social change, especially in the Brazilian case, since it is a country full of inequalities, most of which are products of a compromising past.

Apart from that, the importance of well-established criteria marked by scientific rigor was perceived when conceptualizing and identifying minorities to be aimed by affirmative actions.

In the end and responding to the research's original question, it is understood that the exceptional cases, usually invoked in *ultraliberal meritocratic discourses/arguments*, are not enough to deconstruct affirmative actions, considering all the reasons and all the factors presented.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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