REVISTA ANPPREV DE SEGURIDADE SOCIAL

Law and Democracy in America: reflections about Tocqueville, the jurist[1]

Direito e Democracia na América: pensando o jurista Tocqueville

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ABSTRACT: Alexis de Tocqueville is a singular author in juridical-sociological thought. The

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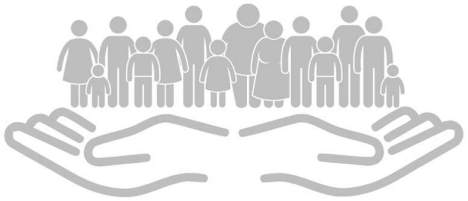
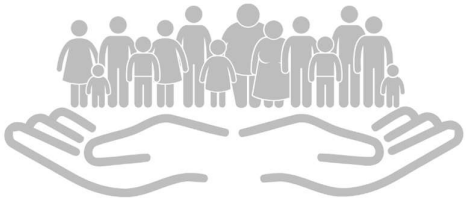


text reflects on the main biographical characteristics of the author to understand properly the objectives and motivations presented in his research about democracy in America and, concomitantly, to search elements that allow us to think about the French and Latin American cases. When analyzing his relation with the legal field, it's intended to observe the analytical potential that the author offers, in order to start a discussion about the practical scope of democracy, the question of associativism, the decentralization and the process of rights' construction. Moreover, an analysis of his conception of the proper institutions is carried through. The examination of state, legislative and, in special, legal institutions reveals the relation between them is much more of tension than of harmony. In the same way, it is analyzed how the Judiciary configures itself, in the ancient regime and in democracy, as an essential institution in the process of guaranteeing rights and, still more, in the proper process of civic education of the individuals from the propagation of an ethos, promoting a reflection on the points that assist us to think the relation between Tocqueville and the legal field.

Keywords: legal institutions; democracy; citizenship; modern law.

RESUMO: Alexis de Tocqueville, é um autor singular no pensamento jurídico-sociológico. O texto reflete sobre as principais características biográficas do autor para compreender, minimamente, os objetivos e motivações presentes em sua pesquisa sobre a democracia na América e, concomitantemente, buscar elementos que nos permitam pensar o caso francês e latino-americano. Ao analisamos sua relação com o campo jurídico, objetiva-se observar o potencial analítico que o autor nos oferece, de modo a travar uma discussão sobre o âmbito prático da democracia, a questão do associativismo, da descentralização e do processo de construção de direitos. Além disso, é realizada uma análise de sua concepção das próprias instituições. O exame das instituições estatais, legislativas e, em especial, jurídicas nos revela que a relação entre elas é muito mais de tensão do que de harmonia. Da mesma forma, é analisado como o Judiciário se configura, tanto no antigo regime quanto na democracia, como uma instituição essencial no processo de garantia de direitos e, ainda mais, no próprio processo de educação cívica dos indivíduos a partir da propagação de um *ethos*, promovendo uma reflexão sobre os pontos que nos auxiliam a pensar a relação entre Tocqueville e o campo jurídico.

Palavras-chave: instituições jurídicas; democracia; cidadania; direito moderno.



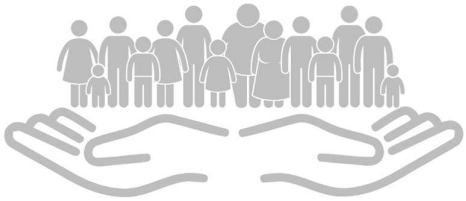
1 SINGULARIZING TOCQUEVILLE

Tocqueville is a unique author. He enables a broad debate on the issue of democracy in Europe and America. He also effectively values the concrete and social reality beyond the research's normative (or pragmatic) nature. Tocqueville allows us to have a broader reading of this theme, pointing out the limits and possibilities of building democracy in his time. The product of his reflections and discussions is still present today.

In his study of democracy in America, Tocqueville observes a fundamental difference between the formal and material points of view about Europe. The trip to America, accompanied by Gustave de Beaumont[2], provokes the recognition of the need to think about a new science with a substantially empirical basis and, therefore, that moves away from the abstract-theoretical plane and observes, in concrete reality, social phenomena. This new science, in general terms, would have the task of articulating theory and practice and, going further, of re-discussing theories based on social practices in order to promote an accurate understanding of the social world, which implies recognizing that "Tocqueville never offered a comprehensive theory of history, and he certainly never tried to visualize laws of historical development" (Boesche, 1985, p. 18), but rather to value specific contexts and their concrete experiences.

For this reason, it should be noted that reality can be studied in different ways, approaches, and contexts, depending not only on the "eyes" of the researcher but also on the sociocultural context in which it is inserted and "America offered Tocqueville the historical material from which he could carry out an analysis of democracy" (Marini, 1991, p. 272). The perspective of democracy brings aspects underlying the methodology of analysis refined by

[2] Gustav de Beaumont and Alexis de Tocqueville, both French, were sent by the French government to analyze the American jail system.

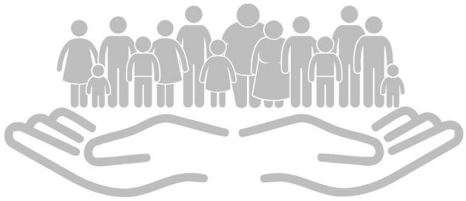


Tocqueville in his work, which, despite discussing multiple aspects of American society, mainly aims to reflect on French society itself.

It is common to refer to research in social sciences based on the idea of objectivity of scientific knowledge, removing – or at least reducing – the interference of the researcher's subjectivity in knowledge production. In Tocqueville's system of thought, underlying the idea of political sociology is the very perspective of studying the American experience and encompassing the range of reflections on the limits and possibilities of increasing democracy in France so that "the new science proposed by Tocqueville, by making explicit the inescapable constraints on democratic reality, also sought to point out the conditions under which political action would become effective in achieving its liberal goals" (Jasmin, 2005, p. 35).

Moreover, from the outset, it should be emphasized that this does not mean applying the American model purely and mechanically to the French case nor proposing uncritical liberalism. Tocqueville, when expressing sensitivity to the peculiarities of each context studied, admits the fact that they are, in principle, incommensurable; however, this does not rule out the possibility of thinking, based on the analysis of the concrete experiences of each experience, of strategies to increase the democratic process (incidentally, of an irreversible nature) in other societies, and "it is to the study of institutions and customs that he dedicates his lessons and to the comparative method" (Lamberti, 1983, p. 96).

The comparative method became an essential element in analyzing advances and failures in the consolidation of democracy in Europe and, in particular, in France. In this sense, this new science to which Tocqueville refers had the objective of "in one fell swoop, persuading individuals of the viability of a liberal egalitarian society and determining its conditions of possibility" (Jasmin, 2005, p. 36). Please note that this is not just a liberal perspective if such perspective is not associated with its propositional role, that is, reflection on substantial criteria of democracy that help construct a society based on the principle of equality.



Democracy, therefore, is a central element in Tocqueville's work and is expressed not only in the most apparent book – "Democracy in America" – but indirectly in others, such as "The Ancien Régime and the Revolution." However, it is common to attribute a strongly sociological character to Tocqueville's readings, with little discussion of the influence of his practice as a lawyer. The dimension of the author's legal expertise does not receive much attention in discussions of social sciences and law when, in fact, Tocqueville had, in addition to formal legal studies, a jurist since he worked as a judge at the Court of Versailles. How, then, should we think of Tocqueville as the jurist? What are the conceptions of law present in his empirical analysis? What are the epistemological perspectives on which his thinking is based? To what extent can we think of the articulation between Tocqueville, the sociologist, and Tocqueville, the jurist?

As has been emphasized, "Tocqueville is not a theoretician. He has much more distrust than appreciation for political speculation. He knows well that the limitation of sovereignty and the guarantee of rights are not obtained by appealing to evidence or pure reason" (Lamberti, 1983). It is a critique of apriorism as a perspective through which rights acquire a purely natural or immanent dimension, which, at first, distances him from some natural law theorists. There is a practical dimension in the scope of rights, which, as will be seen, refers to the idea of active citizenship.

It is important to emphasize that Tocqueville and Beaumont's trip to America initially followed a well-defined proposal: to study the North American penitentiary system and reflect on its possible applications in the French case. Furthermore, it was not a question of studying this system from the point of view of philosophy or sociology but rather from the point of view of public security and law. It was a proposal for a legal study of the issues involving the penitentiary system, and it ended up becoming a sociological study of the issues involving democracy in America. This change was not by chance nor due to the previously determined

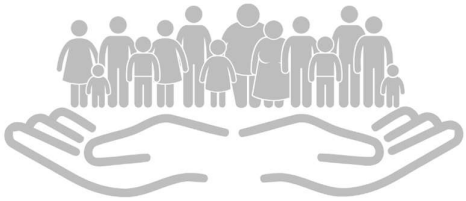
objective (the study of the penitentiary system). In fact:

> The request for a penitentiary mission was a pretext, "an invented excuse" (G. W. Pierson) covering a broader ambition. Long before, the two companions had expressed their desire not to confine themselves to prisons. "By studying the penitentiary system, we will see America," Beaumont wrote to his father from the ship. "We are laying the foundations for a great journey that will one day make our reputation." Moreover, Tocqueville, the most famous author of Democracy in America, confided to Kergolay: "The penitentiary system was a pretext: I saw it as a passport that would allow me to penetrate completely into the United States (Perrot, 1984, p.7).

The study of the penitentiary system was never an end, although the research was carried out. Tocqueville and Beaumont had a clear objective of studying democracy in America, but it was as jurists that they proposed the research to the Ministry of the Interior. The research report on the penitentiary system denotes the formalist burden in the legal field regarding social analyses. Beaumont and Tocqueville begin the report – which later became a book – as follows:

> MM. Gustave de Beaumont, substitute prosecutor of the King at the Court of Seine, and Alexis de Tocqueville, substitute judge at the Court of Versailles, were commissioned by the Minister of the Interior to travel to North America to research the different applications of the Penitentiary System and to collect all the documents needed to clarify the Government in this regard (Beaumont; Tocqueville, 1984, p. 49).

This heading shows us that, despite the research on democracy in America carried out by the authors, the legal aspect was always present in their discussions despite being little analyzed in the social sciences and law field. Indeed, it is not a question of separating the sociologist Tocqueville from the jurist Tocqueville since, despite being didactic, it is not a division that ensures the unity of the author's thought. The idea is that the sociologist and the jurist are not divorced, and there are times when one formation is more evident. Any separation of sociological thought from legal thought would be unrealistic and, going further, contradictory, because it denies the possibility of dialogue and mutual influence between these fields. What seems more appropriate is to reflect, at this opportunity, on the moments when the legal



formation is more evident than the sociological formation, not as a way of excluding one to the detriment of the other, but rather as an effort to read and reflect on Tocqueville also from the point of view of his professional life in France, markedly permeated by the legal field.

To this end, we must start with two questions that, although not limited to the legal field, serve as a reference for the jurist Tocqueville to think about rights. Firstly, it should be emphasized that Tocqueville "also took rights seriously. He went so far as to insist that respect for individual rights is essential to the preservation of freedom and human dignity in democracy" (Winthrop, 1991, p. 394-395), which brings the author closer to a liberal perspective of rights that focuses mainly on political rights since they act to "associate human beings with each other in a civilized form compatible with freedom and dignity" (Winthrop, 1991, p. 398). Secondly, and associated with the idea of a new science, the author's objective "consisted of pointing out mechanisms that inhibit such selfish individualism. After the American experience, he believed he found them in associations, a privileged locus for exercising participation in public life," (Gahyva, 2006) which goes back to claiming rights in the public space through associations. In this line, we have a perspective in which political rights occupy a central place in the very process of claiming new rights (sometimes non-political), which points to the idea that the legal system is not a closed body but rather something that is always under construction or capable of being constructed based on individuals in their relations of civil and political association. In effect, this assertion makes clear the point of contact between, on the one hand, rights and, on the other, democracy as an active spirit of participation in public life.

In the following chapters, we will have the opportunity to analyze in more detail the singularity that the issue of rights occupies in Tocqueville, as well as the place of legal institutions in their implementation and guarantee, from the perspective of active citizenship and the construction of democracy widely discussed by the author in America, France and, to a

lesser extent, in England, and seeking to reflect on his contributions in Latin America.

2 DEVELOPMENT

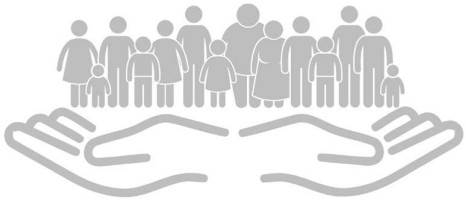
2.1 Tocqueville, the legal field

To consider the interface between Tocqueville's analysis of democracy and his experience as a jurist in France, we must bear in mind some fundamental questions involving: a) the practical nature of democracy; b) the institutional and socio-legal nature of associations and decentralization; c) the nature of political rights and their importance in the construction of new rights. Therefore, we will consider the three articulated questions not to exhaust each subject but to promote a reflection on points of contact that help us think about the relationship between Tocqueville and the legal field.

2.1.1 The praxis of democracy

The starting point of Tocqueville's analysis is that democracy is not just a hermetically sealed and pragmatically definable regime of Government since democracy, above all, involves a practical dimension. In this sense, democracy is not merely a political regime; it is a spirit that is present in society and public life in such a way as to imply a specific active stance towards social reality. In his study of American society, Tocqueville finds a reality different from that of French democracy despite establishing specific points in common, even admitting, in one of his letters, that his brain was “in continual fermentation” (Tocqueville, 1985, p. 61).

America provokes a substantial change in Tocqueville's thought and, at the same time, enables a new way of thinking about social phenomena practically. By emphasizing the dimension of the democratic spirit, Tocqueville draws our attention to the fact that civic culture is an essential element in any democracy as it allows an active stance in constructing and

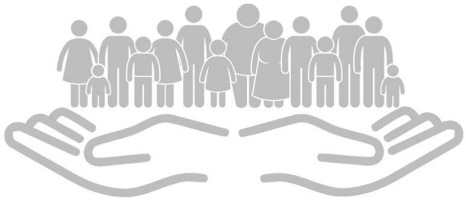


enforcing rights. In the American case, what draws the author's attention is the fact that this democratic culture is present in all individuals, to a greater or lesser degree, through what he called well-understood interest, which initially means that "the American moral doctrine [...] is designed to overcome individualism and encourage association. It is the doctrine of well-understood interest, which is both the recognition of a problem and its solution" (Winthrop, 1991, p. 401). In this line, the typical man in democratic countries "only discovers close to him, on the contrary, beings more or less similar; he cannot, therefore, think of any part of the human species without his thought growing and expanding until it encompasses the whole" (Tocqueville, 1977, p. 329).

Well-understood interest thus involves two dimensions: a) the idea that democracy has a moral aspect through which every citizen has not only the right (because he has political rights) but also the duty (to ward off democratic despotism) to participate actively; b) the idea that participation is not limited to the process of deliberating on social issues but also to the possibility of acting positively in resolving them in a decentralized manner.

For this reason, "interest, not piety or a sense of duty, must become the main motive for claiming, exercising and conceiving rights. However, it also means that human beings do not understand their interests well if they do not transform them into rights." (Winthrop, 1991, p. 413-414). On the one hand, we have a solid interest that becomes shared to the extent that it increasingly involves democratic-participatory aspects and, on the other hand, the necessity of effectively struggling for rights from a non-particularistic perspective based on a good understanding of the collective interest. In this way, Americans:

> They maintained their associative tradition in a world increasingly marked by individualism based on well-understood interests. Inseparable from administrative decentralization, this concept represents a familiar feeling that the promotion of collective well-being will be reflected in the promotion of individual well-being. The logic of well-understood interests allowed citizens to manage a series of local

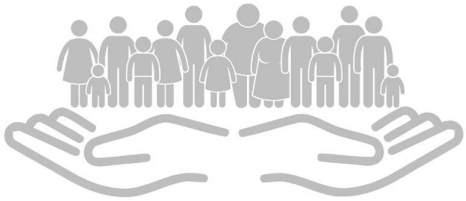


problems, encourage political participation through joint action, and strengthen the bonds of interdependence between individuals (Gahyva, 2006).

When properly understood, interest begins to receive a collective dimension through which it can effectively manifest itself as a right, with associations and decentralization standing out in this movement, as we will see later.

In the American case, it is essential to draw attention to the religious dimension of this interest. Tocqueville, in several passages of "Democracy in America," points to the role of religion in constructing American society from a philosophical and political point of view. The argument focuses on the idea that, given the valorization of public space based on the manifestation of a well-understood interest, civil religion is established within democracy through which laws and customs begin to receive a sacred, religious content, the transgression of which resembles the effects of committing a sin (Tocqueville, 1977, p. 38). Tocqueville observes that legislators “are concerned above all with preserving moral order and good customs in society; thus, they constantly penetrate the domain of conscience, and there is almost no sin that they do not submit to the censure of the magistrate.” (Tocqueville, 1977, p. 38). In this sense, given that a well-understood interest is expressed through rights, any violation of them is seen as a violation of everyone's interest, which, to its limit, has a sacred content.

Lamberti, analyzing this issue from a legal perspective, states that: “Tocqueville’s reflection on rights is part of a very traditional perspective: it is not a question here of 'natural' rights; but the idea of a natural law of divine origin, known by Revelation and moral effort.” (Lamberti, 1983, p. 98). There is an intervention in the private sector not because of a rationally instituted despotism but because the law receives sacred meaning from the moment its content is democratically constructed based on social practices. The scenario of democracy found by Tocqueville in America is one in which rights are built based on concrete experiences and not on theories imported from the European context,



reinforcing the debate on associations and decentralization.

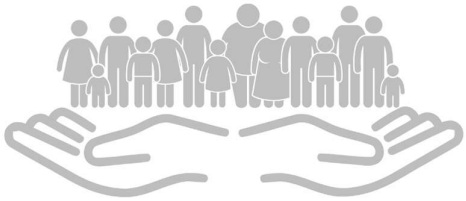
2.1.2 Associations and decentralization in the construction of rights

The issue of associations and decentralization in the construction of rights is central to Tocqueville. It represents one of the discussions in which the difference between the American democratic model and the French democratic model becomes most visible, as well as their limits and possibilities for the realization of rights. The dialogue between both models is present in this initial question: Who is responsible for defining rights, and how can one exercise them? Or, more precisely, what institutional arrangements enable, in their way, a more significant increase in the democratic process of constructing rights, and to what extent do these arrangements depend on the civic culture of their citizens?

In his study of America, Tocqueville saw a scenario in which the construction of rights is carried out at the local level, based on the daily practices of social actors, and not from a center commonly associated with the State. It is in the communes that rights, obligations, and duties are developed, which implies recognizing that both the content of freedom and equality are defined locally through well-understood interests. This organization in which the commune plays a decisive role in social life demonstrates substantial decentralization since it has the right to govern itself in its interest. It only submits to the State when the interest concerns the general sphere, gaining prominence to self-government, self-determination, and active citizenship. Therefore,

> While dividing municipal power among many citizens, the American system does not fear multiplying communal duties. In the United States, it is rightly thought that love of country is a cult to which men bind themselves by practice. In this way, communal life, in a certain way, makes itself felt at every moment; it manifests daily in fulfilling a duty or exercising a right (Tocqueville, 1977, p. 59).

The individual will be a citizen not only because he is the holder of rights but also because



he has obligations towards his society. Tocqueville, in one of his letters, demonstrates this dimension by admitting that two characteristics of American society caused him great admiration:

> The first is people's extreme respect for the law; alone and without public coercion, this commands an irresistible path. The leading cause is that they make the law for themselves and can still change it. [...]. The second thing is that [...] every man considers himself interested in public safety and exercising rights. Instead of counting on politics, he counts only on himself (Tocqueville, 1977, p. 57).

The passage above reveals the previously discussed idea that democracy is not restricted to a political regime but also to a civic spirit. The possibility of "making" law "by oneself" reveals that decentralization allows the individual to get closer to the public sphere to expand the possibilities of realizing their interests and sharing them with others. Furthermore, it moves away from the passive stance that an external entity (generally the State) should watch over and act to realize rights. The activity of constructing rights is a right and duty of the individual, becomes an activity strongly marked by local associations and not by state centralism, based on the principle that "there will only be democratic freedom where there is permanent action by the body of citizens in the public sphere." (Jasmin, 2005, p. 37). The political effect of decentralization is the transformation of the "inhabitant" – commonly associated with a passive stance – into an active citizen and builder of their daily life through the various forms of civil and political association, characterizing a kind of "virtue introduced into the political world" (Lamberti, 1983, p. 96-97). Hence, Tocqueville's admiration for the numerous forms of association permeating American society differs significantly in their objectives and foundations.

The American path to democracy, unlike the French path, is its construction from "bottom" to "top" or, more precisely, from the commune to the State, hence Tocqueville's topographical concern in Democracy in America of first referring to the organization of the

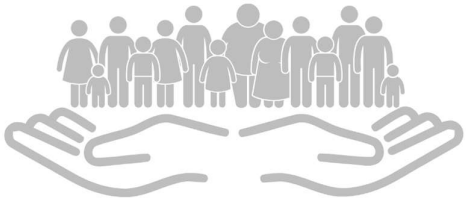
communes and then reflecting on the State. The possibility of the citizen interfering in the socio-political direction of his society is even compared by Tocqueville to the Athenian experience (Tocqueville, 1997, p. 40), which denotes an activity of daily construction of rights from the local public sphere. However, American society differs from Athenian society because its local organization is based on realizing interests, meanwhile Athens emphasized the perspective of the common good in its discussions.

2.1.3 The question of rights

The rights issue in Tocqueville gives rise to several discussions encompassing the material and methodological scope of analyzing social phenomena. Interestingly, the author pays special attention to the French Revolution in his discussions on law, analyzing the issue of universality and, in the American case, reflecting on equality-related issues. It is worth emphasizing that the starting point of Tocqueville's analysis is empirical reality, understood as the "empirical laboratory, where customs and values are translated into institutions and norms of law." (Werneck Vianna, 1997, p. 101). It is the principle of the primacy of society, emphasized in Werneck Vianna's analysis of Tocqueville's work, which advocates the researcher's openness to the specific experiences constructed in the daily lives of actors, to the detriment of a view based on purely philosophical and theoretical knowledge. In legal terms, this stance refers to the possibility of constructing rights based on social practices, unlike what occurred in the French Revolution, which, according to Tocqueville, was constituted based on the abstraction and theorization of rights.

First, however, it is worth referring to the German sociologist Eugen Ehrlich[3], who proposes a distinction between positive law, present in the legal norm, and alive law, the result

[3] It should be noted that Tocqueville lived from 1805 to 1859, while Ehrlich lived from 1862 to 1922. They are not contemporary authors, but it is possible that Ehrlich's conception of living law is influenced by Tocqueville, since they both start from the idea that social reality must be given primacy over theory.



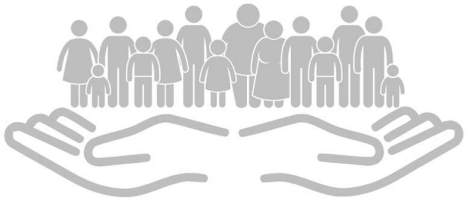
of social dynamics. This author argues that "wanting to enclose all the law of a time or a people in the paragraphs of a code is as reasonable as wanting to imprison a current of a river in a pond." (Ehrlich, 1980, p. 110).

Law, therefore, is greater than the norm, and it is through its practice in everyday life that it can be observed as a social dynamic. The study of living law allows us to extrapolate reasoning based on law and books since it assumes law as a social phenomenon. Ehrlich argues that living law represents the idea that law is constructed through the concrete experience of subjects. Therefore, in the investigation of live law, "neither the historical nor the ethnological method becomes superfluous." (Ehrlich, 1980, p. 114); the law is intrinsically linked to culture and its constitutive historical processes and, in this way, deeply related to social transformations. Adopting the perspective of living law makes it possible to think about the construction of rights in the dynamics of the public space. Creating rights is based on the assumption that "law is greater than the formal sources of law" (Carbonnier, 1980, p. 45) since it encompasses cultural, political, and social aspects[4].

Tocqueville, who preceded both authors above, made a similar argument by opening himself to social reality as a source of creation and construction of rights beyond the formal sphere. Tocqueville did not admire the formalist perspective. In some of his letters sent from America, it is possible to identify passages that denounce the hermetic and positivist thinking of law, such as the following:

> So, the law, which does not please me in theory, does not have the same effect on me in practice, either (Tocqueville, 1977, p. 34).
>
> I am living so far removed from all society and all the feelings of my heart that I am

[4] The recurrence to Ehrlich and Carbonnier is not intended to establish a naive homology between Tocqueville's perspective and that of these authors. It is merely an attempt to use their contributions - which are subsequent to Tocqueville - to reinforce that the discussions that have their embryo in this author were re-read and re-discussed by different schools in the following years and centuries.



> beginning to fear what, in time, will become a legal machine like many of my colleagues, specialized people incapable of judging a great movement and guiding a great discovery to the extent that they are focused on the deduction of a series of axioms and the search for analogies and antonyms. I would rather burn my books than reach that point! (Tocqueville, 1977, p. 34).

Therefore, criticism of traditional law is based on the following aspects: a) the insufficiency of discussing law (both in theory and practice) without considering social, economic, and cultural aspects; b) the specialization that causes the legal field causes the jurist's insensitivity to social experiences and peculiarities; c) the deductive method, commonly used in law, favors the crystallization of the perspective that reads society from pre-existing models, without considering differences and specificities. Therefore, we have a jurist, Tocqueville, who is very critical of the traditional legal field and its disregard for the specificities of social phenomena. Such criticism resembles the idea of "retranslation" analyzed by Bourdieu (2000) in the 20th century.

According to this author, "retranslation" would explain social facts from the perspective of categories predetermined by legal logic, causing these facts to lose their specificity and originality. By trying to fit complex phenomena into rigid frameworks, the law disregards the peculiarities of social experiences. But, in fact, why this emphasis on social reality? Is there a compelling issue that draws Tocqueville's attention in the context of praxis?

By reading the work, I observed Tocqueville's skepticism regarding the transformative role of law toward equality. Although there is equality by formal law, the author argues that equality by law is not possible in practice. The principle is that "although the laws and institutions of democratic society can reduce the effects of birth, knowledge and wealth, sources of eternal inequality, they will never be able to annul them completely" (Jasmin, 2005, p. 42), which corroborates the idea that law has limitations when it comes to promoting concrete and absolute equality. To a certain extent, Marx shares this analysis, but more forcefully, when he states that the State:

> It abolishes the distinctions arising from birth, social status, education, and occupation, declaring that birth, social status, education, and specific occupation are non-political differences when, without taking into account their distinctions, it proclaims that every member of the people participates in popular sovereignty on an equal footing and when it approaches all elements of the real life of the people from the point of view of the State. However, the State does not prevent private property, education, and occupation from acting in their way, that is, as private property, education, and occupation, and asserting their unique nature. Far from abolishing these differences, the State exists only on such premises; it is only conscious of being a political State and makes its universality prevail in opposition to these elements (Marx, 2003, p. 252).

Tocqueville's critique of the formalist (and classical liberal) conception that the law guarantees equality among men is underlying. There was a recognition that "beneath all law," the criterion of universality operated by the normative path of law is its primary strategy to "denounce injustice and the direct and positive knowledge of the Just, escaping human knowledge from a formal perspective." (Lamberti, 1983, p. 112). Inequality reigns on a concrete level, thus the author's conception of the construction and implementation of rights based on social practices acquires prominence.

Suppose Tocqueville distances himself from classical liberalism in terms of the formalism of the law when it comes to the content of the law. In that case, the author presents characteristics typical of liberalism, mainly because he emphasizes defending individual rights against the State. We can treat this liberalism as follows: By emphasizing the separation of powers and the defense of individual rights, he proposed a liberal model in which the individual is the center so that the State should be minimal and, consequently, should not intervene in social relations. The doctrine of liberalism advocated that the State should be "the ghost that frightens the individual. Power, which cannot be dispensed by the State order, appears, from the beginning, in modern constitutional theory as the greatest enemy of freedom." (Bonavides, 1980, p. 30).

In this line, "the less palpable the presence of the State in the acts of human life, the

broader and more generous the sphere of freedom granted to the individual. It would be up to the individual to do or refrain from doing what he pleased." (Bonavides, 1980, p. 31).

In the case of democracy in America, as Tocqueville observes, the process did not occur in this way because the commune antecedes the State. Therefore, the rights of the commune are not about the State but rather rights inherent to its social formation. The State is not the reference for the existence or not of rights. However, regarding the content of individual rights (mainly political rights), Tocqueville presents a conception close to that of classical liberalism insofar as he emphasizes that: "the rights of man are the rights of the citizen" (Lamberti, 1983, p. 101) and, therefore, the law "protects freedom by intervening in everything arbitrary, which necessarily implies a limitation of power" (Lamberti, 1983, p. 109) in favor of "the power of all" (Lamberti, 1983, p. 110). In effect, it is understandable why, in Tocqueville's analysis, political rights are valorized as an essential element in the construction of democracy. In the American experience, Tocqueville appreciates the fact that:

> The general principles on which modern constitutions rest, principles which most Europeans in the seventeenth century scarcely understood and which were still incompletely prevalent in Great Britain, are all recognized and enshrined in law in New England: the intervention of the people in public affairs, the free voting of taxes, the responsibility of the agents of power, individual liberty, and trial by jury are all positively and without question established there (Tocqueville, 1977, p 39).

On the other hand, Tocqueville's conception of the State is not complete in the analysis of democracy in America. If, in analyzing America, Tocqueville shows us his liberal perspective regarding the content of rights, it is in "The Ancien Régime and the Revolution" that we find his conception of the State.

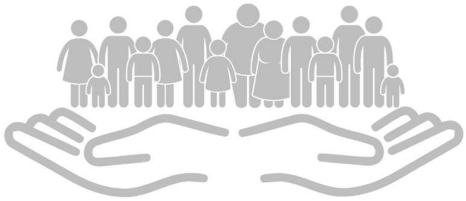
The debate on the atomization of society appears, to a lesser extent, in the analysis of the Ancien Régime. In Book II itself, Tocqueville presents a series of data that corroborate the idea that individuals in French society showed little associationism and, consequently, there was an

incipient activity of demanding rights in the face of the State since the latter presents itself in an absolute form through administrative centralization. To make the debate more sophisticated, Tocqueville also warns that individuals do not even perceive such passivity since the electoral process triggered for certain positions allows for the attenuation of the individual's non-presence in the State, which reinforces the idea that "power is not tyrannical, it is tutelary; the new oppression is regulated and peaceful [...] which gives subjects the feeling of commanding themselves. Despite being wards, they elect their guardians" (Jasmin, 2005, p. 67), so that "elections constitute a momentary and ephemeral abandonment of dependence." (Jasmin, 2005, p. 67).

The tutelary imaginary constructed around the State's social aids induces the idea that rights are, in truth, favors or benefits granted by the State, not attributes owned by individuals. Thus, the first obstacle identified by Tocqueville in the construction of rights through the State refers to the very inaccessibility of this State regarding the realization of rights since such rights are seen as "gifts." In this line, the State becomes the center through which social life develops and social relations are realized. Providence, widely analyzed in American democracy, gets out of the scene and gives way to the State. In Tocqueville's analysis,

> Since the Government thus replaces Providence, it is natural that each person should invoke it to resolve their own particular needs. Therefore, we find an immense number of requests that constantly refer to the public interest when, in reality, they only deal with small private interests (Tocqueville, 1977, p. 94).

In addition to organizing public life, the State also became the reference for private life through public administration or, to a lesser extent, through the feudal lord. However, it must be said that the scenario of the Ancien Régime was not one of the absence of norms; on the contrary, Tocqueville argues for the existence of a plurality of norms issued by the State, by the lords, by the church, which competed for the monopoly of regulating social life. However, what

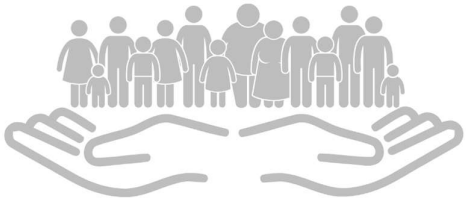


at first might seem like an excess of rules that "stifled" change and social transformation is analyzed by the author as a way of adapting it to particular cases according to the rule-maker, that is, "it rarely disobeyed the law, but bent it in every way according to particular cases and to facilitate business [...]. It is the entire Ancien régime and its entire characterization: a rigid rule and a soft practice." (Tocqueville, 1977, p. 94). There are so many specific and contradictory rules in the Ancien Régime that it gives the impression of rigidity, but in fact, there is a "soft" practice. The evocations and the exceptional courts, as we will see in the next chapter, are examples of this rigidity that becomes more flexible according to the circumstances, which gives the State ample opportunity to intervene in social life and act arbitrarily in its regulation. As we will see below, legal institutions can offer an alternative to this.

2.2 Reflections on Legal Institutions

The theme of legal institutions in Tocqueville draws attention to how rights are realized. In the previous chapter, when analyzing the relationship between society and the State, we observed a debate around formalism and the existence of rights that prevail over the State and originate from the local. We were also able to observe in what sense the exercise of citizenship actively allows an expansion of the list of rights, mainly through political rights, which generates a relationship of tension between concrete practices and the State, which begins to be seen as distant and whose existence would only be justified based on the realization of the general interest of society.

However, there is another dimension to Tocqueville's discussion that reflects on the place of institutions (primarily legal institutions) in the daily lives of individuals. In general terms, Tocqueville argues that institutions enable people to unite and form associations, pushing aside individualism and increasing civic culture. Concerning the judiciary, specifically, Tocqueville



is enthusiastic about its role within society, not only as a guarantor of rights but also as an institution that effectively encourages the exercise of citizenship. However, to understand this relationship, it is necessary to reflect on the debate that Tocqueville held between the legislator and the judge in American democracy, which, in general terms, represents the debate already discussed here between universality (valuing the formal) and empiricism (valuing the real). The author presents a difference between "the law legally made, literally, by the legislator, and a law founded on precedents, and it is satisfying to read his analysis of the legal spirit in the United States to see that he did not underestimate its political significance" (Lamberti, 1983, p. 115). In this context, in addition to universal law and formally valid for all American citizens instituted by the legislature, there is a "law" constructed from social practices, which receives legitimate recognition from the intervention of the judiciary. This institution plays a fundamental role in guaranteeing rights constructed locally through precedents and not only in guaranteeing rights abstractly guaranteed in the Constitution. Indirectly, therefore, the judiciary acts as an institution of recognizing living rights[5], in Ehrlich.

On the other hand, not only the American judiciary contributes to Tocqueville's conception. Let us examine the French judiciary as it worked during the Ancien Régime and then consider the place of this institution in the author's thought.

One of the central issues surrounding the conception of legal institutions in Tocqueville concerns their independence from the State. And Tocqueville observes such independence even in the context of the Ancien Régime. The author's diagnosis focuses on the argument that the French nobles "only exercised public administration in one sector: justice. The most important among them retained the right to have judges who decided

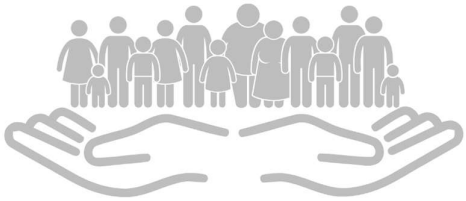
[5] It is interesting to note that the liberal-classical tradition, under the influence of Montesquieu, starts from the premise that the Judiciary is only the "mouth of the law", i.e., it should not adopt any active position in the sense of recognition of rights constituted from specific experiences, since it should only reproduce, in particular cases, the application of the universal and formally valid norm.

some instances in their name and even occasionally made police regulations within the limits of the seigneury." (Tocqueville, 1977, p. 69). As a result, a situation arose in which the State had a reduced capacity to intervene in the administration of justice and resolve conflicts since the legal institution received direct and decisive influence from the nobility. In this context,

> What most guaranteed the oppressed of the time a means of making themselves heard was the Constitution of justice. We had become a country of absolute Government through our political and administrative institutions, but we remained a free people through our judicial institutions. The justice system of the old regime was complicated, confusing, slow, and expensive: these were undoubtedly significant defects, but it never contained servility towards those in power, which is nothing more than a form of venality, in fact, the worst (Tocqueville, 1977, p. 69).

If, in the case of American democracy, Tocqueville denounces the tension between the legislator and the judge, in the case of the French ancien régime, the author denounces the tension between the ruler and the judge. Tocqueville observes that, although there was independence between the judiciary and the State, in practice, the State promoted specific measures that, to a certain extent, mitigated its inability to intervene in the judiciary, among which the formation of ad hoc courts and the holding of evocations. The following passages are illustrative:

> The King could do almost nothing concerning the judges, having no right to recall them, transfer them to another place, or even elevate them to a higher post; in a word, since he could not dominate them either through ambition or fear, he quickly felt constrained by this independence. It led him to deprive them of knowledge of the business that directly concerned the Government and to create a kind of independent court for his private use, thus offering his subjects an appearance of justice without frightening them with reality (Tocqueville, 1977, p. 85).
>
> The Council constantly intervenes using evocation, taking the business that concerned the administration out of the hands of the judges and taking charge of it. Evocations of this type fill the Council's records. Little by little, the exception becomes generalized and transforms into theory. It no longer enacts laws but rather a government maxim intended to demonstrate that all processes with some public or administrative interest are, from now on, no longer within the jurisdiction of the



judges, whose only role is to judge private interests (Tocqueville, 1977, p. 85).

In this scenario of the Ancien Régime, we have the tension between an independent judiciary and, on the other hand, an intervening State, whose activity develops through the usurpation of the competence of that institution. The State's idea of the judiciary would be concentrated, paradoxically, in the very classical liberal notion of this institution, according to which the judiciary would have three central characteristics: it does not pronounce itself except on disputes, it only deals with particular cases, and it does not intervene unless convocate. In contrast, Tocqueville's reading of the judiciary's role in his time is very different from that commonly shared by classical liberals, including, in this case, Montesquieu's vision (1996). Tocqueville argues, on the other hand, that the judiciary occupies a central role in democracy and should be intended to safeguard the people to the point of guaranteeing the rights of individuals and to act as a barrier to the point of "educating individuals to respect the rights of others." (Lamberti, 1983, p. 117). The theme of the French Revolution then returns to the discussion:

> From this prescriptive perspective, the revisionist reading undertaken by such a bibliography negatively records, in the name of the demands for social change and the pursuit of ideals of justice, the French Revolution and the theory of popular sovereignty that emerged from it, in order to value, as in the common law tradition, law as a narrative that continues over time – "the legislation of antecedents" in Tocqueville's analysis produced by judges.
>
> The suggestion is, then, that the judiciary, in order to assume an institutional format compatible with contemporary demands, should detach itself from the ideology and processes that led, through the revolution, to the transition from the traditional to the modern world and which would have resulted in the political immobilization of that Power (Werneck Vinna, 1996, p. 10).

The idea of building rights based on precedents (common law) and not on an abstract norm draws attention to Tocqueville's analysis. There is an apparent understanding that admits

the role of the judiciary as an essential institution for the continuity of the democratization process in Europe (in the context of the Ancien Régime) and that already initiated in the United States (in the context of Democracy in America). Werneck Vianna, when considering Tocqueville's perspective, points out this central role when he states that:

> The intellectuals of the judiciary would be the conscience of this silent revolution that would unfold from within the core of the State, "narrators" of the text that speaks of the rise of the ideal of equality and the expansion of rights in a perennial process of renewal of the old institutions. From "silent" power to the Third Giant, the "democratic centuries" predicted by Tocqueville would be those in which "jurists will perhaps be called upon to play the leading role in the political society that seeks to be born." (Werneck Vinna, 1996, p. 12).

Therefore, the judiciary is seen as an active, proactive, and emancipatory institution. The idea of "muteness" used by Werneck Vianna points to the classical liberal characteristic that admits the judiciary as the simple enforcer of the law. In Tocqueville's thinking, the judiciary not only applies the law (understood abstractly) but also recognizes laws produced from social practices and simultaneously actively participates in enforcing rights, notably political rights, reinforcing the democratic exercise of citizenship. In this sense, considering Tocqueville's argument in its extreme points to another characteristic of this institution, which is perhaps the main characteristic from the point of view of the potential for discussions but, in practice, is little explored: the pedagogical role played by the judiciary in the process of democratization. Let us consider both excerpts below – one about the old regime and the other about democracy in America – together:

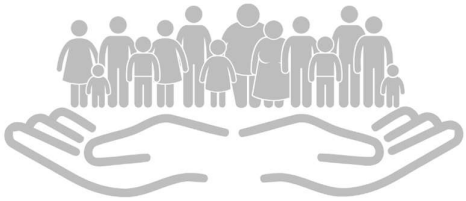
> Judicial customs gradually became national customs. The idea that all matters are open to debate and all decisions have the right to appeal had also been borrowed from the courts, as well as the habit of publicity and the taste for form, which are all inimical to servitude: this is the only part of the education of a free people that the old regime gave us. The administration itself took much from the language and customs of justice. The King felt obliged always to justify his decrees and state his

> reasons before concluding; the Council preceded its sentences with long preambles (Tocqueville, 1977, p. 120).
>
> The European often sees only force in the public official; the American sees right in him. Therefore, man never obeys man in America but justice and the law (Tocqueville, 1977, p. 79).

In both analyses, we observe a judiciary that, due to its own organizational and administrative characteristics, extends itself to the social world to, in a certain way, imprint a particular ethos of exercising citizenship. The logic is that the institution begins to influence citizens while citizens begin to influence the institution from a substantially ethical perspective. The debate on this pedagogical role of the judiciary, although not very frequent in the literature, is the key to thinking about the discussions on judicial activism and the judicialization of politics that are currently underway. Moreover, it is worth emphasizing that this pedagogical judiciary is not a characteristic of modernity since its daily routines and practices have influenced the social world since the old regime. It is undoubtedly due to the very degree of independence it enjoyed in this context, as Tocqueville himself analyzed.

3 FINAL CONSIDERATIONS

Tocqueville is thought-provoking and a unique author. As we begin this text, we focus on the author's main biographical characteristics to understand, at a minimum level, the objectives and motivations of his research on democracy in America and, at the same time, to seek elements that allow us to reflect about the French case, whether in its feudal version or its democratic version. By analyzing the relationship between Tocqueville and the legal field, we were able to observe the analytical potential that the author offers us to discuss the practical scope of democracy, the issue of associations, decentralization, and the process of construction of rights. However, the analysis would be incomplete if we did not reflect on the relationship that develops within institutions since Tocqueville himself attributed a central role to them.

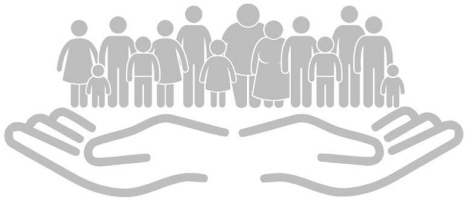


Examining State, legislative, and, especially legal institutions reveals that the relationship between them is more one of tension than harmony, which decisively clashes with classical liberal theory. Likewise, we observed how the judiciary is configured, both in the old regime and in democracy, as an essential institution in guaranteeing rights and, even more, in the very process of civic education of individuals based on the propagation of an ethos.

In short, the Tocquevillean structure of thought considered the essential attributes for the construction of rights and the place of institutions, especially legal institutions, in this process. However, a conclusion based solely on these dimensions would mean rejecting the role that Tocqueville attributes to citizens themselves in guaranteeing and constructing rights. It would no longer be enough to recognize the citizen's character of law. The conquest of rights, according to Tocqueville, would no longer occur in the form of law or within the limits of legality; it goes beyond the legal world to acquire its meaning in the social world. Rights, therefore, should not be implemented passively since it is up to their holders to enforce them. Civil citizenship, originating from bourgeois constitutions, advocates that citizens participate in the State through voting. However, another form of exercising citizenship aroused Tocqueville's admiration: advocating that individuals participate in the State through voting and continuous participation, with the local commune gaining prominence. Furthermore, this is an argument that was enforced in later centuries. Consider Oliveira Vianna's criticism in the first half of the 20th century:

> Pure theorists all profess the fetishism of Regulations and seem to believe wholeheartedly in the civilizing efficacy of ordinances. It seems to them that a page of the Official Gazette of Rio – in which they crystallize in block letters the marvel they have conceived, the “dream” – will be enough to penetrate and transform, in a miraculous suddenness, the entire national consciousness (Oliveira Vianna, 1987, p. 91-92).

As a result, the effort to enforce rights, from Tocqueville's perspective, refers to the process of citizenship itself, that is, to the process of making formal guarantees effectively



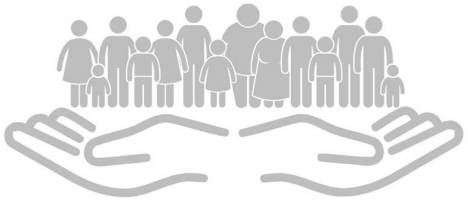
exercised by social actors in their daily lives; it is no longer a question of having the right, but of exercising it. More precisely, this right must be effectively exercised, fought for, and implemented not by the State but by its holders themselves. In his analysis of democracy in America, the author states:

> Men who live in democratic countries, if they have neither superiors nor inferiors nor habitual and necessary partners, willingly withdraw into themselves and consider themselves isolated. I had the opportunity to demonstrate this extensively in the approach to individualism.
>
> Therefore, these men always exert effort to withdraw from their private affairs to take care of public affairs; their natural tendency is to leave them in the hands of the only visible and permanent representative of collective interests, the State (Tocqueville, 2003, p. 180).

Tocqueville's concern is that people may become so focused on their private sphere that they do not give importance to public issues, thus giving the State ample arbitrariness and scope for action. Individualism does not distance individuals from the public sphere, "but it limits and distorts their understanding of it. If human action is always the spontaneous expression of affection or the rational calculation of one's interest, then when the former fails, only the latter remains." (Bellah, 1991, p. 343).

Essentially, the concern is that individualism will cause a disregard for the public sphere to the point that people will lose interest in collective affairs, resulting in "a growing civic indifference that constitutes the breeding ground for the emergence of a new type of despotism." (Jasmin, 2005, p. 37).

Werneck Vianna points out that the "irreversibility of the democratization process does not necessarily translate into a path of affirmation of man in history, and may even mean its opposite" (Werneck Vianna, 1996, p. 94). Therefore, democratization without the corresponding exercise of citizenship can lead to a despotic-democratic type, in which "the uniformity of ideas and feelings come at this moment to organize all powers in the hands of a



single authority that remains above all equally: the central power." (Marini, 1991, p. 283-284). Moreover, this despotism, in its democratic version, would not be based on fear "but on the consent of citizens: individuals would spontaneously give up their decision-making role in common conflicts in exchange for a State that would guarantee tranquility and the achievement of each person's private business" (Gahyva, 2006), which, sociologically, gives rise to the "replacement of well-understood interest by selfish individualism." (Gahyva, 2006). In this way, we can understand political action much more as a rule of sociability than a pure and straightforward way of reaching power.

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