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Linha editorial: A linha editorial segue o eixo de concentração das atividades de pesquisa do NINC, com enfoque para o estudo crítico do Direito Constitucional e das instituições jurídico-políticas, especialmente em suas interfaces com as Teorias da Justiça, a democracia, os direitos fundamentais e a intervenção estatal, e seus pontos de contato com ramos jurídicos do Direito Público intimamente ligados com o Direito Constitucional, tais como o Direito Administrativo, o Direito Eleitoral e a Teoria do Estado.

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Editorial

Editorial

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30 anos da Constituição brasileira de 1988 e 5 anos da Revista de Investigações Constitucionais

30 years of the Brazilian Constitution of 1988 and 5 years of the Journal of Constitutional Research

> *"Repito: essa será a Constituição cidadã, porque recuperará como cidadãos milhões de brasileiros, vítimas da pior das discriminações: a miséria.*
> *(...)*
> *Viva a Constituição de 1988!*
> *Viva a vida que ela vai defender e semear!"*
>
> (Ulysses Guimarães, Presidente da Assembleia Nacional Constituinte de 1987-1988)

O trecho acima transcrito, extraído de um dos discursos de Ulysses Guimarães, Presidente da Assembleia Nacional Constituinte de 1987-1988, bem demonstra a aposta que o povo brasileiro fez no projeto constitucional que então vinha à luz, depositando as esperanças na construção de uma sociedade democrática e regida por valores republicanos e comprometidos com a justiça social, as liberdades e a igualdade. Em 5 de outubro de 2018 a Constituição completa 30 anos, permitindo à comunidade jurídica nacional (e – por que não? – internacional) promover um balanço sobre os avanços e retrocessos alcançados nessas três primeiras décadas de vida da Constituição Cidadã.

Como citar este editorial | *How to cite this editorial*: HACHEM, Daniel Wunder. Editorial – 30 anos da Constituição brasileira de 1988: aniversário ou funeral? **Revista de Investigações Constitucionais**, Curitiba, vol. 5, n. 3, p. 7-11, set./dez. 2018. DOI: 10.5380/rinc.v5i3.64066.

O fortalecimento (ou, para falar com mais sinceridade: o agigantamento) do Poder Judiciário, com a assunção de funções que antes tradicionalmente não lhe competiam; as relações imbricadas (ou, para falar com maior precisão: muitas vezes espúrias) entre o Poder Executivo e o Poder Legislativo num sistema político caracterizado como "presidencialismo de coalizão"; a questão (ou, para falar com maior franqueza: a chaga) da corrupção no âmbito das instituições públicas e privadas e os mecanismos para o seu controle; as tentativas de superar (ou, para falar com maior clareza: de escamotear) um passado de governos autoritários e ditatoriais, que ainda assombram as práticas institucionais no país; todos esses são temas que ensejam a necessidade de uma aprofundada reflexão a propósito do constitucionalismo brasileiro pós-88.

Por essa razão, a presente edição lança o Dossiê Temático "**The 30th Anniversary of the 1988 Brazilian Constitution**", dedicado a leituras dos 30 anos da Constituição da República Federativa do Brasil realizadas por pesquisadores de outros países, como uma forma de oferecer ao público-leitor uma visão do constitucionalismo brasileiro advinda de um olhar estrangeiro. Esta seção especial é composta por 10 artigos redigidos em inglês por autores vinculados a instituições do Chile, Canadá, Colômbia, Egito, Estados Unidos, México e Turquia, sendo dois deles em coautoria com professores brasileiros. A sua organização ficou a cargo de Richard Albert, Professor de Direito Constitucional da University of Texas at Austin (EUA) e Editor Associado da Revista de Investigações Constitucionais, e duas Editoras Convidadas (*Guest Editors*): Sofia Ranchordás, Professora de European and Comparative Public Law e Rosalind Franklin Fellow da University of Groningen (Holanda) e Mariana Velasco Rivera, J.S.D. Candidate da Yale Law School (EUA). A eles, registramos os nossos mais profundos agradecimentos pelo empenho, atenção e cuidado que tiveram ao organizar esse dossiê especial em um momento tão importante do constitucionalismo brasileiro. Agradecemos, igualmente, pelo estudo introdutório "*A moment to mark: the Brazilian Constitution turns 30*", que desenvolveram com o escopo de apresentar os artigos do dossiê temático.

Este é também um momento importante para a **Revista de Investigações Constitucionais**, que com esta edição – a 15ª de sua história – completa 5 anos de existência desde a sua fundação. Nesse período, a revista manteve-se sempre em ascensão, buscando aprimorar cada vez mais a qualidade da seleção de artigos, a editoração dos números, as boas práticas editoriais, a internacionalização dos autores e dos pareceristas e a indexação do periódico em bases de dados, indexadores e fontes de informação de renome. É com muito orgulho que constatamos que, em 5 anos de funcionamento, publicamos artigos de autores vinculados a instituições de 23 países diferentes: Albânia, Austrália, Argentina, Brasil, Canadá, Chile, Colômbia, Cuba, Egito, Estados Unidos, Espanha, França, Itália, Israel, Japão, México, Paraguai, Peru, Reino Unido, Rússia, Turquia, Uruguai e Venezuela. No sistema Qualis Periódicos da CAPES, principal instrumento de avaliação de revistas científicas no país, alcançamos o estrato A1 (o mais elevado

de 8 níveis de classificação). A revista já se encontra indexada na Web of Science e no Scopus, e foi aceita para indexação no SciELO e no Redalyc, todos esses indexadores considerados de excelência no cenário internacional global e latino-americano.

É preciso registrar, nesta oportunidade, um especial agradecimento ao Luzardo Faria, assistente editorial da Revista de Investigações Constitucionais, pelo excepcional trabalho que vem desempenhando em prol do periódico desde a sua fundação, sem o qual esta revista não funcionaria, bem como à Tuany Baron de Vargas, pelos trabalhos desempenhados nos 3 primeiros anos de existência da revista, que permitiram a construção de um periódico atento às exigências das bases de dados e indexadores nacionais e internacionais.

Esta edição inaugura a seção de "Resenhas", até então inexistente na revista. Por sugestão do Professor Juliano Zaiden Benvindo, da Universidade de Brasília, decidimos criá-la como forma de promover a divulgação de obras relevantes na área do Direito Público no âmbito nacional e internacional. E para atuar como editor da nova seção, nada melhor do que quem sugeriu criá-la! Assim, damos as boas-vindas ao Professor Juliano Benvindo como Book Reviews Editor da Revista de Investigações Constitucionais, o qual lança, também nesta edição, a resenha da recente (e já clássica) obra Unconstitutional constitutional amendments: the limits of amendment power, do Professor Yaniv Roznai, publicada pela Oxford University Press em 2017.

Neste número, o terceiro do ano de 2018, publicamos artigos em 2 idiomas (inglês e português), de autores vinculados a 18 instituições de ensino superior de 9 países diferentes: Chile, Canadá, Colômbia, Egito, Estados Unidos, Irlanda, México, Turquia e de 5 diferentes unidades federativas da República Federativa do Brasil, com representação das regiões Sudeste, Centro-Oeste e Nordeste: Minas Gerais, Rio de Janeiro, São Paulo, Distrito Federal e Pernambuco. Dos trabalhos publicados, 78% são de Professores Doutores, 78% redigidos em língua estrangeira, 78% dos artigos possuem entre seus autores pesquisadores estrangeiros e 100% dos autores são exógenos ao Estado do Paraná. São eles:

Dossiê – The 30th Anniversary of the 1988 Brazilian Constitution

- The Brazilian Constitution of 1988 and its ancient ghosts: comparison, history and the ever-present need to fight authoritarianism

Fernando José Gonçalves Acunha
Professor of Constitutional Law at Centro Universitário de Brasília – UniCEUB (Brasília-DF, Brazil)
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Adjunct Professor at the Indiana University (Indianopolis, United States of America) and at the Alexandria University (Alexandria, Egypt)
Juliano Zaiden Benvindo
Professor of Constitutional Law at University of Brasília (Brasília-DF, Brazil)

- Transforming the legislative: a pending task of Brazilian and Colombian constitutionalism

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- Constitutionalizing abortion in Brazil

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Professor emerita at University of Toronto, Faculty of Law (Toronto, Canada)

- Constitutionalism and rights protection in Mexico and Brazil: comparative remarks

Francisca Pou Giménez
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David Kenny
Assistant Professor of Law at Trinity College Dublin (Dublin, Ireland)

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- Desafios ao constitucionalismo na América Latina: uma visão geral sobre o "novo golpismo"

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- O mito de Marbury v. Madison: a questão da fundação da supremacia judicial

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Professor do Mestrado em Direito da Faculdade de Direito do Sul de Minas (Pouso Alegre-MG, Brasil)

Esperamos no futuro passar por muitos outros aniversários – da Constituição de 1988 e da Revista de Investigações Constitucionais – com a expectativa de termos inúmeras razões para comemorar. Viva a Constituição de 1988! Viva a Revista de Investigações Constitucionais!

Curitiba, setembro de 2018.

Prof. Dr. Daniel Wunder Hachem
Editor-Chefe da Revista de Investigações Constitucionais

Introduction
Introdução

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A moment to mark: the Brazilian Constitution turns 30

Um momento para marcar: a Constituição brasileira completa 30 anos

The year 2018 is a significant milestone for the Brazilian Constitution: thirty years since its enactment – and since the country embarked on its new beginning after two decades of civil-military dictatorship. The country has achieved much in its relentless efforts to build a strong constitutional democracy. And yet as the country marks this moment, it finds itself in the midst of great turmoil. Once known primarily as South America's tiger economy, Brazil is now associated in the global mind most closely with an increasingly polarized and at times dysfunctional political environment plagued by systemic corruption. Recent political crises – from the "Operação Lava Jato" corruption scandal,[1] to Dilma Rousseff's impeachment[2], Lula's imprisonment and his failed attempt to run for the presidency from prison,[3] the assassination of the politician and human

[1] *See e.g.* WATTS, Jonathan. Operation Car Wash: The Biggest Corruption Scandal Ever?. **The Guardian**, 01 June 2017. Available at: <https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history>. Accessed in 12 Sept. 2018; and SILVA, Marina. How Operation Car Wash Is Exposing Political Crime in Brazil. **The New York Times**, 18 Sept. 2017. Available at: <https://www.nytimes.com/interactive/2017/admin/100000005437135.embedded.html?>. Accessed on 12 Sept. 2018.

[2] ROMERO, Simon. Dilma Rousseff Is Ousted as Brazil's President in Impeachment Vote. **The New York Times**, 21 Dec. 2017. Available at: <https://www.nytimes.com/2016/09/01/world/americas/brazil-dilma-rousseff-impeached-removed-president.html>. Accessed in 12 Sept. 2018.

[3] PHILLIPS, Dom. Brazilian Court Bars Lula from Presidential Election. **The Guardian**, 01 Sept. 2018. Available at: <https://www.theguardian.com/world/2018/sep/01/brazilian-court-bars-lula-from-presidential-election>. Accessed on 12 Sept. 2018.

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rights activist Marielle Franco,[4] and most recently to the stabbing of the presidential candidate Jair Bolsonaro[5] – have combined with long-standing social problems such as poverty and economic inequality to test both the branches of government and the Brazilian people across the political spectrum like never before since 1988.

The contemporary constitutional history of Brazil is proof of the complexity involved, and often also of the pain, in building a constitutional democracy. It shows that democracy-building, like politics, is not a linear process,[6] and most importantly that it entails failure, challenge, achievement and constant struggle. There is an important lesson to draw from the Brazilian case in our study of democratization: true understanding of political and constitutional realities different from our own requires attention both to text and context, and demands tireless effort and sustained commitment to the enterprise. Only then may we hope to better locate the experience of others in the great sweep of lived constitutionalism, and in turn to offer better and more nuanced comparative accounts.

The papers in this special issue of the *Revista de Investigações Constitucionais – Journal of Constitutional Research* seek to offer a snapshot, from a global perspective, not only of failures and challenges but also the achievements of the Brazilian constitutional project of 1988. We hope the analysis of the Brazilian constitutional reality from these points of view may usefully contribute to the difficult task of forging a realistic path forward to meeting Brazil's most pressing needs.

This special issue includes a number of different contributions that delve into three key constitutional topics: constitutional legitimacy, the role of the Brazilian judiciary in the enforcement of social rights, and the transformation of political institutions.

A first set of articles explores the past and present of the Brazilian Constitution by explaining from a comparative perspective how the past has dictated its development. In their co-authored article, Fernando José Gonçalves Acunha, Mohamed A. 'Arafa and Juliano Zaiden Benvindo explain several modern constitutional problems in light of so-called 'ancient ghosts'. A comparison with Egypt shows how the transition from a military dictatorship to a democracy could have produced different results for Brazil.

A similar analysis appears in the article co-authored by Santiago García-Jaramillo and Camilo Valdivieso-León, though their comparator is Colombia. They highlight that reforming political institutions both in Brazil and in Colombia implicates rethinking

[4] PHILLIPS, Dom. Marielle Franco: Brazil's Favelas Mourn the Death of a Champion. **The Guardian**, 18 Mar. 2018 <https://www.theguardian.com/world/2018/mar/18/marielle-franco-brazil-favelas-mourn-death-champion>. Accessed on 12 Sept. 2018.

[5] LONDOÑO, Ernesto; DARLINGTON, Shasta. Jair Bolsonaro, Presidential Candidate in Brazil, Is Stabbed. **The New York Times**, 07 Sept. 2018. <https://www.nytimes.com/2018/09/06/world/americas/brazil-jair-bolsonaro.html>. Accessed on 12 Sept. 2018.

[6] *See* BALKIN, Jack M. Constitutional Crisis and Constitutional Rot. **Maryland Law Review**, Baltimore, vol. 77, n. 1, p. 147-160, Nov. 2017.

the role and the boundaries of the judiciary in the transformation of constitutionalism. Not surprisingly, a number of articles in this special issue follow this lead and explore the role of the Brazilian judiciary in the interpretation of the 1988 Constitution. To illustrate, the activist contribution of the Brazilian Supreme Court to constitutional change is theorized by Valentina Scotti who explains the importance of "cláusulas pétreas" in the evolution of Brazilian constitutionalism. Andrea Katz draws from a true Brazilian "novela": the "Operação Lava Jato" that exposed the deep entrenchment of corruption in the country and the role of courts and prosecutors in trying to dismantle it.

The thirty years of the 1988 Brazilian Constitution can only be understood in light of the evolving social, economic, and political changes. Alba Ramos Escobar examines the incorporation of peace as a concept in the Brazilian Constitution, arguing its constitutionalization has raised as-yet unresolved questions and challenges. Pablo Contreras and Domingo Lovera underline the importance of non-legal elements, namely geopolitical factors, to the Brazilian Constitution. Arturo Alvarado's article provides a balanced perspective of the good and the bad in societal change in the life of the Constitution. He also underlines one of Brazil's most pregnant problems: the distance between formal entitlements and the real access to social rights. This article ties in quite well with Evan Rosevear's article in which he compares the interpretation of social rights in Brazil and South Africa, with a particular focus on the development of the right to health. Although at first Brazilian courts were reluctant to grant social rights claims, Rosevear explains how case law evolved and the Brazilian judiciary started treating social rights as guarantees owed by the state to specific individuals. The non-fulfilment of these guarantees has been remedied by individual litigation requiring the state to provide access to specific medicines. South Africa offers an informative contrast because its courts have decided similar claims on the right to health and housing by adopting an administrative law approach focused on the "reasonableness" of government policy in specific contexts.

The role of the Brazilian Supreme Court in the constitutionalization of rights is the focus also of Marta Rodriguez de Assis Machado and Rebecca Cook. They reflect in their contribution on the evolution of the right to abortion and the innovative perspective of the Supreme Court that, in the last decade, has reshaped criminal law to give Brazilian women the right to terminate an unwanted pregnancy. The importance of Brazilian courts in the enforcement of social rights is explored further in Francisca Pou Giménez's article in which she contrasts the activism of the Brazilian Supreme Court with the "contained public profile" of the Mexican Supreme Court. "Two constitutional giants", as she calls them, with much less in common that one would expect. Her comparative article provides a less critical analysis of Brazilian constitutionalism than other articles in this special issue: the first thirty years of the Brazil Constitution are presented as a narrative of hope and constitutional appropriation by its people and political

actors. Citizens turned to courts to claim rights in times of need and, in the case of the right to health, they were given an answer. She argues that in Mexico, however, one hundred years has left the constitution in a state of "solitude", given the limited output legitimacy that the Mexican constitution still suffers from.

Brazil will mark the 30th anniversary of its modern constitution with reflection, criticism and celebration. Some will contend the constitution has failed to satisfy the country's needs, others will reason that on balance the constitution has brought more or less stability and success than would have been possible without it, and still others will boast of the constitution's achievements for a country that has become a regional leader and a global power.

All three sentiments are appropriate on this occasion. And all three should be heard. It would do a disservice to the country if the only views aired in this moment were celebratory ones. The truth is that constitutions, for all one might say about their capacity to mold disparate peoples into a nation, always fall short of our highest ideals. They promise rights but often fail to deliver, they separate powers on paper but in reality one branch or another dominates over the others, and they purport to speak in the name of the people but many if not most are excluded from the project of self-government that constitutions envision. And yet the democratic impetus to codify a constitution overwhelms our knowledge of the inevitability that there will be a gulf between its text and our lived experience under it.

We have chosen to commemorate the 30th anniversary of the Brazilian Constitution in this forum – featuring voices new and established, local and external, spanning the spectrum of public law – for three reasons.

First, we think it is important to offer a dispassionate assessment of the Constitution at this critical juncture in its history, already more than ten years older than the average constitution's lifespan of 19 years. The scholars we have gathered in this special issue come from different parts of the globe, with different views on constitutional functions and goods, and together their evaluation of the Brazilian Constitution offer an invaluable cross-section of informed views on this important institution.

Second, we are scholars of public law who believe strongly that occasions like these are unique opportunities for learning and teaching. Anniversary specials focus our attention on our shared and dissimilar values, aspirations, and visions for our state and the world. Even as we explore the specificities of the Brazilian Constitution, we learn about our own constitutional systems, about their relative strengths and shortcomings, about their comparative standing on important indicators of democratic. Wherever we end up – believing that the Brazilian Constitutions fares better than ours, or that our own system has much to impart to Brazil – the victory will have been in our close engagement with another jurisdiction about which we might not have known much before.

And, third, our choice to commemorate this anniversary is driven by the realities of the global currents of law. Our world is growing smaller as intellectual exchange across borders is becoming increasingly more porous and as ideas migrate from one jurisdiction to another. Greater accessibility to other jurisdictions is a hallmark of our current time, as is a heightened awareness of the myriad ways we are connected to each other by the forces of globalization. We take for granted in organizing this special issue that there is interest outside of Brazil to learn about the country's constitution, and also that Brazilians themselves are eager to know what those beyond their borders think of their constitution. The proof is already visible in the many scholars from around the world who have written fascinating papers on the Brazilian Constitution in an effort to deepen their own engagement with the country's many peoples and institutions.

We are grateful to Daniel Wunder Hachem, Editor-in-Chief of this Journal, for giving us the opportunity to organize what we hope will be for readers an important resource to learn about the Brazilian Constitution in comparative perspective as it marks its 30th anniversary.

September, 2018.

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The Brazilian Constitution of 1988 and its ancient ghosts: comparison, history and the ever-present need to fight authoritarianism

A Constituição Brasileira de 1988 e seus fantasmas do passado: comparação, história e a sempre presente necessidade de lutar contra o autoritarismo

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Abstract

Brazil is facing one of its most severe political crises since 2016, with several impacts in its gradual process of democratization. In this context, the main argument in this work is that many of the ghosts that scary the Brazilian society in the Twenty-First century are direct heirs of an unresolved (pre-constitutional) past, whose risks can be strongly perceived and whose solution is an urgent task. Every time there is political turmoil and a disturbance to the rule of law in the country, the support for democracy seems to dwindle. In this vein, this article aims to explore such contradictions and difficulties and how they still represent a threat to the Brazilian democracy through an analysis dedicated to the complex and ambiguous relation that the Constitution (and various of the Brazilian institutions, like the Supreme Court) has (have) established with the military dictatorship that lasted from 1964 until 1985. The authoritarian ghosts that up until now haunts the Brazilian reality, though inevitable due to the compromises that underpin it and the practices that stubbornly replicate the past into the very present, have at least to be disclosed and, as such, challenged by a learning process that only a militant memory is capable of making us aware of.

***Keywords**:* Brazilian Constitution; democracy; authoritarianism; military intervention; dictatorship.

Resumo

O Brasil enfrenta uma de suas crises políticas mais severas desde 2016, com vários impactos em seu processo gradual de democratização. Neste contexto, o principal argumento neste trabalho é que muitos dos fantasmas que assustam a sociedade brasileira no século XXI são heranças diretas de um passado não-resolvido (pré-constitucional), cujos riscos podem ser fortemente percebidos e cuja solução é uma tarefa urgente. Toda vez que há turbulência política e uma perturbação do Estado de Direito no país, o apoio à democracia parece diminuir. Nesse sentido, este artigo tem como objetivo explorar tais contradições e dificuldades e como elas ainda representam uma ameaça à democracia brasileira através de uma análise dedicada à relação complexa e ambígua que a Constituição (e várias das instituições brasileiras, como o Supremo Tribunal Federal) estabeleceu com a ditadura militar que durou de 1964 a 1985. Os fantasmas autoritários que até agora assombram a realidade brasileira, embora inevitáveis devido aos compromissos que a sustentam e às práticas que teimosamente replicam o passado no presente, precisam ao menos ser revelados e, a partir disso, desafiados por um processo de aprendizagem que apenas uma memória militante é capaz de nos tornar conscientes.

Palavras-chave: *Constituição Federal do Brasil; democracia; autoritarismo; intervenção militar; ditadura.*

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1. Introduction; **2.** The Authoritarian Ghosts in Brazil and Egypt; **3.** Brazilian Democratic Crisis and its Authoritarian Origin: How an Unresolved Past may Endanger Present and Future? **4.** Conclusions; **5.** References.

1. INTRODUCTION

It comes as no surprise that Brazil is facing one of its most severe political crises since 2016. Part of the literature even classify current developments as “the greatest constitutional crisis since 1988”.[1] But its origins are no novelty to researchers that dedicate time to analyzing Brazilian constitutional history. As two of us described in a previous work, “Brazil’s contemporary democratic downturn seems to be grounded in more

[1] See PAIXÃO, Cristiano. 30 anos: crise e futuro da Constituição de 1988. **JOTA**, [s.l.], May, 3 2018. Available at: <https://www.jota.info/opiniao-e-analise/artigos/30-anos-crise-e-futuro-da-constituicao-de-1988-03052018>. Retrieved Jun. 5, 2018. The author understands that it is quite normal that constitutional democracies undergo periods of crises; their Constitutions have precisely the role of providing parameters within which disputes are to be fought and solved. What is extraordinary in the Brazilian political and constitutional landscapes these days is the fact that the crisis would be a *de-constitutional* one, which means that the 1988 Constitution is being stripped away from some of its most important parts, and such process, if not stopped, can risk the very future of the Constitution.

entrenched practices that have long co-existed with its gradual process of democratization and which are now in direct clash with democracy itself."[2] Under that line of thinking, our main argument in this work is that many of the ghosts that scary the Brazilian society in the Twenty-First century are direct heirs of an unresolved (pre-constitutional) past, whose risks can be strongly perceived and whose solution is an urgent task.

Even speaking of democracy is not an easy task in contemporary Brazil, because every time there is political turmoil and a disturbance to the rule of law in the country, the support for democracy seems to dwindle.[3] In some occasions – such as the crisis that has struck the country and led to the impeachment of then President Dilma Rousseff –, we can observe the resurgence of calls for military intervention and the return of authoritarianism.[4] At least for now, such radical moves make more fuss than pose serious risks to Brazilian democracy, though they signal that the transition from dictatorship to democracy in the country – a phenomenon deeply attached to the enactment of the 1988 Federal Constitution – has still many unresolved issues with the past.[5]

In this vein, this article aims to explore such contradictions and difficulties and how they still represent a threat to the Brazilian democracy through an analysis dedicated to the complex and ambiguous relation that the Constitution (and various of the Brazilian institutions, like the Supreme Court) has (have) established with the military dictatorship that lasted from 1964 until 1985. For this purpose, it will first use a diachronic comparative approach in order to demonstrate some of the ghosts that the

[2] BENVINDO, Juliano Zaiden; ACUNHA, Fernando José Gonçalves. Brazilian Democratic Decay and the Fear of the People, **International Journal of Constitutional Law Blog**, [s.l.], Jun. 24, 2017. Available at: <http://www.iconnectblog.com/2017/06/brazilian-democratic-decay-and-the-fear-of-the-people/>. Retrieved May 30, 2018.

[3] According to the research group *Corporación Latinobarómetro*, support for democracy in Brazil reached its lowest point in 15 years in 2016, with 32% of Brazil's respondents saying that they support democracy. It is worth remembering that 2016 was the year when the impeachment process of then President Dilma Rousseff took place. There are other interesting data: even though support for democracy increased 11 points from 2016 to 2017 (reaching 43% of respondents), Brazilians ranked their democracy as the worst in the region in 2017 (they attributed a grade "4.2" in a scale that goes from "1" to "10", in which the region has an average grade "5.4"). In 2017, Brazilians were also the group least satisfied with democracy (13% of satisfaction), with the lowest rate of confidence in political parties (7%), with the strongest opinion that government acts in favor of powerful groups (97%) and with the clearest vision that government does not govern in favor of all the population (3%). See more at: CORPORACIÓN LATINOBARÓMETRO. **Informe 2017**. Buenos Aires: Corporación Latinobarómetro, 2018. Available at: <http://www.latinobarometro.org/latNewsShow.jsp>. Retrieved May 31, 2018.

[4] Brazil is no exception to what is being observed throughout the world. In a recent interview to Brazilian newspaper *Folha de S. Paulo*, Professor Yascha Mounk establishes a direct connection between the lack of legitimacy of political parties and politicians in general and authoritarian alternatives. Though he does not believe that the military is close to a *Coup d'État*, he is concerned about the future of democracy. See at: BUARQUE, Daniel. Crise da elite política ajuda a corroer democracia, diz professor de Harvard. **Folha de S. Paulo**, Londres, Jun. 6, 2018. Mundo. Available at: <https://www1.folha.uol.com.br/mundo/2018/06/crise-da-elite-politica-ajuda-a-corroer-democracia-diz-professor-de-harvard.shtml?utm_source=newsletter&utm_medium=email&utm_campaign=newsfolha>. Retrieved Jun. 10, 2018.

[5] See generally SKIDMORE, Thomas E. **Politics in Brazil, 1930-1964**: An Experiment in Democracy. New York, Oxford Univ. Press. 1967.

1988 Constitution needs to combat in its 30th anniversary[6] if it is to be regarded as a constitutional text that fulfills its role as dispute settler. To accomplish its task, this paper will end with a brief description of the democratic crisis the country is now experiencing, drawing a connection between a past that has not been comprehensively assessed and present difficulties. The minimal ambition of this paper is to reveal that, despite the many democratic breakthroughs the transition to democracy and the drafting of a new Constitution have brought to the Brazilian reality, there is a stubborn past that has strategically done whatever it takes to keep its positions and privileges virtually untouched. Brazil has indeed changed for the better with the new democratic order and the new Constitution, but it will take many years yet to seriously challenge the various ghosts that haunts its very reality.

2. THE AUTHORITARIAN GHOSTS IN BRAZIL AND EGYPT

Comparative analyses are always a very risky endeavor. There are many methodological dilemmas when comparing distinct realities and even more so when those realities are marked by substantial differences in history, geography and, more specifically, political and economic developments.[7] More serious, when the comparison refers to different periods in time, anachronism is not a rare outcome.[8] Therefore, to use Egypt for comparison with the Brazilian constitutionalism may, at first, sound like the typical case of falling into all those methodological sins that especially historiography has pointed out as serious mistakes in research.[9] Yet, even in the realm of such difficulties and in the awareness of such risks, comparative analyses may disclose interesting connections and, even when it comes to distinct times in history, a diachronic approach may reveal rich links that a synchronic one would possibly overlook. The purpose of this paper is thereby strongly diachronic by working with possible interconnections that transcend the time gap between two constitutional realities.

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[6] As a disclaimer, it is necessary to explain that this article has some peculiarities, the most important one being the fact that it was written by three authors with distinct origins and diverse intellectual backgrounds. One of them is an Egyptian professor that lives in the country and is experiencing Brazilian everyday life (and its crises) as a foreigner coming from the Middle East. The other two are Brazilian professors that have dedicated most of their academic time to discussing and studying Brazilian and Latin American constitutionalism from the point of view of nationals that are part of such an environment. So, as a way to present a coherent argument, this article started with the observations offered by the foreigner and some of the main concerns that he was able to appoint (obviously influenced by his own background, in which risks to democracy are a permanent variable), which were then complemented by the native writers. We hope readers enjoy reading such an unusual piece of work and that it may contribute to the serious debates presented in this number.

[7] See HIRSCHL, Ran. **Comparative Matters**: The Renaissance of Comparative Constitutional Law. New York: Oxford University Press, 2014.

[8] See SKINNER, Quentin. Meaning and Understanding in the History of Ideas, **History and Theory**, [s.l.], vol. 8, n. 1, p. 3-53, 1969.

[9] SKINNER, Quentin. Meaning and Understanding in the History of Ideas, **History and Theory**, [s.l.], vol. 8, n. 1, p. 3-53, 1969.

In particular for the purposes of this paper, Egypt may be a relevant paradigm for examining how the military and the authoritarian enclaves that follow suit in a dictatorship can represent a type of ghost haunting the very possibility (as in Egypt) or the consolidation (as in Brazil) of democracy. True, the very understanding of what the armed forces mean in both countries differ in many ways. Unlike in Egypt, in Brazil, though still one of the most admired institutions,[10] the army is clearly under civil rule and the President, who is a civilian, is its commander-in-chief. Moreover, there is no connection whatsoever between the Brazilian army and the defense of secularism, unlike in Egypt.

These differences have to do, first, with the fact that Brazil has been a democracy for over thirty years, even though much has still to be done for it to become a full democracy;[11] second, the army, especially in the aftermath of the dictatorial regime, was naturally regarded as a culprit of many of the evils of that past to overcome (the memory of that past has since faded, nonetheless, as we will discuss in more detail in part 2 of this text); and, third, notwithstanding the fact that religion plays a role in Brazilian society, the simple idea that the army has the role of defending secularism can be easily deemed a stretch to any reasonable constitutional interpretation. This is why to compare the Egypt of today, which is a military regime, with Brazil, which is a democracy ruled by a civilian government, may lead to inevitable methodological mistakes. A diachronic approach seems more suitable inasmuch as it initially compares the Egypt of today with the Brazil of the years of military rule, when the army had a central role in the government, and then attempt to connect with the current Brazilian democracy. The premise here is that, in doing so, we are comparing two typical dictatorial regimes despite their different times in history, and, more especially, two regimes that have dealt with the challenges of popular protests and regime transitions in some comparable ways, though their outcomes radically differ one from the other – a very interesting point to explore, by the way.

In particular, there is an interesting comparative debate over how the military can become more democratic and whether popular mobilization helps democratize the military rule. This inquiry, in particular, expanded the spotlight in Egypt after 2011, when some citizens called for enduring protests to further revolutionary goals and

[10] According to a Datafolha Poll, 40% of Brazilians have a strong confidence in the armed forces and 43% have some confidence. See BILENKY, Thais. Forças Armadas lideram confiança da população; Congresso tem descrédito. **Folha de S. Paulo**, Jun. 24, 2017. Caderno Poder. Available at: https://www1.folha.uol.com.br/poder/2017/06/1895770-forcas-armadas-lideram-confianca-da-populacao-congresso-tem-descredito.shtml Retrieved Jun. 5, 2018. See also CORPORACIÓN LATINOBARÓMETRO. **Informe 2017**. Buenos Aires: Corporación Latinobarómetro, 2018. Available at: <http://www.latinobarometro.org/latNewsShow.jsp>. Retrieved May 31, 2018.

[11] THE ECONOMIST. The Economist Intelligence Unit's Democracy Index. [s.l.], [2018?]. Available at: <https://infographics.economist.com/2018/DemocracyIndex>. Retrieved Jun. 10, 2018.

others urged the opposite. Several academic studies highlighting the role of elites argued that elections could progressively corrode the political role of the armed forces and that mobilization could risk disrupting this process by provoking military backlash.[12] On the other hand, it has also been argued that social forces could instead affirm that grassroots protest holds leaders accountable and pushes them toward more inclusive reform than they would otherwise enact.[13]

In both the current Egyptian dictatorship and the former Brazilian dictatorship, militaries took benefit of historical prestige, popular support, and institutional cohesion to seize power, and then managed the institution of elections and some civilianization of government.[14] Moreover, Egypt and Brazil are geographically and demographically large and have strong ties to Western powers: they have, to a certain extent, followed relatively equivalent political economic tracks that involved industrial development, corporatist measures, and a subsequent shift to market reforms.[15]

Yet, various levels and sorts of popular mobilization thoroughly contributed to a variation in the speed and extensiveness of their military-controlled transitions to democracy.[16] In Brazil, a military tyranny permitted elections for Congress and the other units of the federation, but might not have abandoned rule were that not recurrently demanded by numerous forms of grassroots protest.[17] In Egypt, street protests toppled an autocrat (President Hosni Mubarak) and opposed totalitarian practices thereafter; however, grassroots organization after 2011 also strengthened pro-and anti-Islamist polarization and did not develop robust links to political organizations. This situation destabilized the ability of those movements to translate the troublesome power of protest into democratization and allowed the military to renew dictatorial rule.[18]

On the one hand, it should be noted that transitions that move too far in intimidating the interests of the military elite's risk glimmering reaction. Also, processes that do not appropriately challenge militaries can empower them to retain control in the

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[12] See generally ACEMOGLU, Daron; ROBINSON, James. A. **Economic Origins of Dictatorship and Democracy**. Cambridge: Cambridge Univ. Press, 2006.

[13] AGÜERO, Felipe. Institutions, Transitions and Bargaining: Civilians and the Military in Shaping Post-Authoritarian Regimes. In PION-BERLIN, David; (ed.). **Civil-Military Relations in Latin America**: Analytical Perspectives. Chapel Hill: University of North Carolina Press, 2001, p. 194-222.

[14] FITCH, John Samuel. **The Armed Forces and Democracy in Latin America**. Baltimore: Johns Hopkins University Press, 1998. See also: STEPAN, Alfred. Paths towards Redemocratization: Theoretical and Comparative Considerations. In: O'DONNELL, Guillermo; SCHMITTER, Philippe C.; WHITEHEAD, Laurence. **Transitions from Authoritarian Rule**: Comparative perspectives, Baltimore: Johns Hopkins University Press, 1986, p. 64-84.

[15] DIAMOND, Larry J. Thinking about Hybrid Regimes. **Journal of Democracy**, vol. 13, n. 2, p. 21-35, Apr. 2002.

[16] See, e.g., PRZEWORSKI, Adam. **Democracy and the Market**: Political and Economic Reforms in Eastern Europe and Latin America. Cambridge: Cambridge University Press, 1991.

[17] See BARBOSA, Leonardo Augusto de Andrade. **História Constitucional Brasileira**: Mudança Constitucional, Autoritarismo e Democracia no Brasil Pós-1964. Brasília, Biblioteca Digital da Câmara dos Deputados, 2012, p. 149.

[18] See COOK, Steven A. **Ruling but not Governing**: The Military and Political Development in Egypt, Algeria and Turkey. Baltimore: Johns Hopkins University Press, 2007.

new political system and, hence, the result might be limited or quasi-democracy, or institutionalization of a military instruction regime: a hybrid political system in which competitive elections co-exist with an army that uses formal prerogatives and/or informal relations to dictate which themes, actors, and/or policies are politically acceptable.[19]

Brazil's military governors directed, to a certain extent, a gradual liberalization of the political system, though, during the Constituent Assembly of 1987/1988, their capacity to do so was, in many respects, effectively challenged by important sectors of organized civil society.[20] Three years after the inauguration of Brazil's first civilian president since 1964, the military elites and conservative sectors of the Brazilian society could still retain control over much of the political atmosphere they had occupied during the twenty-one years of military rule.[21] This reality would nonetheless be in clash with a rising participation of distinct sectors of society and would create an environment of constitution-drafting in 1987 and 1988 where compromises with the past and democratic breakthroughs would appear side by side.[22]

This clash is the result of the socioeconomic alterations that gave rise to new civil society groups, such independent labor unions that were gaining strength especially since the seventies.[23] Additionally, a rising middle class shaped professional associations that gradually opposed tyranny and, as urban growth outstripped public services, poor residents organized to meet essential needs, forging networks that would later be used to channel protest.[24] Further, both liberation theology and government repressiveness pushed the Catholic Church to condemn human rights violations and demand

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[19] PRZEWORSKI, Adam. **Democracy and the Market**: Political and Economic Reforms in Eastern Europe and Latin America. Cambridge: Cambridge University Press, 1991, p. 72-79.

[20] See BENVINDO, Juliano Zaiden, The Forgotten People in Brazilian Constitutionalism: Revisiting Behavior Strategic Analyses of Regime Transitions. **International Journal of Constitutional Law**, vol. 15, issue 2, p. 332-357, Apr. 2017, at p. 332.

[21] See BENVINDO, Juliano Zaiden, The Forgotten People in Brazilian Constitutionalism: Revisiting Behavior Strategic Analyses of Regime Transitions. **International Journal of Constitutional Law**, vol. 15, issue 2, p. 332-357, Apr. 2017, at p. 340 et seq. See also: "The basis of this expectation lay in the strength of the military government's bargaining position vis-à-vis civilians during the transition to civilian rule, which resulted in the armed forces' retention of institutional prerogatives, including six cabinet positions and a predominant presence in the National Security Council (CSN) and National Information Service (SNI), agencies synonymous with the abuse of human rights under the dictatorship. It was predicted that these prerogatives would provide the military with a strong foundation for exercising tutelage over civilians and protecting the privileges of their institution in the new democracy" (HUNTER, Wendy. Politicians Against Soldiers: Brazil. **Comparative Politics**, vol. 27, n. 4, p. 425-443, Jul. 1995, at p. 425).

[22] Popular mobilization was critical in derailing that outcome, as several expansions permitted that mobilization. Wendy Hunter adds to that electoral competition and financial causes. See: HUNTER, Wendy. Politicians Against Soldiers: Brazil. **Comparative Politics**, vol. 27, n. 4, p. 425-443, Jul. 1995, at p. 439-440.

[23] By 1978, it has been reported that some 43% of workers have been included. See FAUSTO, Boris. **A Concise History of Brazil**. Cambridge: Cambridge University Press, 1999, at p. 304.

[24] AVRITZER, Leonardo. **Civil Society in Brazil**: From State Autonomy to Political Interdependency. Belo Horizonte, [s.n.], 2009, at p. 10. See also AVRITZER, Leonardo. **Participatory Institutions in Democratic Brazil**. Washington: Wilson Press Johns Hopkins, 2009. Changes in the agrarian economy and farming brought small producers and rural and blue-color workers together in new sorts of collective action and representation. See

for social justice.[25] By providing a "protective umbrella" for the poor, Church-fostered local clerical communities endorsed participatory standards and political criticism.[26] The open dialogue policy adopted with the civil society in 1974, for example, restored *habeas corpus* and press freedoms.

Accordingly, protest movements created both popular insistence on democracy and tools for articulating its mobilization. The military government in Brazil, though largely constraining political parties to only two big coalitions – MDB and ARENA – after the enactment of the Institutional Act no. 2 in 1965,[27] allowed some party competition in Congress and in state and municipal legislatures[28] (this two-coalition system would last until 1979). In this respect, the military expanded elections as it thought that it could dictate outcomes, as it had assets, including a relatively economic success and some public support, with which it could arrange the transition while protecting its privileges.[29] Others contended that democratization flourished due to the military's internal divisions, as they asserted that a reasonable faction never proposed to hold power.[30] In any event, the military soft-liners would not have succeeded in corroding dictatorship without the influence produced by a mobilized civilian opposition.[31]

Egypt's 2011 uprising brought varied social sectors together to demand freedom, dignity, and social justice. The military, distinguishing itself from the police in declining to shoot protestors, arisen heroically when it forced the long 30 years iron-fist autocratic leader, President Hosni Mubarak, to resign and the Supreme Council of Armed Forces (SCAF) assumed power.[32] Many scholars recommended that Egypt follow

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NAVARRO, Zander. Democracy, Citizenship and Representation: Rural Social Movements in Southern Brazil 1978-1990. **Bulletin of Latin American Research**, vol. 13, n. 2, p 129-154, May 1994.

[25] MAINWARING, Scott. Urban Popular Movements, Identity, and Democratization in Brazil. **Comparative Political Studies**, vol. 20, issue 2, p. 131-159, July 1987, at p. 146-155. Available at: <https://doi.org/10.1177/0010414087020002001>. Retrieved Jun. 5, 2018.

[26] MAINWARING, Scott. Grass Roots Popular Movements and the Struggle for Democracy: Nova Iguaçu, 1974-1985. In: STEPAN, Alfred (ed.) **Democratizing Brazil**. New York: Oxford University Press, 1989, pp. 168-204.

[27] BRAZIL. Ato Institucional n. 2, of October, 27, 1965. Mantem a Constituição Federal de 1946, as Constituições Estaduais e respectivas Emendas, com as alterações introduzidas pelo Poder Constituinte originário da Revolução de 31.03.1964, e dá outras providências. **Diário Oficial da União**, Brasília, DF, Oct. 27, 1965. Available at: <http://www.planalto.gov.br/ccivil_03/ait/ait-02-65.htm>. Retrieved Jun. 5, 2018.

[28] MAINWARING, Scott. Grass Roots Popular Movements and the Struggle for Democracy: Nova Iguaçu, 1974-1985. In: STEPAN, Alfred (ed.) **Democratizing Brazil**. New York: Oxford University Press, 1989, pp. 168-204.

[29] STEPAN, Alfred. Paths towards Redemocratization: Theoretical and Comparative Considerations. In: O'DONNELL, Guillermo; SCHMITTER, Philippe C.; WHITEHEAD, Laurence. **Transitions from Authoritarian Rule**: Comparative perspectives, Baltimore: Johns Hopkins University Press, 1986, p. 64-84, at p. 59-60.

[30] SKIDMORE, Thomas E. **Brazil**: Five Centuries of Change. 2 ed. New York: Oxford University Press, 2009.

[31] SKIDMORE, Thomas E. **Brazil**: Five Centuries of Change. 2 ed. New York: Oxford University Press, 2009, at p. 184. Only after the rise of the labor movement was the more limited process of liberalization transformed into democratization.

[32] 'ARAFA, Mohamed A. Towards a Culture of Accountability: A New Dawn for Egypt. **Phoenix International Law Review**, vol. 5, issue 1, p. 1-39, 2011, at p. 12-15. See ABDEL-MALEK, Anouar. **Egypt**: Société Militaire. Paris: Editions de Seuil, 1962, at p. 330.

a "Turkish model" toward democracy. The two groups in Egypt to which Turkey offered a model were the military and the Muslim Brotherhood (MB).[33] To the former, it exposed paths to shape the political arena to defend its main benefits and, to the latter, it verified how a populist Islamist party could be elected and deteriorate the military reserve domains, while relegating political rivals.[34] It should be noted that the Egyptian military enjoyed huge institutional cohesion, social respect (prestige), and a historic leadership role, as its power stemmed from a budget exempted from oversight, close ties to the United States and the European Union countries, especially within the counterterrorism programs and fighting Islamic extremists, Suez Canal as a global water passageway and guaranteeing stability with Israel, along with an economic empire in such industries – as tourism, construction, and industrial manufacturing – and networks within bureaucracy and local administration.[35]

While revolutionary groups promoted postponing elections until they could build organized political parties, the military rapidly held elections in 2012 to transfer power to its favored interlocutors – the Muslim Brotherhood, to be easy for them afterwards to remove them, as it happened –, traditional parties and local power dealers.[36] While declining calls to renovate the security apparatus, the military required the

[33] 'ARAFA, Mohamed A. Towards a Culture of Accountability: A New Dawn for Egypt. **Phoenix Law Review**, vol. 5, issue 1, p. 1-39, 2011.

[34] 'ARAFA, Mohamed A. Towards a Culture of Accountability: A New Dawn for Egypt. **Phoenix Law Review**, vol. 5, issue 1, p. 1-39, 2011. See also: ("After 1991, the Egyptian Armed Forces expanded their thorough penetration of almost every sphere of Hosni Mubarak's crony patronage system. The senior officer corps was co-opted by the promise of appointment upon retirement to leading posts in government ministries, agencies, and state-owned companies, offering them supplementary salaries and lucrative opportunities for extra income generation and asset accumulation in return for loyalty to the president. This officers' republic served as a primary instrument of presidential power, and even after Mubarak's ouster retains its pervasive political reach, permeating both the state apparatus and the economy—not just at the commanding heights but at all levels." (SAYIGH, Yezid. Above the State: The Officer's Republic in Egypt. **Carnegie Middle East Center**, Aug. 1, 2012. Available at: <http://carnegie-mec.org/2012/08/01/above-state-officers-republic-in-egypt-pub-48972>. Retrieved Jun. 7, 2018.).

[35] See COOK, Steven A. **Ruling but not Governing**: The Military and Political Development in Egypt, Algeria and Turkey. Baltimore: Johns Hopkins University Press, 2007. See also AMAR, Paul. Why Mubarak is Out. In: HADDAD, Bassam; BSHEER, Rosie; ABU-RISH, Ziad (ed.). **The Dawn of the Arab Uprisings**: End of an Old Order? London: Pluto Press, 2012, p. 83-90, at p. 81-85.

[36] "When he took office on June 30, President Muhammad Mursi of Egypt looked to have been handed a poisoned chalice. The ruling generals (…) had tolerated a clean presidential election but then had hollowed out the presidency, saddling Mursi with an executive's accountability but little of the corresponding authority. The country resigned itself to the grim reality of dual government, with an elected civilian underdog toiling in the shadow of mighty military overlords. Then, (…) Mursi turned the tables, dismissing Egypt's top generals and taking back the powers they had usurped. The power play crystallizes the new dynamic of Egyptian politics: the onset of open contestation for the Egyptian state. For 60 years, an exclusive military-bureaucratic caste ran the state, beating back ambitious counter-elites, Islamist or otherwise. Politics became a scramble for small advantages, gained by petitioning the state, seeking its largesse or striving for representation in an ornamental legislature." (EL-GHOBASHY, Mona. Egyptian Politics Upended. **Middle East Research and Information Project**, 20 Aug. 2012, Available at: <https://www.merip.org/mero/mero082012>. Accessed: 7 Jun. 2018).

institutionalization of reserve spheres in anticipation that its informal impact might reduce after elections.[37]

Protest remains part of this political landscape and major protests – until the moment – have condemned military rule and demanded accountability for misuses. Generally, popular mobilization's input to democratization remain limited – and will keep as that – if mobilization does not bridge cleavages or develop or create robust political organization. In terms of how mobilization's features weakened its democratizing influence, protest movement in Egypt had a restricted impact in creating popular demand for democratization. The military turned public opinion against protestors before demonstrators could turn public opinion against them, as the army usurped the legitimacy of the political (youth activism) movement by suggesting – in the name of the revolution – that protest represented threatening, excessive democratization.[38] Meanwhile, the military used violent and legal repression to stop protest and drag protestors into bloody clashes, as they denounced activism as gangsters, convincing numerous Egyptians that demonstrators were ruining the economy demonstrating for the sake of protesting.[39]

Additionally, popular mobilization did not upsurge politicians' enticements to confront military power-holders, and the grassroots protest did not change this policy.[40] Further, popular mobilization had a diverse impact on politicians' capacities for stimulating military rule, as, for example, the massive protests, pressuring the military to announce presidential elections and affirm that it had no aspirations to govern (chanting "Down with the Military Rule") after Mubarak's ouster.[41] Popular mobilization

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[37] See generally KANDIL, Hazem. **Soldiers, Spies, and Statesmen**: Egypt's Road to Revolt. London: Verso, 2014.

[38] SAYIGH, Yezid. Above the State: The Officer's Republic in Egypt. **Carnegie Middle East Center**, Aug. 1, 2012. Available at: <http://carnegie-mec.org/2012/08/01/above-state-officers-republic-in-egypt-pub-48972>. Retrieved Jun. 7, 2018.

[39] Without managerial leadership and strong association and unification, activists were not able to communicate or pass their own message convincingly, no less rally the population to reject military government. See: "Agreeing with Abdel-Gawad, prominent lawyer Ragaie Attia said: 'The irresponsibility of these revolutionary youth movements led the vast majority of citizens to seek shelter in a man with a strong personality and who can stand up to these anarchistic elements and contain Islamists'." (EL-DIN, Gamal Essam. How Did Muharak's Last PM Make it to Egypt's Second Round of Presidential Elections? **Jadaliyya**, May 26, 2012. Available at: <http://www.jadaliyya.com/Details/26064/How-Did-Mubarak%60s-Last-PM-Make-It-To-Egypt%60s-Second-Round-of-Presidential-Elections>. Retrieved Jun. 7, 2018).

[40] In this regard, the MB intended that if it played by the military's rules, it could move to attain political power. See, e.g.: "Indeed, as a highly institutionalized, hierarchical organization, the Brotherhood has always prioritized structures over individuals. It is telling that, in recent decades, the Brotherhood has failed to produce any charismatic leaders on the national level. So, when it comes to Egyptian politics, the Brothers are also institutionalists." (HAMID, Shadi. The Muslim Brotherhood's New Power in Egypt's Parliament. **Brookings**, Dec. 23, 2011, Available at: <https://www.brookings.edu/opinions/the-muslim-brotherhoods-new-power-in-egypts-parliament/>. Retrieved Jun. 5, 2018).

[41] "A large showing of Egypt's political forces took to Egypt's revolutionary square for the 'Friday of One Demand,' seeking a swift transfer of power and refusing the government's supra-constitutional principles. (…) Hundreds of thousands of protesters descended on *Tahrir* Square (…) to call for one principal demand: an

was associated with a political organization, which facilitated it to translate street power into targeted influence in bargaining with military elites. However, its influence in deepening democratization was restricted because it reinforced rather than spanned crucial cleavages.[42] Finally, the effect of mobilization in thwarting dictatorship after the election of a civilian government saw a similarly mixed record.[43] Subsequently, demonstrators along with activists accused the MB of ineffectiveness, economic failure, and an exclusionary effort to colonize institutions and disregard opposition voices.[44]

A grassroots petition campaign (*tamrod*) collected signatures against Morsi and, on June 30, 2013, united millions of Egyptians again to the streets to demand his resignation; this mobilization sustained until July 3, when the military removed the government, arrested Morsi, and suspended the constitution.[45] Islamist supporters shaped a protest camp that ended with military and security bloody clashes, then banned the MB and labeled it as terrorist organization by a court's decision, arrested tens of thousands on trumped-up charges, and severely restricted freedom of expression and speech. Finally, the Commander-in-Chief (former defense minister) 'Abdel Fattah el-Sisi won presidential elections in May 2014 and March 2018 nearly unopposed.[46]

The current military government has been surpassed by a wave of arrests that has swept up numerous of the country's remaining independent civilians and reporters (bloggers and activists) who have been calling attention to police brutality, massive economic corruption and fraud, lack of judicial independence, rule of law, and other human rights violations.[47] Detainees have been charged with aiding a terrorist

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end to military rule and a swift transfer of power to an elected president by April 2012." (TAREK, Sherif. Egypt's Islamists Dominate Tahrir Square's Dense Friday. **Ahram Online**, Nov. 18, 2011. Available at: <http://english.ahram.org.eg/NewsContent/1/64/26902/Egypt/Politics-/Egypts-Islamists-dominate-Tahrir-Squares-dense-Fri.aspx>. Retrieved Jun. 8, 2018. See also EL-HAMALAWY, Hossam. Morsi, SCAF, and the Revolutionary Left. **Jadaliyya**, Jul. 1, 2012. Available at: <http://www.jadaliyya.com/Details/26430/Morsi,-SCAF,-and-the-Revolutionary-Left>. Retrieved Jun. 7, 2018.

[42] KANDIL, Hazem. **Soldiers, Spies, and Statesmen**: Egypt's Road to Revolt. London: Verso, 2014, at p. 246.

[43] Moreover, the MB's relationship to the military endured. Uncertain Morsi ordered the retirement of senior commanders, but he did not take more meaningful steps to assert civilian control over the military or investigate their violence. At that time, Morsi granted himself comprehensive extrajudicial powers, above the law, surging protests forced him to repeal the decree (*rule by man not rule of law*).

[44] See generally 'ARAFA, Mohamed A. Whither Egypt? Against Religious Fascism and Legal Authoritarianism: Pure Revolution, Popular Coup, or a Military Coup D'*État*? **Indiana International & Comparative Law Review**, vol. 24, n. 4, p. 859-897, 2014.

[45] 'ARAFA, Mohamed A. Whither Egypt? Against Religious Fascism and Legal Authoritarianism: Pure Revolution, Popular Coup, or a Military Coup D'*État*? **Indiana International & Comparative Law Review**, vol. 24, n. 4, p. 859-897, 2014.

[46] See 'ARAFA, Mohamed A. The Unexpected Trials of Egyptian Leaders: Is It a Question of Law or Politics? **US China Law Review**, vol. 12, n. 6, p. 467-487, 2015. Though there was some hope that Sisi might ease what has been the worst suppression and tyranny in Egypt's modern history, he recently awarded himself another mandate with a bizarrely rigged presidential election.

[47] For example, Egypt's military government issued what become known as the "protest law," effectively outlawing freedom of assembly and demonstration. See: "Egypt now finds itself ruled by a military, security and

organizations and "spreading false news." The military-backed government justifies it as if it were fighting Islamist extremists connected to the terrorist Islamic State, but most of those recently arrested are well-known secular liberals who supported Egypt's 2011 pro-democracy movement.[48]

Egypt's transition may illustrate some comparable elements from the Brazilian experience, though the outcomes differ radically: one brought, in the end, the military into power; the other led to a democracy ruled by a civilian government. In Egypt, some argue that popular mobilization gave the military an excuse to seize power and led numerous citizens, tired and exhausted with instability and insecurity, to praise the army's rule and justify extensive human rights transgressions.[49] Yet renewed totalitarianism in Egypt may also have to do to the failure of mobilization to build robust organizational linkages between grassroots movements and political leaders, which opened up the space for interest groups to foster their interests in the aftermath of the transition. It seems that even after uprisings in Egypt, there appeared to be no organized actor capable of establishing democracy and challenging the military's political supremacy, oppressive performs, or propaganda. That doesn't mean that crackdown has no cost: history, after all, proposes that regimes as such stores up trouble that, in the end, will be uncontainable and irrepressible.

A diachronic approach reveals that the gap between both comparative paradigms may lie in the fact that, even though also in Brazil the capacity of fostering linkages between grassroots movements and political leaders is relatively scant, it is not absent, either. In reality, those protests of the seventies which resulted in a greater popular participation during the Constituent Assembly of 1987/1988 have not only provided a more inclusive procedure of constitution-making, but also a symbolic legitimation of that very procedure. It strengthened a transition that was originally aimed to be (totally) controlled, but which gained another configuration within the works of that Constituent Assembly. In other words, in Brazil sectors of organized civil society were successful, though with some constraints by opposition and conservative groups, in channeling their agendas into the political arena and into a constitutional moment,

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intelligence *junta*. Egypt's generals have constantly employed repressive tools to instill fear among the population in order to stifle free expression and peaceful opposition. The military clique's goal here is to evacuate citizens from the public space, to eliminate the autonomy of civil society organizations and to marginalize political parties that are not controlled by the security and intelligence services." (HAMZAWY, Amr. Egypt's Anti-Protest Law: Legalizing Authoritarianism. **Al-Jazeera**, Nov. 24, 2016. Available at: <https://www.aljazeera.com/indepth/features/2016/11/egypt-anti-protest-law-legalising-authoritarianism-161107095415334.html>. Retrieved Jun. 5, 2018).

[48] In the actual war against extremists on the *Sinai* Peninsula, the government is deteriorating and failing despite the use of cruel strategies.

[49] See EDITORIAL BOARD. Acting Out of Weakness, Sissi Launches Another Crackdown, **Washington Post**, The Post's View, June 1, 2018. Available at: <https://www.washingtonpost.com/opinions/global-opinions/egypt-is-being-run-by-a-jailer/2018/06/01/fa436c0c-64f5-11e8-99d2-0d678ec08c2f_story.html?utm_term=.0b037f4bb5f9>. Retrieved Jun. 5, 2018.

and this has positively played out to gradually strengthen democracy. In the following years, the rise especially of the Worker's Party (PT) and other left-leaning political parties, which were very influential and active before and during the Constituent Assembly, signaled this linkage with some of those grassroots movements and it is no wonder that, for thirteen years, it ruled the country with some policies aimed at including some disadvantaged groups in Brazil, though being able to do so by compromising with some society's traditional sectors.

Naturally, unlike in Egypt, the military represented the regime that was going downhill and, as such, could not claim the role of saviors against trumped-up enemies anymore (as they did when they took power in 1964). Rather, they were still influential actors of the transition who would need to negotiate their positions in other terms. Some authoritarian enclaves – the ghosts of the dictatorship – remained strong both in the law and in practice[50] as the outcome of constitutional compromises and the very context of years of dictatorship and the social disparities that have long been a feature of the Brazilian society, but no one can deny that that was a democratic moment that resulted in a constitutional moment.

Yet history proves itself more troubled, and democratic and constitutional moments are themselves an achievement that is fragile if not properly cared and if history does not become a memory to be always remembered. Those authoritarian legacies will, by the same token, do whatever it takes to regain their influence and rebuild their agendas, especially by strategically using the very constitution, its mechanisms and other strategies to unsettle constitutionalism.[51] By the same token, it will take advantage of any crisis, either political or economic, to reaffirm its quality of caretaker government to gradually lay the groundwork for reassuring the strength of its positions in the definition of the future. The events that took place after the transition to democracy in Brazil are evident examples of these movements that, while seeming to be heading forward, are commonly pushed backwards whenever they challenge that past. The question is, therefore, how they can effectively endanger that future.

3. BRAZILIAN DEMOCRATIC CRISIS AND ITS AUTHORITARIAN ORIGIN: HOW AN UNRESOLVED PAST MAY ENDANGER PRESENT AND FUTURE?

Politics and policy-making in Brazil have long been marked by diverse symptoms of democratic malfunction. Inequality (material, economic, and political), powerlessness of most parts of the population, widespread disenfranchisement, and a steep

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[50] See next section.

[51] LANDAU, David. Abusive Constitutionalism. **University of California-Davis Law Review**, vol. 47, p. 189-260, 2013.

gap between those who are to be represented ("The People") and their representatives are common features of Brazilian institutions even post-dictatorship, despite one of the most progressive and democratic Constitutions of the world. As two of us stated elsewhere, "the Brazilian political system (…) is being challenged because of its inability to dialogue with civil society", because it operates in a context in which "Brazilian institutions, in general, and the political class, in particular, have adapted themselves to make use of some antidemocratic practices that subvert the very idea of political representation", a reality that led us to conclude that "Brazilian democratic institutions (…) are still very fearful of the people they should represent."[52]

In this vein, lack of representativeness, illegitimacy, widespread disillusionment with the political class and political parties, economic turmoil, and an enduring and all-encompassing inequality make up a complex landscape within which democracy needs to operate in Brazil. Moreover, there are some new aspects to consider: the Brazilian political spectrum has been permanently agitated by calls to return to the past. That is the reason why the political scenario cannot be adequately understood if another component of Brazilian constitutional system is left behind. We are talking about the way the 1988 Federal Constitution (and the organs whose task is to enforce it, e.g. the Federal Supreme Court) deals with the country's authoritarian past.

As we said, Brazilian political life is witnessing a renewed desire for military rule. A desire to return to an age when politics was strictly controlled in a bipartisan system in which the government almost always had the majority in Congress, when Brazilians did not vote for President for more than 25 years, and when thousands of opponents were haunted, imprisoned, killed or forced to flee the country. Within social media tools, from Facebook and Twitter to radio's talk, and even in street demonstrations (small but innumerous), nostalgia for dictatorship and repression – and worry about the "democratic excesses" – have found a very powerful channel for their grievances. Many put their hopes in speeches of politicians such as Jair Bolsonaro (the far-right candidate who is one of the frontrunners in the next presidential elections[53]) and others of his kind.

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[52] BENVINDO, Juliano Zaiden; ACUNHA, Fernando José Gonçalves. Brazilian Democratic Decay and the Fear of the People, **International Journal of Constitutional Law Blog**, [s.l.], Jun. 24, 2017. Available at: <http://www.iconnectblog.com/2017/06/brazilian-democratic-decay-and-the-fear-of-the-people/>. Retrieved May 30, 2018.

[53] See: "Bolsonaro insists that, like Trump, he will lean on his strong social media following to get out his message to the millions of Brazilians fed up with spiraling violence, pervasive corruption and unwanted immigration. "I'm a threat to oligarchies, I'm a threat to the stubbornly corrupt, I'm a threat to those who want to destroy family values," he said. "That's the threat I represent." Brazil's middle classes have watched their status dwindle along with their income as the economy shrank almost 8 percent over the past two years, allowing Bolsonaro to tap a rich seam of anger and frustration. Budget cuts have weakened precarious public services and the country's unfathomable levels of violence have continued to rise, strengthening the appeal of his hard-line security policies. Amid the almost daily revelations of egregious corruption by the country's political elite, Bolsonaro's unblemished record on graft has only added to his appeal among a disenchanted electorate." (BILLER, David; DOUGLAS, Bruce. The Donald Trump of Brazil' Soars in the Polls. **Bloomberg**, Oct. 13, 2017. Politics.

Open languages and tones of homophobia, sexism, bigotry, and racism have become more pronounced[54] as part of a relentless war against "political correctness." Furthermore, there is a growing belief that democratic institutions are flawed, the courts are partial and used as political instruments,[55] and political parties are consistently weak and corrupt[56] (as generally well-known, political corruption is a real fact of public life in Brazil). It is no wonder that, since the country's transition to democracy, corruption has been: 1) "a challenge for each presidential administration,"[57], 2) the modus operandi of the fragmentary political system, and, to a certain extent, a reality also in the Brazilian judiciary.[58]

All of this feeds up calls for a new period of military rule (or "military intervention", as some demonstrators and enthusiasts insist to name it based on an evidently unconstitutional interpretation of Article 142 of the Constitution[59]). And we believe history has much to say here, because there is strong evidence in favor of a direct link between the way the new democratic regime inaugurated in 1988 dealt with its pre-constitutional past (or did not do so) and how such a past is being recast. Stating simply: The Constitution did not address the authoritarian period in a way it should have done; therefore, it left the door open for such an "authoritarian ghost," and the time to solve the question is now.

Available at: <https://www.bloomberg.com/news/articles/2017-10-13/ex-army-captain-rises-in-brazil-polls-as-threat-to-the-corrupt>. Retrieved June 9, 2018).

[54] See BARROSO, Luís Roberto; BENVINDO, Juliano Zaiden; OSÓRIO, Aline. Developments in Brazilian Constitutional Law: The Year 2016 in Review. **International Journal of Constitutional Law**, vol. 15, n. 2, p. 495-505, June 30, 2017. Available at: <https://doi.org/10.1093/icon/mox038>. Retrieved Jun. 11, 2018.

[55] Empirically, though, the Brazilian judicial system has been regarded as one of the most independent in Latin America. See HELMKE, Gretchen; RIOS-FIGUEROA, Julio. **Courts in Latin America**. Cambridge: Cambridge University Press, 2011, p. 19.

[56] HELMKE, Gretchen; RIOS-FIGUEROA, Julio. **Courts in Latin America**. Cambridge: Cambridge University Press, 2011, p. 19.

[57] POWER, Timothy J.; TAYLOR, Matthew M. Accountability Institutions and Political Corruption in Brazil. In POWER, Timothy J.; TAYLOR, Matthew M. (ed.) **Corruption and Democracy in Brazil**: The Struggle for Accountability. Notre Dame: University of Notre Dame Press 2011, p. 1.

[58] ALBERT, Richard; BENVINDO, Juliano Zaiden; RADO, Klodian; ZHILLA, Fabian. Constitutional Reform in Brazil: Lessons from Albania? **Revista de Investigações Constitucionais**, vol. 4, n. 3, p. 11-34, set./dez. 2017.

[59] Which declares: "The Armed Forces, made up of the Navy, Army and Air Force, are permanent and regular national institutions, organized on the basis of hierarchy and discipline, under the supreme authority of the President of the Republic, and intended to defend the Nation, guarantee the constitutional branches of government and, on the initiative of any of these branches, law and order." See BRAZIL. Constituição da República Federativa do Brasil, of October 5, 1988. **Diário Oficial da União**, Brasília, DF, Oct. 5, 1988. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>. Retrieved Jun. 12, 2018. "Interventionists" see an opening to military action based on the assumption that Article 142 disciplines the guarantee of "law and order". Since there is a "danger" to "law and order" stemming from the ongoing crisis, military leaders would be entitled to act, so the argument goes. We understand that it is a misperception, to say it softly, because a (not so difficult) textual interpretation of Article 142 reveals that the President of the Republic is the *commander-in-chief* of the Armed Forces, whose "intervention" is only possible upon a direct call from one of the branches of the government.

But what do we mean when we say that "the Constitution did not address the authoritarian period in a way it should have done" and what are the stakes? In terms of democratic transition, it is widely known that Latin America implemented in recent decades significant mechanisms of transitional justice that have contributed to the realization of human rights.[60] As a way of addressing the legacy of past violence and consolidation of democracy, the region is indicating, to some degree, its ability to deal with these specific problems.[61]

Brazil, however, lags behind some other countries in the region that have also endured dictatorships – like Chile, Uruguay, and Argentina –, where not only truth commissions have been created (as is the case of Brazil[62]), but also the review or repeal of amnesty laws laid down by military governments has led to the conviction of perpetrators of heinous crimes during those dictatorships. Here, an authoritarian past continues to scary democracy and is about to take its toll unless it is properly exorcised.

The Brazilian Constitution of 1988 chose a peculiar path. It is undeniable that it has devoted its core to the protection of human rights as fundamental rights (which are expressly deemed as unamendable clauses[63]). Besides that, throughout its provisions, it is easily perceived that it has also dedicated itself to protecting labor relations, to establishing a democratic system with checks and balances, to promoting health, education and other social, economic and cultural rights, to recognizing rights of indigenous populations, to eliminating gender inequality, and so forth. All of it was only possible because the society as a whole struggled to overcome more than 20 years of an authoritarian and repressive regime, a process that reached its climax precisely with the enactment of the very 1988 Constitution.

But it did not happen without resistance and eventual shortcomings. More than that, it only happened with compromises and the adoption of a mixed formula. It is worth remembering that the regime that lasted from 1964 to 1985 profited from a

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[60] BUNCE, Valerie. Comparative Democratization: Big and Bounded Generalizations. **Comparative Political Studies**, vol. 33, issue 6-7, p. 703-734, 2000.

[61] As a matter of fact, it is an undisputable success of the whole region to democratize itself, though it is equally undeniable the exclusivity of each situation in national processes. It does not mean this is a process free of critics. But this initial recognition is vital, for example, to understand the ways of transitional justice in South America, as in Brazil, and recently in the Arab Word, as in Tunisia and Egypt.

[62] In the same vein, Argentina is charging the perpetrators of crimes committed during the military regime; Chile is recognizing the right to effective politics of memory through, e.g. the construction of memorials; Colombia is investigating paramilitaries and guerrillas as part of the process of peace and justice; Peru is implementing collective reparations programs; and Guatemala is seeking to compensate their victims, just to name a few.

[63] See the 1988 Brazilian Constitution, art. 60, § 4th, IV (BRAZIL. Constituição da República Federativa do Brasil, of October 5, 1988. **Diário Oficial da União**, Brasília, DF, Oct. 5, 1988. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>. Retrieved Jun. 12, 2018).

strong support from society in most of its years.[64] The influence of groups that had enjoyed power during the military dictatorship was a force within the Constituent Assembly, as was the increasing participation of the organized civil society during the works of the same Assembly in 1987/1988.[65] As Andrei Koerner explains through the concept of "long Constituent Assembly", the new Constitution was initially a "transitory commitment" between opposing political forces present in the constituent works,[66] and the interpretation and the enforcement of the new Constitution was disputed from the very beginning. Privileged groups fought arduously to keep their positions in the new era, as it is the case of the members of the Federal Supreme Court and the Judiciary in general.[67] As they managed (at least partially) to maintain some of their privileges and powers, the author stresses that the progressive potential of the new Constitution was partly doomed. It was also the case of the military, whose influence is still present in the Brazilian constitutional democracy (though naturally reduced compared to the older constitutional order[68]). It is still visible in some spheres, e.g. the military nature of the police,[69] the maintenance and continued enforcement of the Amnesty Law,[70] among others.

[64] See CARVALHO, Alessandra. As Atividades Político-Partidárias e a Produção de Consentimento durante o Regime Militar Brasileiro. In: ROLLEMBERG, Denise; QUADRAT, Samantha V. (org.). **A Construção Social dos Regimes Autoritários: Legitimidade, Consenso e Consentimento no Século XX - Brasil e América Latina**. Rio de Janeiro: Civilização Brasileira, 2011, p. 219-250

[65] BENVINDO, Juliano Zaiden. The Forgotten People in Brazilian Constitutionalism: Revisiting Behavior Strategic Analyses of Regime Transitions, **International Journal of Constitutional Law**, vol. 15, issue 2, p. 332-357, Apr. 2017.

[66] KOERNER, Andrei. Os tempos da ordem constitucional – controle da constitucionalidade e continuidade legal na transição democrática no Brasil. In: SEMINÁRIO INTERNACIONAL "OS TEMPOS DO DIREITO: DIACRONIAS, CRISE, HISTORICIDADE", Brasília, 2016, p. 1-12.

[67] A paradox is evident: as the members of the Supreme Court managed to remain in office and preserved their powers (including the power to dictate the last word in constitutional matters), the new democratic Constitution would be mainly interpreted and enforced by agents coming from the authoritarian past. Such an outcome provoked enormous effects to a reasonable part of the Constitution, whose transformative potential was contained and repressed. For more details, see BENVINDO, Juliano Zaiden; ACUNHA, Fernando José Gonçalves. Tempos na atuação da jurisdição constitucional: A interpretação inicial do STF a respeito do Mandado de Injunção e as oportunidades que não voltam In: PAIXÃO, Cristiano; MARTINS, Argemiro Cardoso Moreira (org.). **Os tempos do direito**: diacronias, crise, historicidade. São Paulo, Max Limonad, 2019 (forthcoming).

[68] As Wendy Hunter writes, "Also, Brazilian politicians have not yet subjected the armed forces to institutionalized civilian control, an undertaking that would go well beyond contesting their influence over specific issues. While all politicians have a long-term interest in keeping the military at bay, individuals (especially legislators) are often reluctant to expend the political capital necessary to institute and sustain systematic civilian control" (HUNTER, Wendy. Politicians Against Soldiers: Brazil. **Comparative Politics**, vol. 27, n. 4, p. 425-443, jul. 1995, at p. 440).

[69] According to Maria Pia Guerra, the creation of a military police in every Brazilian state along with the militarization of various of its activities – like street patrolling –, was undertaken by the military government as a result of the National Security ideology. The 1988 Constitution maintained this model and crystalized this military component in everyday life of Brazilian society. See GUERRA, Maria Pia. Constituição e segurança pública: os desafios do arranjo federal. **JOTA**, May 31, 2018, Available at: <https://www.jota.info/opiniao-e-analise/artigos/constituicao-seguranca-publica-31052018#_ftnref2>. Retrieved Jun. 11, 2018.

[70] Law no. 6.683, of August 28, 1979 (BRAZIL. Lei n. 6.683, of August 28, 1979. Concede Anistia e dá outras providências. **Diário Oficial da União**, Brasília, DF, Aug. 28, 1979 Available at: <http://www.planalto.gov.br/ccivil_03/leis/L6683.htm?TSPD_101_R0=aebf6bccc0e5f0f6f1ef8655f44456e3n3300000000000000003f92b0bfffff000000

Such a mixed nature – combining, on one hand, a relative control over the transition by powerful groups and its continuous influence over the new regime with, on the other hand, a renewed democratic project and a stark reaction against authoritarianism from groups heavily active during the Constituent Assembly – reflected itself on the Constitution, whose very text shows well how this balance between democratic breakthroughs and compromises to keep untouched much of the past has been embedded in the Brazilian democracy.[71]

The Amnesty Law, its interpretation and enforcement are good examples of a past that insists to remain in place. Although the 1988 Constitution can be understood as an important reaction against authoritarian rule whose legitimacy was achieved during the constituent process due to the enormous participation of the civil society, the Supreme Court upheld the Amnesty Law as constitutional in the judgment of Allegation of Disobedience of a Fundamental Precept (*Arguição de Descumprimento de Preceito Fundamental – ADPF*) no. 153. The Court declared, among many other confusing arguments, that the Constitution was part of a "block of constitutionality" inaugurated by Constitutional Amendment no. 26 to the 1967 dictatorial Constitution, and, considering that such an Amendment did not revoke the law (it would have confirmed it instead), amnesty as enacted by the military should be deemed as compatible with the democratic constitutional order.[72]

More than a problem of constitutional compatibility, Raphael Peixoto de Paula Marques explains that it is a question of historical interpretation that is still in dispute and whose significance is enormous.[73] We think it is fair to say that reinterpreting the whole social struggle for amnesty, reassessing the Amnesty Law and recasting the his-

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0000000000000000000005b2b171a006802cd5f>. Retrieved Jun. 12, 2018). It has long been viewed as a legal instrument devoted to protecting (governmental) perpetrators of heinous crimes committed during the dictatorship. It was upheld as constitutional by the Supreme Court in 2010 in the decision of an allegation of disobedience of a fundamental precept (*Arguição de Descumprimento de Preceito Fundamental – ADPF*) no. 153, even though legal cases in the Supreme Court and in the Interamerican Court of Human Rights are still pending.

[71] Roberto Gargarella is a sharp critic of what he calls "mixed Constitutions". See GARGARELLA, Roberto. **Latin American Constitutionalism, 1810-2010**: The Engine Room of the Constitution, New York: Oxford University Press, 2013, p. 157-162. Though his theory works with the distinction between organic and dogmatic parts of the Constitution (the first one having the prevalence and partially determining the interpretation, the width and the depth of the new rights disciplined in the dogmatic part), it is possible to use it to understand the Brazilian Constitution. In its context, the past (more entrenched) has the upper hand in the definition of the future; it tends to suffocate what is new and to restrain provisions that could otherwise be used to change or at least destabilize the *status quo*.

[72] A detailed account of the logics behind the decision of ADPF no. 153 and a critic of the historical arguments used by the Court to justify it can be found at ACUNHA, Fernando José Gonçalves; BENVINDO, Juliano Zaiden. Juiz e Historiador, Direito e História: Uma Análise Crítico-Hermenêutica da Interpretação do STF sobre a Lei De Anistia. **Novos Estudos Jurídicos**, vol. 17, n. 2, p. 185-205, May/Aug. 2012, Available at: <https://siaiap32.univali.br/seer/index.php/nej/article/view/3967/2310>. Retrived Jun. 14, 2018.

[73] MARQUES, Raphael Peixoto de Paula. Anistia nos 30 anos da Constituição de 1988: passado, presente, futuro. **JOTA**, Jun. 14, 2018. Available at: <https://www.jota.info/opiniao-e-analise/artigos/anistia-nos-30-anos-da-constituicao-de-1988-passado-presente-futuro-14062018>. Retrieved Jun. 12, 2018.

torical events of the 1960's, 1970's and 1980's is an essential task to understand how the country sees itself and its own past; it is also very important to explain to present generations why such a past cannot return. As the author writes (free translation),

> *In this context, one could ask about the future of amnesty. The 30th anniversary of the 1988 Constitution may be a proper moment to reopen this debate. Recover the meaning of that social struggle for amnesty is an option to reaffirm the commitment to liberty and equality, principles that lie in the foundations of our constitutional text. At the institutional level, the debate remains open. There are pending lawsuits within the Supreme Court (ADPF no. 153 and 320) and the Interamerican Court of Human Rights (Vladmir Herzog case). Thereby, it is still necessary to deconstruct traditional metaphors about amnesty, (re)discussing and critically confronting the historical interpretation adopted by the Supreme Court about our past and the meaning of the 1988 Constitution.*

As it is the case of amnesty, history must always be a central theme when we discuss the meaning of the Constitution, especially on the verge of its 30th Anniversary. If the democratic text of 1988 is to be deemed as the main guide to the Brazilian society and to adequately perform its function as a settler of the parameters within which political struggles must be resolved, Brazilians need to pay attention to its own past and to the foundations of their three-decade-old democracy as a way to avoid regression and authoritarianism.

4. CONCLUSION

No one can deny that, after over thirty years of democratic life, Brazil has substantially changed for the better. The woes and evils that have long unsettle the Brazilian democracy are, however, still a hallmark of its constitutionalism: high rates of social and regional inequalities, entrenched social violence, and a political system that is unable to respond as legitimate representative of the people. In a sense, this conclusion illustrates the fact that a Constitution does matter – after all, no one will deny that a democratic transition that turned out to be a constitutional transition represents not only a symbolic achievement of a new era in Brazilian social life, but also serves as a reminder that, no matter what, the path towards democracy *has* to move forward towards more democracy and not the other way around. The authoritarian ghosts that up until now haunts the Brazilian reality, though inevitable due to the compromises that underpin it and the practices that stubbornly replicate the past into the very present, have at least to be disclosed and, as such, challenged by a learning process[74] that only a militant memory is capable of making us aware of.

[74] See HABERMAS, Jürgen. Constitutional Democracy: a Paradoxical Union of Contradictory Principles? **Political Theory**, vol. 29, n. 6, p. 766-781, Dec. 2001.

Constitutions – Przeworski had already said it –, "are neither sufficient nor necessary for democracy to survive,"[75] and can be easily reversed to become a tool to jeopardize democracy.[76] Moreover, as the experiences of Brazil and Egypt have shown us, popular movements can be used both to foster change and to defend the *status quo*. As they can lead to transforming realities by channeling demands into the political realm, they can also lead to co-opting these very demands in order to create a simulacrum of the change in favor of those who do not want any change. Constitutions thereby need more than the belief in its own capacity of democratizing a reality. It is a parchment[77] that aims to crystallize the future in the present, the promise in the law,[78] but it is no magic. When we celebrate the thirty years of the Brazilian Constitution, those ripening years that separate rebelliousness from wisdom, it is time for a call for a reflection on where we wish to stand in the following thirty years. And, for that, if it is to keep alive the democracy we have so hardly achieved despite its shortcomings, those following thirty years must be forward-looking while challenging the ghosts our memory cannot ever just let them go.

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[75] PRZEWORSKI, Adam. **Why Democracy Survives in Affluent Societies?** New York, Jan. 20, 2001, p. 18. Available at: <http://www.nyu.edu/gsas/dept/politics/seminars/whydemt.pdf>. Retrieved Jun. 14, 2018.

[76] LANDAU, David; DIXON, Rosalind. Constraining Constitutional Change. **Wake Forest Law Review**, vol. 50, p. 859-890, 2015.

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Transforming the legislative: a pending task of Brazilian and Colombian constitutionalism*

Transformando o legislativo: uma questão pendente dos constitucionalismos brasileiro e colombiano

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Abstract

The Constitutions of 1988 in Brazil and 1991 in Colombia have instantiated a complex process of transformative constitutionalism associated with the protection of rights, and the inclusion of minority groups. In spite of

Resumo

As Constituições do Brasil de 1988 e da Colômbia de 1991 deram início a um processo complexo de constitucionalismo transformativo associado à proteção de direitos e à inclusão de grupos minoritários. Apesar do papel

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the prominent role of the judiciary in these processes, it should be stated that these Constitutions recognized the importance of the legislative branch within the transformations they seek to achieve. The question that remains open is whether a strong intervention by the judiciary is instrumental to put the legislature back in shape and put it in tune with the transformation that both Constitutions seek to achieve. As this paper will show, despite the good decisions delivered when deciding particular cases, overall, transformative constitutionalism based on the prominent role of the Courts has not been that transformative in terms of reforming political institutions. In this sense, what this paper seeks to highlight is that, in order to develop an adequate theory on judicial review, it is crucial to truly identify the limitations of constitutionalism and what judicial review can and cannot do.

Keywords: transformative constitutionalism; representative democracy; judicial review; political institutions; comparative constitutionalism.

proeminente do Judiciário nesses processos, deve-se afirmar que essas Constituições reconheceram a importância do Poder Legislativo dentro das transformações que buscam alcançar. A questão que permanece em aberto é se uma forte intervenção do Judiciário é fundamental para colocar o Congresso de volta em forma e colocá-lo em sintonia com a transformação que ambas as Constituições buscam alcançar. Como este artigo mostrará, apesar das boas decisões tomadas ao decidir casos particulares, em geral o constitucionalismo transformador baseado no papel proeminente dos Tribunais não tem sido tão transformador em termos de reforma das instituições políticas. Nesse sentido, o que este artigo procura destacar é que, para desenvolver uma teoria adequada sobre o controle judicial, é crucial identificar verdadeiramente as limitações do constitucionalismo e o que o controle judicial pode e não pode fazer.

Palavras-chave: *constitucionalismo transformador; democracia representativa; controle judicial; instituições políticas; constitucionalismo comparado.*

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1. Introduction; **2.** Brazil 1988 and Colombia 1991: the establishment of value pluralism and the reinforcement of democracy; **3.** Transformative constitutionalism and Political Institutions; **4.** Conclusions and Final Remarks; **5.** References.

1. INTRODUCTION

The enactment of the Constitution of the Federative Republic of Brazil, in 1988, marks a starting point for a time of constitutional transformations in Latin America. This Constitution, issued in an environment of distrust in the established public powers, is considered as the beginning of an era of democratization in the country, in which the Federal Supreme Court has had an increased role in its responsibility of "*safeguarding the Constitution*"[1]. Almost in parallel with this, and within the same perception of institutional distrust, in 1991 Colombia adopted its new Constitution based on democratic values and the protection of a wide range of fundamental rights (not only the classical liberal but also social and economic), establishing the Constitutional Court as an institution entrusted with safeguarding "*the integrity and supremacy of the Constitution*"[2].

Although both countries share a long history of judicial review, after the 1988 and 1991 Constitutions, both the Federal Supreme Court in Brazil and the Constitutional Court in Colombia have had international recognition as agents of social change

[1] Constitution of the Federative Republic of Brazil. Art. 102.

[2] Political Constitution of Colombia. Art. 241.

within systems in which democratic values are threatened due to somehow dysfunctional political institutions. Notwithstanding this, there have been several objections made to these Courts in the context of pluralist and rifted democratic societies, in particular, regarding their capabilities of transforming the political institutions, rather than making by themselves most of the decisions of principle and public policy.

This paper will analyze if the Constitutions of 1988 in Brazil and 1991 in Colombia were aimed at disenfranchising the political representative institutions. As it will be seen through a brief study of the formation of these Constitutions and their main institutional designs, instead of this, they aimed at reinforcing such institutions, opening them to "the people". In spite of the above, Courts have had a central role in developing these Constitutions, and despite the good decisions delivered when deciding particular cases, overall, *transformative constitutionalism* based on the prominent role of the Courts has not been that transformative in terms of reforming political institutions. In this sense, what this paper seeks to highlight is that, in order to develop an adequate theory on judicial review, it is crucial to truly identify the limitations of constitutionalism and what judicial review can and cannot do.

2. BRAZIL 1988 AND COLOMBIA 1991: THE ESTABLISHMENT OF VALUE PLURALISM AND THE REINFORCEMENT OF DEMOCRACY

In 1985, after more than two decades of military rule in Brazil, the newly elected civilian government adopted a constitutional amendment empowering the next Congress to serve as a constituent assembly[3]. Through a process of deliberation which involved the participation of 13 political parties that conformed an Assembly of 559 members, on October 5, 1988, and within the framework of a slow and gradual process of transition to democracy called *abertura* (opening)[4], the new Constitution of the Federative Republic of Brazil was adopted. This constitutional process is highly valued by the idea of pluralism it implied, to the point that the 1988 Constitution is a highly complex document, which includes a long set of rights[5], and judicial injuctions. Its content also has "*a strong emphasis on human dignity (one of the constitution's fundamental principles), democratic rule, and a vast raft of fundamental rights, including a range of social and economic rights (although the text is silent as to whether they are justiciable)*"[6]. The

[3] Constitutional Amendment No. 26 of November 27, 1985.

[4] See, VIEIRA, Oscar Vilhena. The Descriptive Overview of the Brazilian Constitution and Supreme Court. In: VIEIRA, Oscar Vilhena (et. al.). **Transformative Constitutionalism:** comparing the apex courts of Brazil, India and South Africa, 2013. p. 75.

[5] Marmor has developed an argument stating that in divided societies which include value pluralism there is a strong tendency toward 'rights talk'. See, MARMOR, Andrei. On the limits of rights. In: MARMOR, Andrei. **Law in the Age of Pluralism**. Oxford Univeristy Press, 2007.

[6] DALY, Tom Gerald. **The Alchemists**: Questioning our Faith in Courts as Democracy-Builders. Cambridge: Cambridge University Press, 2017.

1988 Constitution has been regarded as being designed to weaken the executive and to strengthen the legislature and judiciary[7].

The judiciary, as established in the 1988 Constitution, "*checks both the legislature and the executive through the power of judicial review*"[8]. The Federal Supreme Court's review powers were enhanced by expanding access to an existing abstract review mechanism (the direct action of unconstitutionality)[9]. Notwithstanding the amplified role of the Court at the center of the constitutional order as being the "*guardian of the Constitution*"[10], said powers were established with recognition to the other public powers (specially the legislative), and even exercised, at least during early stages of the new charter, with caution and restraint.

One example of this can be seen in the 1988 Constitution's measure regarding legislative omission, contained in paragraph 2, article 103 of the constitutional text[11]. This provision, rather than encouraging the Court to determine the content of the lacking measure or get into public policy making, is aimed at the issuance of a declaration of unconstitutionality and a notification to the competent power for the adoption of the necessary actions. The judiciary is called to raise a 'red flag' when action is needed, but not to take action by itself[12]. In exercising this power,

> *[u]nlike the Hungarian Constitutional Court's energetic and expansive use in the early 1990's of its power to address legislative omission (before it fell out of favor with the judges), the Brazilian Supreme Court took a relatively cautious approach to its new power to address legislative omission, keeping to simple declarations that legislation was required to give effect to a constitutional provision*[13].

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[7] See, ROSENN, Keith. Separation of Powers in Brazil. **Duquesne Law Review**, Miami, v. 47, p. 839-870, 2009.

[8] ROSENN, Keith. Separation of Powers in Brazil. **Duquesne Law Review**, Miami, v. 47, p. 839-870, 2009.

[9] For a summary on judicial review in the Brazilian system, see: MALISKA, Marcos. The Brazilian Judicial Review. **Education & Science Without Borders**, Curitiba, vol. 6, n. 12, p. 54-57, 2015. As the author exposes, "*In the Brazilian constitutional system all judges have constitutional jurisdiction. In other words all judges have the power to declare a law unconstitutional. The declaration of unconstitutionality is made incidentally in the judicial case that is being analyzed. There is in Brazil the concentrated control of constitutionality too. In the concentrated control of constitutionality the Supreme Federal Court is the only competent organ of the judiciary to rule on the claim of unconstitutionality. These are called direct actions of the unconstitutionality in which the main claim (merit of action) is a declaration of unconstitutionality. In these lawsuits there is not proper case, only an abstract discussion if a law is not contrary to the constitution*".

[10] Constitution of the Federative Republic of Brazil. Article 102.

[11] Constitution of the Federative Republic of Brazil. Article 103. "*Paragraph 2. When unconstitutionality is declared on account of lack of a measure to render a constitutional provision effective, the competent Power shall be notified for the adoption of the necessary actions and, in the case of an administrative body, to do so within thirty days*".

[12] A similar process, was proposed in Colombian in the 1910 constitutional assembly, although a model of 'strong' judicial review was finally enacted.

[13] DALY, Tom Gerald. **The Alchemists**: Questioning our Faith in Courts as Democracy-Builders. Cambridge: Cambridge University Press, 2017.

In addition to this, it should be noted that the institutional design established in the 1988 Constitution gave great prominence to the legislative branch, which was entrusted with the power of regulating constitutional provisions through statutory lawmaking, thus recognizing the importance that Congress should have in the development of constitutional values[14]. In this sense, more than seeking to disenfranchise the political representative institutions, the Constitution aimed at confronting the previous hegemonic supremacy of the executive branch, in favor of a harmonious collaboration with the legislative branch which was in charge of regulating the content of the constitutional text, and with a Federal Supreme Court granted with renewed powers.

In the Colombian context, in 1991 a Constitutional Assembly, that enjoyed the support of the majority of society[15], was regarded as a "*consensual attempt to broaden democracy, as a means to confront a generalized state of political corruption and violence*"[16]. This Assembly became an icon of a peaceful transition, and the recognition of value pluralism that achieved an inclusive dialogue between different sectors of the Colombian society. Even guerrilla groups, indigenous and afro communities were given a seat at the Assembly. Furthermore, the M-19 –a former guerrilla group- won an important part of the Assembly seats[17]. The enacted constitutional text introduced a wide catalogue of rights[18], and new and more inclusive judicial procedures for the enforcement and protection of fundamental rights like the *acción popular*, *acción de grupo* and *acción de tutela* were adopted.

The institutional design adopted by the 1991 Constitution was complex: the Constitutional Court was created as a 'powerful court', but entrusted with an exhaustive list of functions such as judicial review of laws, judicial review on procedural grounds of constitutional amendments, and as a check on the executive branch during '*times of emergency*' (among others). In addition to this, said Court was entrusted with the fundamental rights adjudication, when undertaking the review of the expedite protection of such rights via *accion de tutela*[19], by other judges.

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[14] See, Constitution of the Federative Republic of Brazil. Articles 44-75.

[15] For a comprehensive account of this process see, LEMAITRE RIPOLL, Julieta. **El Derecho Como Conjuro.** Bogotá: Uniandes y Siglo del Hombre Editores, 2009.

[16] UPRIMNY YEPES, Rodrigo. Should Courts enforce Social Rights? The Experience of the Colombian Constitutional Court. In: COOMANS, Fons, (ed.). **Justiciability of Economic and Social Rights**: Experiences from Domestic Systems. Antwerpen-Oxford: Intersentia, 2006.

[17] In fact, it was the second political force at the Constitutional Assembly, just after the traditional liberal Party.

[18] Although the Constitutional text, in article 85, specified that just some rights would have immediate application (mostly classical liberal-individual rights) while the others, should be subject to legislative development. While the Colombian Constitution does not include a clause like article 103.2 of the Brazilian Constitution, the Court has developed almost every right in the Constitution, even in absence of legislative action, this has been controversial even within the Court, as can be seen in the concurring opinion of decision T-175 of 2013.

[19] Article 86 of the 1991 Colombian Constitution defines the tutela by stating that: "Every individual may claim legal protection before the judge, at any time or place, through a preferential and summary proceeding, for himself/herself or by whoever acts in his/her name, the immediate protection of his/her fundamental

However, one of the main aims of this Assembly was to rescue the legislative branch from the ostracism that it had under the 1886 Colombian Constitution, due to the excessive power given to the executive branch. In this sense, for instance, one of the delegates at the Constituent Assembly expressed that:

> *[t]he Legislative branch cannot transfer to the hands of another the power to make laws, due to the fact that it only has that power by delegation of the people (…) the legislative branch cannot transfer its power to another branch, it must be kept where the people bestowed it. In our country, the Executive branch through its famous extraordinary faculties expedites ninety percent of our statutes, such powers must disappear*[20].

Although both the Brazilian and Colombian Constitutions have instantiated a complex process of transformative constitutionalism associated with the protection of rights[21], and the inclusion of minority groups, it should be stated that both Constitutions recognized the importance of the legislative branch within this process, on the one hand, and empowered the Courts in its limited functions as "guardians" of the Constitution, on the other. The question that remains open is whether a strong intervention by the judiciary is instrumental to put the legislature back in shape[22] and put it in tune with the transformation that both Constitutions seek to achieve.

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constitutional rights when the individual fears the latter may be jeopardized or threatened by the action or omission of any public authority (...)".

[20] See, 1991 Constituent Assembly Records, Delegate Jaime Arias López (1991). At. Volume 80, p. 3.

[21] It is a highly contested issue, whether such transformation should be undertaken by the Court itself or by political institutions. For instance, Ruth Gavison has developed a critical assessment toward strong judicial activism aimed at 'social transformation'. See, GAVISON, Ruth. The Role of Courts in Drifted Democracies. **Israel Law Review**, vol. 33, n. 2, p. 216-258. 1999.

[22] David Landau, has argued that the Colombian Court has tried to do this in some decisions, basically in the decision C-816 of 2004. See, LANDAU, David. A Dynamic Theory of Judicial Role. **Boston College Law Review**, Boston, vol. 55, n. 5, p. 1501-1562. 2014. Also, the Colombian Constitutional Court, in a recent decision (C-332 of 2017) stated that deliberation in Congress is fundamental to the 1991 Constitution, and thus struck down part of the special process for the implementation of the peace agreement signed between the Colombian government and FARC guerilla, which limited congressional deliberation. Although this decision may be regarded as a good decision in terms of proctecting deliberation, several objections can be raised to the theory used by the Court to reach such decision, for instance see the dissenting opinion by Justice Alejandro Linares-Cantillo.
For a general objection to this theory of unconstitutional constitutional amendments, see: BENITEZ, Vicente. **Constitución Popular, No Judicial**: una teoría democrática del control de constitucionalidad de las reformas a la Constitución en Colombia. Bogotá, Legis, 2014 and GNECCO, Francisco; GARCIA, Santiago, La teoría de la sustitución: de la protección de la supremacía e integridad de la constitución, a la aniquilación de la titularidad del poder de reforma constitucional en el órgano legislative. **Revista Universitas**, vol. 65, No. 133, 2016. p. 59-103.

3. TRANSFORMATIVE CONSTITUTIONALISM AND POLITICAL INSTITUTIONS

Even though, both the Brazilian and the Colombian Constitutions aimed at strengthening the political process[23] and the legislative branch, most of the constitutional law literature continues to portray legislators, in theoretical studies, as self-interested individuals seeking only to win reelection and maximize their private interests. Thus, they are shown as not to be trustworthy of "the people", and even more, as individuals who can not take the Constitution and the values and rights it includes seriously[24]. Legislators are not only depicted as being vulnerable to the public opinion, as the result of being dependent on the electoral democratic process, but also Congress itself is shown as a dysfunctional institution worried only on bargaining on self-interest, but not in achieving the well-being of the citizens. Congress is shown as being unable to have discussions of principles, while the judiciary is a 'forum of principles'[25]. Perhaps, in countries like Colombia and Brazil, it is hard to undertake an empirical defense of legislatures[26], but it is worth considering that their Constitutions were not aimed at disenfranchising Congress as a political-representative institution, but rather to transform it into a pluralist forum that can truly exemplify their citizens, as well as the plurality that lies at the base of the population, cultures, and moral-political thought.

Even if both the Brazilian Federal Supreme Court and the Colombian Constitutional Court play a central role in the constitutional arrangements of both Constitutions, it must be acknowledged that Congress has not disappeared from constitutional designs. Congress, in a Constitution like the Colombian and the Brazilian "*is not a supreme institution*", it is limited by it, "*but this desirable limitation of the power of the legislature should not be taken to mean that is has lost its status as the best reflection within government of the source of political power- the people-*"[27]. There is an urgent need in constructing a narrative of Congress as an institution that, in the light of pluralism and disagreement, can

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[23] In a recent work on transformative constitutionalism, it has been argued how it is not circumscribed to the Global South, and also how the transformations it seeks to achieve are not limited to battles in Constitutional Courts. See, HAILBRONNER, Michaela. Transformative Constitutionalism: Not Only in the Global South. **American Journal of Comparative Law**, vol. 65, n. 3, p. 527-565, Nov. 2017.

[24] For a description on this assumption see: PARKER, Richard. **"Here, the People Rule"**: A Constitutional Populist Manifesto. Boston: Harvard University Press, 1994.; WALDRON, Jeremy. **Law and Disagreement.** Oxford University Press, 1999.; GARRET, Elizabeth; VERMEULE, Adrian. Institutional Design of a Thayeran Congress. **Duke Law Journal**, vol. 50, n. 5, 2001.

[25] DWORKIN, Ronald. The forum of principle. **New York University Law Journal**, vol. 56, n. 469, 1981.

[26] This argument is circumscribed to these particular contexts, provided that authors like Jeremy Waldron have also undertaken empirical defense of legislatures. See: WALDRON, Jeremy. **Law and Disagreement.** Oxford University Press, 1999; BAUMAN, Richard; KAHANA, Tsvi. **The least examined branch.** Cambridge: Cambridge University Press, 2006; WALDRON, Jeremy, **The Dignity of Legislation.** Cambridge University Press, 1999.

[27] GAVISON, Ruth. Legislatures and the Phases and Components of Constitutionalism. In: BAUMAN, Richard; KAHANA, Tsvi (Eds.). **The least examined branch.** Cambridge: Cambridge University Press, 2006.

truly respect the equality of all citizens by the democratic process of decision-making, by giving them the opportunity of having their interests equally considered[28] and by the same token giving them the possibility to influence the decision stage. Thus, there is a need to recover the willingness of citizens to engage in a deliberative process with those who they disagree, in the political arena and not only through litigation[29].

During the last decades, and due to the good particular results that judicial decisions have achieved[30], there has been very few scholarly interest in examining legislatures, and thinking on how they can be improved, in order to implement the values that were entrenched in highly plural and democratic Constitutions like the Colombian and the Brazilian. However, building an *aspirational* idea of Congress can instantiate a healthy discussion on the legal and constitutional reforms that are needed to put this institution back in shape.

Such depiction of Congress should depart from the same idea of value pluralism entailed by these Constitutions. As a result of such pluralism, the Constitution includes abstract and open-ended clauses that are undeniably *essentially contested concepts*[31]. As Marmor describes them, they are "*general constitutional provisions containing abstract moral-political principles*" which "*might be seen as a kind of vague and general framework, setting the language in which moral-political concerns need to be phrased, but leaving the content of the relevant expressions free for us to shape as we deem right at any given time*"[32]. Such approach leads to the question of who should shape those general constitutional provisions.

In a pluralist society committed with some form of equal distribution of political power[33], the answer seems to be in favor of the people themselves or through their elected and accountable representatives, in a deliberative scenario, under the rules of some epistemic procedures where political equality is guaranteed by openness of deliberation, and voting as aggregation comes after a careful public debate[34].

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[28] See, CHRISTIANO, Thomas. The Authority of Democracy. **The Journal of Political Philosophy**, vol. 12, n. 3, 2004.; and MARMOR, Andrei. Authority, Equality and Democracy. In: MARMOR, Andrei. **Law in the Age of Pluralism.** Oxford University Press, 2007.

[29] For a comprehensive account of this, see: MORTON, F.L.; KNOPFF, RAINER. **The Charter Revolution & The Court Party**. University Toronto Press, 2000.

[30] See, UPRIMNY YEPES, Rodrigo. Should Courts enforce Social Rights?: The Experience of the Colombian Constitutional Court. In: COOMANS, Fons, (ed.). **Justiciability of Economic and Social Rights: Experiences from Domestic Systems.** Antwerpen-Oxford: Intersentia, 2006.

[31] See, GALLIE, W.B. Esentially Contested Concepts. **Proceedings of the Aristotelian Society**, vol. 56, n. 167, 1955-1956. p. 167-198.

[32] MARMOR, Andrei. Meaning and Belief in Constitutional Interpretation. **Fordham Law Review**, vol. 82, n. 565, nov. 2013.

[33] See, MARMOR, Andrei. **Law in the Age of Pluralism**. Oxford University Press, 2007.

[34] ESTLUND, David (et. Al). The Place of Self-Interest and the Role of Power in Deliberative Democracy. **The Journal of Political Philosophy**, vol. 18, n. 1, 2010, p. 54-100.

It far exceeds the aim of this paper to provide a comprehensive description of what reforms should be undertaken as to have a well-ordered legislative branch. But a sound institutional design of Congress must arise as a truly deliberative institution which not only hears but also values the voices of the minority groups, of regional interests, and of the laymen. It should be an institution with clear and easy to understand rules of deliberation that not only enhances debate and allows the intensity of preference to be duly channeled, but also respects equality at the decision stage. The electoral arrangements should be constructed to allow elections to be truly ruled by the principle of one-person one-vote, and not to be distorted through the flow of money to politics[35]. Congress should be committed to deliberation, as Vermeule and Garret explain,

> *deliberation exploits the collective character of legislatures in ways that can, in principle, improve Congress's constitutional performance. Among the concrete benefits of deliberation are its tendencies to encourage the revelation of private information, to expose extreme, polarized viewpoints to the moderating effect of diverse arguments, to legitimate outcomes by providing reasons to defeated parties, and to require the articulation of public-spirited justification for legislator's votes […] In addition, deliberation makes congressional decision-making more accessible and transparent to the public, which increases accountability of the decision makers and may enhance the perceived legitimacy of the outcome[36].*
>
> *Also, a culture of accountability must be promoted among citizens, so that the self-interest of reelection can be connected to the broad interest of respect for the Constitution and people's rights.*

As some authors have pointed out, discussions at legislative level with the involvement of citizens and their representatives might instantiate a culture of tolerance among citizens. Jeremy Waldron has stressed this argument by following the thoughts of the philosopher Bernard Williams and pointing out the difference between *being able to say to a losing opponent, "Well, you lost" and saying to him, "You were wrong" or "You were proved wrong." The former saying, "Well you lost," is compatible with recognizing his position as honest and honorable; it's like saying, "Better luck next time."[37]*. In his view, the first attitude, being associated with the democratic and majoritarian procedures,

[35] In the Brazilian context, Roberto Unger has called for an urgent reorganization of electoral politics, and the empowerment of the Civil Society. See, UNGER, Roberto Mangabeira. **Democracy Realized: the progressive alternative.** New York: Verso, 2001.

[36] GARRET, Elizabeth; VERMEULE, Adrian. Institutional Design of a Thayeran Congress. **Duke Law Journal**, Vol. 50, No. 5, 2001.

[37] This argument is taken from a lecture delivered by Jeremy Waldron, Forthcoming in Spanish: WALDRON, Jeremy. Control de Constitutionalidad y Legitimidad Política. **Díkaion**, Vol. 27, No. 1, 2018.

and the last one being more common with 'moral victories' within the process of interpretation of abstract terms by courts, a process that might send a message that such decisions might be reached *in a sort of timeless fashion, declaring a timeless moral truth, as it were;* with the problem for civil tolerance, that *such a message conveys to the losing party that it has got its profound moral principles wrong*[38]. Although these arguments are not conclusive, they should give us some pause as for thinking on courts as the sole agents in the application of a transformative constitution, -usually ruling in highly divided societies, aiming at reconciliation and at a higher level of tolerance and civility- and should call for more attention to improve the shape of representative institutions like legislatures.

After these brief considerations on the role of Congress in the context of constitutionalism, it is important to ask whether the strong intervention of the Courts, by means of judicial review, that has been the consequence of both the Brazilian and Colombian 1988 and 1991 constitutions, respectively, can be helpful for shaping a 'healthy legislature'. Sometimes it is assumed that a strong substantial intervention by Courts will improve the quality of legislative outcomes, provided that "*if legislators know in advance that a piece of legislation they seek to enact is likely to be struck down as unconstitutional, they would refrain from trying to enact it*".

However, as Garret and Vermeule explain, "*that it is just not necessarily, or even typically, the case; scholars have long pointed out that legislators often go ahead with an act they expect to be struck down as unconstitutional because it gives them the populist political benefit vis-à-vis their constituents without actually bearing the responsibility for the unwanted consequences of the proposed legislation*"[39]. In this sense, critics of judicial review doubt that substantive judicial intervention is good for putting back into shape a dysfunctional legislative institution. For instance, Tushnet has argued that since legislators act in the in the court's shadow, "*we really cannot know how Congress would perform if the courts exited, if Congress does badly because the Courts are on the scene*"[40].

On the other hand, Marmor also questions this possibility, based on the fact that unconstitutionality is not regarded as a sanction on the legislature, and therefore it does not deter Congress from proposing and enacting questionable measures, thus opening the doors for openly unconstitutional and populist proposals. At the end, following Marmor's observations, a strong intervention from the constitutional courts can promote the disenfranchisement of a culture of political accountability, based

[38] MARMOR, Andrei. Constitutional Interpretation. **USC Law and Public Policy Research Paper**, Los Angeles, vol. 4, n. 4, 2004.

[39] MARMOR, Andrei. Randomized Judicial Review. **USC Law Legal Studies Paper,** Los Angeles, vol. 15, n. 8, 2015.

[40] TUSHNET, Mark. **Taking the Constitution Away from the Courts.** Princeton University Press, 2000.

on constitutional grounds[41]. Furthermore, even defenders of judicial review, as Waluchow, call the attention on the need to undertake reforms to improve the legislative branch, and not to solely rely on the decisions of courts, even if they might yield good decisions[42].

Other accounts, which favor judicial review, but take a modest approach towards the changes it can achieve[43], highlight that judicial intervention can be instrumental to strengthen the democratic decision making, and even fortify the representative institutions as the legislatures. Hart Ely, for example, argued that judicial review could be used as a guardianship on the existence conditions of laws[44], and especially in the deliberative conditions that a representative democracy needs, like the inclusion of the minorities in the debates and decision-making on topics that certainly affect them[45]. In a case-based study of new democracies, including Brazil and Colombia, Daly has shown that this assertion is not conclusive, but that even said courts themselves cannot achieve all the changes needed for a well-shaped democracy there are some steps that these courts can help to take toward democratization[46].

Therefore, the question on whether constitutional courts are good at promoting deliberation and democracy, is a contested matter, but a constitutional court can be regarded as an *antidote* to the pathologies of the democratic process[47], and therefore, as having a limited role as to be in charge of reviewing the existence conditions of the laws, and undertaking a procedural review of the legislature, but not as a mere

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[41] See, MARMOR, Andrei. Randomized Judicial Review. **USC Law Legal Studies Paper,** Los Angeles, vol. 15, n. 8, 2015. This argument is also developed by BRADLEY THAYER, James. The Origin and Scope of the American Doctrine of Constitutional Law. **Harvard Law Review**, vol. 7, n. 3, Oct. 25, 1893.; GARRET, Elizabeth; VERMEULE, Adrian. Institutional Design of a Thayeran Congress, **Duke Law Journal**, Vol. 50, No. 5, 2001.

[42] WALUCHOW, Wilfrid. **A Common Law Theory of Judicial Review:** The living Tree. Cambridge Studies in Philosophy and Law. 2009.

[43] Some authors, like Richard Fallon Jr. have portrayed judicial review, as an additional check that might improve the protections of rights. However, this account of judicial review, does not deny the need of a strong legislature, as a forum where rights can also be defended and protected. See, FALLON, Richard. The Core Of An Uneasy Case For Judicial Review. **Harvard Law Review**, vol. 121, n. 7, May, 2008.

[44] ADLER, Matthew; DORF, Michael. C. Constitutional Existence Conditions and Judicial Review. **Virginia Law Review**, vol. 89, n. 6, 1105-1202, Oct. 2003.

[45] See, HART ELY, John. **Democracy and Distrust**. Harvard University Press, 1980.

[46] DALY, Tom Gerald. **The Alchemists**: Questioning our Faith in Courts as Democracy-Builders. Cambridge: Cambridge University Press, 2017.

[47] Some authors have argued that this antidote can be dangerous for pluralist and democratic societies, provided that judges may use their powers to favor some sort of status-quo, rather than to empower disenfranchised groups. The role of judges, briefly described here is modest, and restrained, and the interventions hereby proposed are more in the context of the "non-core" cases that Waldron exemplifies in The Core of the Case against Judicial Review. For this discussion see: MORTON, F.L.; KNOPFF, RAINER. **The Charter Revolution & The Court Party**. University Toronto Press, 2000.; MANDEL, Michael, **The Charter of Rights and the Legalization of Politics in Canada**. Thompson Educational Publishers, 1994.; MANDEL, Michael. A Brief History of the New Constitutionalism, or "How We Changed Everything So that Everything Would Remain the Same. **Israel Law Review**. vol. 32, n. 2, 1998.

review of formalism, but also as making sure that the rules of deliberation[48], and the inclusion of the minorities and disenfranchised groups are met. Those are minimal conditions of a pluralist democracy, as the one aimed by both the Brazilian and Colombian Constitutions.

As a result, in Constitutions like the Brazilian and the Colombian, the role of judges should be aimed at the transformation of the legislative branch[49], not as to disappear it or to disenfranchise it from the discussions on questions of principle, rights and public policy, but rather to promote the conditions of deliberation in the political branches, and to truly transform it into a pluralist, and politically accountable forum where the discussions needed in the context of the transformative constitutionalism can take place. It has been a long-contested issue whether courts can bring about social change[50], but even when the answer to this issue goes to the court's side, it is uncontested that legislatures are also needed in the process of achieving a true and lasting social change. First, because they are instrumental to open spaces where decisions are taken in the midst of a pluralist assembly, that reflects the differences and the diversity of societies, and that at the end are accountable to the citizens[51]. Legislatures in well shape, can promote deliberation not only at the elected representatives level, but also at the

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[48] A similar argument, was put forward by Dorf and Sabel, who described that judicial review could serve democracy by giving *fewer definitive answers to legal, social, and ultimately political questions while inquiring into more of the political actors' own deliberative capacities.* Thus, they proposed judicial review to be exercised as a *review of the admissibility of the reasons private and political actors themselves give for their decisions, and the respect they actually accord those reasons: a review, that is, of whether the protagonists have themselves been sufficiently attentive to the legal factors that constrain the framing of alternatives and the process of choosing among them.* DORF, Michael C.; SABEL, Charles F. A Constitution of Democratic Experimentalism. **Columbia Law Review**. vol. 98, n. 2, Mar, 1998.

[49] This approach also demands restraint and humility from the Courts, provided that, as Daly (2017) states, a strong judicialization of politics "*should not glibly be taken as a sign of a positive democratization trajectory, it can just as easily signal deep-rooted problems in a state's democratic development*", it is preferable to have some deference toward the political process self-regulations, as Garret (2002) explains "*judicial decisions that establish the structure of parties are problematic because courts constitutionalize the policy choices they make, even though those choices are not necessarily compelled by the Constitution*". This deference is justified, for example, when the political powers show that they are capable of protecting dissent and minorities, as recently happened in Colombia with the enactment of a statute protecting political opposition, which was upheld by the Court in decision C-018 of 2018.

[50] See, RODRÍGUEZ GARAVITO, Cesar; RODRÍGUEZ FRANCO, Diana. **Cortes y cambio social**: cómo la Corte Constitucional transformó el desplazamiento forzado en Colombia. Colección Dejusticia, 2010.; BONILLA, Daniel (ed.). **Constitucionalismo del Sur Global.** Bogotá: Siglo del Hombre Editores. 2015. More critical views are pointed out in the following: GARGARELLA, Roberto. **La Sala de Máquinas de la Constitución**: dos siglos de constitucionalismo en América Latina (1810-2010). Buenos Aires: Katz Editores, 2015.; DALY, Tom Gerald. **The Alchemists**: Questioning our Faith in Courts as Democracy-Builders. Cambridge: Cambridge University Press, 2017.; ROSENBERG, Gerarld. **The Hollow Hope**. University of Chicago University Press, 2008.

[51] As Gavison, states Courts can help strengthen political institutions, if they "are there to strengthen accountability, but their functioning should not undermine the effectiveness of government. Furthermore, political, non-judicial forces should have a large role in strengthening the "accountability" side of government and legislatures". See, GAVISON, Ruth. The Role of Courts in Drifted Democracies. **Israel Law Review**, vol. 33, n. 2, p. 216-258. 1999.

laymen level, thus promoting a democratic culture where the questions of principle and public policy are opened to all the persons affected by them and not only to elites of either politicians or jurists.

Latin-American scholars have pointed out how the constitutions regarded as transformative have not been so ambitious in reshaping the political institutions[52]. In spite of the rich catalogue of rights that they have included, and the positive role that they claim from the State as to make them available for all citizens, the organic structure of these constitutions remains similar to the one that the constitutionalism from the XIX century promoted. However, this process of transformation should also be taken to the organic level, and perhaps more efforts should be made to rescue the legislative branch, as a forum where the content of these rights, and social changes could be achieved, in light of an inclusive deliberation among equals[53], where the representatives of the people are free to speak without unwanted interruptions or intimidations, by arguments justified with reasons, and where equal respect and consideration is paid to the multiple arguments that are presented[54].

An objection to these arguments can be raised by stating that not only by writing positively about Congress will things become better. To this objection it should be replied, that knowing the limitations of the capabilities of courts in processes of democratization, and transformation of political institutions can help to construct realistic demands on the Courts role, and to acknowledge that *the political branches are at least as crucial to the functioning of democracy as are the courts*[55]. Also, in a theorethical level, the fact that a conception of democracy is hard to achive, does not entail that as a matter of principle it should be deemed as wrong[56].

4. CONCLUSIONS AND FINAL REMARKS

As a modest conclusion, and even if it sounds as a truism, it should be stated that both the Brazilian and the Colombian Constitutions aimed at transforming their legislative institutions into pluralists, and deliberative forums, accountable to citizens,

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[52] GARGARELLA, Roberto. **La Sala de Máquinas de la Constitución**: dos siglos de constitucionalismo en América Latina (1810-2010). Katz Editores, 2015.

[53] Although some bargaining and compromise is inevitable in these legislative scenarios, there are devices of institutional design in order to put these situations in favor of weak political parties, such as by the establishment of super majorities in decisions that are highly valuable and sensitive.

[54] STEINER, Jurg. Citizens' Deliberation and Human Rights. In: SAUL, Mathew, Follesdal Andreas; ULFSTEIN, Geir (eds.). **The International Human Rights Judiciary and National Parliments**. Cambridge University Press, 2017.; STEINER, Jurg; JARAMILLO, Maria Clara; MAIA, Rousile; MAMELI, Simona. **Deliberation Across Deep Divisions**. Transformative Moments, Cambridge University Press, 2016.

[55] GAVISON, Ruth. The Role of Courts in Drifted Democracies. **Israel Law Review**, vol. 33, n. 2, p. 216-258. 1999.

[56] ESTLUND, David. Epistemic Proceduralism and Democratic Authority. In: GEENES, Raf; TINNEVELT, Ronald (eds.). **Does Truth Matter? Democracy and Public Space**. Springer: Dordrecht, 2008.

and capable of undertaking discussions of rights and principle. Even if the empirical situation does not favor this aspiration, there is an urgent need to rescue the legislatures and put them back in good shape, since they are institutions that can channel the voices of pluralist and diverse groups when deliberation is taken seriously. Also, it is hard to rescue the legislative branch from the ostracism if it is shown as a dispensable branch of government, a perception that can be easily exacerbated if most of the discussions on principle, rights and even public policy are made by the judiciary.

There is obviously a need to undertake legal reforms that strengthen political parties, aimed for example at the promotion of the participation of minority parties and social groups, and to guarantee the openness and honesty in political campaigns and congressional deliberation. Perhaps the role of the Brazilian and Colombian Courts in this transformation is better played by being the guardians of the rules of deliberation, by taking actions to promote pluralism, and by promoting the discussion among equals at the legislature, as a modest antidote to the dysfunctionality of such branch, than by making most of the decisions of principle, rights and public policy.

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Constitutional amendments and constitutional core values: the Brazilian case in a comparative perspective

Emendas constitucionais e valores constitucionais fundamentais: o caso brasileiro em uma perspectiva comparativa

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Abstract

The debate over the exercise of primary and secondary constituent power is a long-lasting one and is grounded on positions diverging according to the interpretation of constitutionalism and democracy, and to the conception of constitution's flexibility. In order to safeguard the sacrality of the fundamental Charter at the same time ensuring its flexibility, framers, moreover after WWII, entrenched therein both specific procedures for the exercise of the secondary constituent power and clauses for the protection of constitutional fundamentals. After the exhaustion of the primary constituent power, a relevant role has been played by Supreme Courts, which ensured the enforceability of the abovementioned clauses and procedures, and, in some cases, inferred them in the lack of explicit constitutional provisions. The Brazilian Supremo Tribunal Federal (STF) is among those Courts which had to infer their competence in reviewing constitutional amendments from the unamendability clauses

Abstract

O debate sobre o exercício do poder constituinte originário e derivado é duradouro e se baseia em posições divergentes de acordo com a interpretação do constitucionalismo e da democracia, e com a concepção da flexibilidade da Constituição. A fim de salvaguardar a sacralidade da Carta fundamental, assegurando ao mesmo tempo a sua flexibilidade, os seus fundadores, principalmente após a Segunda Guerra Mundial, incluíram procedimentos específicos para o exercício do poder constituinte derivado e cláusulas sobre a proteção dos valores constitucionais fundamentais. Após o esgotamento do poder constituinte originário, uma função relevante foi desempenhada pelos Supremos Tribunais, o que garantiu a aplicabilidade das cláusulas e procedimentos acima mencionados, e em alguns casos identificou-os diante da falta de disposições constitucionais explícitas. O Supremo Tribunal Federal brasileiro (STF) está entre os tribunais que tiveram que inferir sua competência de controlar a constitucionalidade de emendas constitucionais a

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entrenched in the Charter. The analysis, in a comparative perspective, of the STF's activism is the focus of this article.

partir das cláusulas pétreas consagradas na Constituição. A análise do ativismo do STF numa perspectiva comparativa é o âmago deste artigo.

Keywords: constitutional amendments; constitutional core values; Supreme Federal Court; power of judicial review; judicial activism.

Palavras-chave: *emendas constitucionais; valores constitucionais fundamentais; Supremo Tribunal Federal; controle judicial de constitucionalidade; ativismo judicial.*

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1. Constitutional amendments, unamendability clauses and constitutional core values; **2.** Judicial activisms and constitutional unamendability: a comparative perspective; **3.** The uncertain unamendability of 1988 Brazilian Constitution; **3.1** Unamendability in the interpretation of the *Supremo Tribunal Federal*; **4.** Concluding remarks; **5.** References.

1. CONSTITUTIONAL AMENDMENTS, UNAMENDABILITY CLAUSES AND CONSTITUTIONAL CORE VALUES

The debate over the exercise of primary and secondary constituent power[1] is a long-lasting one and is grounded on different interpretations of constitutionalism and democracy. The sacrality – and consequent unamendability – of the constitutional Charter John Locke entrenched in 1660 Carolina's Constitution opposes to Edmund Burke's conception that the lack of tools for ensuring flexibility endangers the possibility of preserving the Constitution. In a nutshell, building on Burke, if no rules for modifications are provided, then the whole text can be legally modified through the ordinary legislative procedure. This has been the case, i.e., of the 1848 Italian Albertine Statute, defined perpetual and irrevocable in the Preamble. In name of such a rigidity the progressive evolution toward parliamentarianism, able to subject the Executive to the control of the Parliament and not of the King, was rejected in theory by conservationists[2] and in practice when the King literally interpreted its power to 'appoint and revoke *his* ministers' (art. 65) and appointed Mussolini as Prime Minister. Nevertheless, the lack of amending procedure allowed henceforth Fascism to change the institutional structure as well as the bill of rights through the ordinary legislation formally respecting the legality.[3]

In order to allow for constitutional 'maintenance', clauses on flexibility have been therefore progressively introduced in Constitutions, moreover since the end of

[1] This distinction was elaborated at first in SIEYES, E. J. **Qu'est-ce que le Tiers état?**. Paris: Boucher, 2002, distinguishing between *pouvoir constituant* (constituent power) and *pouvoir constitué* (constituted power).

[2] SONNINO, Sidney. Torniamo allo Statuto. **Nuova Antologia**, 151, p. 9-28, 1897.

[3] See BIN, Roberto. Rigidità della Costituzione. Flessibilità degli intellettuali. In: CORTESE, Fulvio (Coord.), **Liberare e federare: l'eredità intellettuale di Silvio Trentin**. Firenze: Firenze University Press, 2016, p. 25-36, p. 29.

WWII, through the definition of specific procedures for the exercise of the secondary constituent power. The complexity of these procedures can greatly vary according to the required majorities, *quora* and time delays, but they generally aim at ensuring that fluctuant majorities cannot drastically modify the Constitution though safeguarding a certain degree of flexibility for constitutional maintenance.[4]

Furthermore, through these procedures constitutional identity can be reinterpreted[5] without recurring to the exercise of the primary constituent power, by its own nature *extra legem*.[6] In order to control this reinterpretation, however, in some constituent experiences framers have vaguely declared the unamendability of 'spirit' of the Constitution. A choice still allowing for great margins of interpretation because 'the spirit of the constitution is, in fact, unlikely to be encapsulated in single words […]. Rather than requiring a predetermined meaning, the 'spirit' of the Constitution admits shifts of meaning'.[7] A reference to the 'spirit' can be found, for instance, in art. 152 of the 1992 Constitution of Estonia, recognizing to the Supreme Court the power to annul 'any law or other legislation that is in conflict with the provisions and spirit of the Constitution'. Similarly, art. 116 of the 1990 Constitution of Nepal stated the impossibility to introduce amendments violating the 'spirit of the Preamble'. The vagueness and multifaceted meaning of the latter allowed the Supreme Court to enforce its own interpretation of such a spirit and 'legally put down any rebellion against judicial authority'.[8] In other constituent experiences, instead, framers identified constitutional identity and preserved it through clauses pinpointing those sacred – and therefore unamendable[9] through the exercise of the secondary constituent power – provisions and/or concepts representing the constitutional core values. This is the case, i.e., of the 1948 Italian

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[4] On the different procedures for constitutional amendments and on their consequences on constitution's flexibility, see ROZNAI, Yaniv. Amendment Power, Constituent Power and Popular Sovereignty. Linking Unamendability and Amendment Procedures. In: ALBERT Richard; CONTIADES Xenophon; FOTIADOU Alkmene (Coord.). **The Foundations and Traditions of Constitutional Amendment**. Oxford: Hart, 2017. p. 37. As Richard Albert underlines, there can be also countries providing nuanced procedures according to the relevance of the provisions to be amended (ALBERT, Richard. Introduction. The State of the Art in Constitutional Amendment. In: ALBERT, Richard; CONTIADES Xenophon; FOTIADOU Alkmene (Coord.). **The Foundations and Traditions of Constitutional Amendment**. Oxford: Hart, 2017. p. 9).

[5] On this point see ROZNAI, Yaniv. Unamendability and the Genetic Code of the Constitution. **New York University Public Law and Legal Theory Working Papers**, New York, Paper 514, 2015. p. 26; DIXON, Rosalind. Amending Constitutional Identity. **Cardozo Law Review**, vol. 33, p. 1847, 2011-2012; ROSENFELD, Michel. **The Identity of the Constitutional Subject**: Selfhood, Citizenship, Culture, and Community, London: Routledge, 2010.

[6] See KAY, Richard S. Constituent Authority. **American Journal of Comparative Law**, vol. 59, p. 715, 2011.

[7] See PINELLI, Cesare. The Concept and Practice of Judicial Activism in the Experience of Some Western Constitutional Democracies. **Juridica International**, vol. XIII, p. 32, 2007.

[8] STITH, Richard. Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal's Supreme Court. **American University International Law Review**, vol. 11, n. 1, p. 47-77, 1996.

[9] The effects of entrenching unamendable provisions have been highlighted in ALBERT, Richard. Constitutional Handcuffs. **Arizona State Law Journal**, vol. 42, n. 3, p. 663, 2010, underscoring their preservative, transformational or reconciliatory role. A further elaboration on these characteristics is proposed in ROZNAI, Yaniv.

Constitution, prohibiting the amendment of the republican form of government (art. 139). Finally, in some countries Supreme Courts have inferred from the Charter implicit limits to constitutional amending power and have assigned to themselves the power of controlling the compliance with them. The most noteworthy and renowned of such Court is the Supreme Court of India, whose experience is discussed below.

Such a power of judicial review of constitutional amendments raises thorny issues moreover given an increasing judicial activism in the interpretation of the (explicit or implicit) criteria for assessing the constitutional amendments' unconstitutionality.[10] First, the classical counter-majoritarian objection,[11] roughly based on the unlimited supremacy of the Parliament in name of the respects of the principles of democracy and of people's sovereignty, contests the possibility to vest a non-elected institution with the power to control the will of the (elected) representatives of the people. Conversely, it has been argued that some limits should be imposed for the preservation of the constitutional order; as Cappelletti puts it, 'Constitutions express the positivization' of higher values; judicial review is the method for rendering such values effective'.[12] Second, it can be questioned whether this non-elected institution has to exert it only on the formal and procedural aspects or may substantively intervene in investigating the content of constitutional amendments. It is a relevant issue, given the cases of constitutional amendments infringing the core values of the Charter,[13] and/or representing a constitutional dismemberment,[14] although they formally respect the rules and procedures.

These issues animated a vivid debate also in Brazil. Here, in the framework of a lengthy and detailed Charter providing also a complex system of judicial review of legislation, the Brazilian *Supremo Tribunal Federal* (Federal Supreme Court, henceforth also STF) showed its , with regard to activism in the interpretation of the *clausulas petreas* (petrous clauses) preserving several constitutional features from amending power.

Unamendability and the Genetic Code of the Constitution. **New York University Public Law and Legal Theory Working Papers**, New York, Paper 514, 2015.

[10] On this point, see GÖZLER, Kemal. **Judicial Review of Constitutional Amendments**: A comparative study. Istanbul: Ekin, 2008.

[11] The counter-majoritarian argument has allowed the development of a vast literature. Here, it would suffice to mention the seminal work of BICKEL, Alexander. **The Least Dangerous branch**. The Supreme Court at the bar of politics. New Haven: Yale University Press, 1962.

[12] As CAPPELLETTI, Mauro. **The judicial review in the contemporary world**. Indianapolis: Bobbs-Merrill, 1971, p. x.

[13] BARAK, Ahron. Unconstitutional Constitutional Amendments. **Israel Law Review**, vol. 44, n. 3, p. 321-341, 2011; ROSNAI, Yaniv. **Unamendable Constitutional Amendments**. The Limits of Amendment Powers. New York: Oxford University Press, 2017; ORAN, Doyle. Constraints in Constitutional Amendment Power. In: ALBERT Richard; CONTIADES Xenophon; FOTIADOU Alkmene (Coord.). **The Foundations and Traditions of Constitutional Amendment**. Oxford: Hart, 2017. p. 74-81.

[14] ALBERT, Richard. Constitutional Dismemberment. **Boston College Law School – Legal Studies Research Paper**, Boston, Paper 424. 2016.

In this article, therefore, the case of the STF is compared with other Courts' judicial activism for the protection of constitutional core values.

2. JUDICIAL ACTIVISM AND CONSTITUTIONAL UNAMENDABILITY: A COMPARATIVE PERSPECTIVE

When interpreting provisions or the intent of Charter's authors 'the more a judge feels himself free, in such circumstance, to give the text further meaning, the more he is considered 'activist'.[15] Activist courts may therefore de facto amend the Constitution, somehow challenging the constituent power of framers, by radically changing the literal interpretation of provisions.[16] The Canadian doctrine of the Constitution as a living tree enhancing the interpretation of the protection of rights far beyond the literal meaning of constitutional provisions[17] is a good example of such a judicial freedom.

Furthermore, in those legal systems explicitly providing it, Courts may also challenge the secondary constituent power by extensively interpreting their power of judicial review of constitutional amendments. In Turkey, for instance, in spite of the content of art. 148 of 1982 Constitution assigning to the Constitutional Court the power to control constitutional amendments only with regard to the respect of amending procedures, a substantive check has been operated when judges behaved constitutional core values in danger. Indeed, in 2008[18] the Court has used its power to strike down an amendment to art. 10 and 42, which would have enabled the wearing of headscarves in universities, on the grounds that it infringed the unamendable principle of the secular state.[19]

With regard to the challenges to secondary constituent power, as said before, the Supreme Court of the Union of India is the one which proved the greatest judicial activism, as it not only self-recognized the power of judicial review of constitutional amendments, but used it to wage war against the Executive's interpretation of the

[15] See PINELLI, Cesare. The concept and practice of judicial activism in the experience of some western constitutional democracies. **Juridica International**, vol. 13, p. 31, 2007.

[16] This however does not make irrelevant the provision of the mentioned procedures for constitutional amendments, as they safeguard the adherence to the rule of law and to the constitutional transparency. See DIXON, Rosalind. **Constitutional Amendment Rules**. A Comparative Perspective. Cheltenham: Elgar, 2011, p. 98.

[17] This doctrine was used for the first time ever in the famous 1929 'Person's case', when the Privy Council, at the time Court of last resort for Canada, recognized women's right to be appointed at the Senate on the ground that, in spite of a clear mention of women as qualified persons, the provision had to be progressively interpreted in order to include also women. Since then, the doctrine has been diffusely used in Canadian jurisprudence although contrasted by the originalist point of view. On this debate, see: MILLER, Bradley W. Beguiled by Metaphors: The "Living Tree" and Originalist Constitutional Interpretation in Canada. **Canadian Journal of Law & Jurisprudence**, vol. 22, n. 2, p. 331-354, 2009.

[18] See Constitutional Court of Turkey, 5 June 2008, n. 2008/116, Resmi Gazete 27 032 (Oct. 22, 2008).

[19] According to art. 4 of 1982 Turkish Constitution, art. 1 to 3, protecting a number of principles such as the rule of law, Ataturk's nationalism, secularism, state integrity and republicanism, are unamendable.

directive principles entrenched in the 1949 Union's Constitution. At the beginning, the Court used its power of judicial review of legislation to strike down the laws for land expropriation enacted at the end of the '60s; notably, in the 1967 *Golak Nath* decision,[20] supporting land owners' claims against the violation of their property rights, the Court enunciated that the legislative power is bound to the respect of constitutional core principles, which include property rights. Then, when Indira Gandhi's government (elected in 1971) pushed the Parliament to pass constitutional amendments entrenching nationalization and land redistribution in the Charter, the Supreme Court issued the *Kesavananda Bharati* decision.[21] In this decision, the Court made two revolutionary interpretations of the Constitution: first, it inferred from the power of judicial review of legislation provided in the Charter an implicit power to review also constitutional amendments; second, it affirmed the existence of a 'basic structure of the Constitution' constitutional amendments, although duly passed by the legislature, cannot infringe or alter.[22] Finally, when the Parliament passed another constitutional amendment which would have attributed itself an unlimited amending power, the Court issued the *Minerva Mills* decision[23] clarifying that the amending power cannot infringe the identity of the existing Constitution. Since then, several other Courts adopted an approach to constitutional amendments based on the 'basic structure doctrine' in order to state the existence of implicit limits.[24]

In a global comparison, this approach to constitutional amending power is counterbalanced by Courts having adopted a strong judicial restraint in compliance with a rigid respect of the principle of parliamentary supremacy. A quite renowned example of judicial restraint is the 1962 decision of the French *Conseil Constitutionnel* over the amendments passed with a popular referendum on the election of the President of the Republic.[25] Acting as the Montesquieu's *bouche de la loi*, the *Conseil* declared itself bound by people's sovereignty and refused to check the constitutionality of a constitutional

[20] *Golak Nath v. State of Punjab*, 1967 2 SCR 762.

[21] *Kesavananda Bharati v. State of Kerala*, 1973 4 SCC 225.

[22] In *Kesavananda* the basic structure was defined as to include the supremacy of the Constitution, the republican and democratic form of government, the secular character of the State, the separation of power principle, the federative nature of the state. Nevertheless, this is not a closed list, and the Supreme Court of India has added (or removed) some elements from time to time. For an account of this evolution, see MEHTA, Pratap Bhanu. The inner conflict of constitutionalism. Judicial review and the 'basic structure'. In: HASAN, Zoya; SRIDHARAN, Eswaran. (Coord.) **Indian's living constitution**: Ideas, practices, controversies. London: Anthem Press, 2005. p. 179-206.

[23] *Minerva Mills v. Union of India*, 1 SCR 206 [1981].

[24] For some examples, see COLÒN-RIOS, Joel. Beyond parliamentary sovereignty and judicial supremacy: the doctrine of implicit limits to constitutional reform in Latin America. **Victoria University of Wellington Law Review**, vol. 44, p. 521-534, 2013; MOHALLEM, Michael F. Immutable Clauses and Judicial Review in India, Brazil and South Africa. Expanding Constitutional Courts' Authority. **The International Journal of Human Rights**, vol. 15, n. 5, p. 765-766, 2011.

[25] See *Conseil Constitutionnel*, 62-20 DC, 6 November 1962.

amendment approved by referendum.[26] A lack of competence confirmed in 2003, when the French people was not even directly involved in the approval of the constitutional amendment.[27]

More nuanced, finally, has been the attitude of the German Federal Constitutional Tribunal. Facing the lack of an explicit recognition of the power of judicial review of constitutional amendments in 1949 German Basic Law, the Tribunal demonstrated a certain activism and self-attributed it in 1951.[28] Notably, it argued that, because the Basic Law is a logical unity and its provisions cannot be interpreted independently, those amendments infringing the higher law and fundamental principles on which the Charter is based should be deemed as unconstitutional and are therefore null and void. Two years later,[29] the Tribunal added that constitutional amendments infringing those provisions higher than the Basic Law should be deemed as unconstitutional as well and should be therefore struck down. The parameter for assessing the unconstitutionality of constitutional amendments has varied since then, nevertheless respecting the approach that the power of the Parliament to amend the fundamental Charter can be limited when it infringes constitutional core values.[30] Nevertheless, the post-war activism, deemed necessary when the protection of the constitutional core values was relevant to hinder possible resurgences of the authoritarian phenomenon,[31] had been progressively abandoned in favour of a more strict respect of art. 79.3 'eternity clause' providing the explicit unamendability only for art. 1 and 20, respectively protecting human dignity and the principles of the democratic and social federal state and of the rule of law.[32]

The position of Courts briefly summarized here represents the main comparative spectrum in which the STF jurisprudence on constitutional amendment can be analysed.

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[26] On the role attributed to people's sovereignty in the French context, see DEROSIER, Jean-Philippe. The French People's role in amending the Constitution. In: ALBERT Richard; CONTIADES Xenophon; FOTIADOU Alkmene (Coord.). **The Foundations and Traditions of Constitutional Amendment**. Oxford: Hart, 2017; and BARANGER, Danis. The Language of eternity. Constitutional review of amending power in France (or the absence thereof). **Israel Law Review**, vol. 44, p. 389, 2011.

[27] See *Conseil Constitutionnel*, 2003-469 DC, 26 March 2003.

[28] *Südweststaat*, 2 BverfGE (1951).

[29] See Article 117, 3 BverfGE (1953).

[30] For the other relevant cases on this topic, see *Klass* 30 BverfGE (1970), *Land Reform I* 84 BverfGE (1991), *Land Reform II* 94 BverfGE (1996), *Lisbon Treaty* 2 BverfGE (2009).

[31] This point was clearly assessed in BRECHT, Arnold. **Federalism and Regionalism in Germany**. The Division of Prussia. New York: Oxford University Press, 1945, p. 138.

[32] For a scholarly analysis of this evolution, see PREUSS Ulrich K. The implication of the eternity clauses: the German experience. **Israel Law Review**, vol. 44, p. 429, 2011.

3. THE UNCERTAIN UNAMENDABILITY OF 1988 BRAZILIAN CONSTITUTION

The possibility to amend 1988 Brazilian Constitution has represented a crucial element since its entry into force, probably for its extreme relevance in the process of consolidation of the Brazilian democracy as well as for the circumstances in which it was drafted. Working to a new Charter after a very long period of authoritarianism[33] and only thanks to a transition the military in power started in 1974 for still controversial reasons,[34] the 559 members of the Congress elected on 15 November 1986[35] had to serve both as a unicameral constituent assembly[36] and as a bicameral ordinary legislature under the pressures to be re-elected and at the same time to provide for a text able to control possible future deviations of the governing bodies. Since the first constituent phases, Congressmen therefore refused to work on a draft already prepared by constitutional law scholars,[37] willing to safeguard the Assembly's independence in the exercise of the constituent power. In order to ensure an open and democratic process, the civil society was also encouraged in presenting proposals through the mechanism of the popular amendment.[38]

The approval of the Charter 19 months later seemed not to exhaust the exercise of the primary constituent power. Indeed, art. 2 of the Temporary Constitutional Provisions Act (TCA) called for a popular referendum five years after the entry into force of the Constitution to decide between the monarchical and the republican form of government.[39] Furthermore, art. 3 TCA envisaged the possibility that the Constitution

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[33] All along the so-called Old Republic (1891-1930) the country was led by a de facto single party system also providing an elitist suffrage mechanism (only the 3% of the population was entitled to vote), then followed by a period of subsequent military coups – only briefly interrupted by a democratic period – which lasted until 1985. In a nutshell, before the approval of 1988 Constitution, the country actually experience only 16 years of democracy in the 166 years since its independence from Portugal.

[34] See ROSENN, Keith S. Conflict resolution and constitutionalism. The making of the Brazilian Constitution of 1988. In: MILLER Laurel E., AUCOIN Louis (Coord.). **Framing the State in Times of Transition: Case Studies in Constitution Making**. Washington, DC: USIP, 2010, p. 435-466.

[35] However, it included a Senate indirectly elected by an Electoral College established in 1982 under the previous authoritarian electoral legislation.

[36] It is worthy to remind that, when acting as constituent framers, the members of the Congress divided in eight thematic commissions, each of them split into three sub-commissions. The final systematization effort was then led by a Commission of 97 members.

[37] A limited guidance was however provided by the draft elaborated by the Committee led by the distinguished jurist Afonso Arinos appointed by President Sarney. Although he finally decided not to submit Arinos' draft to the Congress, the ideas it contained flawed in the Constituent Assembly. Furthermore, the Assembly enjoyed of the translations in Portuguese of foreign constitutions.

[38] It requires the signatures of at least 30,000 voters and has to be organized by at least three legally constituted associative entities responsible for the authenticity of the signatures.

[39] The referendum was held on 21 April 1993 and the population decided in favour of the republican form of government (66% against 10.2%). Called to decide also on the system of government, people chose for presidentialism (55.4% against 24.6%).

could have been completely revised in 1993 by an absolute majority of Congress in a unicameral session. A possibility that however never materialized both for the opposition of important NGOs and for the emergence of a corruption scandal, nicknamed Budget-gate, meanwhile diverting the attention of Congressmen.[40]

At the end of such a long constituent process, Brazil was endowed with a long and detailed Charter,[41] constitutionalizing almost every aspect of what was deemed important for the institutional life and for the protection of individual and collective rights and also entrenching directive principles for public policies, on the example of the 1937 Irish Constitution. Finally, due to framers reluctance in vesting with the secondary constituent power only the federal Legislature, art. 60 of the Charter attributes the constitutional amending power to several institutional actors[42] and defines the procedure for exercising it.[43] Furthermore, art. 60.4 imposes specific limits to the content of constitutional amendments: 'No proposal of amendment shall be considered which is aimed at abolishing the federative form of the State; the direct, secret, universal and periodic vote; the separation of the Government Powers; individual rights and guarantees'.[44] These limits have been defined as *clausulas petreas* (petrous clauses) and, as Rosnai underlines, they are able to stand against the exercise of constitutional amending power but can be obliterated by the exercise of constituent power as 'even rocks cannot withstand the volcanic outburst of the primary constituent power'.[45]

The provision of unamendable clauses is not an innovation in the Brazilian constitutional framework and already 1891 Constitution – enacted after the abolition of the Unitary Monarchy – protected from amending power the republican federal form of government as well as the representation of the states in the Senate (art. 90.4). Since then, similar clauses, inspired to those into force in the USA and in Portugal, were then included in 1934, 1946, and 1967 Constitutions. Nevertheless, scholars have contested the effectiveness and genuinity of these clauses: because authoritarianism was nonetheless established, they have been considered a result of constitutional stickiness;[46]

[40] For further details on this, see ROSENN, Keith S. Conflict resolution and constitutionalism. The making of the Brazilian Constitution of 1988. In: MILLER Laurel E., AUCOIN Louis (Coord.) **Framing the State in Times of Transition: Case Studies in Constitution Making**. Washington, DC: USIP, 2010, p. 435-466, p. 453.

[41] It was composed of 245 articles, plus the 70 articles in the Temporary Constitutional Provisions Act.

[42] It is assigned to one-third of the members of the Chamber of Deputies or of the Federal Senate, to the President of the Republic, and to more than one half of the Legislative Assemblies of the units of the Federation each of them expressing itself by the relative majority of its members.

[43] A three-fifth majority and two rounds of deliberations in both the House of Representatives and the Senate, is required. According to the rules of procedure of both Houses, once approved on first reading five sessions must follow before a second reading takes place. Rejected or impaired amendments cannot be subject of another proposal in the same legislative session.

[44] For the full text of the 1988 Brazilian Constitution, see http://english.tse.jus.br/arquivos/federal-constitution.

[45] See ROSNAI, Yaniv. **Unconstitutional Constitutional Amendments**: The limits pf Amendment Powers. New York: Oxford University Press, 2017, p. 164.

[46] VAROL, Ozan O. Constitutional Stickiness. **UC Davis Law Review**, vol. 49, p. 899, 2016.

being a 'void' repetition of clauses on unamendability they have been deemed as a 'bricolage', that is a constitutional borrowing from foreign provisions 'at hand'.[47]

Conversely, although they repeat some of the clauses already entrenched in previous Constitutions, *clausolas petreas* provide for some innovations. First, the formula protecting the nature of the State does not mention the Republican form of government, but only its federative form.[48] This lack can be explained by the need of keeping the door opened for an amendment waiting for the results of the mentioned 1993 referendum and the possible complete constitutional revision. Furthermore, and more relevantly, a great innovation was the unamendability concerning 'individual rights and guarantees', completely unheard in the previous Brazilian constitutional history.

For the consequences it has had in engendering STF's activism, it is worthy to summarise the system of judicial review of legislation 1988 Constitution provides. It mixed the incidental and diffuse mechanism, entitling every judge with such a power, with the Kelsenian model of abstract control in the hand of an ad hoc Court, which in the case of Brazil is the *Supremo Tribunal Federal* and not a Constitutional Court established with this aim. Therefore, STF serves as a court of last resort[49] in the *inter partes* decisions of unconstitutionality issued by ordinary judges in cases of *recursos extraordinarios*,[50] and it acts also as an ad hoc court in the four direct and abstract actions, having an *erga omnes* effect,[51] the Constitution provides. Finally, it should be reminded that, while drafting a so complex discipline of the power of judicial review of legislation – which empowers the STF through numerous tools for adjudicating on the activity (and on the omissions) of the Parliament and of the Government and at the same time undermines its authority subjugating the *erga omnes* effect of some decision to the will of the Senate – framers also 'forgot' to individuate a body entitled to enforce the protection of the *clausulas petreas*.

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[47] ROSNAI, Yaniv. Unamendability and the genetic code of the constitution. **New York University Public Law and Legal Theory Working Paper**, New York, Paper 514, 2015. p. 24-25.

[48] For a comparison among Brazilian Constitutions, notably with reference to the unamendability clauses, see MAIA, Luciano. The Creation and amending process in the Brazilian Constitution. In: ANDENAS M. (Coord.). **The creation and amendment of Constitutional Norms**. Cheltenham: BIIC, 2000, p. 54-86.

[49] In a system already lacking of the principle of the binding precedent, the STF's authoritative power in the decisions issued under this capacity is lessened by the Senate of the Congress' competence to evaluate on the possibility to abrogate provisions the STF declared unconstitutional, which however is something the Senate has very rarely done, thus limiting the declarations of unconstitutionality to an *inter partes* effect.

[50] It is worthy to note that since 2004 these appeals are filtered through the provision that they may be introduced only when the case at hand has a general impact on the national legal system (Constitutional Amendment n. 45, 8 December 2004). On the relevance of this amendment for the evolution of the constitutional control of legislation in Brazil see DIAS TOFFOLI, José Antônio. Democracy in Brazil, The evolving role of the country's Supreme Court. **Boston College International and Comparative law Review**, vol. 40, 2017. p. 245; ROSENN, Keith S. Judicial Reform in Brazil. **Law & Business Review of the Americas**, vol. 19, 1998.

[51] Since the approval of the Law n.11.417, 19 December 2006, the STF may also approve, with a specific majority, a *sumula vinculante*, providing a specific interpretation with an *erga omnes* binding effect.

3.1. Unamendability in the interpretation of the *Supremo Tribunal Federal*

Matching the almost yearly enactment of a constitutional amendment with the 'amendment difficulty'[52] *clausulas petreas* should represent can be quite hard without underscoring that the most part of these amendments did not concern the core of the Constitution. As Benvindo highlighted,[53] some of them may be considered 'awkward in a comparative perspective', such as the one for authorizing municipalities to establish a contribution to finance the public lighting service,[54] for allocating funds destined to irrigation,[55] for excluding from the monopoly of the union the exploitation of radioisotopes,[56] and for introducing the monthly pension for rubber tappers.[57] Some others, however, have been quite relevant for the system, such as those allowing the re-election for a single subsequent term for presidents, governors and mayors,[58] and introducing a more restrictive rule for presidents to adopt provisional measures.[59]

The reason of this vast exercise of the constitutional amending power can be traced back to the said wide content of the Charter imposing specific directions to the future policy-making. Therefore, the only way for realizing policies different from those provided in the Constitution is to proceed to constitutional amendments.[60]

In this activity of 'adaptation' of the text to the political programs of the governments the Supremo Tribunal Federal has positioned as a very relevant political actor[61] since it self-recognized a power of judicial review of constitutional amendments at the beginning of '90s, inferring it from the power of judicial review of legislation (art. 102).

[52] GINSBURG, Tom; MELTON, James. Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty. **Coase-Sandor Institute for Law & Economics**, Working Paper No. 682, 2014. p. 5.

[53] See BENVINDO, Juliano Zaiden. The Brazilian Constitutional Amendment Rate: A Culture of Change?, **International Journal of Constitutional Law Blog**. Available at: <http://www.iconnectblog.com/2016/08/the-brazilian-constitutionalamendment-rate-a-culture-of-change/>. Last accessed: 10 Aug. 2016.

[54] Constitutional Amendment n. 39 (December 19, 2002).

[55] Constitutional Amendment n. 43 (April 15, 2004).

[56] Constitutional Amendment n. 49 (February 8, 2006).

[57] Constitutional Amendment n. 78 (May 14, 2014).

[58] Constitutional Amendment n. 16 (June 4, 1997).

[59] Constitutional Amendment n. 32 (September 11, 2001).

[60] COUTO, Cláudio Gonçalves; RANTES, Rogério Bastos. Constituição, Governo e Democracia no Brasil. **Revista Brasileira de Ciências Sociais**, vol. 21, n. 61, 2006. A noteworthy case in this regard concerns the constitutional amendments introduced for favouring the free marked. This topic is vastly analysed in MENDES Conrado Hübner. Constitutions and Institutions: Justice, Identity and Reform. Judicial review of constitutional amendments in the Brazilian Supreme Court. **Florida Journal of International Law**, vol. 17, n. 3, p. 449-461, 2005.

[61] Actually, according to ARANTES, Rogério Bastos. Direito e política: o ministério público e a defesa dos direitos coletivos. **Revista Brasileira de Ciências Sociais**, vol. 14, p. 83-102, p. 83, 1999 the whole Judiciary plays a very relevant role in the system established in 1988 as re-democratization conceived it both as tool for finally ensuring justice after the military regime and as an arbiter between the society and the powers of the State.

Notably, in a 1991 decision the STF affirmed that, because constitutional amendments are an exercise of the secondary constituent power, they can be the object of an abstract control and, in order to protect the constitutional identity defined by the clauses of unamendability, even of an a posteriori review.[62] The *Supremo Tribunal Federal* has also explicitly stated that the clauses on unamendability serve to the scope of preserving the continuity and the identity of the Charter,[63] which may be altered only through the exercise of the (primary) constituent power. Furthermore, because 'procedures to introduce constitutional changes, are expression of an instituted constituent power, thus limited by nature […] constitutional changes deriving from a revision are subject to judicial control and scrutiny as regard the petrous clauses'.[64] This approach has been constantly confirmed,[65] also clarifying that 'a constitutional amendment, which is emanated from a derived constituent, when violative of the original constitution, may be declared unconstitutional by the Supreme Court, which is the guardian of the constitution'.[66]

This subordinated relation between constituent and constituted powers has been applied also to the hierarchy between States Constitutions and Federal Constitution and about the amendments to the former, Thus, in the exercise of their constituent power, the units of the federation should strictly conform to the federal Charter;[67] a rule a fortiori valid for units' constitutional amendments.

A very interesting case about the judicial review of constitutional amendments occurred in 2006, with reference to the amendment, which some scholars defined as an unconstitutional constitutional amendment behaving it infringes the protected constitutional core values,[68] approved on 16 December 2006 as a reaction to the economic malfunction at the federal level. It introduced a New Tax Regime and modified the content of the Act of Transitional Constitutional Provisions in order to provide since 2017 for a twenty-year limit to Brazilian public expenditures accorded to the yearly variation of the inflation rate, somehow limiting the state commitment in protecting social rights and in ensuring public services – such as i.e. health, education, social assistance and security – to which the Constitution bound the state in Title III. Evidently, the amendment, although approved respecting the provided procedures, clashed with two elements included in the *clausulas petreas*, namely the federal structure of the state and fundamental rights, at the point that it seems aimed at dismembering constitutional rights

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[62] See ADIMC 466/91 DF.

[63] ADIN n. 815- 3/ DF, DJU de 10/ 05/ 96.

[64] ADIMC 981-8/600/93 PR, Dec. 93.

[65] See i.e., ADIMC 926/ 1993 and ADIMC 981– 8/ 600/ 93 PR.

[66]ADIN 939-7 DF.

[67] ADIMC 568-5/600/91 AM, 1991.

[68] See ROZNAI, Yaniv; KREUZ, Letícia Regina Camargo. Conventionality control and Amendment 95/2016: a Brazilian case of unconstitutional constitutional amendment. **Revista de Investigações Constitucionais**, Curitiba, vol. 5, n. 2, p. 35-56, mai./ago. 2018.

with long-lasting effects on a whole generation and even beyond;[69] the amendment also seems to infringe the welfare state that the Constitution wanted to establish.

The Brazilian doctrine has already debated on the Judiciary's adjudications able to alter the public policies on the budget. Notably, Baracho stated the 'it is reasonable to imagine that the Judicial Branch does not intend to be responsible for the economic difficulties that a judicial decision might produce. […] It is undoubtedly important to preserve the integrity of the Judicial Branch, but it is also essential to secure the exercise of the fundamental rights, even if for that, in certain circumstances, it is necessary, based on constitutional principles, to stop public policies'.[70] The STF has confirmed this approach when it declared the unconstitutionality of the presidential veto at art. 55, 2 of the Budget Guidelines Law n. 10.707/2003, which violated the 29/2000 Constitutional amendment establishing a minimum of final resources for founding health services and actions.[71] On that occasion, the STF recognized its lack of competence in defining public policies at the same time considering a responsibility of the Judiciary to intervene when the Executive or the Legislature fail to respect their incumbencies and risk the efficiency and integrity of the individual and/or collective rights constitutionally granted. Therefore, the Judiciary's, and moreover the STF's, role in the protection of rights and in favour of the Brazilian constitutional identity seems a consolidated given.[72]

4. CONCLUDING REMARKS

The STF's activist attitude, however, is still controversial because it not only confirms the power of a non-elected body to control the decision of the representatives of the people, but transforms the Court in a policy-makers, allowing it for opting among the different policies through the approval or refusal of an amendment. It is also controversial because there is no certainty that the interpretation the Court will provide is itself consistent with the Constitution and able to conform to the constitutional identity.

[69] ALBERT, Richard. Constitutional Amendment and Dismemberment. **Yale Journal of International Law**, vol. 43, n. 1, 2018.

[70] See BARACHO JUNIOR, J. A. O. A interpretação dos direitos fundamentais na Suprema Corte dos EUA e no Supremo Tribunal Federal. In: SAMPAIO, José Adércio Leite (Coord). **Jurisdição constitucional e direitos fundamentais**. Belo Horizonte: Del Rey, 2003. p. 343.

[71] See ADPF 45, DJ 29.04.2004.

[72] A suggestion may come from the comparative studies with reference to the South Africa Constitutional Court approach to the realization of social rights, which has constantly pushed the government in adopting programs able to secure them notwithstanding the scarcity of resources. In the literature, see SUNSTEIN, Cass R. Social and Economic Rights? Lessons from South Africa. **Public Law and Legal Theory Working Paper**, Paper 12, 2001.

Paraphrasing Plato[73] and Giovenale[74], there is no one controlling those who have the power to control.

Such an issue is even more relevant when the text to be interpreted has an open texture, as the Brazilian one, attributing to its interpreter the power to fill the empty box framers provided. In these cases 'it cannot be said that judicial decisions preserve its [the Charter's] supremacy. They would preserve, instead, the understanding that the Court has of those open norms'.[75]

Although these are valid objections – on which the counter-majoritarian argument and the so-called political constitutionalism[76] have been built up – in the case of Brazil, and possibly of Latin American countries in general, the role the Judiciary plays in protecting rights enjoys of a huge popular support and it is grounded on the detailed references to individual and group rights as well as to State policies entrenched in the Charter. Even when this entails an adjudication on the allotment of the State budget, therefore, STF's activism confirms the will of Brazilian Judiciary in supporting the transformation of paper rights into real guarantees. As a consequence, however, it has represented a source of tension with political authorities, which have frequently underlined how this activism has penalized the efficiency of the courts.[77] A rationale on which, for instance, the 2004 Judicial Reform Constitutional Amendment has been approved. It is worthy to note, in the end, that even when intervening on the functioning of the Judiciary, the legislator has safeguarded the power of judicial review of constitutional amendments in spite of some speculations in the Brazilian legal doctrine suggesting the possibility of abolishing it. According to Ferreira Filho,[78] indeed, *clausulas petreas* are not themselves unamendable so that, in order to amend the provisions they protect, it

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[73] PLATO. **The Republic**, III. p. 13.

[74] GIOVENALE. **Satire**, VI. p. 48-49.

[75] MENDES Conrado Hübner. Constitutions and Institutions: Justice, Identity and Reform. Judicial review of constitutional amendments in the Brazilian Supreme Court. **Florida Journal of International Law**, vol. 17, n. 3, p. 449-461, 2005. p. 459.

[76] On political constitutionalism, limiting the role of Courts in the review of legislation and a fortiori of constitutional amendments, see BELLAMY, Richard. **Political Constitutionalism**. A Republican Defense of the Constitutionality of Democracy. Cambridge: Cambridge University Press, 2007; GOLDONI, Marco. Che cos'è il costituzionalismo politico? **Diritto e Questioni Pubbliche**, vol. 10, 2010; TUSHNET, Mark. **Taking the Constitution away from the Courts**. New Jersey: Princeton University Press, 1999; Id, The relation between political constitutionalism and weak-form judicial review. **German Law Journal**, vol. 14, n. 12, 2013; WALDRON, Jeremy. The Core of the Case against Judicial Review. **The Yale Law Journal**, vol. 115, p. 1346, 2006. For some thoughts more strictly related to the Brazilian context, see LIMA, Jairo Néia; BEÇAK, Rubens. Emenda Constitucional e Constitucionalismo Político: A Potencial Moderação Das Críticas Ao Controle Judicial De Constitucionalidade. **Conpedi Law Review**, vol. 2, n. 4, p. 275-296, 2016.

[77] On the functioning of Brazilian Judiciary, moreover with reference to rights' protection, see ROSENN, Keith S. Procedural Protection of Constitutional Rights in Brazil. **The American Journal of Comparative Law**, vol. 59, n. 4, p. 1009-1050, 2011.

[78] FERREIRA FILHO, Manoel Gonçalves. Significação e alcance das 'clausulas pétreas'. **Revista de Direito Administrativo**, vol. 220, p. 11-17, 1995.

would suffice to proceed to a double amendment procedure, first amending art. 60 and then the core constitutional values it protects. Actually, this is a minority position in the Brazilian literature, being predominant the idea that unamendable clauses are intrinsically unamendable, although this is not explicitly stated in the Charter;[79] a position the STF already put forward in 1991 declaring the 'National Congress […] legally bound by the original constituent power, which has laid down, besides circumstantial entrenchment to reform, an immutable clause, *immune to parliamentary revision*'.[80]

Looking at the Brazilian experience in a comparative perspective, therefore, a sort of 'basic structure doctrine' entrenched in the *clausulas pétreas* and protected through the judicial review of constitutional amendments seems well established, as well as the principle according to which the complete alteration of the genetic code of the Constitution[81] can be realized only through a new exercise of the primary constituent power.

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[79] SILVA, Virgílio Afonso da. Ulisses, as sereias e o poder constituinte derivado: sobre a inconstitucionalidade da dupla revisão e da alteração no quórum de 3/5 para aprovação de emendas constitucionais. **Revista de Direito Administrativo,** vol. 226, p. 11-32, 2011.

[80] ADIN n. 815- 3/ DF, DJU de 10/ 05/ 96. For a general perspective on the possibility of amending provisions on unamendability, see ROZNAI, Yaniv. The Theory and Practice of 'Supra-Constitutional' Limits on Constitutional Amendments. **International and Comparative Law Quarterly**, vol. 62, p. 557, 2013.

[81] ROZNAI, Yaniv. Unamendability and the Genetic Code of the Constitution. **New York University Public Law and Legal Theory Working Papers**, New York, Paper 514, 2015.

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Making Brazil work? Brazilian coalitional presidentialism at 30 and its post-*Lava Jato* prospects

Fazendo o Brasil funcionar? O presidencialismo de coalizão brasileiro aos seus 30 anos e suas perspectivas pós-Lava Jato

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Abstract

This article analyzes the topic of Brazilian coalition presidentialism. It offers the reader a close look at coalitional presidentialism in each of Brazil's governments since the democratization of the country to the present day, presenting the complex relations between the Legislative Branch and the Executive Branch at these different moments in Brazil's political history. The main focus of the article is to relate the impacts of "Lava Jato" to this process, seeking to indicate possible consequences of this operation, which caused great repercussions on Brazilian politics, to this scenario of the relationship between the Executive and Legislative branches.

Keywords: coalitional presidentialism; Brazil; democratization; Lava Jato; Brazilian Constitution

Resumo

O artigo analisa a questão do presidencialismo de coalizão nos países da América Latina em geral e no Brasil em particular. Oferece ao leitor um olhar mais atento ao presidencialismo de coalizão em todos os governos brasileiros desde a democratização do país até os dias atuais, apresentando as complexas relações entre o Poder Legislativo e o Poder Executivo nesses diferentes momentos da realidade política brasileira. O principal foco do artigo é relacionar os impactos da operação "Lava Jato" a esse processo, buscando indicar possíveis consequências desta operação, que causou grandes repercussões na política brasileira, a esse cenário de relacionamento entre os Poderes Executivo e Legislativo.

Palavras-chave: *presidencialismo de coalizão; Brasil; democratização; Lava Jato; Constituição brasileira.*

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1. Introduction; **2.** Coalitional Presidentialism: Efficiency and Accountability at Loggerheads; **3.** Accountability: Mechanisms of Presidential Oversight; **4.** A Balance Sheet for Coalitional Presidentialism; **5.** In *Lava Jato*'s Wake: The Semi-Presidential Temptation and Lasting Changes?; **6.** References.

1. INTRODUCTION

In 1865, British constitutional theorist Walter Bagehot memorably explained that the success of British government lay in "the efficient secret" of its Constitution, which mandates "the nearly complete fusion of the executive and legislative powers."[1] By the end of the nineteenth century, cabinet government, as we call it today, had transformed a once-fractious House of Commons. Party interests trumped those of the individual MP or borough; programmatic policymaking replaced incoherent pork-barrel spending; and Parliament on the whole grew more productive, rising to the task of governing a newly modernizing and modern Britain.[2]

By this yardstick, it is not a terrible exaggeration to say that the Brazilian Constitution of 1988 harbors a very *inefficient* secret. The virtues Bagehot praised are replaced by their opposite. Brazil's legislature, widely regarded as a "cesspit of venality and opportunism," is famously weak in governing, more active in the business of distributing pork barrel than on national issues.[3] The party system is weak—twenty-six different parties currently hold seats in Brazil's Chamber of Deputies, thirty-five officially registered with the Superior Electoral Court (TSE), and opportunistic party-switching among legislators is legion.[4] With no ready-made majorities and scant party discipline, temporary legislative coalitions are stitched together with pork, by baiting legislators with Cabinet portfolios, or, more crudely, through sheer bribery.[5]

[1] Walter bagehot, quoted in KELLY, Scott. **The slow death of the 'Efficient Secret':** The Rise of MP independence, its causes and its implications. London: The Constitution Society, 2014, p. 6.

[2] COX, Gary. **The Efficient Secret.** New York: Cambridge University Press, 1987, esp. Chapter 6. KELLY, *supra,* describes a breaking down of the close relationship in such a way as to precisely bolster Cox's theory: "The weakening of the party system and the rise of MP independence is also making it increasingly difficult to reconcile the dual functions of a vote cast at a general election – to choose an MP and a Party of Government. The result is a growing accountability gap."

[3] ANDERSON, Perry. Lula's Brazil. **London Review of Books**, vol. 33, no. 7, p. 3-12, Mar. 31, 2011; AMES, Barry. Electoral Rules, Constituency Pressures, and Pork Barrel: Bases of Voting in the Brazilian Congress. **Journal of Politics**, vol. 57, no. 2, p. 324-343, 1995, 324; AMES, Barry. **The Deadlock of Democracy in Brazil**. Ann Arbor: University of Michigan Press, 2002.

[4] DESPOSATO, Scott. Party Switching in Brazil: Causes, Effects, and Representation. In: HELLER, William B.; MERSON, Carol (eds.). **Political Parties and Legislative Party Switching**. New York: Palgrave Macmillan, 2009, p. 109-44. Until recently, it was common for politicians to switch parties, thereby changing the composition of the chambers and destabilizing legislative coalitions. However, in 2007, the Supreme Federal Court put a stop to the practice of party switching after elections, reasoning that legislative seats belong to parties, not to individuals.

[5] The "*Mensalão*" was the name of the scandal that broke in 2005 when word got out that Lula's Workers Party (PT) was doling out monthly payments of $7000 to representatives in exchange for their votes. Today, in the light of its larger cousin, *Lava Jato,* however, the Mensalão has come to seem like small potatoes.

Dating back to the mid-twentieth century, the coalitional presidential system was described in 1949 by the Brazilian legal scholar Afonso Arinos as "unique in the world," its leaders more like "those of European parliamentarism than the president of the United States."[6] Since then, generations of scholars have waffled back and forth as to whether this unique arrangement is a good thing. After the constitution of 1988, a first generation of scholars was pessimistic. Brazil's institutions were untested and seemingly weak, hyperinflation was ravaging the economy, and the first few administrations were plagued by corruption scandals. A second generation—buoyed by robust growth under Fernando Henrique Cardoso and Lula—spoke of the "unexpected success" of Brazil's coalitional presidential regime. Today, of course, the mood has swung back to gloom, with the massive *Lava Jato* investigation exposing the system's rotten foundations.

As is clear, scholars' assessments of the system are often tied to the state of Brazilian politics at the time they are writing, which casts some doubt on the durability of the conclusions, and they often boil down to one, unasked premise: what is the real *cost* of coalition formation? If coalitions could be bought with ideological cohesion (as in two-party systems), coalitional presidentialism was relatively cheap, and thus a viable model. If the cost of coalitions was pork barrel, the system's flaws became harder to defend, but it could still allow for good outcomes where a strong, capable President was there to bind things together. If the whole thing depended on corruption, however, as *Lava Jato* has seemed to prove, the only possible conclusion would be deep pessimism.

This paper argues that said debate is one-sided, because it typically omits the critical role played in this system by the judiciary—courts and prosecutors.[7] If *Lava Jato* has taught us anything, it is, first, just how deep corruption ran in "making the system work" and, second, how essential is the role of the judiciary in mediating ordinary politics. In this light, I argue that Brazil's "inefficient secret" is its combination of a weak party system and a judicialized politics. The former virtually guarantees that non-programmatic tools like pork have been, and will continue to be, the mortar binding legislative majorities together, and that Congress will lack the energy to act against the President, the crucial actor creating legislative majorities and moving them to action. On the other hand, in light of Congress' weakness, political oversight requires the conspicuous and public participation of the judiciary. Not limited to just *Lava Jato,* the judiciary's political role is so developed that it is essential in shaping party balance, and even the content of policy. This alone could be a problem, but it is the clash of judicial norms (probity, pu-

[6] Afonso Arinos, quoted in MELO, Marcus André; PEREIRA, Carlos. **Making Brazil Work**: Checking the President in a Multiparty System. New York: Palgrave Macmillan, 2013. p. 4.

[7] I am aware that under the Brazilian Constitution, the *Ministério Público* (the Public Prosecutor's Office) is an independent body subject to the control of neither the Executive Branch nor the judicial branch. However, I describe it as exercising a "judicial" function because its primary tools—lawsuits and investigations—and the norms it obeys and imposes are themselves juridical.

blicity, and transparency) with a legislative process built under precisely the opposite expectations (compromise, quid pro quo, pork) that is truly unmanageable.

First, I describe the basics of Brazil's coalitional system, framing these in terms of two competing imperatives: *efficiency* and *accountability*. Every governing system requires efficiency to run, but for Brazil, with its fragmented party system, the costs are uniquely high. Accountability, on the other hand, is achieved not by a robust Congress and President vying against each other, but by court oversight, and with it norms that call into question the very system of coalition government. Second, I turn to the normative, canvassing scholarly assessments of the system before offering my own. Finally, I offer a few tentative ideas on what lasting effect *Lava Jato* and other recent shocks to the system (electoral reform, proposals to adopt a semi-presidential system) promise to have.

There is no doubt that *Lavo Jato*-fatigue has already set in among most Brazilians, and the pace of arrests will slow as the system approaches something like normalcy. Still, the built-up furor does not seem to have been channeled into institutional reforms that will remedy the system's problems. Proposed party and electoral reforms are unlikely to completely rationalize Brazil's political parties; legislative majorities are likely to remain ad hoc and pork-based; and even the instauration of a prime minister, should that reform eventually pass (unlikely given the weakness of Temer, an interim president), is unlikely to staunch the need for judicial interventions to police system functioning. As a result, fits and starts, rather than growing pains, seem likely to characterize Brazil's politics for years to come.

2. COALITIONAL PRESIDENTIALISM: EFFICIENCY AND ACCOUNTABILITY AT LOGGERHEADS

With an idea in mind of tyranny as "the accumulation of all powers in the same hands, whether of one, a few, or many," James Madison and his co-drafters created the blueprint for the world's first presidential republic. Splitting up the king's power to make the law from the power of enforcing it, they created a regime of cleverly engineered separations—the president from the legislature, the legislature into multiple bodies, the body politic into regional and local units.[8] At the same time, as they knew from the failure of the 1777 Articles of Confederation, which had required unanimity

[8] On the republicanism of the American Founding Fathers, the classic accounts are provided by BAILYN, Bernard. **The Ideological Origins of the American Revolution**. Cambridge, MA: Harvard University Press, 2017. and WOOD, Gordon S. **The Creation of the American Republic, 1776-1787**. Chapel Hill, NC: University of North Carolina Press, 1998.

among the thirteen original states for all resolutions, the greater the number of actors involved in decision-making, the greater the risk of paralysis.[9]

The Framers' problem illustrated the basic challenge of designing a presidential system: how, in the name of active government, to stimulate cooperation between actors that the constitution separates in the name of liberty?

In this chapter, this debate will be framed as the tension between *efficiency* and *accountability* within a constitutional system. The classic republican model of the American framers relied on *accountability-enhancing mechanisms* to divide power in order to check it. These mechanisms maintain separations in offices or functions, and strengthen external checks upon actors in the system. On the other hand, *efficiency-enhancing* mechanisms are more pragmatic and accommodationist; these tend to blur lines of separation in order to make divided government more fluid, streamlined, and more workable.[10]

Efficiency-enhancing mechanisms are well-known to us. Political parties, by binding Congress and the President to a shared set of policy goals, can stimulate coordination across the branches. (Party's binding effect can completely trump structural divides: the U.S. Senate's preferences may be better predicted, for example, by ideology than by being a branch opposite the President.[11]) "Legislative" powers held by the President are another example. Certain constitutions allow the President the faculty of proposing laws, drafting the budget, bringing bills before Congress, fast-tracking legislation, and so on, which can add speed and urgency to the process. Other presidential powers can be applied in such a way as to help speed along the business of legislation. The appointment power, for example, can be used to reward the President's backers with desirable positions inside the public bureaucracy, which can help bring both public administration and the legislature into line with her preferences. The President can also use his financial resources to spearhead pork barrel, lavishing local constituents with spending meant to earn their gratitude and, in turn, that of individual legislators who can help pass the president's legislative agenda.

Although the U.S. Constitution remains a fairly classical example of a "separated system" of powers, over the world, more recent presidential democracies tend to depart from the classical blueprint.[12] Pragmatic in their arrangements, they tend to eschew strict separations between the branches, and to cluster more proactive power in

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[9] EDLING, Max M. **A Revolution in Favor of Government:** Origins of the U.S. Constitution and the Making of an American State. New York: Oxford University Press, 2003 (characterizing the U.S. Constitution as a "revolution in favor" of a strong central government).

[10] This is not to conflate the separation of powers with the separation of functions.

[11] On this point, see LEVINSON, Daryl J.; PILDES, Richard H. Separation of Parties, Not Powers. **Harvard Law Review**, Cambridge, 2006. Available at SSRN: <https://ssrn.com/abstract=890105>.

[12] JONES, Charles O. **The Presidency in a Separated System.** Washington, D.C.: Brookings Institution, 1994) (classifying the U.S. as, not presidential, but a "separated system" of powers).

the Presidency itself.[13] (Latin American constitutions are also more heavily presidential because of a long post-independence history of strong centralist governments.[14]) In the classical U.S. model, the President has no formal lawmaking powers other than the veto. Brazil, on the other hand, typifies the Latin American ideal of a strong president with a central role in governance and strong proactive powers to initiate legislation.

Drafted in the shadow of military dictatorship, it was a surprise for many that the Brazilian Constitution turned out to be a "more transformative than conservative" text.[15] The military government had agreed to a democratic transition only on the condition that, rather than electing a constitutional assembly, the Constitution would be drafted by congressional incumbents (largely center-right and pro-military). (This condition also substantially dragged out the process, as legislators were forced to do double duty drafting the constitution in the morning and statutes in the afternoon). In the constitutional Assembly, however, a surprising number of progressive initiatives like the referendum and plebiscite, as well as new social and collective rights, had made their way into the text, thanks to forceful progressive leadership and fractures among the conservative delegation.

One progressive stance which did *not* carry the day was the left's attempt to rid Brazil of its presidential system. For the left, this position was a reaction, not just to the brutal excesses of the military junta, first nurtured by, then cannibalizing, the executive branch, but also to lessons learned from democracy's collapse in 1964, which many blamed on paralysis characteristic of that system.[16] But despite progressives' successes in the Assembly to that point, Brazilian presidentialism was saved at the eleventh hour

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[13] KATZ, Andrea S. **The President in His Labyrinth:** Checks and Balances in the New Pan-American Presidentialism. New Haven, 2016. Dissertation (Ph.D.). Yale University (arguing that more recent presidential democracies, especially those of Latin America, are more president-centric and less structurally "separate").

[14] GARGARELLA, Roberto. **The Legal Foundations of Inequality.** New York: Cambridge University Press, 2010.

[15] PILATTI, Adriano. **A Constituinte de 1987-1988**: progressistas, conservadores, ordem econômica e regras do jogo. Rio de Janeiro: Lúmen Júris, 2008, p. 5. This section relies, in addition to Pilatti, on the following accounts of the history of the Constitutional Convention: ROSENN, Keith S., Conflict Resolution and Constitutionalism: The Making of the Brazilian Constitution of 1988. In: MILLER, Laurel E. (ed.). **Framing the State in Times of Transition:** Case Studies in Constitution Making. Washington, D.C.: U.S. Institute of Peace, 2010, p. 435-466; MAINWARING, Scott; PÉREZ-LIÑAN, Aníbal. Party Discipline in the Brazilian Constitutional Congress. **Legislative Studies Quarterly,** vol. 22, no. 4, 453-483, 1997; AMES, Barry; POWER, Timothy. **Research Guide to Roll-Call Voting in Brazil's Constituent Assembly, 1987–1988**. Unpublished manuscript, 1990.; BONAVIDES, Paulo; ANDRADE, Paes de. **História Constitucional do Brasil**. Brasília: Senado Federal, 1989; BRASIL. Câmara dos Deputados, **Diários da Assembléia Nacional Constituinte**. Brasília: Câmara dos Deputados, Coordenação de Publicações, 1987; COELHO, João Gilberto; OLIVEIRA, Antonio Carlos Nantes de. **A nova constituição. Avaliação do texto e perfil dos constituintes**. Rio de Janeiro: Revan, 1989; SOUZA, Márcia Texeira, O processo decisório na Constituição de 1988: práticas institucionais. **Lua Nova - Revista de Cultura Política**, vol. 58, 38-59, 2003; and BARBOSA, Leonardo Augusto de Andrade. **História Constitucional Brasileira: Mudança constitucional, autoritarismo e democracia no Brasil pós-1964**. Brasília: Edições Câmara dos Deputados, 2012.

[16] RENNÓ, Lucio. Críticas ao Presidencialismo de Coalizão no Brasil: Procesos Institucionalmente Constritos ou Individualmente Dirigidos? In: AVRITZER, Leonardo; ANASTASIA, Fátima (eds.). **Reforma Política no Brasil.** Minas Gerais: Editora UFMG, 2007.

by the "Centrão," a center-right coalition patched together out of squabbling parties on the right loyal to the incumbent, José Sarney, also a favorite of the military.

This was not the last hurrah and the Brazilian parliamentarism, however. Incredibly, one Antônio Henrique Bittencourt da Cunha Bueno, a representative from São Paulo and avowed monarchist, managed to slip into the Constitution a provision triggering a referendum whereby the Brazilian people would have a chance to choose their preferred system of government. Bittencourt considered Brazil's golden age to have been the reign of Emperor Pedro II (1831-1889), and, in the run-up to the 1993 referendum, actively campaigned with the emperor's great-grandson for the monarchical alternative. Alas, it was not to be. Republicanism carried the day over monarchy, with 66% to 10% of the vote, respectively, while the second question on the ballot, presidentialism versus parliamentarism, broke in favor of the status quo, 55% to 24%.

Thus Brazilian presidentialism survived. And although the drafters had succeeded in whittling down some of the president's powers, the Brazilian president is one of the strongest of any nation—on paper, at least.[17] Fernando Limongi calls the president the "principal legislator" of Brazil.[18] The President can initiate legislation, and has *exclusive* authority to introduce bills relating to the following policy areas: administrative or judicial organization, including the creation and abolition of public offices and Ministries; tax and budgetary matters; public services and administrative personnel; the tenure of civil servants; the organization of federal public defender's offices; and the military. Between 1988 and 2007, around 85.6% of laws approved by Congress were initiated in the executive branch, and 71% of all bills submitted by the President to Congress were approved within his or her mandate.[19] With the powerful partial veto in hand, the President also has the ability to shape legislation before it is passed.[20]

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[17] On the comparative robust powers of the Brazilian president, see, e.g., SHUGART and CAREY, supra n. 9; FIGUEIREDO, Argelina; LIMONGI, Fernando. **Executivo e Legislativo na nova ordem constitucional**. 2nd ed. Rio de Janeiro: Editora FGV, 2001; POWER, Timothy. The pen is mightier than the Congress: Presidential decree power in Brazil. In: CAREY, John M. and SHUGART, Matthew Soberg (eds.) **Executive Decree Authority**. New York: Cambridge University Press, 1994, p. 197-230; PRADO, Mariana Mota; PEREIRA, Carlos. Presidential Dominance from a Comparative Perspective: The Relationship between the Executive Branch and Regulatory Agencies in Brazil. In: ROSE-ACKERMAN, Susan; LINDSETH, Peter L. (eds.). **Comparative Administrative Law.** Cheltenham: Edward Elgar, 2010, p. 239; ALSTON, Lee J.; MUELLER, Bernardo. Pork for Policy: Executive and Legislative Exchange in Brazil. **The Journal of Law, Economics, & Organization**, vol. 22, no. 1, p. 87-114, 87-88, 2005. p. 87-88; BINENBOJM, Gustavo. **Uma Teoria do Direito Administrativo**. 3. ed. Rio de Janeiro: Editora Renovar, 2014.

[18] LIMONGI, Fernando. Presidencialismo e Governo de Coalizão. In: AVRITZER, Leonardo; ANASTAIA, Fátima (eds.). **Reforma política no Brasil.** Minas Gerais: Editora UFMG, 2007, p. 256.

[19] LIMONGI, supra n. 18, p. 256.

[20] INÁCIO, Magna. Estructura y Funcionamiento de la Cámara de Diputados. In: SÁEZ, Manuel Alcántara; MELO, Carlos Ranulfo (eds.), **La democracia brasileña: Balance y perspectivas para el siglo XXI.** Salamanca: Ediciones Universidad de Salamanca, 2008. p. 159.

The president also has broad power to govern by decree.[21] Although *decretos* (decrees) with the force of law from the pre-dictatorship era were replaced by *medidas provisórias* (provisional measures), valid only for 60 days, after which Congress must pass, amend, or reject them, these are a powerful tool for the sheer reason that they can clog up Congress' agenda, as, if not voted on within 45 days, they skip to the head of the queue, superseding all other legislative deliberations. The President also wields great power as the head of Brazil's enormous thicket of federal agencies, with sole supervisory power over their organization, operation, and "higher management." She can not only fill but also abolish vacant federal government positions, and, with senatorial consent, can appoint not only Cabinet members and federal court judges, but also state Governors, federal public prosecutors, the head of the Central Bank and numerous others, a staggering 48,000 appointments in total.[22]

Yet even the greatest formal powers mean little without, as American presidential scholar Richard Neustadt put it, "the power to persuade."[23] In a 2010 interview, former president Cardoso reflected back on the challenges of the office:

> *The worst mistake presidents can commit is to imagine that they have a mandate to govern alone. In order to fulfill their promises to the electorate, they need Congress. And to obtain a majority in Congress they need to build alliances… Without alliances presidents do not govern.*

In modern Brazil, not only legislative productivity but also presidential success and system function require the formation of broad but disciplined and lasting coalitions.[24] Under Cardoso and Lula, for instance, such coalitions were built up, and startling

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[21] Constitution of the Federative Republic of Brazil, Arts. 62 and 84, I.

[22] Constitution, Art. 84, XV and XXV.

[23] NEUSTADT, Richard. **Presidential Power and the Modern Presidents:** The Politics of Leadership From Roosevelt to Reagan. New York: Free Press, 1991. p. 29.

[24] FIGUEIREDO, Argelina Cheibub; LIMONGI, Fernando. Mudança Constitucional, Desempenho do Legislativo e Consolidação Institucional. **Revista Brasileira de Ciencias Sociais**, vol. 10, no. 29, p. 175-200, 1995; FIGUEIREDO, Argelina Cheibub; LIMONGI, Fernando. Presidential Powers, Legislative Organization, and Party Behavior in Brazil. **Comparative Politics**, vol. 32, no. 2, 2000, p. 151-170; LIMONGI, Fernando. Democracia no Brasil: presidencialismo, coalizão partidária e processo decisório. **Novos Estudos – CEBRAP**, vol. 76, p. 17-41, 2006, LEMOS, Leany B.; POWER, Timothy J. Determinantes do controle horizontal em parlamentos reativos: o caso do Brasil (1988-2005). **Dados**, vol. 56, p. 383-412, 2013; ARMIJO, Leslie Elliott; FAUCHER, Philippe; DEMBINSKA, Magdalena. Compared to What?: Assessing Brazil's Political Institutions. **Comparative Political Studies**, vol. 39, no. 6, p. 759-786, 2006; NETO, Octávio Amorim; SANTOS, Fabiano G.M. The Executive Connection: Explaining the Puzzles of Party Cohesion in Brazil. **Party Politics**, vol. 7, no. 2, p. 213-34, 2002; COX, Gary W.; MORGANSTERN, Scott, Latin America's Reactive Assemblies and Proactive Presidents. **Comparative Politics**, vol. 33, no. 2, p. 171-189, 2001; REICH, Gary, Executive Decree Authority in Brazil: How Reactive Legislators Influence Policy, **Legislative Studies Quarterly**, vol. 27, no. 1, p. 5-31, 2002; FIGUEIREDO, Argelina. Resenha de estudos sobre o Executivo. **Revista do Serviço Público**, vol. 55, nos. 1-2, p. 5-48, 2014. Bolivar Lamounier discusses the prolificness of the Cardoso administration, although he considers it "paradoxical" given the system's "manifest dysfunctionality." FIGUEIREDO, Rubens; LAMOUNIER, Bolívar. **A era FHC: um balanço**. São Paulo: Editora

legislative productivity was the result. On the other hand, for presidents like Fernando Collor de Mello and of course Dilma, taming a fractious, undisciplined Congress proved impossible, and their tenures ended in impeachment.

In the absence of ties that bind President and party, and with Congress fragmented into dozens of parties, coalition-building is no easy task. Even relatively established parties—the center-right PSDB and PMDB, and the leftist PT—are, today, sprawling conglomerates standing for little in the way of a coherent message. Gross malapportionment in Brazil's two congressional houses further complicates matters: in the Senate, the ratio of over-representation between the smallest and largest state stands at about 88:1 (65:1 in the U.S.). Three-quarters of Senate seats and a majority of those the lower house are controlled by Brazil's three poorest and most backward "macro-regions," which account for two-fifths of the population.[25] The President flaunts the wishes of these staunchly religious and conservative regions at her own peril, as the recent impeachment of Dilma showed.

3. ACCOUNTABILITY: MECHANISMS OF PRESIDENTIAL OVERSIGHT

Given the current backdrop of the *Petrolão* and *Lava Jato*, it is impossible to talk about Brazil's political branches without discussing the role of judges and prosecutors. In the current crisis, politics has become "judicialized,"[26] the legal and the political spheres closely intertwined—too close, many feel. With Brazil's celebrity judges and prosecutors playing God over the fates of the political higher-ups—Lula, Cunha, and Temer just a short list—disillusioned observers see courts and prosecutors as high-handed at best; as hypocritical tools of right-wing interests, at worst.

In the separation-of-powers model, Congress is, in theory, the primary branch for exercising "horizontal accountability"[27] over the President. This encompasses two

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Saraiva, 2002; LAMOUNIER, Bolívar, Brazil: an assessment of the Cardoso administration. **Constructing democratic governance in Latin America**, vol. 2, p. 269-291, 2003.

[25] ANDERSON, Perry. Crisis in Brazil. **London Review of Books**, vol. 38 no. 8, p. 15-22, April 2016, SAMUELS, David; SNYDER, Richard. The Value of a Vote: Malapportionment in Comparative Perspective. **British Journal of Political Science**, vol. 31, p. 651-71, 2001. p. 662.

[26] ARANTES, Rogério B. Judiciário: entre a Justiça e a Política. In: AVELAR, Lucia; CINTRA, Antonio Octavio (eds.), **Sistema Político Brasileiro:** uma introdução. 2. ed. Rio de Janeiro: F Konrad Adenauer; Editora UNESP (2007), p. 81-115. For Arantes, the judicialization of politics is most likely to take place when certain conditions are met, as in Brazil, namely, democracy reestablished in the 80s, a federal constitution with an extensive list of provisions, a growing list of interest groups demanding the resolution of collective problems, a multi-party system requiring coalitions to support the government, use of the judiciary as a tool of opposition to the government, and a constitutional model delegating a high degree of legitimacy to the judiciary in various areas.

[27] LEMOS and POWER, supra n. 24. On Congress' role in holding the President to account, see COX and MORGANSTERN, supra n. 24; MORGANSTERN, Scott; NEGRI, Juan Javier; PÉREZ-LIÑÁN, Aníbal, Parliamentary Opposition in Non-Parliamentary Regimes: Latin America. **The Journal of Legislative Studies**, vol. 14, no. 1-2, p. 160-189, 2008; BARROSO, Luis Roberto. **Brazil's Unbalanced Democracy**: Presidential Hegemony, Legislative Fragility and the Rise of Judicial Power. Lecture at Yale Law School, New Haven, CT, 2011.

types, *political* and *legal* accountability: policy agreement is an example of the one; transparency and the absence of crime the other. This, at least, is in theory. In reality, the distinction has collapsed. What tends to drive Congress's exercise of its typical investigative tools—public hearings, summoning ministers for testimony, investigative commissions—are the distinctively *non*-legal criteria of, one, presidential popularity with the public and, two, the size of the pro-presidential faction in Congress.[28] Impeachment, rather than a remedy for high "crimes" against the Constitution and the Union,[29] seems in practice the punishment for political incompetence, as in the cases of Collor and Dilma.

On the judicial side of things, the Brazilian landscape is varied and complicated, but in the context of this chapter, two important features stand out: the strength of Brazil's regional sub-units and the power of courts, and especially public prosecutors. As a federated state, Brazil decentralizes a good deal of power to its states, and wealthy regions like São Paulo and Minas Gerais boast famously strong institutions, especially governors, judges, and prosecutors. This is part of the reason why *Lava Jato* started on the watch of federal prosecutors from the city of Curitiba.

The commonplace that *Lava Jato* has "politicized" the Brazilian judiciary is misleading. Under the 1988 Constitution, the Brazilian judiciary was *conceived* as a political actor—not, of course, in the sense of being a political partisan (political independence and professionalism having always been buzzwords for Brazil's public servants), but in the sense that in post-dictatorship Brazil, courts began to be understood as sites for popular democratic action, especially in the absence of action by often-weak representative institutions.[30]

In the Brazil emerging from the shadow of dictatorship in the mid-'80s, a heady spirit of reform demanded more than a passive citizenry that voted once every few years.[31] As in other relatively young Latin American democracies, new forms of participatory institutions took root in Brazil: some were direct grassroots bodies attempting to shape public law and administration.[32] New offices sprang up, including the newly

[28] LEMOS and POWER, supra n. 24.

[29] Constitution of the Federative Republic of Brazil, Art. 85 (defining impeachment), and Law No. 1.079 of April 10, 1950 (defining crimes for which impeachment is a remedy), available at: http://www.planalto.gov.br/ccivil_03/LEIS/L1079.htm.

[30] VIANNA, Luis Werneck; CARVALHO, Maria Alice Rezende de; MELO, Manuel Palácios Cunha; BORGES, Marcelo Baumann. **A Judicialização da Política e das Relações sociais no Brasil**. Rio de Janeiro: Editora Revan, 1999, p. 47–70. See also the discussion of "interventionist constitutionalism" (*constitucionalismo dirigente*) in COSTA, Fernando Magalhães; MAGALHÃES, Frederico. Judicialização da política e ativismo judicial à luz do procedimentalismo e do substancialismo. **Conteúdo Jurídico**, Brasília, p. 14-16, Sept. 2015.

[31] AVRITZER, Leonardo. **Impasses da Democracia no Brasil.** Rio de Janeiro: Editora Civilização Brasileira, 2016.

[32] Thamy Pogrebinschi has explored these at length in Brazil. POGREBINSCHI, Thamy. Participation as Representation: Democratic Policymaking in Brazil. In: CAMERON, Maxwell A., HERSHBERG, Eric, and SHARPE, Kenneth E. Sharpe (eds.). **New Institutions for Participatory Democracy in Latin America**. New York: Palgrave Macmillan, 2012), p. 53-74; POGREBINSCHI, Thamy. The Pragmatic Turn of Democracy in Latin America.

powerful Public Prosecutor,[33] and old institutions like the courts were recast as a sort of "wailing wall" of popular claims, and given new powers.[34] Prime examples of these the individual constitutional action (*ação popular*) and the power of public prosecutors to bring public class actions in the name of the people against private enterprises and government actors (*ações civiis públicas,* ACPs). In the process, the work of public prosecutors became a deeply visible and popular exercise. As one commentator puts it, the proper object of prosecutorial tutelage has gone from narrow private litigated interests to the "public interest" writ large, adding vast new responsibilities, but above all, *social meaning,* to an old institution.[35] Another weapon in the prosecutorial toolkit is the *termo de ajustamento de conducta* (TAC), a kind of plea bargain allowing prosecutors to leverage the mere *threat* of a lawsuit into behavioral modifications against public and private actors, a device with extremely broad application given how much faster it is than a typical lawsuit.[36]

The ACP and the TAC are important for another reason than the visibility they offer prosecutors: it gives them broad abilities to sue the government, and therefore to shape public policy. ACPs have been filed against hosts of federal agencies, including those that oversee the provision of electricity, water, and oil, those that are responsible for environmental regulation, and even the Ministry of Social Security, accusing it of unreasonable delays in performing medical exams in rural states. In the year before her impeachment, an ACP was filed against President Rousseff herself by the opposition PSDB for her alleged illicit use of public funds to defend herself from impeachment. Meanwhile, thousands of TACs are filed a day in the interests of protecting public property, labor rights, and the environment, and to correct and punish corporate malfeasance.[37]

Friedrich Ebert-Stiftung: Latin America and the Caribbean, p. 3-20, Aug. 2013; POGREBINSCHI, Thamy. The Impact of Participatory Democracy: Evidence from Brazil's National Public Policy Conferences. **Comparative Politics**, vol. 46, no. 3, p. 313-332, Apr. 2014.

[33] KERCHE, Fábio. Autonomia e discricionariedade do Ministério Público no Brasil. **Dados-Revista de Ciências Sociais,** vol. 50, no. 2, p. 259-279, 2007.

[34] VIANNA, Luis Werneck; BURGOS, Marcelo Baumann. Entre princípios e regras: cinco estudos de caso de Ação Civil Pública. **Dados**. vol. 48, n.4, p.777-843, 2005. p. 781. LOPES, José Reinaldo de Lima. Brazilian Courts and Social Rights: A Case Study Revisited. In: GARGARELLA, Roberto, DOMINGO, Pilar, and ROUS, Theunis (eds.). **Courts and Social Transformations in New Democracies**: An Institutional Voice for the Poor? New York: Routledge, 2016, p. 185-212; ARANTES, Rogério B.; COUTO, Cláudio G. Constitutionalizing Policy: The Brazilian Constitution of 1988 and its Impact on Governance. In: NOLTE, Detlef; SCHILLING-VACAFLOR, Almut (eds.). **New Constitutionalism in Latin America**. New York: Routledge, 2012.

[35] VIANNA and BURGOS, supra n. 34.

[36] CRAWFORD, Colin. Defending Public Prosecutors and Defining Brazil's Environmental "Public Interest": A Review of Lesley McAllister's *Making Law Matter: Environmental Law and Protections in Brazil*. **George Washington International Law Review**, vol. 40, no. 3, p. 619-647, 2009, p. 620.

[37] TACs also give prosecutors great leverage over the regulatory state. This is particularly so in their role supporting public-private partnerships. For a population wary of privatizations, TACs ensure corporate accountability in these transactions, freeing up the government to contract with such actors without arousing public suspicion. ROSE-ACKERMAN, Susan. **Public Administration and Institutions in Latin America**. Paper prepared for

TACs have been used to bring a regional public health agency into compliance with the law by forcing it provide services it had reneged upon, and against clothing manufacturer Zara to impose fines upon it for using unpaid labor in its factories.[38]

It is worth emphasizing the scope of this power. "Try to imagine," writes Colin Crawford, "an arm of the U.S. Department of Justice suing the U.S. President and the administrator of the U.S. Environmental Protection Agency for failing to enforce the environmental laws, and one begins to appreciate the potential scope of the *Ministério Público*'s authority. For most of us, the scenario is unimaginable in the United States."[39]

4. A BALANCE SHEET FOR COALITIONAL PRESIDENTIALISM

Historically, there has been vivid disagreement among scholars about how to assess Brazil's coalitional presidentialism. Defenders tout the virtues of moderation and stabilization that coalitional governance supposedly imposes.[40] On the other hand, for most political scientists, especially those outside of Brazil, the prevailing wisdom is that "modern democracy is unthinkable save in terms of political parties," the opportunism and prodigious appetite of Brazil's "politicians without parties" just proof of the system's immaturity and weakness.[41]

What successful coalition-building *actually* requires is debated, and the answer is necessarily bound up with one's assessment of the Brazilian system as a whole. The most rational mechanism, expounded by Octávio Amorim Neto and others, is the "party balance" model. On this theory, a President's need to win support from legislative allies is translated into appointments to top positions in ministries, governmental agencies and public enterprises that mirror the composition of the governing coalition of the moment. As the logic goes, the more proportional the cabinet, the greater chance

Copenhagen Consenso, San José, Costa Rica, Oct. 2007; PIRES, Roberto. Promoting Sustainable Compliance: Styles of Labour Inspection and Compliance Outcomes in Brazil. **International Labour Review**, vol. 147, nos. 2-3, p. 199-229, Jan. 2008; COSLOVSKY, Salo V.; LOCKE, Richard. Parallel Paths to Enforcement: Private Compliance, Public Regulation, and Labor Standards in the Brazilian Sugar Sector. **Politics & Society**, vol. 41, no. 4, p. 497-526, Dec. 2013.

[38] VIANNA and BURGOS, supra n. 34, 786.
LOPES, José Reinaldo de Lima. Brazilian Courts and Social Rights: A Case Study Revisited. In: GARGARELLA, Roberto, DOMINGO, Pilar, and ROUS, Theunis (eds.). **Courts and Social Transformations in New Democracies**: An Institutional Voice for the Poor? New York: Routledge, 2016, p. 185.

[39] CRAWFORD, supra n. 36, p. 621.

[40] See note 24, supra.

[41] AMES 1995, supra n. 3, AMES 2002, supra n. 3, MAINWARING, Scott. Politicians, Parties, and Electoral Systems: Brazil in Comparative Perspective. **Comparative Politics**, vol. 24, no. 1, p. 21-43, Oct. 1991, MAINWARING, Scott. Party Systems in the Third Wave. **Journal of Democracy**, vol. 9, no. 3, p. 67-81, July 1998; MAINWARING, Scott. **Rethinking Party Systems in the Third Wave of Democratization:** The Case of Brazil. Palo Alto: Stanford University Press, 1999; SAMUELS, David J. Sources of Mass Partisanship in Brazil. **Latin American Politics and Society**, vol. 48, no. 2, p. 1-27, Spring 2006; ROBERTS, Kenneth, **Changing Course in Latin America**: Party Systems in the Neoliberal Era. New York: Cambridge University Press, 2014.

the President's legislative allies are satisfied with the arrangement, the more disciplined the legislative coalition, and thus the greater chance of presidential success at getting her legislative agenda passed.[42]

Defenders of the partisan balance model find in it many virtues. Wide legislative coalitions are thought to impose moderation and consensus on the executive policy agenda, neutralizing radical sharp turns in policymaking and imposing a kind of discipline on presidential unilateralism.[43] Coalitions prove fairly stable across administrations, the President's agenda-setting powers allowing her to neutralize personalism and secure disciplined party support.[44] Patronage also helps stabilize the coalition, providing party leaders with the means to discipline and punish backbenchers. Bargaining need not even take place on a item-by-item basis: once the government is formed and benefits distributed among coalition members, the president may exact support for his or her entire legislative platform much like a prime minister.[45] Cabinet proportionality is also thought to reduce unilateralism by the President, the rate of decrees going down in direct proportion.[46]

The vividly contrasting tenures of presidents Fernando Collor de Melo (1990-92) and Fernando Henrique Cardoso (1994-2003) speak to the accuracy of partisan balance model. The first popularly elected president in Brazil after the dictatorship, the charismatic young Collor enjoyed strong popular backing early in his tenure, but his radical plan of neoliberal reforms was supported, as one Argentine journalist put it, "only by his

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[42] NETO, Octavio Amorim. **Presidencialismo e Governabilidade nas Américas**. Rio de Janeiro: Fundação Getúlio Vargas, 2006, 64-70; NETO, Octavio Amorim. Presidential cabinets, electoral cycles, and coalition discipline in Brazil. In: MORGANSTERN, Scott, and NACIF, Benito (eds.). **Legislatures and Democracy in Latin America**. New York: Cambridge University Press, 2002, pp. 48-78; NETO and SANTOS, supra n. 24. But see CHEIBUB, José Antonio; LIMONGI, Fernando. Democratic Institutions and Regime Sruvival: Presidentialism and Parliamentarism Reconsidered. **Annual Review of Political Science**, vol. 5, p. 151-179, 2002 (finding no connection between cabinet proportionality and legislative success of the presidential agenda).

[43] MELO and PEREIRA, supra n. 6. Political scientist Giovanni Sartori's 1997 study of comparative constitutional design focused on the political conditions that could engender "consensus democracy" by balancing the need for strong parliamentary control and efficient government with safeguards against both parliamentary obstructionism and government by decree. SARTORI, Giovanni. **Comparative Constitutional Engineering**: An Inquiry into Structures, Incentives, and Outcomes. New York: NYU Press, 1997. Observed former president Cardoso in an interview in 2012, "[T]here is a kind of non-explicit agreement [in our system for consensus]. When Lula became President the world believed he would destroy everything that I had done. And he didn't . . . When I lived in Chile [during Brazil's period of military dictatorship] the Christian Democrats and Socialists were opponents … Then they merged to create a united force, the Concertación. We didn't do that. But in practice we are doing the same." Interview with Fernando Henrique Cardoso, "More personal security, less inequality." **The Economist Online**, Jan. 19, 2012.

[44] MAINWARING, Scott; SHUGART, Matthew S. **Presidentialism and Democracy in Latin America.** New York: Cambridge University Press, 1997; FIGUEIREDO and LIMONGI, supra n. 24.

[45] The distribution of ministries and high-ranking positions also follows a federalist logic, as the government must cater to factions at different state levels. LIMONGI, supra n. 24, 2005.

[46] NETO, Octavio Amorim; TAFNER, Paulo. Governos de coalizão e mecanismos de alarme de incêndio no controle legislativo das medidas provisórias. **Dados**, vol. 45, no. 1, p. 5-38, 2002.

arrogance and by the advice of a group of technocrats."[47] While his predecessor, Sarney, had maintained a flourishing spoils system of patronage, Collor's style of leadership was less consensual and much more technocratic. His initial governing coalition consisted of only three political parties and covered 245 seats, or about 49 percent of the Chamber of Deputies; 60 percent of the posts in his first cabinet went to non-partisan ministers.[48] Admittedly, the administration was crippled by a perpetually bleak economic forecast of massive hyperinflation, and beset by a series of corruption scandals and massive popular protests around the country. But when Collor was impeached from office in 1992, it was his hubris, unilateralism, and lack of real alliances or strong backing in Congress that were blamed for the fall.

Collor's successor Cardoso, or FHC, as he was popularly known, was never tempted to repeat this experiment in unilateralism. His party, the PSDB, had won a scant 14% of seats in Congress in 1994 (and would win 17.5% in 1998). Of necessity, Cardoso stitched together a sprawling legislative coalition totaling, at one time, six parties and 72.8% of seats in the Chamber of Deputies.[49] Notwithstanding its size, the coalition was blessed with remarkable "coalescence"[50] and had notable success in bringing about Cardoso's liberal reformist vision of the "necessary state." The roll-out of four direct cash transfer programs, Bolsa Escola (schooling credits), Agente Jovem/Erradicação do Trabalho Infantil (support for families with children), Bolsa Alimentação (distribution of foodstuffs), and Auxílio-gás (cash transfers for gas), allowed simultaneously for a reduction in poverty and a reduction in bureaucratic waste with the elimination of middlemen. that eliminated that helped to universalize welfare coverage while circumventing the bureaucracy, tamping down on clientelism, and decentralizing and streamlining public spending state by expanding municipal responsibilities and fiscal resources.[51] Decentralizing fiscal resources via formulae for calculating totals to administer to state governments for grant-in-aid programs, FHC further reduced public spending and pork barrel exchanges between legislators and state governors. Cardoso even managed to launch major reforms to the Brazilian Constitution: state monopolies were dismantled, hiring and salary decisions in the public bureaucracy decentralized, and immediate

[47] NATANSON, José. **La nueva izquierda: Triunfos y derrotas de los gobiernos de Argentina, Brasil, Bolivia, Venezuela, Chile, Uruguay y Ecuador.** Buenos Aires: Penguin Random House Group Editorial Argentina, 2008. p. 56.

[48] PEREIRA, Carlos. **Brazil's Executive-Legislative Relations under the Dilma Coalition Government**. Washington: Brookings Institution, 2010.

[49] LIMONGI, Fernando; FIGUEIREDO, Argelina. Processo orçamentário e comportamento legislativo: emendas individuais, apoio ao Executivo e programas de governo. **Dados**, vol. 48, p. 737-776, 2005; PEREIRA, supra n. 48, 2.

[50] NETO, supra n. 42.

[51] These programs were joined by the Program for Family Health, the Support Program for Family Agriculture, and Project Alvorada ("Sunrise"), which targeted municipalities with particularly high rates of residents below the poverty line.

presidential reelection was reinstated. While Cardoso's attempts to reform civil service employee pensions and the tax system failed, while his reforms to social security passed only after having lost much of their bite, as two well-known Brazilian political scientists claim, "it would be impossible to claim that the results achieved [by the Cardoso government] were modest."[52]

On the other hand, the system's defects have never been clearer. For critics of Brazilian coalitional presidentialism, the standard refrain has been that, given the weakness of political parties, the system was predisposed to opportunism, and therefore only *ad hoc* illegitimate methods like horse trading or, even worse, bribery could hope to hold it together.[53] In the light of *Lava Jato,* the above image of Collor, a political incompetent who squandered his chances at coalition-building, and Cardoso, the seasoned negotiator who sustained a coalition for almost eight years at a comparatively low cost, seems too simple. In fact, the real cost of coalitional stability, even for a gifted leader, is much higher.

As Perry Anderson recounts,

> *[A]lthough the coffers of Cardoso's campaigns were "clean" in the sense of American money politics, where Super PACs buy votes, and his coalition was ideologically unforced, once he was elected neither his objectives nor those of his allies could be achieved without reliance on other methods. Both his vice-president, Marco Maciel, and his most powerful ally in Congress, Antonio Carlos Magalhães, were linchpins of the repressive political order in the north-east – one installed as governor by the dictatorship in Pernambuco, the other in Bahía, after both had supported the destruction of democracy in 1964 – with no intention of altering traditional ways of running it. ACM, as he liked to*

[52] FIGUEIREDO and LIMONGI, supra n. 49. Constitutional reform in Brazil requires the approval of three-fifths of all members in both the Chamber of Deputies and the Senate in two separate rounds of voting. Moreover, because regulations in the lower chamber allowed any party to call a vote on individual parts of a proposition, the three-fifths quorum had to be achieved on hundreds of different votes. ALSTON and MUELLER, supra n. 17. GAETANI, Francisco; HEREDIA, Blanca**. The Political Economy of Civil Service Reform in Brazil**: The Cardoso Years. Document prepared for the Red de Gestión y Transparencia del Diálogo Regional de Política del Banco Interamericano de Desarrollo, p. 1-41, Oct. 2002; KOYASU, Akiko. Social Security Reform by the Cardoso Government of Brazil: Challenges and Limitations of Reform Ten Years After 'Democratization'. **The Developing Economies**, vol. XLII, no. 2, p. 241-261, June 2004. p. 242.

[53] Expressing the view that institutionalized party systems return superior outcomes, see KITSCHELT, Herbert; HAWKINS, Kirk A.; LUNA, Juan Pablo; ROSAS, Guillermo; ZECHMEISTER, Elizabeth J. **Latin American Party Systems**. New York: Cambridge University Press, 2010; MAINWARING 1998, supra n. 41, MAINWARING 1999, supra n. 41. On the opportunism and appetite for pork of Brazil's politicians, see, e.g., CAVAROZZI, Marcelo; CASULLO, Esperanza. Los partidos políticos en América Latina hoy: consolidación o crisis? In: ABAL MEDINA, Juan Manuel;CAVAROZZI, Marcelo (eds.) **El asedio a la política: los partidos latinoamericanos en la era neoliberal**. Rosario: Editorial Homo Sapiens, 2003; ALSTON and MUELLER, supra n. 17; AMES 1995, supra n. 3, AMES 2002, supra n. 3, NETO and SANTOS, supra n. 24, ANDERSON, Perry. The Cardoso Legacy. **London Review of Books**, vol. 24, no. 24, p. 18-22, Dec. 2002; COX and MORGANSTERN, supra n. 24, WEYLAND, Kurt. The Brazilian state in the new democracy, **Journal of Interamerican Studies and World Affairs**, vol. 39, no. 4, p. 63-94, Winter 1998.

> *be known, boasted: "I win elections with a bag of money in one hand and a whip in the other."54*

Among the "other methods" Cardoso employed were sheer bribery, as when his bid to revise the Constitution ran into opposition from within his own party. For another, Cardoso's stable majority was the product of a pact between his own party, the PSDB, based in the industrialized wealthy south and south-east, and the conservative PFL, whose electorate lay in the rural north-east and north, enclaves of poverty and authoritarianism. Brazil's heavily jerry-rigged electoral map, which overvalues Brazil's poorest, worst educated, most conservative, and least populous regions, effectively eliminates the possibility of such a coalition for a president on the left. As the fate of the PT shows, such parties must go to greater lengths to achieve similar results.

No one doubts that Lula, Brazil's most popular president in decades, had enormous reserves of personal charisma. But it now turns out that his coalition was held together, for at least his first term, by a very unsavory binding agent. Although Lula had been systematically shunned by industry and the center-right media in his first presidential campaigns of 1989, 1994, and 1998, by 2002, he had managed to reassure banks and companies that he would not attack them and coasted to victory with their support and funding. Yet as a newly-elect, he was a legislative orphan, his newcomer PT utterly lacking in connections in Congress, and still regarded as radical.

Upon taking office, Lula and PT higher-ups eschewed what the obvious route of courting the catch-all PMDB, fearing it would prove a drag on their agenda. Instead, the decision was made to protect some semblance of ideological purity and "stitch together a patchwork of backers out of the dense array of smaller parties, without conceding them much foothold in the government, but paying them cash for their support in the chamber by way of a solatium." In practice, the PT was attempting "to compensate for its lack of the kinds of partner with whom Cardoso had enjoyed a natural connubium … by dispensing a set of material inducements to co-operation at a lower level, and in lesser coinage: monthly wads of money in lieu of major offices of state."[55] At the time, it may have seemed a venal sin. But Lula barely weathered the *mensalão* scandal that exploded when this practice was uncovered in 2006, and during his second term in office, Lula made sure to make room for the PMDB in his Cabinet.[56] Today, of course, Lula is in jail, serving out a twelve-year sentence for *corrupção passiva* (receipt of bribes) and money laundering.

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[54] ANDERSON, supra n. 25.

[55] Ibid.

[56] PEREIRA, supra n. 48; PEREIRA, Carlos; POWER, Timothy; RAILE, Eric D. **Coalitional Presidentialism and Side Payments:** Explaining the Mensalão Scandal in Brazil. Unpublished manuscript, 2008.

Lula's PT successor, Dilma Rousseff, tried the contrary approach at the start of her term, appointing as vice-president a PMDB loyalist who helped rustle up a coalition covering over 60 percent of the Assembly. Yet Dilma never had Lula's charisma or easy touch as a negotiator, and her pact with the center-right remained forced and tenuous. By the time the Petrobras scandal broke in late 2014, rumors of impeachment began, especially when the PT's misdeeds became clear (Dilma herself never was, and still has not been, formally implicated). In July 2015, the PMDB pulled out of the coalition when its head, Eduardo Cunha, himself came under criminal investigation for involvement in the scandal, accusing the PT of "using its machinery to seek the political persecution of those who turn against it," as the aggrieved Cunha put it. The reality was probably the opposite, the kingmaker PMDB smelling blood in the water and seizing the opportunity to install one of their one in the Planalto, the presidential mansion. Dilma responded in October by increasing the PMDB's share of her cabinet. But by December, anti-PT protests surged, and the PMDB refused to protect her—the impeachment process, ironically, was set in motion by Cunha, by then out of office, and signed off on by Temer while the President was out of the country.

Now Temer serves out the remainder of Dilma's term through January 2019, although he too is banned from running for office for campaign violations. As vice-president, escaped impeachment in June 2017 by a single vote from the Supreme Electoral Tribunal, and he remains under criminal investigation for possible involvement in an illegal ethanol purchasing scheme.

The massive public disgust unleashed by the unfolding corruption scandal has done even more to thrust the judiciary into the spotlight. Early in the investigation, scenes of *Lava Jato*'s lead prosecutor, Deltan Dallagnol being accosted in the street by Brazilians shedding tears of gratitude, or of the tenacious federal judge Sérgio Moro honored in a carnival parade with a twenty-foot-doll in his likeness confirmed the visibility of a Public Prosecutor's Office newly aware of its power to tap into, or mobilize, popular energies.

But *Lava Jato* walks a fine rope. "A 'clean hands' operation can't risk getting its own hands dirty," observes scholar Rogério Arantes, and the investigation, while impressive in its results thus far, is showing signs of being overstretched.[57] Some charges brought under its auspices have been flimsy, hasty—especially, agrees the legal community, those against Lula himself. The timing of charges seems to coincide a little too neatly with the electoral calendar, leading to accusations of political favoritism. And in the rush to secure convictions, judicial and prosecutorial ethics have been bent: in March 2016, for example, Judge Moro illicitly leaked a wiretapped phone call betwe-

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[57] OLIVEIRA, André de. "Protagonismo da Justiça deslocou centro gravitacional da democracia brasileira" (Interview with Rogério Arantes). **El Pais Brasil**, Sept. 24, 2016.

en Lula and Dilma. Many were aghast at this lapse in judgment, but Moro was never sanctioned.

Today, the prosecutor Dallagnol claims Brazilians are stuck in a "bribeocracy" (*propinocrácia*) whose transgressions still need to be purged. On the other side are disgruntled *petistas* and politicians afraid of getting caught up in *Lava Jato*'s net railing against a "government of judges" and an unaccountable, voracious "fourth branch."

This impasse is typical of the structure of Brazil's regime: Dallagnol criticizes the opportunistic *quid pro quo* that has always structured congressional majorities; the "judicialization of politics" shining the unflattering light of publicity upon the ordinary business of the politics, with the judiciary now deciding the fates of those in the system. The timing of *Lava Jato* owes much to contingency, but it is also due in part to design.[58]

First, given the fragmented party system, Congress is built to survive through ad hoc jockeying. Add to this the heavily conservative bias guaranteed that body by electoral laws, and long-entrenched *norms* of patronage and patrimonialism that characterize Brazil's legislative and bureaucratic culture, and it becomes difficult to imagine a productive government keeping its hands clean.[59]

Dirty hands alone would be sordid but sustainable—as it has been for most of Brazil's history—were it not for the deeply political role assigned in the new order to Brazilian prosecutors in light of their public-facing democracy-vindicating persona and the responsibility assigned them as constitutional watchdogs.

The outsized role of judges and prosecutors, as I've tried to show, was partly intentional, partly not. The "judicialization of politics" in Latin America was a logical outgrowth of a past of military impunity and institutional weakness, as Brazil's Constitution reflects. But it also reflects a gradual, steady, and largely unchecked increase in the power of these actors in the face of a notoriously unrepresentative, ineffective, corrupt, and passive Congress unable itself to take on the task of ensuring governmental accountability. With Congress so weak, the judiciary has taken on a larger and larger role in the legislative process. The result is to force that process to respond to norms of transparency and rationality that are totally alien to it, from a cultural point of view, and nearly impossible to achieve, for the structural reasons already discussed.

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[58] Ibid. Political scientist Rogério Arantes spoke of just this phenomenon in a recent interview. "It is curious how [prosecutors and courts] can cause alternation in power, by electoral and non-electoral routes as has occurred in Brazil today, but cannot completely take the place of politics, which has its own logic and which, at least in a democracy, constitutes the most legitimate language and space of representation and government. In any case, this battle between Justice and Politics is inscribed in our institutional design and should be seen as a permanent championship and not just as an isolated match."

[59] ARANTES, Rogério B. The Federal Police and the Ministério Público. In: POWER, Timothy; TAYLOR, Matthew (eds.). **Corruption and Democracy in Brazil**. 1 ed. Notre Dame: University of Notre Dame Press, 2011, p. 184-217. The foundational take on the history of patrimonial norms in Brazilian politics and society is provided by FAORO, Raymundo. **Os donos do poder:** Formação do patronato político brasileiro. 3. ed. São Paulo, Editora Globo, 2001.

A final casualty of the system is the judiciary itself. Today's *Lava Jato* backlash is not just the normal swing of the pendulum once a crisis has passed; the worry is that, by becoming so deeply involved in the political process, the judiciary has savaged the distinction between political and legal, and in turn the ideal of "judicial independence," so crucial to its very survival.

5. IN LAVA JATO'S WAKE: THE SEMI-PRESIDENTIAL TEMPTATION AND LASTING CHANGES?

Political crisis has a way of making even seemingly preposterous and radical reform proposals more palatable, and after *Lava Jato,* Brazil's perennial flirtation with parliamentarism, or at least a closely related semi-presidential version, has reemerged. Attesting to the depths of the crisis, it is the current president, Michel Temer, who has floated a proposal to newly reform the Constitution so as to make the nation a semi -presidential democracy. Temer believes the proposal would improve governance and strengthen cooperation between the two branches. Under that system, the President, directly elected by voters, would choose a prime minister to govern alongside him or her, the President acting as head of state; the Prime Minister head of the government. Where relations between Congress and the executive branch broke down, the Prime Minister would be dismissed and the President would nominate a replacement.

So far, the proposal remains at the "test balloon" stage, although it has the approval of Temer cronies in all the major branches (Supreme Court Justice Gilmar Mendes, president of the Senate Eunício Oliveira (PMDB), and president of the Chamber of Deputies Rodrigo Maia (DEM)). In the meantime, two separate reforms at more advanced stages of consideration by Congress include a bid to create a public fund for political campaigns, with all corporate donations prohibited, and a redistricting proposal that would eliminate proportional representation in an attempt to winnow down the number of represented parties to more manageable levels.

All signs suggest that the semi-presidential option will remain a distant dream for Brazil, but even if passed, it would hardly be the catchall fix that some see. Normalizing the formation and collapse of governments, as opposed to the cataclysmic event that is presidential impeachment, where a president loses parliamentary support, would go some way to stabilizing what appears a normal feature of Brazilian politics.[60] But without great reform to the party system, there is no reason to think that this would

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[60] Argelina Figueiredo claims that impeachment in Brazil, far from a bug, may instead reflect properly functioning mechanisms of accountability kicking in to rid the system of a corrupt president. FIGUEIREDO, Argelina. The Collor Impeachment and Presidential Government in Brazil. In: LLANOS, Mariana; MARSTEINTREDET, Live (eds.). **Presidential Breakdowns in Latin America**: Causes and Outcomes of Executive Instability in Developing Democracies. New York: Palgrave Macmillan, 2010, p.112-13, 124.

rationalize Brazil's corrupt politics, produce better governing outcomes, or transform Congress into a true check on the President.

Real reform to the party system, such as would be needed, is unlikely. For a time during and immediately after the "Salad Revolution" and the arrest of Lula, it seemed that Brazil was turning "bi-partisan" on its own, through the formation of broad pro- and anti-*petista* coalitions. Since that time, these have dissolved—without the moral legitimacy of opposition, the strong leadership of Lula, or even the opportunism of incumbent funding, the PT's future especially in doubt.

To change the party system through legal means, electoral reform is the place to start, but at the scale currently proposed, these will not effectuate a real transformation. The hold of the old parties in the North, Northeast, and Southeast regions is unlikely to be threatened by the public campaign fund, the elimination of proportional representation, or a threshold on the number of parties in Congress. With the map still gerrymandered, for the foreseeable future, the stalwart PSDB and PMDB will remain fixtures of any coalition *not* purchased through illicit means, virtually foreclosing all but a center-right coalition in the FHC mold. Lacking channels to translate electoral success into votes, a frustrated Brazilian left may take to attacking the legitimacy of the system itself. The result will be mass discontent of the sort witnessed today.

As concerns the role of the fearsome "fourth branch," there are signs that the tide is already receding. In May 2016, the independent *Contraloria Geral* was dissolved by executive order and folded in to the new Ministry of Transparency, Supervision, and Control (under presidential supervision). In May 2017, the *Lava Jato* task force of the Federal Police of Curitiba was reduced and its budget cut drastically. It is possible that *Lava Jato* will clean up the worst of Brazil's norms of corruption. At the same time, now that Pandora's box has been opened, it seems that the publicity- and oversight-enhancing role of technology will be here to stay. But horse-trading, spoils, and policy incoherence are likely to remain the primary stock in trade of Congress for some time to come.

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Constitutionalizing umbrella-concepts: peace and conflict in the Brazilian Constitution

Constitucionalizando conceitos guarda-chuva: paz e conflito na Constituição brasileira

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Abstract

The incorporation of the concept of peace as an umbrella concept within the Brazilian Constitution has generated conceptual problems. This is demonstrated by attempts to understand the scope and limits of peace and conflict established by the Brazilian Constitution. The purpose of this study is to explore the concepts of peace and conflict, in order to clarify the meanings to which the Constitution refers, and to overcome the umbrella concept. For this, articles 4.6 and 4.7 of the Constitution were analyzed, in light of Galtung's theory of peace and conflict and Brazil's foreign policy from 1988 onwards.

Keywords: peace; reconceptualization; conflict; Galtung, constitutionalization; Brazilian Constitution.

Resumo

A incorporação do conceito de paz como um conceito genérico dentro da Constituição brasileira gerou problemas conceituais. Isso é demonstrado por tentativas de compreender o alcance e os limites dos conceitos de paz e conflito estabelecidos pela Constituição Brasileira. O objetivo deste estudo é explorar os conceitos de paz e conflito, a fim de esclarecer os significados desses termos referidos pela Constituição e superar a generalidade do conceito. Para tanto, foram analisados os artigos 4.6 e 4.7 da Constituição, à luz da teoria de paz e conflito de Galtung e da política externa brasileira a partir de 1988.

Palavras-chave: *paz; reconceitualização; conflito; Galtung; constitucionalização; Constituição Brasileira.*

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1. Introduction; **2.** Beyond peace as an umbrella concept. Towards a down to earth concept of peace based on the Brazilian foreign policy since 1988; **3.** The concept of conflict: Article 4.7 of the Brazilian Constitution; **4.** Conflict Resolution; **5.** Conflict transformation; **6.** Intervention; **7.** Conclusion; **8.** References.

1. INTRODUCTION

Almost since human behavior has been recorded in history, conflicts have existed –sometimes wars, sometimes simple non-violent conflicts; also, since then, ways have been traced to prevent or stop them from happening. The exploration of these topics has always transcended the theoretical scope. The most common approaches to conflict (and peace) throughout history involve literature, movies and, in general, pop-culture. Conflicts are as familiar as peace – in daily life, in books, in televisions; these are not rare issues to everyone. The reality is that the period which followed the World Wars largely influences how we conceive these topics and even the way people interrelate with each other, or the subjects that are taught at school. The creation of international institutions in which peace is inherent to their existence and theoretical development have impact in our lives, not only, for example, in the prevention of conflict, but also in personal relations or the ways in which the people interact with governments. Despite the signing and ratification of a peace treaty or the inclusion of a State in an international organization that pursues peace being characteristic of commitment to the world, several questions still arise. What happens when a State constitutionalizes these commitments? What does the constitutionalization of peace and conflict resolution really mean, and are these States aware of that meaning? Brazil is one of the States which function in this manner. This paper explores the implications of the concepts of "peace defense" and "pacific resolution of conflicts" established in articles 4.6 and 4.7 respectively of the Constitution of the Federative Republic of Brazil, in light of the theories of peace and conflict developed by Johan Galtung.

It is important, as previously established, to accept that peace and conflict perceptions are generally informal; this is reasonable since people interact with these ideas every day. In daily use of these concepts, one might perceive them as super-concepts or umbrella-concepts that are not clearly defined, such as collective goals, abstract "things" that one may pursue because they have the virtue of being good – whatever that means individually or even collectively. Viewing peace as an umbrella concept has resulted in peace being seen as something unreasonable and imperceptible for research or analysis. However, it is possible and necessary to analyze peace and conflict from a more technical, formal and scientific perspective. In doing so, one can specifically avoid peace becoming an umbrella concept. That is the aim of this article. This article will analyze the aforementioned constitutional articles, specifically the concepts of "peace

defense" and "pacific resolution of conflicts", in light of conflict theory and will illustrate its implications and meaning in light of specific cases.

2. BEYOND PEACE AS AN UMBRELLA CONCEPT. TOWARDS A DOWN TO EARTH CONCEPT OF PEACE BASED ON THE BRAZILIAN FOREIGN POLICY SINCE 1988

Transcending the umbrella concept, there are several ways in which peace may be understood. First, there is the old idea, which is referred to as stability and equilibrium in micro (individuals) or macro (countries) situations. Secondly, the 'law and order' idea refers to social order and the observability of the law, even when it is constrained to solely the use of force. Third, there is also the concept of negative peace that refers to the absence of collective organized violence specifically (excluding every other type of violence, like individual violence without a conduct pattern). Lastly, there is the view in which peace represents all that is good – the benefits and merits of being part of the international community, such as cooperation or integration, and sometimes, the resultant absence of violence.[1] But the question is, which of these meanings best fits the Brazilian Constitution?

Since it cannot be determined exactly what peace means for Brazil by merely regarding the Constitution which seems to utilizes peace as an umbrella-concept, a brief analysis of the shape and design of Brazilian international policy regarding peace and conflict, from 1988 onwards, will be made. It is important to note that this paper will not analyze the whole foreign affairs apparatus. Instead, it will focus on particular issues, that will assist in explaining which of the four ideas of peace best gives a notion of what article 4.6 of the Constitution really means when it says "peace defense".

Brazilian foreign policy can be divided in three overarching aspects: presence, cooperation, and international security. The most noticeable aspect is the prevalence and the active exercise of article 4.4 of the Constitution (which is also an international law principle) regarding no-intervention, and the internally customary[2] rule with which Brazil has constantly opposed economic sanctions (notably at the United Nations) for issues related to self-determination of the Member States of the International Community. In light of this, Brazil's presence in underdeveloped countries, specifically Portuguese-speaking nations, can also be observed, along with the importance of cooperation to not only Brazil, and the aforementioned countries benefitted by Brazil's cooperation policies, but also the international community as a whole. Although there is even an agency related to international cooperation (Agência Brasileira de Cooperação), emanating from the Ministry of Foreign Affairs, it is important to mention that it is

[1] GALTUNG, Johan. **A theory of peace**. Oslo: Transcend University Press, 1967. p. 12.

[2] In terms of continuous practice of the Brazilian State regarding economic sanctions for issues related to self-determination.

not directly related to the peace agenda; this is evident because of the priority topics, that are agendas themselves, of the Ministry of Foreign Affairs, such as bilateral relations, regional integration, interregional mechanisms, etc.; cooperation and peace and security are separated from each other.

Regarding international security, it is imperative to point out that everything done by Brazil on this issue is in the context of the United Nations[3] (or this is at least the impression held). In this sense, the important issues of international security are: peacekeeping operations, presence on Lebanon and Haiti, disarmament and arms control, non-proliferation, commitment against the use of chemical weapons, the budget of the United Nations, cooperation with the International Criminal Court, all the issues related to asylum and refuge institutions, and the reform of the United Nations Security Council, which is intended to increase the number of permanent members with veto power.

Considering this, we can conclude that by "defense of peace", article 4.6 of the Brazilian Constitution is actively referring to a combination of stability and equilibrium in micro or macro situations, and negative peace. It also passively refers to the benefits and merits of being part of the international community, given the importance that Brazil places on cooperation, even if Brazil itself does not recognize it, since, as aforementioned, it is not part of the State's peace agenda. It is instead perceived as an independent "project", which in the eyes of Brazil, is limited to cooperation, although in practice it transcends this and contributes to peace.

If, for this case, we conceptualize violence as a biological and physical force, or the effort of causing physical damage to another person, then we may find that a more precise concept of peace may be: the absence of violence and exploitation, with existing equality elements, as well as the search for the absence of negative relations and the search of conditions that facilitate the presence of positive relations.[4] Both positive and negative relations should be explored separately, even when they are not empirically.

Once the constitutional meaning of "peace" is established, other fundamental concepts, such as positive relations, can be explored: positive relations are a set of what seems to be "superior" intra-national or international values, where the States have an implicit consensus. Galtung has identified ten tentative values of positive relations, which are the presence of cooperation, freedom from fear, freedom from want, economic growth and development, absence of exploitation, equality, justice, freedom of action, pluralism, and dynamism. In general, contradictions cannot be found in positive relations, because even if it is difficult to find all positive relations together at the same time, this is because of structural incompatibility, not logic inconsistence.[5] Positive

[3] The United Nations does not have a monopoly of peace, conflict resolution, transformation or intervention, but normally the States are more secure of themselves contributing to the international community through this international organization.

[4] GALTUNG, Johan. **A theory of peace**. Oslo: Transcend University Press, 1967. p. 14.

[5] GALTUNG, Johan. **A theory of peace**. Oslo: Transcend University Press, 1967. p. 16.

relations are an analytic catalogue of problems. The values are useful to highlight certain problems, and, with that, we can maximize and minimize the use of violence.

Now we can reconfigure concepts, including negative peace as the absence of violence; positive peace as the summation of values of positive relations; and national values as the expression of the objectives that States pursue individually.

The analysis above also helps to identify which of the ten tentative values proposed by Galtung are Brazilian intra-national values, i.e. presence of cooperation, freedom from fear, economic growth and development, equality, justice and pluralism.

The importance of understanding this in each case or for each State is to be able to predict how each country would deal with a peace process, either during their own peace process or as an external actor.

Now, a similar case of another State that has positivized peace in its Constitution will be looked at. The case of Japan is particularly interesting because of its own history with war, specifically World War II and the aftermath. The current Constitution[6] came into force two years after the end of WWII. One of the most important provisions in the whole Constitution and one for which the richest legal discussions have taken place, is Article 9 which establishes the renunciation of war as follows:

> *(1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.*
>
> *(2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.*

As opposed to the Brazilian case and despite this constitutional article being written in negative terms, it gives a clear idea of how Japan views the concept of peace. Article 9 refers to stability and equilibrium in micro and macro situations, social order and observability of the law, and most importantly, it refers actively and explicitly to negative peace as the absence of organized state violence. The discussion can then turn to either the several possible interpretations of the Article 9 which is given by politicians, Courts and academia, or the debate concerning the amendment of this article due to the recent tense relationship with North Korea. Whether this article is only for international peace, although for domestic purposes, it would be unsustainable, can also be examined. However, these debates will not be addressed. Rather, what matters is the explanation of the scope and concept of peace Japan as emanated from the Constitution. Having established the above, we can now clarify that the national values

[6] JAPAN. **Constitution of Japan.** 3 November 1946. Available at: <http://www.japaneselawtranslation.go.jp/law/detail_main?re=&vm=02&id=174>. Accessed on 14 July 2018.

based on that brief analysis of Article 9 in light of Japanese foreign affairs. confirm that Galtung's tentative values are also exercised by Japan.

As for Japanese foreign affairs, the country has general agendas[7] with specific themes within them. For issues addressed in this paper, the relevant agenda is Security/ Peace & Stability of the International Community, within which the issues are: Crime, Cybersecurity, Disarmament and Non-Proliferation, Peaceful Uses of Nuclear Technology, Human Rights, Humanitarian Assistance, Refugees, International Law and Treaties, Japan and the United Nations, Japan's Security Policy, Maritime Affairs, and Women's Empowerment and Gender Equality. For this case, we are going to focus on Human Rights, Humanitarian Assistance, and Japan and the United Nations. According to the latest National Security Strategy of Japan:

Under the policy of "Proactive Contribution to Peace" based on the principle of international cooperation, Japan will contribute even more proactively in securing peace, stability and prosperity of the international community while achieving its own security as well as peace and stability in the region.[8]

From this, it is clear that Japan's national security strategy does not only refer to security issues from a realist perspective, but it makes cooperation the focus, using it as a direct link towards peace. The approaches that Japan has made to effectuate said strategy include: (1) Strengthening Diplomacy at the United Nation, (2) Strengthening the Rule of Law, (3) Leading International Efforts Towards Disarmament and Non-Proliferation, (4) Promoting International Peace Cooperation, (5) Promoting International Cooperation against International Terrorism. Together, the national security strategy and these five approaches make it clear that Japan, in fact, shares Galtung's tentative values.

3. THE CONCEPT OF CONFLICT: ARTICLE 4.7 OF THE BRAZILIAN CONSTITUTION

In order to have a deeper theoretical understanding of Article 4.7,[9] conflict and conflict resolution must be further investigated. Conflict, on the one hand, always involves contradiction, something that is placed in the middle and impedes something else.[10] According to Galtung, the elementary formation of conflicts is disputed: two actors, each looking for the same objective; this is followed by a dilemma: when one actor seeks different objectives. A dispute can be observed through the elements that construct it, when the destruction of other actors is observable; however, when

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[7] JAPAN. **Japan's Security / Peace & Stability of the International Community.** 2018. Available at: <http://www.mofa.go.jp/policy/security/index.html>. Accessed on 14 July 2018.

[8] JAPAN. **National Security Strategy of Japan.** 2018. Retrieved from: <https://www.cas.go.jp/jp/siryou/131217anzenhoshou/pamphlet_en.pdf>.

[9] Pacific resolution of conflicts.

[10] That "something else" is what Galtung call goals.

self-destruction is observed, there is a dilemma. Only when some of this destructive conduct becomes violent, can it be confirmed[11]that there is a conflict in development.[12]

As previously affirmed, in conflict there is always contradiction. This is because contradiction is formally an element of conflict. Conflict is integrated with attitudes, behaviour and contradiction.[13] Contradiction is formed when an objective is incompatible with a goal-search system. When a conflict is happening the fundamentals – "attitude" and/or "contradiction" – are latent, while only the "behaviour" is empirically observable.[14] In order to have a conflict, existing "attitudes" and "behavior" are characterized by tension and/or distention. In both cases, when contradiction is added to the sum, the result is conflict.

The conflicts can be actor conflicts or structural conflicts. In actor conflicts, attitudes and contradictions are happening consciously, while in structural conflicts, they happen unconsciously. Concerning the "behaviour" component, it is always observable in both forms of conflict.[15]

Based on the brief analysis made in the first section, it can be concluded that the concept of conflict in the Brazilian Constitution refers to actor conflict and not structural conflict. In structural conflicts, there is no consciousness of attitudes. In addition, indicators and patterns that show that consciousness is not empirical can be found; the contradictions are inter-systemic, meaning that contradiction is part of the whole system.[16] The performance of Brazil since 1988 at the international stage, has nothing to do with the characteristics of the structural conflict. An important reason to confirm this claim may be found in article 4.9.[17] Cooperation as a principle of International Law could make us think that the concept of conflict constitutionally adopted by Brazil is wide and incorporates both structural and actor conflict. However, this is not the case, since intention of article 4.9 has no link with conflict. Instead, it merely concerns the materialization and constitutionalization of a principle of international law.

It is important to explicate the relations found in centre-periphery conflicts.[18] For an actor to exist in this type of conflict (or, similarly, in horizontal ones), the actor will need space for acting, alternatives to make decisions, the intention of having, as well as pursuing, objectives. These elements comprising the actor-existing problem are impossible to be achieved solely by the periphery actor in centre-periphery conflicts because of the relation of power established from the centre to the periphery.

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[11] As it was established previously, violence for this case, refer to physical or verbal one that have the intention to hurt, harm or destroy another actor.

[12] GALTUNG, Johan. **A theory of conflict**. Hawaii: University of Hawaii, 1973. p. 59.

[13] Building the conflict triangle.

[14] GALTUNG, Johan. **A theory of conflict**. Hawaii: University of Hawaii, 1973. p. 31.

[15] GALTUNG, Johan. **A theory of conflict.** Hawaii: University of Hawaii, 1973. p. 54.

[16] GALTUNG, Johan. **A theory of conflict**. Hawaii: University of Hawaii, 1973. p. 23-32.

[17] Cooperation among peoples for the progress of humanity

[18] Or vertical conflicts.

In this case, and with Brazil being a periphery actor on the international stage, it is interesting to observe the performance of Brazil in the United Nations Security Council post-1988. Brazil has been a member of the Security Council on ten occasions, with five taking place since 1988. During those five periods, Brazil has voted for resolutions almost each instance; however, Brazil has abstained seven times, and voted against one other time. These instances took place regarding: (1) the multinational operation for humanitarian purposes in Rwanda in 1994, where Brazil abstained alongside China, New Zealand, Nigeria and Pakistan;[19] (2) the authorization of multinational force to restore legitimate President of Haiti Jean-Bertrand Aristide and the removal of the military junta in 1994, where both China and Brazil abstained;[20] (3) the termination of measures in resolutions 841 (1993), 873 (1993) and 917 (1994) regarding the return of President Jean-Bertrand Aristide to Haiti, in 1994, abstaining along with Russia;[21] (4) the intervention of a team of the United Nations Mission in Haiti in 1994, abstaining along with Russia;[22] (5) the elections in Lebanon and calls for withdrawal of foreign forces in 2004, sharing its abstention with Algeria, China, Pakistan, the Philippines and Russia;[23] (6) the war in Darfur and the relation with the International Criminal Court in 2005, alongside Algeria, China and United States;[24] (7) the sanctions on Iran over its nuclear program in 2010, voting against the measures alongside Turkey;[25] (8) the authorization of the use of a no-fly-zone over Libya, with the explicit task of protecting the civilian population in 2011, where it shared the abstention with China, Russia, Germany and India.[26]

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[19] UN Security Council, **Security Council resolution 929 (1994) [UN Assistance Mission for Rwanda]**, 22 June 1994, S/RES/929 (1994), available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/260/27/PDF/N9426027.pdf?OpenElement>. Accessed on 14 July 2018.

[20] UN Security Council, **Security Council resolution 940 (1994) [UN Mission in Haiti]**, 31 July 1994, S/RES/940 (1994), available at: <http://unscr.com/en/resolutions/doc/940>. Accessed on 14 July 2018.

[21] UN Security Council, **Security Council resolution 944 (1994) [Haiti]**, 29 September 1994, S/RES/944 (1994), available at: <https://www.sipri.org/sites/default/files/2016-03/944.pdf>. Accessed on 14 July 2018.

[22] UN Security Council, **Security Council resolution 964 (1994) [UN Mission in Haiti]**, 29 November 1994, S/RES/964 (1994), available at: <http://unscr.com/en/resolutions/doc/964>. Accessed on 14 July 2018.

[23] UN Security Council, **Security Council resolution 1559 (2004) [on the political independence and withdrawal of foreign forces from Lebanon]**, 2 September 2004, S/RES/1559 (2004), available at: <http://www.refworld.org/docid/41516a7e4.html>. Accessed on 14 July 2018.

[24] UN Security Council, **Security Council resolution 1593 (2005) [on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan]**, 31 March 2005, S/RES/1593 (2005). Accessed on 14 July 2018.

[25] UN Security Council, **Security Council resolution 1929 (2010) [on measures against Iran in connection with its enrichment-related and reprocessing activities, including research and development]**, 9 June 2010, S/RES/1929 (2010), available at: <http://www.refworld.org/docid/4c1f2eb32.html>. Accessed on 14 July 2018.

[26] UN Security Council, **Security Council resolution 1973 (2011) [on the situation in the Libyan Arab Jamahiriya]**, 17 March 2011, S/RES/1973(2011), available at: <http://www.refworld.org/docid/4d885fc42.html>. Accessed on 14 July 2018.

What can be observed from this is that on several occasions Brazil has used its votes as voice of peripheral States, at a particular stage where the votes have the same wage in-between them[27], but where only a few States have access.

4. CONFLICT RESOLUTION

In the Occident, there is the (mis)conception that conflict resolution is the final state of conflict, and that the solution lasts forever.[28] Contrary to this notion, conflict resolution is actually a new formation, one which is (1) acceptable for every actor, and (2) sustainable for every actor.[29] It is also wrongly believed that conflict is officially solved once the elites of each party accept the solutions,[30] yet this can be problematic. Each actor may sign the conflict finalization bona fide, but this may not be the case in every situation. Signatories can be dishonest. Though, even when being honest, can they really represent and be the voice of all their people, and considering all factors? If everyone agrees, how are they going to sustain the subject? Can they produce less contradictory formations?[31] Less contradictory formations are acceptable; nevertheless, they must be founded using the appropriate approach.[32] Otherwise, the outcome will be the constant and almost perpetual result of every conflict resolution: the resurgence of negative behaviour, the influence of old material, and the development of a new or old type of violence and conflict.[33]

Galtung made a strong critique of diplomacy on this subject. He concludes that everything tends to be better and less fragile if diplomats include the elite's fraction of conflict parties interests, but also the people's interests in conflict resolution, and 'not only elite track' as they normally do: "Unfortunately, this type of naiveté is rather widespread, particularly among diplomats, probably because of the feudal nature of their institutions and its function in an inter-system with clearly feudal characteristics".[34]

Failings of conflict resolution can be encountered when the mediators are external actors (or "superior" actors) who threaten or pressure the other actors to accept a resolution in the terms that the external actor wants or needs, thereby preventing real agreement. In order to elude this, external actors should be avoided. Instead, the actors may accept mediators that are part of the formation.[35]

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[27] Even when the weight of the votes between States is the same, is important to highlight that the affirmative vote of nine members required (in all other matters but procedural ones), needs concurring votes of Permanent Members.

[28] GALTUNG, Johan. **Peace by peaceful means**. Oslo: Prio, 2012. p. 87.

[29] GALTUNG, Johan. **Peace by peaceful means**. Oslo: Prio, 2012. p. 87.

[30] Because we are used to think conflicts resolution in terms of peace agreements. GALTUNG, Johan. **A theory of conflict**. Hawaii: University of Hawaii, 1973. p. 54.

[31] GALTUNG, Johan. **Peace by peaceful means**. Oslo: Prio, 2012. p. 87.

[32] GALTUNG, Johan. **Peace by peaceful means**. Oslo: Prio, 2012. p. 87.

[33] GALTUNG, Johan. **A theory of conflict**. Hawaii: University of Hawaii, 1973. p. 37.

[34] GALTUNG, Johan. **Peace by peaceful means**. Oslo: Prio, 2012. p. 89.

[35] GALTUNG, Johan. **Peace by peaceful means**. Oslo: Prio, 2012. p. 90.

5. CONFLICT TRANSFORMATION

To understand conflict transformation, it must be realized that transformation is permanent; new actions emerge that require responses, and new contradictions may also arise. The best way to deal with this is to construct a stable solution. For the solution to be stable, it needs to have transformation capacity and a method by which it can handle transformation sustainably. It is of utmost importance to understand that the real objective of transformation is the process itself.

What needs to be done in order transform conflicts and transcend formations is to establish conditions: (dis)articulation,[36] (de)conscientization,[37] complication or simplification,[38] (de)polarization,[39] and (de)escalation. [40]

When the conflict deformation is solved, one realizes that the existence of repressed contradictions is what sometimes make conflicts resurface.[41]

One of the most important conflict transformations in which Brazil actively participated is the Cenepa War regarding the border between Peru and Ecuador. The Protocol of Rio de Janeiro was signed (in 1942) with the intention of ending the conflict;[42] however tensions continued and resurged until 1990.[43] The re-negotiation finished with other peace accords (the Declaration of Peace of Itamaraty) and officially ended in 1999 with the signing of the Brasilia Act, which in turn also ratified the peace agreements of Protocol of Rio de Janeiro signed in 1942.[44]

Returning to the theoretical, even after analyzing articles 4.6 and 4.7 of the Brazilian Constitution and concluding that they do not refer to the structural conflicts of Brazil's international relations, structural conflict transformation should be analyzed in order to distinguish it from the other types of conflict transformations.

Structural conflicts include, by definition, structural violence. In this case, the contradiction is inside the verticality of the structure, the repression and exploitation. The vertical elevation is divided between "those above" and "those below". "Those below" may horizontally have two forms of organization that would transform them into actors:

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[36] Complete or incomplete conflict triangle.

[37] Make attitude or contradiction more or less conscious.

[38] Observe more or less, actors and objectives.

[39] Reduce the formation of conflicts to a more simplistic level.

[40] Growth and diminution of violence; GALTUNG, Johan. **A theory of conflict**. Hawaii: University of Hawaii, 1973. p. 110.

[41] GALTUNG, Johan.**Peace by peaceful means.** Oslo: Prio, 2012. p. 90.

[42] In this case, one can identify what was said before about the external actors, and the possibilities of failure.

[43] This case is a good example of what has been said above about the defects that can be brought about by peace agreements, and therefore, the signing of peace agreements does not guarantee peace per se.

[44] The immediate effect of the agreements was to seek peace, through the withdrawal of troops from the area of confluence, and the establishment of recognized borders by the international community.

conscientization and mobilization.[45] "Those above", trying to avoid "those below" from becoming actors, exercise forms of prevention: penetration[46] and segmentation[47] for conscientization,[48] and fragmentation[49], alongside marginalization for mobilization.[50/51] The steps to overcome the structural violence faced by "those below" are: (1) confrontation through the selection of a topic that encapsulates the conflict in general; (2) struggle without violence to overcome the repression and exploitation;[52] (3) decoupling, to cut the structural relation between the repressor and the exploiter, which helps to generate positive structures below; deprivation or no cooperation has the objective of constructing autonomy for "those below", and make them less repressible and exploitable;[53] and (4) recoupling to generate new and less violent structures, because although, decoupling functions well for its purposes, it is not the long term objective; recoupling has the objective of generating a new horizontal structure, which guarantees human rights instead of repression, equity instead of exploitation, autonomy instead of penetration, integration instead of segmentation, and participation instead of marginalization.[54]

Conflict transformation by complex actors, is *sui generis*, and so should be the approach taken. In this case, the centre-periphery frameworks will be either bilateral or multilateral. Two of the exact approaches are diachronic, while the other is synchronic. The first diachronic approach generates from the centre with an easy link, whereas the second diachronic approach is produced from the periphery with an easy link, and the synchronic approach is developed with all the links at the same time.[55]

One of the final points that Galtung adds to conflict transformation is that we may think about it as a chain; first we need to simplify, then evade polarization, and finally guide the formation to a higher level of transformation, possibly through intervention.

6. INTERVENTION

The final part of the theory is particularly important, due to the common formal conception of what peace empirically means. Ever since peace (as an umbrella-concept) was popularized by the League of Nations and later the United Nations, there has

[45] GALTUNG, Johan. **Peace by peaceful means**. Oslo: Prio, 2012. p. 93.

[46] Conditioning the mind by those above.

[47] Limitation vision of reality of those below.

[48] Separation of each other of those below.

[49] Separation of some from those below from the rest of each other.

[50] GALTUNG, Johan. **A theory of conflict**. Hawaii: University of Hawaii, 1973. p. 129.

[51] GALTUNG, Johan. **Peace by peaceful means**. Oslo: Prio, 2012. p. 93.

[52] GALTUNG, Johan. **Peace by peaceful means**. Oslo: Prio, 2012. p. 93.

[53] GALTUNG, Johan. **Peace by peaceful means**. Oslo: Prio, 2012. p. 93.

[54] GALTUNG, Johan. **Peace by peaceful means**. Oslo: Prio, 2012. p. 93.

[55] GALTUNG, Johan. **A theory of conflict**. Hawaii: University of Hawaii, 1973. p. 110-117.

been a notion that peace is monopolized in practice by international organizations. In this sense, the scope of their actions is limited. We think in terms of wars. Cooperation, for example, is not even included in the meaning of peace.

Considering this, clarifying the need for and methods of intervention is important. First of all, it needs to be understood that intervention exists to stop destruction and suffering. There are three ways of intervention: (1) peacekeeping, which aims at stopping destruction from a behavioral point of view; (2) peacemaking, which is about creating new structures of conflict and transforming attitudes; and (3) peacebuilding to overcome the origin of conflicts.[56] When identifying the factors which led the conflict, the parties involved in the conflict have to focus on the past, taking a behaviour-oriented approach, as it offers an empirical basis on which responsibility is distributed amongst actors. When a conclusion is drawn, the parties involved in the conflict need to look towards to the future and be aware that presentism makes scrutiny impossible. This stage has nothing to do with abandoning memory and/or truth processes – the information of the actors is indispensable for moral and juridical processes. Instead, it involves the design of a mechanism used to transcend the conflicts. Since systems have memory, what happened in the past will always be relevant. This is also the reason why it was previously established that the conflict transformation process is the objective by and in of itself; the past will not be sufficient to design the future. In practice, we face the challenge of demonstrating that what has happened was not the law of nature. Rather, both actors and participants need to be shown and convinced that the events could have been different and that the future could be different, if a different course is taken, which is separated from the events of the past.[57]

Finally, other precise directives need to be formulated on peacekeeping, peacemaking, and peacebuilding in practice. Firstly, at the peacekeeping stage, ceasefire will be observed and communication will be secured. Secondly, at the peacemaking stage, observations will lay on the changing of attitudes, basically a reprogram. Thirdly, peacebuilding will concern intervention in conflicts and deliberate forms of implementation through awareness. The objective of peacebuilding is the acceptance of a new formula that can define the formation of new structures and new institutions. Peacebuilding tends to be the most difficult part of the peace process due to the risk that it may not be effective if not properly executed.

One of Brazil's main conflict intervention missions took place in Haiti from 2004 to 2017, in which other countries also participated, especially Latin American countries, such as Chile. Initially, the cause that motivated the intervention was the weakness of the State and its risk of becoming a failed State following the coup d'état in 2004. The circumstances surrounding this situation resulted in the United Nations Security Council's

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[56] GALTUNG, Johan. **Peace by peaceful means**. Oslo: Prio, 2012. p. 105.

[57] GALTUNG, Johan. **A theory of peace**. Oslo: Transcend University Press, 1967. p. 74-78

decision to declare that the conditions of Haiti were a threat to international peace and security in the region. The intervention was a joint effort amongst many States, in which Brazil played a critical role. Brazil was entrusted with the maintenance of peace through the establishment of new structures and institutions. The results and even the decision to intervene have been widely questioned and criticized; however, the reality is that the margin of action of the United Nations and the countries that intervened was very limited, given that Haiti was on the way to becoming a failed State. Therefore, the formation of new structures and institutions is not only more complex in these types of cases, but also requires a special design which is different from those that can be given from the perspective of peace. The mission was concluded in 2017; thus, the results are being awaited in order to determine whether or not the intervention, which began in 2004, can be justified and analyzed in more detail. This intervention and the specific mission that Brazil carried out in Haiti have direct relation to the meaning of peace within the Constitution, which is analyzed in the first part of this article, in terms of peacekeeping and security operations, with the objective to observe the absence of violence.

7. CONCLUSION

Given this analysis, a series of conclusions can be drawn in two ways – one of a critical approach and one inspired by the aims of this article.

Importantly, the discussion of the concepts of peace and conflict within this article, along with the analysis of Brazil's foreign policy in 1988 and onwards, help us to understand the meaning of article 4.6 and 4.7 of the Brazilian Constitution. In general, the analysis and interpretations of constitutional precepts or constitutional principles – from approaches other than those that law can provide us – enrich both debate and research. In this case, Johan Galtung's theories of peace and conflict are interdisciplinary by nature, which render the findings even more interesting. On the one hand, the Brazilian concept of peace provided for by the Constitution entails a combination of stability and equilibrium in micro or macro situations and negative peace. On the other hand, the concept of peace also passively refers to "the good things and benefits of being part of the international community". Additionally, the concept of conflict which is referenced by the Brazilian Constitution is 'actors conflict'.

Fulfilling this article's aims to explore and analyze certain constitutionalized theoretical concepts, Galtung's theory helps to not only re-conceptualize articles 4.6 and 4.7 of the Brazilian Constitution, but also to analyze, in more detail, its conceptual limits and scope. Despite having analyzed the practicalities, i.e. Brazilian foreign policy, the study of these issues never ceases to be theoretical; however, this article affirms that by making the concepts definitive they can transcend the theoretical plane and have

practical implications, whether in foreign policy or the courts, hence the large focus on (re)conceptualizing and translating constitutional precepts into their practical worth.

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UN Security Council, **Security Council resolution 1973 (2011) [on the situation in the Libyan Arab Jamahiriya]**, 17 March 2011, S/RES/1973 (2011), available at: <http://www.refworld.org/docid/4d885fc42.html>. Accessed on 14 July 2018.

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UN Security Council, **Security Council resolution 940 (1994) [UN Mission in Haiti]**, 31 July 1994, S/RES/940 (1994), available at: <http://unscr.com/en/resolutions/doc/940>. Accessed on 14 July 2018.

UN Security Council, **Security Council resolution 944 (1994) [Haiti]**, 29 September 1994, S/RES/944 (1994), available at: <https://www.sipri.org/sites/default/files/2016-03/944.pdf>. Accessed on 14 July 2018.

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Beyond futebol and language: what have we missed from not paying Brazilian constitutionalism its due attention? Reflections from Chile

Para além do futebol e do idioma: o que perdemos por não ter dado ao constitucionalismo brasileiro a devida atenção? Reflexões a partir do Chile

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Abstract

This essay proposes a critical and comparative reflection focusing on the lack of 'constitutional dialogue' Chile has developed with Brazil – and vice versa. After proposing a couple of contentions to explain this lack of attention (cultural and constitutional colonialism, on the one hand, coupled with Brazil geopolitical power, on the other), it moves on to lament what this lack of attention has deprived Chile from. As it discusses the means to overcome the lack of legitimacy that affects Chile's constitutional text, it calls attention to some of the reasons that may

Resumo

Este ensaio propõe uma reflexão crítica e comparativa com foco na falta de "diálogo constitucional" que o Chile desenvolveu com o Brasil – e vice-versa. Depois de propor algumas disputas para explicar essa falta de atenção (colonialismo cultural e constitucional, por um lado, aliado ao poder geopolítico do Brasil, por outro), passa a lamentar o quanto essa falta de atenção prejudicou o Chile. Ao discutir os meios para superar a falta de legitimidade que afeta o texto constitucional do Chile, chama a atenção para algumas das razões que podem explicar, e na realidade

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explain, and actually justify, the celebratory tone the Brazilian Constitution's 30th anniversary has acquired.

justificar, o tom celebratório que o aniversário de 30 anos da Constituição brasileira acabou por adquirir.

Keywords: Brazil; Chile; constitutional change; Constitutional Law; comparative constitutionalism.

Palavras-chave: *Brasil; Chile; mudança constitucional; Direito Constitucional; constitucionalismo comparado.*

CONTENTS

1. Introduction; **2.** Brazil: A foreign neighbor? **3.** Brazil as a (proud constitutional) continent; **4.** A democratic transition as a factor for exceptionalism; **5.** Some conclusions: Excuse us, we are lost; **6.** References.

1. INTRODUCTION

The Constitution of Brazil is celebrating its 30th anniversary in 2018. According to one commentator, its text shows a constitution which is "reasonably advanced" and whose innovations are relevant not only to Brazilian but also to "worldwide constitutionalism".[1] How does Chile view the Brazilian experience? How has this advanced constitutionalism impacted us? The answer seems both embarrassing and intriguing. A quick survey on Chilean constitutional scholarship shows references to Brazil's Constitution and constitutionalism to be virtually non-existent. The most cited, as well as required, constitutional law handbooks practically do not mention any regulation, let alone development, of what Figueiredo labels as Brazil's advanced constitutionalism. It is true that amidst our own discussion on constitutional change some have revived (mostly to challenge those who favor a constituent assembly) the Brazilian experience of 1988.[2] Nevertheless, these scholars are still the exception within a scholarly trend that prefers to look to the Global North in search of (constitutional) experiences.

What explains this lack of attention? It is true that over the years we have developed a reverential fear towards Brazil when it comes to football. But that cannot seriously account for the scholarly aversion depicted above. Of course, there is also the language barrier. But it should not be deemed as an obstacle that is too burdensome. In fact, from a practical viewpoint both sides have come to idiomatic terms by resorting to what many call 'portuñol' – an informal mix of both Spanish and Portuguese. Furthermore, many legal practitioners have studied abroad and for some reason or another have paid attention to constitutional developments in other countries upon learning the

[1] FIGUEIREDO, Marcelo. La Evolución Político-Constitucional de Brasil. **Revista Estudios Constitucionales**, Santiago, año 6, n. 2, p. 209-246, 2008. p. 210.

[2] SOTO, Francisco. Las falacias sobre la asamblea constituyente. Reflexiones sobre el actual debate constitucional en Chile. In: CHIA, Eduardo; QUEZADA, Flavio (Eds.). **Propuestas para una Nueva Constitución (Originada en democracia)**. Santiago: Instituto Igualdad – Facultad de Derecho de la Universidad de Chile – Friederich Ebert Stiftung, 2015. p. 88; SOTO, Francisco. Asamblea Constituyente: La experiencia Latinoamericana y el actual debate en Chile. **Revista Estudios Constitucionales**, Santiago, año 12, n. 1, p. 397-428, 2014. p. 408-9.

countries' history and taking an interest in their constitutional schemes. We have done this even to the point of adjusting the Global South agenda to the academic interests of the Global North. To do all this, we have learnt a foreign language (English, French and German) and struggled to overcome other cultural barriers.

What is it, then? We devote this short essay to proposing some insights on the lack of regional dialogue, and from there suggest the major insights we have missed for not paying Brazil's constitutionalism its due. We do this in light of the Brazilian experience of constitutional enactment and amendments, and considering the debate underway in Chile from some time now about whether or not to change the constitution that was imposed during the dictatorship. The first section (2) explores the faults in which Chilean constitutional scholarship has incurred that explain this lack of attention. We suggest this is mainly due to a variant of constitutional colonialism. The following section (3) contends there are also faults that might be attributed to Brazilian constitutionalism itself, which has also – and, as we will describe, not necessarily because of the same reasons – dismissed regional dialogue. We believe this is due to Brazil's geopolitical, as well as to (4) the fact Brazil is a community proud of its Constitution, although not necessarily of its constitutional practice. This, we argue in the last section (5), should lead us to seriously (re)consider what we in Chile have hitherto missed: to see our own constitutional debate in light of the Brazilian experience, which shows its community was decided to transit from dictatorship to democracy by enacting a new constitution – whose 30th birthday they now commemorate –.

2. BRAZIL: A FOREIGN NEIGHBOR?

Above we noted how little attention Chilean scholarship pays to the Brazilian constitutional system, the literature on it and Brazilian's high court decisions. Why this is so?

We suggest that, at least from Chile, there is a significant dose of academic colonialism which has closed new perspectives on the study of the constitutional systems of neighbor countries. In the field of Constitutional Law, academic colonialism can be understood as a selective reception and internalization of theoretical frameworks and scholarly ideas that influenced the local understanding of one's national constitution and political sovereignty under the terms of the Global North. It is part of a broader European and Anglo Saxon legal influence.[3] This sort of colonialism is an heir of the influence of both the European and American constitutional projects in South America.[4]

[3] LÓPEZ MEDINA, Diego. **Teoría Impura del Derecho. La transformación de la cultura jurídica latinoamericana**. Bogotá: Legis, 2009. p. 1- 70.

[4] RODRÍGUEZ GARAVITO, César. Un nuevo mapa para el pensamiento jurídico latinoamericano. In: RODRÍGUEZ GARAVITO, César (Coord.). **El Derecho en América Latina. Un mapa para el pensamiento jurídico del Siglo XXI**. Buenos Aires: Siglo XXI Editores, 2011. p. 12.

Scholarly colonialism is nothing new, but it has only recently been a matter of critical academic examination in the field of Latin American legal systems and counter -hegemonic studies.[5] Some of those studies are inspired under new ways of rethinking academic paradigms in legal pluralistic contexts, especially those in which indigenous peoples cohabitate with the (now in crisis) national State[6]. In the field of Constitutional Law, the rise of new constitutional orders in Bolivia, Ecuador and Venezuela has led to a new understanding of, one, the definition of fundamental rights and, two, the establishment of State powers.[7] The emergence of the idea of a constitutionalism of the Global South is only recent.[8] New Latin American constitutions were accompanied by a new way of thinking about constitutional law and the theoretical paradigms that legal studies should be framed under.

In the case of Chile, we suggest that the legal academia is clearly colonized by the Global North and that our country has not adopted a new constitution influenced by the rise of political movements. The latter issue is analyzed in the final section of this paper. Regarding the first issue –colonization of the Global North– some of the studies on the Chilean legal culture have stressed that, initially, French and Hispanic influence were decisive in the construction of legal jurisprudence in our country.[9] In fact, Chile has a legal system that belongs to the family of civil law.[10] Therefore, codification has

[5] *See*, in general, SANTOS, Boaventura de Sousa; RODRÍGUEZ GARAVITO, César. Law, politics, and the subaltern in counter-hegemonic globalization. In: SANTOS, Boaventura de Sousa; RODRÍGUEZ GARAVITO, César (Ed.). **Law and Globalization from Below.** Cambridge: Cambridge University Press, 2005. p. 1-26.

[6] TUHIWAI SMITH, Linda, **A descolonizar las metodologías. Investigación y pueblos indígenas**, Santiago: LOM editores, 2016; TULLY, James, **Strange Multiplicity. Constitutionalism in an Age of Diversity**. Cambridge: Cambridge University Press. 1995. p. 140-182; BALDI, César. Del Constitucionalismo Moderno al Nuevo Constitucionalismo Latinoamericano Descolonizador. **Revista de Derechos Humanos y Estudios Sociales**, vol. 5, n. 9. p. 51-72, 2013. p. 54-55.

[7] *See*, among many others, CASAL HERNÁNDEZ, Jesús María. El constitucionalismo latinoamericano y la oleada de reformas constitucionales en la región andina. **Revista del Instituto Max Planck de Historia del Derecho Europeo**, Múnich, No. 16, p. 13-66, 2010; VICIANO PASTOR, Roberto; MARTÍNEZ DALMAU, Rubén. Aspectos generales del nuevo constitucionalismo latinoamericano. In: ÁVILA LINZAN, Luis Fernando (Ed.). **Política, Justicia y Constitución.** Quito: Corte Constitucional para el Período de Transición, 2012, p. 157-186; VICIANO PASTOR, Roberto; MARTÍNEZ DALMAU, Rubén. El nuevo constitucionalismo latinoamericano. Fundamentos para una construcción doctrinal. **Revista General de Derecho Público Comparado.** No. 9, p. 1-24, 2011. For other denominations of the new model of Latin American Constitutionalism, *see* TÓRTORA, Hugo. **Cambios introducidos al sistema de derechos fundamentales por el Nuevo Constitucionalismo Latinoamericano Descolonizador.** Valparaíso, 2017. 306 f. Thesis (Doctorate) - Doctorate in Law Program, Universidad de Valparaíso. In:critical terms, *see* GARGARELLA, Roberto. **Latin American Constitutionalism 1810-2010**. Oxford: Oxford University Press, 2013.

[8] BONILLA, Daniel (Ed.). **Constitucionalismo del sur global**. Bogotá: Siglo del Hombre Editores, 2015.

[9] BARAONA GONZÁLEZ, Jorge. La cultura jurídica chilena: apuntes históricos, tendencias y desafíos. **Revista de Derecho de la Pontificia Universidad Católica de Valparaíso**, Valparaíso, vol. 35, p. 427-448, 2010. On the Chilean Legal Culture, *see* SQUELLA, Agustín (Ed.). **La Cultura Jurídica Chilena**. Santiago: Corporación de Promoción Universitaria, 1992.

[10] On the Civil Law tradition, *see* DAVID, René; JAUFFRET-SPINOSI, Camille. **Los Grandes Sistemas Jurídicos Contemporáneos**. 11. ed. Ciudad de México: Universidad Autónoma de México, 2010; MERRYMAN, John

shaped our legal cultural practices[11] and, as such, scholars have gone back to Europe –for the most part– to grasp the theoretical apparatus to understand our legal system. If we look at the bibliography of the mainstream treatises or manuals on Constitutional Law, it is easy to see that most references are either local or European (mostly from Spain, though sometimes from the Anglo Saxon world. An examination of the bibliography of a sample of traditional Chilean Constitutional Law manuals reveals that authors like Evans de la Cuadra,[12] Verdugo *et al.*,[13] Molina,[14] Vivanco,[15] Cea,[16] and Evans Espiñeira,[17] among others, do not quote or resort to Brazilian texts. Works in Portuguese are scarcely cited.[18]

The legal inheritance of codification has also impacted our judicial practices.[19] An unpublished empirical study has identified the secondary sources that the Chilean Constitutional Court has cited in its decisions (from 1981 to 2005, just before a major constitutional amendment augmented the powers of the court).[20] The study shows that the most cited secondary source is the Dictionary of the Royal Spanish Academy (*Real Academia Española*)[21]. This is obviously a sign of the high degree of local colonialism in terms of language, one that can even dismisses national sovereignty under the dictates of a foreign monarchical institution on the meaning of the words of the

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Henry; PÉREZ-PERDOMO, Rogelio. **The Civil Law Tradition. An Introduction to the Legal Systems of Europe and Latin America**. 3. ed. Stanford: Stanford University Press, 2007.

[11] *See*, in general, SQUELLA, Agustín. La Cultura Jurídica Chilena. In: SQUELLA, Agustín (Ed.). **La Cultura Jurídica Chilena**. Santiago: Corporación de Promoción Universitaria, 1992. p. 32-48.

[12] EVANS, Enrique. **Los derechos constitucionales**. 3. ed. Santiago: Editorial Jurídica de Chile, 2004.

[13] VERDUGO, Mario; PFEFFER, Emilio; NOGUEIRA, Humberto. 2.ed. **Derecho Constitucional.** Santiago: Editorial Jurídica de Chile, 2002.

[14] MOLINA, Hernán. **Derecho Constitucional**. 8.ed.Santiago: Lexis Nexis, 2008.

[15] VIVANCO, Ángela. **Curso de Derecho Constitucional**. 3.ed. Santiago, Ediciones Universidad Católica de Chile, 2015.

[16] CEA, José Luis. **Derecho Constitucional Chileno.** 2. ed. T. II. Santiago, Ediciones Universidad Católica de Chile, 2008.

[17] EVANS ESPIÑEIRA, Eugenio. **La Constitución Explicada**. 3. ed. Santiago: Legal Publishing, 2010.

[18] *See*, for example, some of the few exceptions, such as GARCÍA, Gonzalo; CONTRERAS, Pablo; MARTÍNEZ, Victoria. **Diccionario Constitucional Chileno**. 2.ed. Santiago: Hueders, 2016. p. 205 (quoting Gomes Canotilho); NOGUEIRA, Humberto. **Derecho Constitucional Chileno**. Santiago: Thomson Reuters, T. I, 2012, p. 22 and 283 (quoting Luis Roberto Barroso) and T. III, p. 333 (quoting André Ramos Tavares).

[19] CORREA SUTIL, Jorge. La Cultura Jurídica Chilena en Relación a la Función Judicial. In: SQUELLA, Agustín (Ed.). **La Cultura Jurídica Chilena**. Santiago: Corporación de Promoción Universitaria, 1992. p. 87.

[20] ORTIZ, Leonardo. **La Dogmática Jurídica en el Tribunal Constitucional Chileno.** ¿Un **Refuerzo Argumentativo Real o Aparente? Análisis Jurisprudencial desde 1981-2005.** Santiago, 2016. 49 f. Thesis (Graduate) - Law School Program, Universidad Alberto Hurtado. You can check the tables with the references, the rankings and the graphs of this empirical study at https://www.pcontreras.net/investigaciones.html, where they have been uploaded.

[21] ORTIZ, Leonardo. **La Dogmática Jurídica en el Tribunal Constitucional Chileno. ¿Un Refuerzo Argumentativo Real o Aparente? Análisis Jurisprudencial desde 1981-2005**. Santiago, 2016. 49 f. Thesis (Graduate) - Law School Program, Universidad Alberto Hurtado. p. 22-30.

Chilean constitution[22]. Most of the other secondary sources are either local or from a few Spanish speaking countries; none are from Brazil[23]. Among the five countries whose literature is most cited by the Court, we find three European countries of reference: Spain, Italy and France.[24] The only Portuguese text cited by the Constitutional Court is the famous book by José Gomes Canotilho, a Portuguese constitutional law scholar.[25]

It remains to be seen if this scenario has recently changed or is about to change. However, the available data seemingly shows there is a shift from the symbolic status that Spain highly enjoyed to a new reverence to Anglo Saxon countries. Under the current national program for postgraduate scholarships, new academics are mainly being trained in countries such as the United Kingdom, the United States and Canada. According to the data presented by the National Commission for Scientific and Technological Research, since 1980 until present day, 251 scholarships have been awarded to study masters, doctoral and postdoctoral programs in Law.[26] The United States leads the ranking of post-graduate destinations, with 138 scholarships granted to recipients who have graduated from a legal academic program in the North American country, and is followed by the United Kingdom (63) and Spain (21). No Latin American country has been a destination for graduate studies, and the only country in the Global South has been Singapore, with only one scholarship assigned. Suffice it to say, Chilean legal academia is being trained in the Global North.

Economic considerations have led Chilean attorneys to pay more and more attention to legal developments in the US;[27] plus, prestige and symbolic recognition comes with masters and doctorate degrees from the North. What Rodríguez Garavito has stated in general terms is particularly applicable to the Chilean case:

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[22] For a critique of this hermeneutic approach, *see* ZAPATA, Patricio. La Interpretación de la Constitución. **Revista Chilena de Derecho**, Vol. 17, p. 162-164. 1990; BASSA, Jaime. La interpretación de los derechos fundamentales. In: CONTRERAS, Pablo; SALGADO, Constanza. **Manual sobre Derechos Fundamentales. Teoría General.** Santiago: LOM ediciones, 2016.

[23] ORTIZ, Leonardo. **La Dogmática Jurídica en el Tribunal Constitucional Chileno. ¿Un Refuerzo Argumentativo Real o Aparente? Análisis Jurisprudencial desde 1981-2005**. Santiago, 2016. 49 f. Thesis (Graduate) - Law School Program, Universidad Alberto Hurtado. p. 32.

[24] ORTIZ, Leonardo. **La Dogmática Jurídica en el Tribunal Constitucional Chileno. ¿Un Refuerzo Argumentativo Real o Aparente? Análisis Jurisprudencial desde 1981-2005**. Santiago, 2016. 49 f. Thesis (Graduate) - Law School Program, Universidad Alberto Hurtado. p. 32-33.

[25] STC Rol Nº 346-02, Apr. 8, 2002, cons. 51º, *citing* GOMES CANOTILHO, José. **Derecho Constitucional y Teoría de la Constitución.** Coimbra: Librería Almedina. 1999.

[26] *See* Comisión Nacional de Investigación Científica y Tecnológica, Becas según área de conocimiento OCDE y país de destino, *available at* https://app.powerbi.com/view?r=eyJrIjoiMjBhNTU0ZTItNzJjNS00OWQwLThiMWMtOWI2ZGI1NjM0NDZkIiwidCI6ImU3M2FmMWRlLWU5ZTYtNGM0OS1iMWUxLWZjNjg3ZjM2MjY0NyIsImMiOjR9 [last visited on Apr. 05, 2018]. The data presented only covers students that have obtained the degree pursued and not currently enrolled students.

[27] BARAONA GONZÁLEZ, Jorge. La cultura jurídica chilena: apuntes históricos, tendencias y desafíos. **Revista de Derecho de la Pontificia Universidad Católica de Valparaíso**, Valparaíso, vol. 35, p. 427-448, 2010. p. 442-443.

> *In our texts and our classes, the intellectual production of the North is magnified disproportionately (and that of the South reduced accordingly), as in the classic Mercator maps. In effect, a disproportionately large portion of time, resources and energy of Southern jurists is consumed in assimilating, translating and glossing -or simply 'keeping up' with- the materials produced in the North.*[28]

It seems that Chile only looks north and not across the Andes. Our neighbors – especially Brazil– are not in the map of our readings as they are not the authorities cited in our cases nor do these countries serve as our destination for further education and post-graduate studies.

3. BRAZIL AS A (PROUD CONSTITUTIONAL) CONTINENT: THE GEOPOLITICAL *GRAVITAS*

Nevertheless, 'it takes two to tango'. In this section, we will tentatively explore what can be called – borrowing from Donelly – Brazilian exceptionalism[29] and briefly explore the reasons why Brazil has also been reluctant to build (constitutional) bridges with other countries in the region.

There might be a sensitive geopolitical reason that could explain the lack of attention to Brazilian constitutionalism in Chile –and the same probably goes for the rest of the Spanish speaking countries–. This is the fact that Brazil, because of both its political and economic size, may legitimately see itself, and be regarded by others, as a continent in itself (with its own preoccupations, developments, etc.), separate from other Latin American countries. Its dimensions are not something one can easily miss. Brazil is the largest country in South America in terms of territorial extension (8.515.759 km2) –followed by Argentina, which is around one fourth of its size (2.780.400 km2)–.[30] It is the fifth largest country in the world in terms of territorial surface area.[31] According to the United Nations *World Population Prospects*, Brazil also has the fifth largest

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[28] RODRÍGUEZ GARAVITO, César. Un nuevo mapa para el pensamiento jurídico latinoamericano. In: RODRÍGUEZ GARAVITO, César (Coord.). **El Derecho en América Latina. Un mapa para el pensamiento jurídico del Siglo XXI**. Buenos Aires: Siglo XXI Editores, 2011. p. 12 (translation is ours).

[29] According to Donelly, what defines what he termed American exceptionalism was "the belief that the United States is different from (and generally superior to) most other countries, in large part because of its commitment to individual rights". DONELLY, Jack, **International human rights**, 4 ed. Boulder: Westview Press, 2013. p. 87.

[30] Brazil's official data is taken from INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA. Área territorial Brasileira, *available at* https://ww2.ibge.gov.br/home/geociencias/cartografia/default_territ_area.shtm> Last visited: Mar. 20, 2018.

[31] *See* UNITED NATIONS STATISTICS DIVISION, **Demographic Yearbook – Table 3: Population by Sex, Rate of Population Increase, Surface Area and Density**. Available at: <https://unstats.un.org/unsd/demographic/products/dyb/dyb2012/Table03.pdf>. Last visited: Mar. 20, 2018.

population with 209.288.278 inhabitants and is the most populated country in Latin America.[32] Brazil is by far the largest democratic republic in Ibero-America and is the fourth largest democracy in the world (after India, the United States, and Indonesia).[33]

The economic power of Brazil is another factor that sets it apart from the rest of the countries in the region. Its Gross Domestic Product (GDP) was 1,796.19 USD Billions in 2016.[34] If we compare Brazil with Argentina (545.90 USD Billions),[35] Chile (247 USD Billions),[36] or Colombia (282 USD Billions), it is not hard to understand how much further ahead Brazil is over the rest of the region.[37] Brazil has taken a seat with other powerful nations with similar features;[38] it is part of the BRICs, a term coined by Goldman Sachs to group the powerful rising economies of Brazil, Russia, India, and China.[39]

The size of a democracy –regarding territorial surface, population and GDP– is a feature that impacts both the internal process of self governance and its autonomy in relation to other countries[40]. It is a factor that concerns any comparative study of democracies.[41] Large democracies are usually organized under federalism as a horizontal arrangement of separation of powers. According to Calabresi & Bickford "[o]f the G-20 countries with the most important economies in the world, at least twelve have federal constitutional structures and several others are experimenting with federalism and the devolution of power. The first group includes [...] Brazil [...]."[42] As one author noted, "[f]

[32] UNITED NATIONS. **World Population Prospects. The 2017 Revision.** New York: United Nations, 2017. p. 17. Available at: <https://esa.un.org/unpd/wpp/publications/Files/WPP2017_KeyFindings.pdf>. Last visited: Mar. 20, 2018.

[33] Brazil's position is obtained when data from the UN Statistics Division are crossed and filtered under any ranking of democratic countries, such as one developed by The Economist Intelligence Unit or by Freedom House. *See* THE ECONOMIST. **Democracy Index 2017.** Available at: <https://www.eiu.com/public/topical_report.aspx?campaignid=DemocracyIndex2017>. Last visited: Mar. 20, 2018; FREEDOM HOUSE, **Freedom in the World 2018**. Available at: <https://freedomhouse.org/report/freedom-world/freedom-world-2018>. Last visited Mar. 20, 2018)

[34] TRADING ECONOMICS. **Brazil GDP.** Available at: <https://tradingeconomics.com/brazil/gdp>. Last visited: Mar. 20, 2018).

[35] TRADING ECONOMICS. **Argentina GDP.** Available at https://tradingeconomics.com/argentina/gdp> Last visited: Mar. 20, 2018).

[36] TRADING ECONOMICS. **Chile GDP.** Available at https://tradingeconomics.com/chile/gdp>. Last visited: Mar. 20, 2018).

[37] TRADING ECONOMICS. **Colombia GDP.** Available at https://tradingeconomics.com/colombia/gdp>. Last visited: Mar. 20, 2018).

[38] DAUVERGNE, Peter; FARIAS, Déborah, The Rise of Brazil as a Global Development Power. **Third World Quarterly**, Vol. 33, No. 5, p. 903-917, 2012.

[39] *See*, in general, ELLIOTT ARMIJO, Leslie. The BRICS Countries (Brazil, Russia, India, and China) as Analytical Category: Mirage or Insight: Mirage or Insight? **Asian Perspective**, Vol. 31, No. 4, p. 7-42, 2007. p. 8.

[40] DAHL, Robert Alan; TUFTE, Edward R. **Size and democracy**. Stanford: Stanford University Press. 1973; ALESINA, Alberto; SPOLAORE, Enrico. **The Size of Nations.** Cambridge: The MIT Press, 2003.

[41] LIJPHART, Arend, **Patterns of Democracy**. New Haven: Yale University Press, 1999. p. 60-61.

[42] CALABRESI, Steven G.; BICKFORD, Lucy D. Federalism and Subsidiarity: Perspectives From U.S. Constitutional Law. In: FLEMING, James E. & LEVY, Jacob T. (Eds.). **Nomos LV: Federalism and Subsidiarity.** New York: New York University Press, 2014. p. 123.

ederalism is presently far stronger in Brazil than in any other Latin American country."[43] The type of interrelation between the federal level and the state level articulates a dynamic and vibrant federalism.

Assuming the size and federal arrangement of power in Brazil, it is not difficult to understand that this country is presented as a major self-governing unit which tends to engage in an inner self observation and reflection of the country's own dynamics, from the local to the national level and vice versa. These contextual factors constitute a framework for understanding how the Brazilian democratic transition constitutes a phenomenon of study that happens *ad intra* –within its borders– and becomes self-referential in academic terms.

4. DEMOCRATIC TRANSITION AS A FACTOR FOR EXCEPTIONALISM

Although geopolitical size may explain part of Brazilian exceptionalism, it is also worth exploring the way Brazilians see (and feel about) their constitution, for we believe this also sheds important light on, to the point it may actually justify, this inward -looking ethos. (As we will discuss later, this is precisely what we believe we have missed for not paying due attention to the Brazil constitutional evolution due attention.

Already a mature constitution,[44] we believe it has built penetrating roots in both the Brazilian academia and citizenry. This attitude, we suggest here, fuels Brazil's geopolitical dimensions, thus producing a self-referential constitutional scheme. How was this attachment produced? There is a critical feature of Brazil's Constitution we must highlight: Brazil transitioned from dictatorship to democracy by enacting a new constitution. Other countries, such Chile, did not. Is this important in creating constitutional attachment? Let's see.

Brazilians discussed which would be the best means to enact a new constitution to welcome democracy. Two narratives were competing at the time. One narrative wanted to mark a decisive break with military dictatorship, and the other saw transition as the culmination of a gradual transformation, which the dictatorship both favored and permitted.[45] The former, not surprisingly, pushed for a constituent assembly –the very means, as they saw it, that could embrace the constituent power needed to break with the past and represent the people's interests–. Not in vain, this position insisted the assembly's integration should be independent from congress. At the same time, they

[43] ROSENN, Keith S. Federalism in Brazil. **Duquesne Law Review**, Vol. 43, p. 577-598, 2005. p. 578.

[44] Elkins, Melton and Ginsburg "predicted lifespan for constitutions for all countries is 19 years". GINSBURG, Tom. Constitutional endurance. In: GINSBURG, Tom; DIXON, Rosalind (eds.). **Comparative Constitutional Law**. Cheltenham-Northampton: Edward Elgar, 2011. p. 112-125. p. 112.

[45] BARBOSA, Leonardo. **História Constitucional Brasileira:** Mudança constitucional, autoritarismo e democracia no Brasil pós-1964. 2 reimp. Brasília: Centro de Documentação e Informação-Edições Câmara, 2016, p. 204-205.

claimed the assembly's exclusive task would be that of adopting a new constitution, thus not being distracted with governmental (day-to-day) politics.

The latter, instead, favored institutional means. Of course the constituent assembly itself is an institution, but those who preferred the "reconciliaçao and continuidade" path understood institutional means as a channel for the enactment of the new constitution through national congress. This congress would therefore exercise both its regular functions as well as its constituent powers. This is the position that prevailed.[46] To take the words of Leonardo Barbosa, the "mudança constitutional"[47] was carried out by the very first democratic congress that followed dictatorship.[48] This is why some have called this process of constitutional change a reform through transaction.[49] In fact, many believe constitutional enactment occurred under heavy military tutelage, rendering the work of this so-called constituent congress nothing other than a democratic façade for what was de facto an elite-driven transition aimed at maintaining the status quo.

We believe it is wrong to read the work of that congress as simply pointing toward the idea of a regular congress that assumed constituent powers. First, as some have mentioned, Brazilian society, and accordingly its constitutional culture, was at the time already developing a political liberalization.[50] We can say it was a process of liberalization before democratization – which would be the goal of transition. This in part explains why the military were not in a particularly good standing to impose their views.[51] Compare this with the Chilean case, once again, where the military dictatorship imposed a constitutional text in the middle of its regime and continued to resort to political terror.

Second, it is important to pay attention to the political significance surrounding the elaboration of the Constitution, for even if the means chosen was not a constituent assembly, the political environment was tellingly constituent. The 1986 democratic

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[46] MARTÍNEZ-LARA, Javier. **Building Democracy in Brazil:** The politics of Constitutional Change, 1985-95. Basingstoke: Palgrave Macmillan, 1995. p. 55-60.

[47] BARBOSA, Leonardo. **História Constitucional Brasileira:** Mudança constitucional, autoritarismo e democracia no Brasil pós-1964. 2a reimp. Brasília: Centro de Documentação e Informação-Edições Câmara, 2016.

[48] A detailed description of these processes, and the debates the constitutional change sparked, can be consulted in MARTÍNEZ-LARA, Javier. **Building Democracy in Brazil:** The politics of Constitutional Change, 1985-95. Basingstoke: Palgrave Macmillan, 1995.

[49] MUNCK, Gerardo; SKALNIK, Carol. Modes of Transition and Democratization: South America and Eastern Europe in Comparative Perspective. **Comparative Politics**, vol. 29, n. 3, p. 343-362, 1997. p. 347-351.

[50] MUNCK, Gerardo; SKALNIK, Carol. Modes of Transition and Democratization: South America and Eastern Europe in Comparative Perspective. **Comparative Politics**, vol. 29, n. 3, p. 343-362, 1997. p. 348.

[51] ZIMMERMANN, Augusto. Constitutions without constitutionalism: The failure of constitutionalism in Brazil. In: SELLERS, Mortimer; TOMASZEWSKI, Tadeusz (eds.). **The Rule of Law in Comparative Perspective**. Dordrecht: Springer, 2010, p. 135-45. p. 136. *See also* ROSENN, Keith. Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society. **The American Journal of Comparative Law**, Vol. 38, p. 773-802. 1990. p. 775.

elections in Brazil were not regular business. This was because not only were Brazilians returning to popular elections but, most importantly for our analysis here, because these elections were, although not in radical rupture with the past, certainly a decisive step toward "full restoration of democratic institutions".[52] That restoration demanded a new constitutional scheme. To insist: despite the fact the process of constitutional replacement was eventually carried out by constituted institutions, they did so within the understanding 'something constituent' was happening. Not only did the elites understand this was the role the institutions were playing, but most importantly, the people understood this. In fact, many argue that during the constituent debates of the 1980's a new constitutional culture was developed, thus empowering grassroots organizations.[53]

To be sure, it is not only that they see the 1988 constitution as democratically enacted because the politico-constitutional environment dictated so. As some authors have claimed, the very constituent process was both formally (institutionally) opened to gather popular inputs, as well as political (therefore not necessarily formal) and social.

Institutional openness was developed by different means at different stages of constituent conversations. At any rate, these instances of institutional participation existed and citizens made quite good use of them. Rossen perfectly summarizes what he calls a process crossed with 'unprecedented popular participation':

> *The Assembly's Internal Regulations required each subcommittee to devote five to eight sessions to hearing from entities representing different sectors of Brazilian society. Those heard included such diverse groups as government ministers, unions, landlords, Indians, street urchins, prostitutes, homosexuals, and maids. The Assembly established a computerized data bank containing the thousands of popular suggestions concerning the contents of the new constitution. During the seemingly interminable deliberations, virtually all aspects of Brazilian society were debated.*[54]

Popular input was then not just a top-down graceful decision but a sort of unavoidable path the very transition – pushed from below – was taken to notice. First, it has been rightly claimed that strategic behavior analysis focuses heavily elites but little

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[52] MARTÍNEZ-LARA, Javier. **Building Democracy in Brazil**: The politics of Constitutional Change, 1985-95. Basingstoke: Palgrave Macmillan, 1995. p. 45.

[53] ZAIDEN, Juliano. The forgotten people in Brazilian constitutionalism: Revisiting behavior strategic analyses of regime transitions. **International Journal of Constitutional Law**, Vol. 15, n. 2, p. 332-357, 2017. p. 346.

[54] ROSENN, Keith. Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society. **The American Journal of Comparative Law**, Vol. 38, p. 773-802. 1990. p. 777.

on the people themselves.[55] In fact, a closer look at the mobilizations occurring at the time show that (what Zaiden has termed) 'the forgotten people' played a critical role in contesting what started as an elite-driven process.[56] In the words of Leonardo Barbosa, social mobilization was successful in challenging the elitist turn the process took at the outset,[57] thus becoming "a fundamental source for understanding the potentiality of Brazil to turn the page on the past and to look to the eagerly awaited future".[58] Political transition thus "became a constitutional transition".[59]

Finally, and probably one of the reasons ample debates were possible, congress decided constitutional change without a blueprint. This led them to enshrine almost all rights conceivably possible. As some have put it, this text represents an "exceptionally ambitious attempt[] to afford constitutional protection to individual" as well as collective rights.[60] In fact, some have depicted the Brazilian Constitution as an "attempt to constitutionalize nearly every aspect of public life …".[61] From a purist viewpoint this may be seen as a reason to critique. In fact, it has been said Brazil's constitution fails to meet the minimum standards of a proper liberal Constitution as its programmatic turn – which has been said to look more like "a 'program of government' to be complied by the ordinary legislator"[62] – departs from configuring a statute of power. Some lament the "lack of organic unity" the 1988 constitution shows, blaming the absence of a "master plan" that could have given the text some coherence.[63]

Others, however, rightly point to the mobilizations that were taking place as the constitution was being discussed. In the clarifying words of Conrado Hübner Mendes, one of the best reasons that could account for the social change inspiration embedded in the constitution is the politico-constitutional context itself against which

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[55] *See generally* ZAIDEN, Juliano. The forgotten people in Brazilian constitutionalism: Revisiting behavior strategic analyses of regime transitions. **International Journal of Constitutional Law**, Vol. 15, n. 2, p. 332-357, 2017.

[56] ZAIDEN, Juliano. The forgotten people in Brazilian constitutionalism: Revisiting behavior strategic analyses of regime transitions. **International Journal of Constitutional Law**, Vol. 15, n. 2, p. 332-357, 2017. p. 344.

[57] BARBOSA, Leonardo. **História Constitucional Brasileira: Mudança constitucional, autoritarismo e democracia no Brasil pós-1964**. 2a reimp. Brasília: Centro de Documentação e Informação-Edições Câmara, 2016. p. 209.

[58] ZAIDEN, Juliano. The forgotten people in Brazilian constitutionalism: Revisiting behavior strategic analyses of regime transitions. **International Journal of Constitutional Law**, Vol. 15, n. 2, p. 332-357, 2017. p. 347.

[59] ZAIDEN, Juliano. The forgotten people in Brazilian constitutionalism: Revisiting behavior strategic analyses of regime transitions. **International Journal of Constitutional Law**, Vol. 15, n. 2, p. 332-357, 2017. p. 354.

[60] ROSSEN, Keith. A Comparison of the Protection of Individual Rights in the New Constitutions of Colombia and Brazil. **Inter-American Law Review**, Vol. 23, n. 3, p. 659-661. 1992. p. 660.

[61] ELKINS, Zachary; GINSBURG, Tom; MELTON, James, **The Endurance of National Constitutions**. Cambridge: Cambridge University Press, 2009. p. 6.

[62] ZIMMERMANN, Augusto. Constitutions without constitutionalism: The failure of constitutionalism in Brazil. In: SELLERS, Mortimer; TOMASZEWSKI, Tadeusz (eds.). **The Rule of Law in Comparative Perspective**. Dordrecht: Springer, 2010. p. 135-45. p. 138.

[63] ROSENN, Keith. Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society. **The American Journal of Comparative Law**, Vol. 38, p. 773-802. 1990. p. 779.

these debates took place: "At that point, inscribing into the Brazilian Constitution the demands of each social movement was a symbolic and legitimizing act which had to be performed."[64]

From a politico-constitutional side, therefore, this myriad of provisions may well account for the political processes that were unfolding at the time of its enactment, as well as reveal the goal Brazilians were pointing towards.[65] As Hübner has contended, when seen from a comparativist viewpoint, the Brazilian Constitution "is surprising as it goes far beyond the fundamental constitutional compromises".[66] In fact it is an example of directive constitutionalism, a form of constitutionalism aimed at achieving greater social justice and enhancing democratic participation, thus transforming, in the long run, social and political relations of power – what Klare termed as transformative constitutionalism when passing judgment on the South African Constitution of 1996.[67]

Whereas from a legalistic viewpoint these all-encompassing provisions may explain why it is virtually possible to question "every legislative decision",[68] their very same amplitude gives politics ample room to cope with the matters the people care the most about – what Tushnet aptly calls, constitutional matters[69] –, therefore developing a sense of constitutional usefulness/aptitude.[70] This is opposed to other traditions such

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[64] MENDES, Conrado Hübner. Constitutions and Institutions: Justice, Identity, and Reform. Judicial review of constitutional amendments in the Brazilian Supreme Court. **Florida Journal of International Law**, vol. 17, n. 3, p. 449-462, 2005. p. 452.

[65] We use the word 'goal' here not in a naive constitutional sense (as if constitutional provisions alone were enough to critically alter the material, symbolical, and cultural conditions of life of the people), but in a politically conscious fashion: considering the way constitutional provisions allow politics (broadly understood) to shape their implementation.

[66] MENDES, Conrado Hübner. Constitutions and Institutions: Justice, Identity, and Reform. Judicial review of constitutional amendments in the Brazilian Supreme Court. **Florida Journal of International Law**, vol. 17, n. 3, p. 449-462, 2005. p. 452.

[67] KLARE, Karl. Legal Culture and Transformative Constitutionalism. **South African Journal on Human Rights**, vol. 14. n. 1, p. 146-188. 1998. p. 150.

[68] MENDES, Conrado Hübner. Constitutions and Institutions: Justice, Identity, and Reform. Judicial review of constitutional amendments in the Brazilian Supreme Court. **Florida Journal of International Law**, vol. 17, n. 3, p. 449-462, 2005. p. 455.

[69] TUSHNET, Mark. **Why the Constitution Matters**. New Haven: Yale University Press, 2011.

[70] It is true that under the auspices of the 1988 constitution courts, and particularly the *Supremo Tribunal Federal*, have been vigorated vis-à-vis the other branches thus promoting a more active role for judges. However, at the same time courts have developed -- as almost every other court in liberal democracies -- a certain political capacity to take care of their political capital. Thus, some studies show courts have been far from being either voracious activists or tremendously deferential to political power, developing an ambivalent stance. MENDES, Conrado Hübner. The Supreme Federal Tribunal of Brazil. In: JAKAB, András; DYEVRE, Arthur; ITZCOVICH, Giulio (eds.). **Comparative Constitutional Reasoning**. Cambridge: Cambridge University Press, 2017. p. 115-153. In:a similar vein, MOTTA FERRAZ, Octavio. Between activism and deference: social rights adjudication in the Brazilian Supreme Federal Tribunal. In: ALVIAR, Helena; KLARE, Karl; WILLIAMS, Lucy (eds.). **Social and Economic Rights in Theory and Practice. Critical Inquiries**. New York-London: Routledge, 2015. p. 121-137.

as the one imposed in Chile, where the constitutional text tends to be seen exclusively as a set of restrictions that constrain politics.[71]

To sum up, we have argued that one reason that may explain Brazil's inward-looking constitutional attitude is its immense geopolitical power. Coupled with a sort of constitutional colonialism – found both here and there –, there is little ground to build fluent constitutional dialogues in the region, more generally, and between Brazil and Chile, more specifically. The second reason, we ventured, may be related to Brazil's constituent power. Closer attention to the moment the constitutional text was being discussed allows us to see that a constitutional culture was being developed, one which built strong ties around the 1988 Constitution. We do not intend to pass any judgment on Brazilian politics, rather notice that since 1988 politics have taken place within the constitutional confines – even if interpreted in a questionable fashion. Both the democratic practices the constitution has fostered, as well as the foundational moment of 1988, have developed "the acknowledgment by the political forces [and those of the citizenry?] that the Brazilian Constitution is a norm to be taken seriously".[72] Despite some claims here and there apropos Dilma's impeachment or Lula's arrest, there is no comprehensive claim demanding a constituent assembly and a new constitution.

5. SOME CONCLUSIONS: EXCUSE US, WE ARE LOST

After years of legislative debate, the Chilean Congress passed a labor reform. Among its many regulations, it included some measures to strengthen the power of unions. One of these measures was granting unions the exclusive power to collectively bargain. Large corporations, siding with right wing political parties, claimed that the regulation violated the individual right to collective bargain (there is no contradiction in this, though this is exactly what they argued). The Constitutional Court joined their reasoning. In so doing, it stated that the constitutional text is not neutral in these matters; no constitution is neutral, it further added.[73]

There is one sense in which this reasoning is trivial. It is of course true that constitutions are not neutral. We expect constitutions not to be neutral on configuring a democratic regime or a republican form of government, or on recognizing constitutional rights. However, the non-neutrality the Constitutional Court was talking about was

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[71] Whereas it is true that under classical liberal constitutionalism constitutions are to set limits on power, the case of the Chilean constitution shows when these limits are imposed undemocratically, they only serve to petrify a certain (in this case, dictatorial) legacy. Professor Fernando Atria has insightfully show how the authoritarian drafters of 1980 took chance of the limitative character that accompanies constitutionalism in sketching a straight jacket for politics. ATRIA, Fernando. **La Constitución Tramposa**. Santiago: LOM Ediciones, 2013.

[72] MENDES, Conrado Hübner. Constitutions and Institutions: Justice, Identity, and Reform. Judicial review of constitutional amendments in the Brazilian Supreme Court. **Florida Journal of International Law**, vol. 17, n. 3, p. 449-462, 2005. p. 454.

[73] Tribunal Constitucional de Chile, Causa Rol 3016(3026)-2016, 19 May 2016, cons. 12.

not this, rather regular decisions of the kind taken in "normal lawmaking".[74] In fact the Court declared, probably with some embarrassment, that "this constitution has some singularities". It was as if it were acknowledging that some decisions normally expected to be defined by regular politics were already enshrined at constitutional level.[75]

This explains why there is a widespread crisis of constitutional legitimation in Chile. The constitution is rightly seen as the dictatorship's legacy, already defining the outcome of many matters politics should deal with. Whereas the rest of the countries in the region started to walk the transitional terrain by agreeing to new constitutional channels –Brazil included, as we have seen–, Chile's constitutional regime had been defined quite some time before the transition began. In fact, the Constitution was imposed in 1980, eight years before Pinochet was defeated in a plebiscite the dictator himself called expecting to be ratified in power in 1988. Chile's 1980 Constitution was, and still is, authoritarian. From a substantive viewpoint, the 1980 Constitution was not looking to foster a new democracy, but rather to protect the dictatorship's oeuvre from it. The objective was, thus, to shield it from future revisions, therefore placing a political program out of the reach of democratic politics.

This explains why social movements have long been asking (some as early as 1980) for a genuine constituent process to get rid of the constitutional heritage of the dictatorship. After assuming her second (non-consecutive) term, President Bachelet intended to answer these claims – constitutional replacement was a central part of her presidential campaign. On the thirteenth of October 2015, Bachelet announced what is now called the itinerary of the constituent process. That process finalized with a bill submitted before Congress proposing the amendment of the entire constitutional text. Bachelet submitted this bill five days before leaving office, with little political support and having had scarce (virtually no) contact with political parties, let alone social movements, during its drafting. The bill was drafted in secrecy and many contend it scarcely honored the participatory stages that took place a couple of years prior and involved more than 200,000 people.

What was the problem with the process? Different from the Brazilian experience (and others, such as that of Colombia in 1991), Bachelet's itinerary resorted to constituted (institutional) procedures not with the aim of activating the constituent agency of the people, but rather to suffocate it. It ended up constraining participation and channeling the debates through regular congress. It is true, as we have reviewed here, that Brazil also resorted to its national congress. But, as we have seen, Brazil did so with the firm political aim of overcoming the dictatorship's legacy. Chile, instead, resorted to constituted institutions basically to constrain the people's constituent agency and,

[74] ACKERMAN, Bruce. **We The People 1: Foundations**. Cambridge: Harvard University Press, 1991.

[75] Notice that this is not the typical anti constitutionalist claim. *See* WALDRON, Jeremy. A Right-Based Critique of Constitutional Rights. **Oxford Journal of Legal Studies**, Vol. 13, n. 1, p. 18-51, 1993.

without learning from previous mistakes, thereby obliterating the potential to enact a democratic constitution.

What have we missed by paying no attention to Brazilian constitutionalism? Many things. Certainly one important lesson whose consequences we are now dealing with is the following: established (constituted) institutions can be resorted to in order to democratize constituent processes. Existing constitutional requirements may well function as catalyzers of constitutional replacement, and the goal of democratizing the process can only be achieved when the political elite – besides performing their historical role – are open to being seduced by the challenges of the citizens themselves.

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The Brazilian Constitution of 1988: a comparative appraisal

A Constituição Brasileira de 1988: uma avaliação comparativa

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Abstract

This article examines the 1988 constitution of The Federative Republic of Brazil and its significance after 30 years of its implementation. Asserts some of its more advance social, political features and evaluates the current challenges to implement a democratic governance, based on a Rule of Law within the evolving constitutional framework. It also makes some comparisons between the Brazilian constitutional and political processes and other Latin American experiences, weighing whether or not Brazil started a new era of constitutional thinking in Latin America.

Keywords: Constitution; Rule of Law; justice; democratic governance; liberal constitutionalism.

Resumo

Este artigo examina a Constituição de 1988 da República Federativa do Brasil e seu significado após 30 anos de implementação. Afirma algumas de suas características sociais e políticas mais avançadas e avalia os desafios atuais para implementar uma governança democrática, baseada em um Estado de Direito dentro da estrutura constitucional em evolução. Também faz algumas comparações entre os processos constitucionais e políticos brasileiros e outras experiências latino-americanas, avaliando se o Brasil iniciou ou não uma nova era de pensamento constitucional na América Latina.

Palavras-chave: *Constituição; Estado de Direito; justiça; governança democrática; constitucionalismo liberal.*

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CONTENTS

1. The Constitution and the current political situation of Brazil. **2.** Some innovative features of Brazilian Constitution. **3**. The Brazilian Constitution in the perspective of Latin America. **4.** Concluding remarks. **5.** References.

1. THE CONSTITUTION AND THE CURRENT POLITICAL SITUATION OF BRAZIL

This article examines the 1988 constitution of The Federative Republic of Brazil and its significance after 30 years of its implementation. Asserts some of its more advance social and political features and evaluates the current challenges to implement a democratic Rule of Law within the evolving constitutional framework. It also makes some comparisons between the Brazilian constitutional and political processes and other Latin American experiences. By doing so this paper tries to answer in which ways the Brazilian normative and democratic transformations either maintained or opened a new era of constitutionalism that departed from liberal conceptions of justice, when trying to solve historic and current quests for justice.[1] To measure changes, the article revises the tensions produced in the economic and the social entitlements and the political features of the *Carta Magna*.

The 1988 constitution of Brazil was an advance in political and democratic agreements as well as an *avant-garde* document for Latin America economic, social and human rights. It is also the result of the struggle of pro-democratic social movements and the articulation of a political elite willing to exit the military rule with a new constitutional contract. It was also a successful exit from a period of military dictatorship that was the scourge of southern countries during the 1970's, and marked a shift in political contests for Brazil's political coalitions.

During the constitutional assembly, different political actors proposed social, economic and political arrangements that they expected to be stable, beyond the evolving political coalitions. They tried to establish stable, trustable and predictable governance provisions. Their design had some short and some long term consequences, among other things because they introduced a new set of fixed institutions they pretended to be stable and would/could last for long electoral cycles. During the first short term period political actors, like political parties, organizations and citizens should be able to learn and

[1] Some authors like to define the trend as new Latin American Constitutionalism, but I will argue that these ideas can be considered within the framework of a liberal conception of justice.

integrate its rules and logics into their strategies. Other changes were long-term effects, chain like-transformations, been the conception of citizenship the deepest result.[2]

While the creators of this fixed Supreme Law attempted to avoid the temptation of different electoral coalitions to change the course and impose rules for the future, the dynamics of competition and the social mobilization impacted several of its features and shifted the navigation course. It can be said that the basic institutional design is strong and operative, and has survived governments with different ideologies, but I will like to propose that there are some governance tensions that explain the contemporary political crisis in the country. Some basic constitutional features need to be analyzed and estimate its strengths and capacity to guide the country outside the present stagnation, into a realistic future. To advance on these topics: the vicious cycle of violence, corruption and impunity; the partisan politics that produce conflicting and confronting majorities derives on the need for stronger independent judiciary, together with provisions to improve access to rights and justice and, overall, build a consensual Rule of Law, where all citizens and politicians will abide.

Other significant element is the combination of a presidential system articulated with a pluralist partisan congress and a federalist republic, which incorporates issues of republicanism and pluralism, but with different rules when compared to other cases like Mexico, Argentina or the United States. For instance, article 170 of the constitution establishes the mandate of reducing regional and social differences, and other articles mark strong promotion of deliberative political processes,[3] together with a representative partisan system. The country has shown tensions between some features of democratic enhancement, like direct participation, in contrast with traditional partisan representation. As a bonus in the game there are signs of a more active judiciary.

In this sense, since 1988, Brazil embarked on a period of major transformations and I would like to highlight four substantive dimensions. First, the *Carta Magna* announced a new era of political, economic and social rights precisely at an important moment of economic changes at global level, and national policies must fit under the framework of the so-called Washington "Consensus". This is particularly important since Brazil's government will have to implement a package of reform policies promoted by Washington and several other institutions like IMF or IDB, in order to contain its hyper-inflation and government deficit.[4] These issues have marked a sturdy redirection

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[2] Some scholars argue that the constitution marked the foundation of a new state but that would mean that every constitutional assembly creates a new "Leviathan", something that does not happen in Latin America. AVRITZER, Leonardo; MARONA, Marjorie. Judicialização da política no Brasil: ver além do constitucionalismo liberal para ver melhor. **Revista Brasileira de Ciência Política**, Brasília, n. 15, p. 69-94, set./dez. 2014.

[3] SUNSTEIN, Cass. Beyond the Republican Revival. **The Yale Law Journal**, New Haven, vol. 97, 1988. p. 1540.

[4] Which included tax discipline and reform; redirection of public spending from subsidies; trade and foreign direct investment liberalization; privatization of public enterprises; deregulation and strengthening of private property rights. One constitutional provision previewed by the Fundamental Law happened in October 5, 1993

for Brazilian government coalitions during the 1990's and were not achieved without strong fights, because it limited the provision of good and the access to economic and social welfare.

Second, like other countries in the region, Brazil experienced an increasing and unstoppable crisis of violence at multiple and interweaved levels, that was accompanied by a human rights crises. The country has an extremely high homicide violence rate together with organized crime, with unfair and arbitrary detentions of black populations, police lethality, massacres and violations of human rights in prisons. Its cities experienced a violent period of life, where criminal organizations controlled entire jails and territories, followed by military operations in states that trespassed governance and legal lines, forcing everybody to ask: who governs these regions? Today the military still have strong presence in various arenas, that some consider to be beyond the constitutional framework, and both the military and organized criminal bosses stall underneath the interstices of democratic power. All of this happens with a level of impunity that demonstrated the incapacity of the State to protect citizens' basic rights. But there are other deep infringements in the rights to health, education, and discrimination to major portions of vulnerable populations.

The third theme I would like to stress and is perhaps the more linked to constitutional features is the political and legal dynamics. Brazil has an electoral and partisan system that is the cause of confrontation and the current political crisis. It is a structure induced instability. Politics is the landscape of major conflicts and eroding political fights. These political confrontations are ingrained into the basic electoral laws and governance institutional provisions, and enduring hostility between the Executive and different political coalitions on the Congress. Its current profound crisis is partly the result of various rampant corruption scandals that recently lead to a political and judicial crisis because of the destitution of its president, the accusation against the current head of the Executive and the recent detention of Lula da Silva.

I would like to add that this is just the window dressing room of major crisis with potentially continental scale: the *lava jato* scandal, involving not only leaders of political coalitions but also major transnational capitalist corporations, like *Oderbrecht*, is now investigated even by offices from foreign governments.[5] Brazilian politics are not nurtured by preference aggregation policies, but by corruption strategies and conspiration scandals, a monster that eats its own creatures, no matter the motivation; from

with an amendment that provide new guidelines to public policies with a focus on citizens. AVRITZER, Leonardo; MARONA, Marjorie. Judicialização da política no Brasil: ver além do constitucionalismo liberal para ver melhor. **Revista Brasileira de Ciência Política**, Brasília, n. 15, p. 69-94, set./dez. 2014. p. 80.

[5] This is the case of a Brazilian transnational enterprise, but also opens the issue of the increasing power of national and international corporations in state governance, and the limits that contemporary constitutions have for this cases. It is not clear how the government is protecting the rights of people against predatory practices of this corporations.

Color de Mello impeachment in the 1990's, to the destitution of Dilma Rousseff and then the imprisonment of Luiz Inácio Lula da Silva, with current president Temer under attack, accused of corruption charges. All of this has depended on the majority of a congress that has provided Brazilians with enough evidence of negligence.

Together with the trends that have accompanied this corroding development of impune corruption is the increasing wave of violent crime and illegalities, which in certain cases has taken the form of internal confrontations between state and non-state armed actors, but in other forms it is a political confrontation among corrupt coalitions that seem to involve the cooptation or integration of both criminal bosses and the elite in one ruling coalition, a reconfiguration of the power coalitions of the State.[6] The paradox is that most of these governments do not collapse, instead, they carry out regular electoral processes with enormous conflicts and illegitimate results, despite citizen's struggles.

The most dramatic consequence of this violence is that Latin American people have lived under a "State of Terror", spanning from its local forms of precarious gangs in neighborhoods, *favelas, and barrios*, to cities under the complete control of criminal organizations, such as the *Primeiro Commando de la Capital* in Sao Paulo.[7]

As a consequence of the three former dimensions that substantiate the abysmal distance between the written entitlements and the real every day deprivation of rights, the fourth must important feature is the lack of a Rule of Law. The task of creating a fair and lawful government was not the only challenge for the elite and the masses. For decades, several factors have impeded the accomplishment of this goal. Governments have shared a set of legal principles, institutions, processes, and regulations that are formally democratic, even though they score low in several governance indicators, like high inequality, rampant corruption widespread illegal activities at all levels, lack of transparency, un-controlled organized violence and impunity, limited freedom of the press, an absence of the monopoly of legitimate violence and incomplete territorial control of their states (limited sovereignty).

After stating these issues, we need to ask: Are these unintended consequences, incidental conditions of democratization? Are they indicators of a major shift in State

[6] The ruling elite plays power strategies and enjoys its involvement in corruptions scandals with such impunity that it has put the regime in a most dangerous situation. They survive with a complex formula in which legal authorities respond to illicit actors, producing incentives and threats that are accepted by governments. Elites still participate in elections and in forming governments. Meanwhile, some citizens also behave in an incongruent fashion: accepting clientelism and other illegitimate incentives to vote, even when their governments do not respond to them and fail to provide the benefit of public services. Elections partisan competition and distribution of power is carried out, but the results are not representative governments, but another type of autocratic government. See GARAY, Luis; DE LEÓN, Isaac; SALCEDO-ALBARÁN, Eduardo. Captura y Reconfiguración Cooptada del Estado en Guatemala, Colombia y México. **Método**, Bogotá, n. 64, p. 3- 45, ene. 2010.

[7] ADORNO, Sergio. Democracy in Progress in Contemporary Brazil: Corruption, Organized Crime, Violence and New Paths to the Rule of Law. **International Journal of Criminology and Sociology**, Ontario, vol. 2, p. 409-425, oct. 2013.

Governance beyond the constitutional framework? What is the part of the constitution in this outcome?[8] What has remained from the *old regime* and what has changed, that produces these outcomes?

In the last 30 years Brazil's population grew *circa* 50% and today 86% of Brazilians live in cities. Illiteracy has been reduced; education, sanitary, and general conditions improved; life expectancy and *per-cápita* income increased; but poverty and inequality indexes have been scarcely reduced, showing the limits of transforming structural opportunities. There are improvements, but not enough to say that problems are resolved. Regarding the governments, budgets have increased monumentally, but in spite of that people still are not able to receive the benefits of their policies and have not fair access to constitutional rights. The Brazilian economy is more market oriented and the current crisis shows the weakness of some achievements, especially because is vulnerable to political actions. Some generations of Brazilians that grew with the idea of entitlements, and the promising role of the state as major provider are living today in desolation. As mentioned before, one of the main paradoxes of Brazilian Constitution is that it was written at the end of a promising welfare state era, but there is a major downsizing of the public sector; the irresistible reduction of Brazilian public administration and its re-accommodation into a more fitted, but decadent government, less capable of providing all the services.

2. SOME INNOVATIVE FEATURES OF BRAZILIAN CONSTITUTION

I shall begin this section with the first article that establishes the clue concepts of citizenship, human dignity and political pluralism. The first idea has been one of the cardinal concepts of the development of a Human Rights framework in the region. Today must of the constitutions consider the concept of dignity as the basis of rights and entitlements. That proposition has reinforced the mandate that international relations are to be conducted with the prevalence of human rights (article 4th.); and can be complemented with the ideas of building a free, just and solidary society that guarantee national development, eradicate poverty, substandard living conditions and reduce social and regional inequalities (article 3rd. and others); also significant is the promotion of the well-being of all citizens, without prejudice as to origin, race, sex, or any other form of discrimination, such as the recognition of the indigenous peoples rights to their lands. This is a comprehensive framework of human rights that can be compatible with a liberal doctrine of justice.

Other innovative features of the *Carta Magna* were the establishment of urban policies as a constitutional matter, something that had not occurred in the region before

[8] I would like to mention that since its declaration, the Constitution has experienced 99 amendments and 6 special constitutional revisions.

suggesting the social functions of the city in ensuring the well-being of its inhabitants. But it is necessary to address that other articles of the Constitution offer a different idea of the political contract that was forged at the constitutional assembly, in compliance with agreements from the *ancient regime*. For instance, Articles 142th and 144th offer a clear idea of the limits of any associational contract that eliminates the former regime. This has left open the probability of military interventions and has permitted the evolution of several questionable and "exceptional" punitive policies, like the interventions of military police corps in Favelas (*Policía pacificadora programs*), or the recent intervention of the federal forces in the State of Rio. Certain texts of the constitutions and its public policies have opened opportunities for what is called "states of exceptions" in Latin America. Mexico's federal courts for example, are facing cases related to the role of armed forces in public security.

3. THE BRAZILIAN CONSTITUTION IN THE PERSPECTIVE OF LATIN AMERICA

The constitutional movement of Brazil also marks a new wave of reforms in the subcontinent. First, because it was written with a different constitutional approach; second, it was more of a convention voted by both citizens and social movements that struggle against dictatorship, and a political and military elite willing to convene a democracy. Third, there was a different context contrary, for example, to the Chilean constitutional transition that had strong control of the military. So it can be said that Brazil started a wave of new constitutional ideas and ideologies, which were later unraveled in the Colombia reforms of 1991; and followed by Paraguay in 1992, Peru in 1993, Venezuela in 1999; Ecuador in 2008; Bolivia in 2009 and then Mexico in 2012. Mexico in contrast with several other nations of the subcontinent, took almost 25 years to achieve a human rights framework as the foundation of people's rights. This was not a new constitution but a major reform.

I would like to enhance several novelties of Brazil's constitution, and contrast them with new ideas, institutions and other improvements made later on by other national assemblies in the continent. It is necessary to address the question if this is a new trend of constitutionalism in Latin America (beyond old constitutionalist paradigms, either conservative or *garantists)*; and/or an innovative sign of structural changes in contemporary governance.

It could be argued that this case started a new constitutionalist conception, like several scholars have proposed.[9] But I have to state that there is not a single, coherent

[9] Negreto argues that Latin American countries started a wave of constitutional change since 1978. One of the new trend is a coexistence between party representation in a more pluralist setting, together with consensual-deliberative decision making procedures; other reforms foster concentration of power in the executive

idea of a new constitutional design; every country arrived to the constitutional change from different routes and from different political formations (partisan and veto power actors, like the military). To be sure, Brazil and later on several countries established new rights, entitlements and constitutional figures. I can emphasize on the historical indigenous rights achievements, together with other minorities and collective rights; such as the fight for racial and gender equality, the multicultural identity of citizens and the plurinational states.[10] Other important topic is the new juridical pluralism in Colombia and even in Mexico. According to Uprimni[11] the common trends are transformative, egalitarian, participatory, and pluralist. Is important to assess that this is a result of citizens' struggles in the context of inequality and cultural heterogeneity.

But in the governance features the results are suboptimal. Still, I will like to propose that the majority of these ideas need to be discussed within the frame of a liberal conception of justice. There is a similar recognition of diversity, expansion, and protection of individual and collective rights in liberal conceptions of justice, as well within political liberalism.

And for sure access to justice has been one of the most active drivers of political and constitutional debates, whit no conclusive results today. There are also some features of constitutional revision that need to be taken into consideration like the new Supreme Court decisions, or the increasing presence of an Inter-American Court of Human Rights in issues of entitlements. But these are new trends that are going beyond Brazil's reforms.

We can discuss the innovative political decisions and policy design practices, like the direct participation. This mechanisms and other forms of collective decisions might be in confrontation with traditional representative partisan decisions, and the judicial review of the processes, but the case might still fit into a pluralistic idea of democratization.

Following Gargarella, the two critical variables to characterize these constitutional theories as different are: 1) how much the constitutions recognize and protect fundamental rights; and 2) how much space the constitutions grant to democratic participation in order to make collective decisions.[12] In addition, Gargarella proposes that

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branch (Like in Venezuela). According to him, constitutional choices are endogenous to the performance of preexisting constitutional structures and to the Partisan interests and relative power of reformers. According to him Latin America reflects the heterogeneous interests of the actors who had influence over institutional selection. NEGRETO, Gabriel. Shifting Constitutional Designs in Latin America: A Two-Level Explanation. **Texas Law Review**, Austin, vol. 89, 2011. p. 1777.

[10] AVRITZER, Leonardo; MARONA, Marjorie. Judicialização da política no Brasil: ver além do constitucionalismo liberal para ver melhor. **Revista Brasileira de Ciência Política**, Brasília, n. 15, p. 69-94, set./dez. 2014. p. 79-80.

[11] UPRIMNY, Rodrigo. The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges. **Texas Law Review**, Austin, vol. 89, 2011. p. 1587, 1599.

[12] UPRIMNY, Rodrigo. The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges. **Texas Law Review**, Austin, vol. 89, 2011.

other new regional paradigm of constitutionalism is a great judicial independence such as Argentina.[13]

It is worth considering the new role of the judiciary system as a more active agent of protection and expansion of rights, and as a limit to political abuse by other actors.[14] But this new active judiciary does not walk in one single direction.[15] Avritzer perceives both directions in the new role of the judiciary in Brazil. But together with these innovations we can also notice some emerging practices from national executives in legislative and political arenas, that are justified and legitimized as interventions against the inefficiencies of representative democracies and have produced revolting conflicts. This can be the case of Venezuela, where the president confronted and challenged the limiting abilities of both legislative and judiciary systems, in the name of constituency. And there is the case of new trends in the Executives in Latin America that concentrate more power in security policies, giving the military a stronger role in state and internal security.

As a synthesis, I want to recover one issue highlighted before, which is a pending matter for all regional governments: building a Rule of Law. No constitutional reform has produced that result, and political elites that promoted the changes are still fighting for reforms; all of them can be integrated in the single idea of retain power. The systematic struggle for presidential reelection manifest that elites are running out of the limits of the Rule of Law.

It is also important to notice that constitutions are products of different historical, political and social mobilizations, but they all share the same purpose of building a more just society and a more fitted government. Their purpose is to make the constitutional rights more accessible for citizens, especially those in disadvantage. They might separate from liberal philosophies of justice, understood as fairness. It is in this case that they offer no options to the most striking contemporary problems of creating a fair world, were certain principles of justice will govern a modern social order. [16]

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[13] GARGARELLA, Roberto. Recientes reformas constitucionales en América Latina: una primera aproximación. **Desarrollo Económico**, Buenos Aires, vol. 36, n. 144, jun./ mar. 2013. p. 977.

In the case of the judiciary, analyzes the 45th Amendment to the Brazilian Constitution, that enlarges the access to the justice in this country. RIBEIRO, Ludmila. **The Constitutional Amendment 45 and the access to the justice. Revista Direito GV**, São Paulo, vol. 4, n. 2, p. 465-491, jul./ dez. 2008.

[14] It is worth telling that the current political discussion puts stress on the competing roles of two different concepts of liberty and the role of the judiciary in it. Constitutions are limits to governing elites; they are not antidemocratic, but ensure fair procedures beyond electoral coalitions and the judicial review that emanates from the discretional interpretation of judges.

[15] For the Judicialization of politics see: AVRITZER, Leonardo; MARONA, Marjorie. Judicialização da política no Brasil: ver além do constitucionalismo liberal para ver melhor. **Revista Brasileira de Ciência Política**, Brasília, n. 15, p. 69-94, set./dez. 2014. p. 90.

[16] RAWLS, John. **The law of peoples: with "The idea of public reason revisited"**. Massachusetts: Harvard University Press, 2001.

4. CONCLUDING REMARKS

Sometime between the late 1980's and the beginning of this century, a great majority of Latin America's political regimes started to be elected with democratic methods; some of then went to a period of deep constitutional reforms, notwithstanding the fact that the construction of the Rule of Law was and still is a pending matter. Today, almost all of them promote a more active constitutionalism formerly fight corruption and created transparency organizations, but no one has achieved a minimum standard.

Although political liberties associated with democracy (i.e., suffrage of rights, association and freedom of speech) have been secured in many countries, the systematic violation of human rights by governments still poses a major challenge across the region. Moreover, several countries in the region continue to suffer from high levels of economic inequality, social exclusion, and discrimination along ethnic, racial, and gender lines.

This essay proposes that Brazilian constitution created important historical advances for its citizens and for other constitutions in the region. But on the negative side, the institutional provisions to implement them lacked capacity, political will and strength. There is an abysmal distance between formal entitlements and the absence of access to basic rights for the majority of population. Along with these deficits, the constitutional political machinery has encouraged the elite to behave in a devastating political fight, due to its own ambition, its incapacity and its involvement in illegal and illegitimate behavior. Most of it is the result of the electoral and political rules embedded in the system.

This article values the innovative propositions of rights and entitlements of the *Carta Magna* and examines four important dynamics that are driving the current political economic and even social crisis in the country. Some of them are connected to constitutional designs, other came as long term consequences of the implementation of this fundamental law. The first one is the contrasting capacity and response of the government to both the economic entitlements of Brazilians; the strong, deep condition of poverty and inequality, and the insufficient performance of the government policies. Even the appraised policies to combat poverty like *Bolsa Família,* that some claimed was capable of changing structural dynamics, reduce poverty and increase an upward class mobility, looks weak in the midst of the recession. Besides, the corporate scandals that actually launched the current crisis are a signal of the size of corporate pressure on economics that hinders real growth and wealth creation and distribution.

The second profound problem of Brazil is the multidimensional violence that endangers basic rights; the dimensions run from high rates of homicidal aggressions, to criminal organizations controlling cities and putting people under a state of terror, corruption and impunity of large scale, to the disaffection of the basic rules of engagement

in the political and juridical arenas. Criminal and illicit activities eroded the ability of States to govern democratically. The next two dimensions explored are the political features that underlie the dynamics of contentions (a confrontation that lead to the current crisis), and the consequent inexistence of a Rule of Law established as a promise in the *Carta Magna* but derogated by every day political practices.

More economic reforms are needed in order to guarantee better results for their constitutional promises, as well as a better system of cooperation that provides the necessary public goods to exit historic conditions of poverty, inequality and deprivation. The key state holders need to consent on the basic rules of the game. Latin America needs to address these problems in order to break the vicious cycle of violence, corruption and impunity of the eroding partisan politics that produce conflicting majorities. Political confrontations today are nourished by groups linked to political parties beyond citizens' interests. There is also need for a stronger independent judiciary system, that creates better access to rights, justice and overall a road to a consensual Rule of Law.

Democracy is more than a set of institutional rules that create governments. Is a social system that polices corruption, limits violence, protect its citizens to promote their legitimate involvement and curbs violations of the Rule of Law[17]

Finally, I argue that Brazil opened a new enlighted age of constitutional reforms and way of thinking. Whether or not this is a new school is still in discussion, but I argue that must of its "creations" can still be interpreted and explained within a liberal conception of justice and its associated political conception. Of course it can be said, and I will agree, that the "new era" has several innovative actions, new rights, a new conception of the person and a multidimensional-enriched idea of citizenship. But some of the institutional figures and rules established in constitutions incepted after 1988 are still for grabs. Again, several of its political arrangements have produced more institutional tensions and conflicts rather than solving the old disorder. Some of them are related to the direct participatory processes; others to a new role of the Executives and other to new functions of the judiciary, but none of them has been able to solve the puzzling issue of extremely pluralistic, fragmented and conflicting partisan electoral system.

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Social rights interpretation in Brazil and South Africa

Interpretação de direitos sociais no Brasil e na África do Sul

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Abstract

In this paper, I examine the social rights jurisprudence of Brazil and South Africa, two jurisdictions that have adopted markedly different approaches to their interpretation. In doing so, I advance three arguments relating to the study of social rights adjudication and the effects of the resulting jurisprudence. First, understanding the development of social rights jurisprudence requires understanding the pre-existing set of judicial norms that define the role of the judges and acceptable mode(s) of legal reasoning. Second, variations in institutional design and understandings of precedent means that one cannot assume that the decisions of the apex court will be universally or quickly incorporated into the decisions of the lower courts. As such, it may be necessary to look beyond apex court decisions to get an accurate picture of patterns of social rights jurisprudence in a given jurisdiction. Third, both of the dominant approaches have the potential to institgate significant policy change, but they also encourage different types of litigation and different litigants. This, in turn affects the approach taken to addressing the policy areas and does not necessarily lead to

Resumo

Neste artigo, examino a jurisprudência de direitos sociais do Brasil e da África do Sul, duas jurisdições que adotaram abordagens marcadamente diferentes para sua interpretação. Ao fazê-lo, adianto três argumentos relacionados ao estudo da judicialização dos direitos sociais e aos efeitos da jurisprudência resultante. Em primeiro lugar, entender o desenvolvimento da jurisprudência dos direitos sociais exige compreender o conjunto pré-existente de normas judiciais que definem o papel dos juízes e o(s) modo(s) aceitável(is) de raciocínio jurídico. Em segundo lugar, as variações no desenho institucional e nos entendimentos de precedente significam que não se pode presumir que as decisões do tribunal superior serão universal ou rapidamente incorporadas às decisões dos tribunais inferiores. Como tal, pode ser necessário olhar além das decisões judiciais ágeis para obter uma imagem precisa dos padrões da jurisprudência de direitos sociais em uma determinada jurisdição. Terceiro, ambas as abordagens dominantes têm o potencial de afetar mudanças políticas significativas, mas também encorajam diferentes tipos de litígios e litigantes diferentes. Isso, por sua vez, afeta a abordagem adotada para tratar das

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the prioritization of areas where the investment of state resources will yield the greatest returns or be the most socially just.

áreas de política e não leva necessariamente à priorização daquelas nas quais o investimento de recursos estatais produzirá os maiores retornos ou será o mais socialmente justo.

Keywords: social rights; Brazil; South Africa; jurisprudence; comparative constitutionalism.

Palavras-chave: *direitos sociais; Brasil; África do Sul; jurisprudência; constitucionalismo comparado.*

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1. INTRODUCTION

Social rights—positive obligations on the state to provide for the maintenance and development of individuals independent of labor market participation—are now common, arguably standard, features of contemporary constitutions. At the beginning of 2016, 58% of national constitutions included a justiciable right to education, 43% the right to health, and 27% the right to housing. Of the battery of eight social rights identified by Jung et al,[1] 63% of constitutions contained at least one in justiciable form and 40% contained four or more.[2] From their earliest entrenchment in the constitutions of Peru (1828),[3] Germany (1919),[4] and Argentina (1949)[5] to their international recognition via the *Universal Declaration of Human Rights* and the *International Covenant on Economic, Social and Cultural Rights*, social rights have become the focus of sustained popular, political, judicial, and academic attention.

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[1] The rights to child protection, education, health, social security, development, food and water, housing, and land. JUNG, Courtney; HIRSCHL, Ran; ROSEVEAR, Evan. Economic and Social Rights in National Constitutions, **American Journal of Comparative Law**, vol. 62, no. 4, p. 1043–1093, out. 2014.

[2] JUNG, Courtney; HIRSCHL, Ran; ROSEVEAR, Evan. Justiciable and Aspirational ESRs in National Constitutions. In: YOUNG, Katherine G. (ed.) **The Future of Economic and Social Rights**. Cambridge: Cambridge University Press, 2019 (forthcoming). When both aspirational and justiciable variants are considered, 81% of national constitutions contain the right to education, 70% the right to health, and 43% the right to housing; 83% contain at least one of the eight social rights, and 65% contain four or more.

[3] Art. 171 of the Political Constitution of the Peruvian Republic, 1828. Cf. UNITED KINGDOM. Foreign Office. **British and Foreign State Papers**. Vol. 16. London: James Ridgway, 1828-1829. p. 966–88.

[4] MARTIN, Charles E.; GEORGE, William Henry (eds). Consitution of Germany, 1919. In: **Representative Modern Constitutions**. MUNRO, William B.; HOLCOMBE, Arthur N. (Trad.) Los Angeles: Times-Mirror Press, 1923, p. 74–103, art. 161.

[5] PEASLEE, Amos J. (ed.) **Constitution of the Argentine Republic**, 1949. In: Constitutions of Nations Concord. NH: Rumford, 1950, art. 7.

Although a part of the "higher law" of countries marked by substantial religious, economic, social, and political variation, the formal articulation of these rights in constitutional documents is strikingly similar. Unsurprisingly, however, this similarity has not manifest in the similar interpretation and application of these rights by courts in different jurisdictions. Rather, two dominant approaches have emerged.[6] The first is exemplified by Brazilian right to health jurisprudence. This approach treats social rights as (near) immediately realizable guarantees, owed by the state to specific individuals, the non-fulfilment of which is remedied by individual litigation resulting in *inter partes* decisions requiring the state to fund and/or provide specific medicines or medical services.[7] The second is exemplified by the right to health and right to housing jurisprudence of the South African Constitutional Court. This approach is similar to an administrative law approach insofar as the primary focus of the analysis is on the "reasonableness" of government policy relevant to the provision of the social right(s) in question.[8] Although a particular individual may not have received a benefit associated with a right, the courts were reluctant to step in if there is government policy in place that is deemed to be a reasonable means of progressively realizing that right.

In this paper, I examine the social rights jurisprudence of these two countries with an eye toward highlighting variation in their interpretation between both jurisdictions and rights, identifying factors responsible for the origin and perpetuation of this difference, and considering the implications thereof. In doing so, I advance three arguments relating to both the study of social rights adjudication and the effects of the resulting jurisprudence. First, in order to understand the development of social rights jurisprudence, it is essential to understand the pre-existing set of judicial norms that define the role of the judges and acceptable mode(s) of legal reasoning. Second, the cross-national diversity of judicial-institutional structures and mechanisms for advancing social rights claims means that one cannot automatically assume that the decisions of the apex court will be universally or quickly incorporated into the decision of the lower courts. As such, it may be necessary to look beyond apex court decisions to get an accurate picture of social rights jurisprudence in a given jurisdiction. Third, both of the dominant approaches have the potential to redistribute resources and instigate significant policy change. But, they also encourage different types of litigation and different litigants. This, in turn, shapes the incentives faced by policy-makers and does not

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[6] Cf. BRINKS, Daniel M.; FORBATH, William. The Role of Courts and Constitutions in the New Politics of Welfare in Latin America. In: PEEREBOOM, Randall; GINSBURG, Tom (ed.). **Law and Development of Middle-Income Countries**: Avoiding the Middle-Income Trap. New York: Cambridge University Press, 2014.

[7] FERRAZ, Octavio Luiz Motta. The Right to Health in the Courts of Brazil: Worsening Health Inequities? **Health and Human Rights**, vol. 11, no. 2, p. 33–45, dec. 2009.

[8] LIEBENBERG, Sandra. South Africa: Adjudicating Social Rights Under a Transformative Constitution. In: LANGFORD, Malcolm (ed.) **Social Rights Jurisprudence**: Emerging Trends in International and Comparative Law. New York: Cambridge University Press, 2008.

necessarily lead to the prioritization of areas where the investment of state resources will yield the greatest returns or be the most socially just.

The remainder of the paper is divided into four sections. In the next section I briefly outline the comparability of the cases before discussing the development of the right to health, education, and housing jurisprudence in both Brazil and South Africa. In Section 3, I argue that certain differences in the "judicial culture" of South Africa and Brazil, in combination with the institutional design of their respective judiciaries, substantially accounts for their divergent social rights jurisprudence. In Section 4, I discuss some of the observed and potential implications of the two interpretive approaches. I then offer concluding comments in Section 5.

2. CONSTITUTIONAL CONTEXTS AND PATTERNS OF INTERPRETATION

The Brazilian and South African experiences of social rights constitutionalism are well-suited to comparison. Their current constitutions came into being within a few years of one another,[9] after periods of authoritarian rule, and were conceptualized as "peoples'" constitutions. They were also intended to bring about both symbolic and substantive transformation and to foster stable, inclusive democracies. In doing so they emphasized the importance of holding state actors accountable and defending individuals via the inclusion of extensive bills of rights and assigning their protection to strong, independent judicial branches. In the following two subsections, I briefly outline the development of the social rights jurisprudence in each country, emphasizing the rights to health, housing, and education.

2.1. Brazil

2.1.1. Health

The earliest litigation and the most prominent—in terms of volume, economic impact, and academic attention—in Brazil deals with health and access to healthcare. Claimant's legal arguments tend to be premised on some combination of the right to life (art. 5), the general guarantee of social rights (art. 6), the right to health (art.196), and the obligation of the state to provide a unified system of healthcare (art. 198) outlined in the Constitution along with Law 8080 of 1990, the public healthcare system's (*Sistema* Único *de Saúde* or SUS) enabling legislation and, in the case of HIV/AIDS-related claims, Law 9313 of 1996 which mandates the free provision of antiretroviral medication.

[9] Brazil's in 1988 and South Africa's in a two-stage process in 1993 (interim) and 1996 (final).

For several years after the promulgation of the 1988 constitution the judiciary was largely unwilling to grant social rights claims. This initial reticence is attributable to two key factors: the conservatism of the senior, appellate judiciary and the professional norms of the judiciary as a whole that precluded transformative judgements in the area of social rights (or any other area of the law) without a coherent legal doctrine that could be used to justify granting such claims. Because there was no acceptable legal doctrine or interpretation of the social rights guarantees in the 1988 Constitution that would allow them to do so, regardless of their personal or professional desire to do so. As is the case for most countries in Latin America, Brazil has a long history of judicial review, although the willingness and ability of the judiciary to effectively deploy it has varied substantially in relation to the country's political climate.[10] However, to the extent that the judges rendered decisions contrary to the will of the executive, the theoretical basis for the authority to do so was premised on liberal-democratic notions of negative rights such as the prevention of unlawful detention; existing doctrine was either ambivalent toward the positive components of rights obligations or antithetical to their justiciability.

In terms of legal reasoning, two principal arguments were initially successful against social rights claims with positive implications (e.g. the provision of medicines). The first argument was that these rights were programmatic rights; that they were not directly binding and required enabling legislation. If and when the legislature passed law or regulations to achieve these ends, the courts could legitimately decide on whether or not the State was meeting the obligations imposed by the legislature. Otherwise, the social rights were not directly applicable in the way that civil and political rights were. The second argument, also a classical constitutional objection, is based on the separation of powers doctrine. It is, so the argument goes, not the place of the courts to dictate policy to the executive and legislature. These two arguments, particularly the former, were generally held to be persuasive until the mid-1990s. As a result, there was little in the way of successful social rights litigation during this time.[11]

This approach began to change in the mid-1990s when decisions of the Rio Grande do Sul and São Paulo TJs (state appellate courts), as well as the STF (Brazil's apex court for constitutional matters) began to reject these arguments.[12] A decision of particular note from the STF was Minister Celso de Mello's preliminary judgement,

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[10] See e.g., MARCHANT, Anyda. The Brazilian Writ of Security (Mandado de Segurança) and Its Relationship to the Extraordinary Remedies of the Anglo-American Common Law: An Object Lesson in Latin American Law Making. **Tulane Law Review**, New Orleans, 19, 214 p. 1944-1945; and BREWER-CARÍAS, Allan R. Constitutional Protection of Human Rights. In: **Latin America**: A Comparative Study of the Amparo Proceeding. New York: Cambridge University Press, 2008, p. 142–147.

[11] SARLET, Ingo Wolfgang. Interview on 8 May 2015

[12] SARLET, Ingo Wolfgang. Interview on 8 May 2015.

subsequently adopted unanimously by the plenary Court, in PET 1246.[13] Originating in the State of Santa Catarina, the Court's decision required public funding for an experimental treatment administered in the U.S. for Duchenne muscular dystrophy, a degenerative disease affecting children. With respect to the justiciability of social rights, the key element of the decision is Minister de Mello's assertion that in choosing "between protecting the inviolability of the right to life, an inalienable Constitutional fundamental right, and a financial and secondary interest of the State, I believe—once this dilemma is established—ethical and legal reasons leave the judge with only one possible option: unwavering respect for life."[14] Not all judges and not all courts were quick to follow, but a general rejection of the "separation of powers" and then the "programmatic rights" arguments seems to have become the consensus by about 1999.[15]

Early (successful) litigation focused on demanding public provision of medicines, predominantly antiretrovirals, to HIV/AIDS patients as a part of a loosely coordinated effort on the part of civil society organizations, health professionals and reform-minded elements in government ministries and agencies.[16] The form of the claims tended to run as follows: the claimant has a particular medical condition that puts their life or health at risk, a particular treatment or medicine would improve their health or chances of survival and, as such, the state has a responsibility to ensure they receive that treatment or medicine. In response, state parties tend to argue that judicial rulings in the area would violate the separation of powers, that there are reasonable protocols in place to allocate the health system's finite resources, that budgetary and legal limitations (e.g., the prohibition on the use of public funds for non-budgeted purposes) preclude the immediate provision of all treatments and medicines to all individuals and that the constitutional rights relating to health must be interpreted and applied as a

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[13] Min. Celso de Mello, PET 1246 MC/SC (Medida Cautelar na Petição), 13-02–1997 D.J. (S.T.F. (Monocratic) 1997); Min. Sepúlveda Pertence, PET 1246 MC/SC, 17-04–1998 D.J. (S.T.F. (Plenary) 1997).

[14] WANG, Daniel. Courts as Healthcare Policy-Makers: The Problem, the Responses to the Problem and Problems in the Responses. **Direito FGV Research Paper Series**, São Paulo, Paper n. 75, p. 22, citing; Min. Celso de Mello, PET 1246 MC/SC (Medida Cautelar na Petição), 13-02–1997 D.J.

[15] In particular, the STJ maintained that the right to health was a programmatic right requiring legislation to attract justiciable obligations until 1999. SARLET, Ingo Wolfgang. Interview on 8 May 2015.

[16] PASSARELLI, Carlos André F.; and TERTO JÚNIOR, Veriano. Non-Governmental Organizations and Access to Anti-Retroviral Treatments in Brazil. **Divulgação Em Saúde Para Debate**, n. 27, p. 252-264, aug. 2003. p. 257; NUNN, Amy; DICKMAN, Samuel; NATTRASS, Nicoli; CORNWALL, Alexandra b; GRUSKIN, Sofia. The Impacts of AIDS Movements on the Policy Responses to HIV/AIDS in Brazil and South Africa: A Comparative Analysis. **Global Public Health** 7, n. 10, p. 1034–1038, nov. 2012; OLIVEIRA, Vanessa Elias; HOLDS, Lincoln Noronha. Judiciary-Executive Relations in Policy Making: The Case of Drug Distribution in the State of São Paulo. **Brazilian Political Science Review**, São Paulo, v. 5, n. 2, p. 10-38, jul. 2012; RICH, Jessica A. J. Grassroots Bureaucracy: Intergovernmental Relations and Popular Mobilization in Brazil's AIDS Policy Sector. **Latin American Politics & Society**, [s.l.], v. 55, n. 2, p. 1-25, jun. 2013.

part of the constitution as a whole, cognizant of the reality of finite resources and competing rights and interests.[17]

The fragmented nature of the Brazilian judicary, the limited utilization of fully electronic case management systems, and the inconsistency and incompatibility of case reporting systems means there is no precise picture of the volume or outcomes of these types of claims for the country as a whole. A large body of research focused on particular states, courts, treatments, or some combination of these, however, indicates that the volume of cases is quite high and that claimant success rates are extremely high. Early empirical work in this area found that claimants succeeded 82-100% of the time, with the majority of studies indicating success rates of more than 90%.[18] Although the methodology employed by most of these studies in the collection of data means that they cannot be, strictly speaking, considered to be representative samples, the congruence of the results is notable. These findings are also largely supported by more recent studies based on larger and more representative samples. For example, a 2013 study of right to health decisions of the State Appellate Courts (TJs) of Rio de Janeiro, Minas Gerais, and Pernambuco found an overall success rate of 97.8%,[19] another study in the State of Paraná found that cases filed in 2009 had success rate of 81% at the trial level and 92% at the appellate level.[20] More recently, however, there is evidence of a slight decline in success rates. In a study of lawsuits seeking public provision of medicines filed in the Federal Court of the State of Paraná in 2014, the claimant success rate of those that had been resolved at the time of the study's publication was only 75%.[21]

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[17] MARQUES, Silvia Badim; DALLARI, Sueli Gandolfi. Garantia Do Direito Social à Assistência Farmacêutica No Estado de São Paulo. **Revista de Saúde Pública**, vol. 41, n.1, p.101-107, 2007; HOFFMAN, Florian F.; BENTES, Fernando R. N. M. Accountability for Social and Economic Rights in Brazil. In: GAURI, Varun Gauri; BRINKS, Daniel M.(ed.). **Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World**. New York: Cambridge University Press, 2008. p. 119–27; BORGES, Danielle; UGÁ, Maria Alicia Dominguez. Conflitos e impasses da judicialização na obtenção de medicamentos: as decisões de 1ª instância nas ações individuais contra o Estado do Rio de Janeiro, Brasil, em 2005. **Cadernos de Saúde Pública**, v. 26, no. 1, p. 60–62, jan. 2010.; MENICUCCI, Telma Maria Gonçalves; MACHADO, José Angelo. Judicialization of Health Policy in the Definition of Access to Public Goods: Individual Rights versus Collective Rights. trans. Leandro Moura. **Brazilian Political Science Review**, v. 4, no. 1, p. 48-49, jul. 2011.

[18] FERRAZ, Octavio Luiz Motta. R**ight to Health Litigation in Brazil, An Overview of the Research. Right to Health Through Litigation? Can Court Enforced Health Rights Improve Health Policy?** Workshop, University Torquato di Tella, Buenos Aires, 2009.

[19] TRAVASSOS, Denise Vieira; FERREIRA, Raquel Conceição; VARGAS, Andréa Maria Duarte; MOURA, Rosa Núbia Vieira de; CONCEIÇÃO, Elza Maria de Araújo; MARQUES, Daniela de Freitas; FERREIRA, Efigênia Ferreira e. Judicialização da Saúde: Um Estudo de Caso de Três Tribunais Brasileiros. **Ciência & Saúde Coletiva**, v. 18, no. 11, p.3419-3429. 2013.

[20] PEREIRA, José Gilberto; PEPE, Vera Lúcia Edais. Acesso a Medicamentos Por via Judicial No Paraná: Aplicação de Um Modelo Metodológico Para Análise e Monitoramento Das Demandas Judiciais. **Revista de Direito Sanitario**, v. 15, n. 2, p. 30-45. 2014.

[21] NISIHARA, Renato Mitsunori; POSSEBOM, Ana Carolina; BORGES, Luiza de Martino Cruvinel; SHWERTZ, Ana Claudia Athanasio; BETTES, Fernanda Francis Benevides. Judicial Demand of Medications Through the Federal Justice of the State of Paraná [Demanda Judicial de Medicamentos Na Justiça Federal Do Estado Do Paraná], **Einstein**, Sao Paulo, v. 15, n. 1, p. 85-91, mar. 2017.

At the STF, Arguelhes and Hartmann identified 74 cases heard by one of the three collegiate bodies that dealt with the right to health on the merits of the case (as opposed to procedural matters) between 1988 and 2009. In all but one of these cases the state party was required to provide some or all of the requested medical treatment.[22] The same study also found an almost non-existent engagement with the academic literature—either legal-doctrinal or social scientific—relating to positive rights and the nature of state obligations with respect to the realization of such rights.

In contrast, collective claims relating to the right to health are both rare and have met with very little success. For example, in their study of social rights litigation, Hoffman and Bentes identified 7,100 right to health cases decided by a sample of State Supreme Courts,[23] the STF and the STJ between 1994 and 2004.[24] Only 2% of these were collective claims. Although Brazilian courts are perfectly willing to wholeheartedly involve themselves in healthcare issues when the claimant is an individual, in the context of collective claims this is very much not the case. Interestingly, and in direct contrast to the jurisprudence in individual claims, decisions in collective claims tend to invoke arguments about the scarcity of resources and the poor position of courts to second guess the decisions of health authorities as reasons to exercise restraint.[25] In reference to the issue of collective claims, Ferraz concludes that,

> *The Brazilian judiciary… seems to be an obstacle to collective lawsuits in the field of health. There is a clear resistance, from their part, even when they grant the request of the plaintiff, to determine with any precision what the state is actually obliged to comply with. They are clearly more comfortable to issue more assertive and determined orders when the case is individual.*[26]

Prado, in surveying right to health litigation trends, puts the matter more bluntly: "Brazil has a judiciary that is not open to collective claims."[27]

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[22] ARGUELHES, Diego Werneck; HARTMANN, Ivar. A. Law in the Books and Books in the Court. Are Social Rights Literature and Judicial Practice on the same page in Brazil? **Annuaire International des Droits de L'Homme**. v. VII. Athens: Sakkoulas, 2014. p. 15-38.

[23] Those of Bahia, Goiás, Pernambuco, Rio de Janeiro, and Rio Grande do Sul.

[24] HOFFMAN, Florian F.; BENTES, Fernando R. N. M. Accountability for Social and Economic Rights in Brazil. In: GAURI, Varun Gauri; BRINKS, Daniel M.(ed.). **Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World**. New York: Cambridge University Press, 2008. p. 115–19.

[25] WANG, Daniel. Courts as Healthcare Policy-Makers: The Problem, the Responses to the Problem and Problems in the Responses. **Direito FGV Research Paper Series**, São Paulo, Paper n. 75. p. 25–26.

[26] FERRAZ, Octavio Luiz Motta. Brazil: Are Collective Suits Harder to Enforce? In: LANGFORD, Malcolm; RODRIGUEZ-GARAVITO, Cesar; ROSSI; Julieta (ed.). **Social Rights Judgments and the Politics of Compliance**. Cambridge: Cambridge University Press, 2017. p. 189.

[27] PRADO, Mariana Mota. The Debatable Role of Courts in Brazil's Health Care System: Does Litigation Harm or Help? **Journal of Law, Medicine & Ethics**, v. 41, n. 1, p. 124-137. 2013.

2.1.2. Education

Right to education claims are primarily grounded in art. 208 of the 1988 Constitution, which dictates that the state has a duty to guarantee free and compulsory basic education as well as early childhood education and that "the Government's failure to offer compulsory education or offering it irregularly implies liability on the part of the competent authority." Litigation in this appears to have began in earnest in the early to middle 2000s,[28] although the São Paulo State Public Ministry did file a number of cases dealing with education during the 1990s relating to age eligibility and catchment areas.[29] Although there have been more collective cases filed in this area, individual claims are still the dominant form of action and the volume of litigation has been substantially lower than that of the right to health.[30]

A certain proportion of education cases have focused on access to institutions of higher education, but the bulk of claims, individual and collective, have dealt with primary and early childhood education. In the State of São Paulo, the Public Ministry successfully advanced a number of claims relating to daycare spaces in the early 2000s in the State Court system, but the rulings were not particularly effective—the state was unable to provide the spaces as it lacked the resources. With respect to collective cases, the judiciary was largely unwilling to engage. According to one scholar and activist involved with *Ação Educativa*, an education focused NGO,

> *Judges would answer the individual claim and completely ignore the collective claim. For example, if we stated we needed 1,500 [daycare] places for children in the State of São Paulo, the Judge would say 'no can do, that is public policy.' But, if we asked for a single place for a child, this was not seen as a problem.*[31]

Similarly, a Public Defender engaged in right to housing litigation noted that in advancing collective claims, Public Defenders (and others) face a lot of judicial resistance, often in the form of references to the *reserva possível*, the separation of powers, and concerns about judicial activism in order to deny collective claims.

This, in turn, has led many, including the Public Defender's Office, to focus predominantly on individual claims. The principal concern with individual litigation in the

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[28] SARLET, Ingo Wolfgang. Interview on 8 May 2015; PIOVESAN, Flavia, Brazil: Impact and Challenges of Social Rights. in the Courts. In: LANGFORD, M. (ed.). **Social Rights Jurisprudence**: Emerging Trends in International and Comparative Law. Cambridge: Cambridge University Press, 2009. p. 188–89.

[29] SILVA, Caitia Aida. Brazilian Prosecutors and the Collective Demands: Bringing Social Issues to the Courts of Justice. Miami: **Latin American Studies Association Annual Meeting**, 2000.

[30] PIOVESAN, Flavia, Brazil: Impact and Challenges of Social Rights. in the Courts. In: LANGFORD, M. (ed.). **Social Rights Jurisprudence**: Emerging Trends in International and Comparative Law. Cambridge: Cambridge University Press, 2009. p. 188–89; RASCOVSKI, Luiz. Interview on 23 Apr. 2015 (trans. Nicole Julie Fobe); XIMENES, Salomão Barros. Interview on 24 Apr. 2015 (trans. Nicole Julie Fobe).

[31] XIMENES, Salomão Barros. Interview on 24 Apr. 2015 (trans. Nicole Julie Fobe).

area of education is that rather than resulting in policy change, it has simply led to parallel lists. In general, all primary and pre-primary institutions have waiting lists. When a judge orders the executive to provide a place to a specific individual, all that happens is that they are given a priority status on the waiting list.[32] More recently, however, there has been a notable success in the area of collective education claims. In December of 2013 the São Paulo State Court of Appeal (SPTJ), overturning the trial decision, ruled that the City of São Paulo was required to make 150,000 new child care spots available by 2016.[33] This decision was the result of several years combined efforts of the Public Ministry, Public Defender's Office, *Ação Educativa*, and other NGOs. One of the key distinguishing features of the case was the amount of research and data presented by the claimants that clearly identified underserviced areas and gaps in coverage at a level of detail not previously seem.[34] At present, however, the implementation of this decision and whether it will act as a guide for subsequent claims is unclear.

2.1.3. Housing

In contrast to right to health and right to education litigation, the right to housing is generally invoked as a shield rather than a sword in Brazil. That is, it is most frequently used as a defense against eviction orders rather than an attempt to exact a good or benefit directly from the state. Right to housing litigation also appears to be the least commonly advanced and to have had the least impact of the three rights.[35] At least part of the reason for this is attributable to the seeming unwillingness of the judiciary to directly abrogate individual property rights.[36] That said, as a general rule, a primary residence that has been used as collateral against a loan cannot be seized on the basis of a right to housing.[37] Additionally, in the lower courts, eviction orders have be known to be accompanied by temporary provision of a stipend to the evicted party in an amount deemed sufficient to pay for alternative accommodation. In practice, however, this does not generate additional housing or security of tenure, but simply

[32] RASCOVSKI, Luiz. Interview on 23 Apr. 2015 (trans. Nicole Julie Fobe); XIMENES, Salomão Barros. Interview on 24 Apr. 2015 (trans. Nicole Julie Fobe).

[33] VIERA, Oscar Vilhena. Judicial Experimentation and Public Policy: A New Approach to the Right to Education in Brazil. **OxHRH Blog**, 31 July 2014. Available at: <http://ohrh.law.ox.ac.uk/?p=12688>.

[34] XIMENES, Salomão Barros. Interview on 24 Apr. 2015 (Trans. Nicole Julie Fobe).

[35] COUTINHO, Maria Laura. Do Brazilian Courts Contribute to the Implementation of the Right to Housing? **Fundação Getulio Vargas - Research Paper Series**, São Paulo, Feb. 2014; SCHULZE, Martin. Interview on 07 May 2015 (trans. Fábio Tomkowski).

[36] AUGUSTO, André. Interview on 24 Apr. 2015 (trans. Nicole Julie Fobe); MÉSZÁROS, George. S**ocial Movements, Law, and the Politics of Land Reform**: Lessons from Brazil, Law, Development and Globalization. Abingdon: Routledge, 2013. p. 4–5.

[37] SARLET, Ingo Wolfgang. Interview on 8 May 2015.

results in the evictee moving into different irregular housing where they remain exposed to the same precarity.[38]

Despite some victories in the trial courts—which have been overturned on appeal—and a certain willingness to experiment by progressive judges, scholars such as Mészáros suggest that there is a heavy strain of conservatism present in the Brazilian judiciary that is associated with the enforcement of liberal conceptions of private property and equates attempts to modify that understanding (e.g., through protest), as attacks on the rule of law. This approach has a chilling effect on land reform as it introduces a variety of procedural requirements, increases the cost of expropriation, and plays into a narrative of occupiers as threatening the rule of law.[39]

2.2. South Africa

2.2.1. Health

The right to health was also the first social right to attract judicial attention in South Africa.[40] The parameters of the right are laid out in section 27 of the 1996 Constitution which stipulates that everyone has the right to, inter alia, "access to health care services, including reproductive health care," requires the state to progressively realize the guarantee via "reasonable legislative and other measures within its available resources," and unqualifiedly asserts that "No one may be refused emergency medical treatment."

The first major case was brought by Mr. Soobramoney, a 41-year-old diabetic man with chronic renal failure as well as a number of other serious medical issues who had been denied the dialysis necessary for his continued survival. The resources of the renal clinic in question—the only one in the province—were limited and it was only able to provide dialysis to 30% of those requiring it. In response, the clinic had employed nation-wide guidelines to prioritize access to treatment for those with the best prospects of recovery. The applicant did not meet these criteria and sought an order from the High Court requiring the clinic to provide treatment.

In the High Court decision, Justice Combrinck determined that the Clinic had insufficient resources to treat all those requiring it, that the guidelines were not unreasonable, and that it was "not the function of this Court to direct the State to make

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[38] VALLE, Vanice Regina Lírio do. Judicial adjudication in housing rights in Brazil and Colombia: a comparative perspective. **Revista de Investigações Constitucionais**, Curitiba, vol. 1, n. 2, p. 67-102, maio/ago. 2014. DOI: http://dx.doi.org/10.5380/rinc.v1i2.40511. p. 89.

[39] MÉSZÁROS, George. **Social Movements, Law, and the Politics of Land Reform**: Lessons from Brazil, Law, Development and Globalization. Abingdon: Routledge, 2013.

[40] Cf. *Van Biljon and Others v. Minister of Correctional Services and Others,* [1997] 4 S.A. 441 ((C) 1997).

additional funds available to the renal clinic so that the applicant and others may be treated" as that was a fundamentally political decision.[41] Justice Combrinck also rejected the argument that the fact that the claimant would die without dialysis meant that this constituted an emergency situation. As such, he dismissed the application.

The decision was appealed to the Constitutional Court, which upheld the decision of the High Court. In so doing, Chief Justice Chaskalson also affirmed Justice Combrinck's determination that it was not the place of the courts to interfere with the state's allocation of resources. In light of the depth and diversity of need, he held, the state was required to make difficult decisions and in doing so "There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society."[42] The Soobramoney decision was a great disappointment to many human rights advocates, academics, and civil society organizations, many of whom who viewed the courts' refusal to examine the reasonableness of the allocation of funding as an abdication of their responsibility.[43]

The second major right to health case dealt with by the Constitutional Court was *Treatment Action Campaign*,[44] five years later. Rather than the availability of a service to a particular individual, *TAC* challenged the adequacy of government measures to address mother-to-child transmission of HIV. Specifically, the organization argued that restricting the distribution of Nevirapine, an antiretroviral drug, to a limited number of test sites was unreasonable in light of its previously demonstrated effectiveness and the fact that the state was receiving the drug at no cost. It also argued that the lack of a national plan for the prevention of mother-to-child transmission was a violation of its duty to progressively realize the right to health through legislative and other means.[45] In response, the state argued that it did not have the resources to provide the full package of care it intended to provide with the drug at other location and that excessive distribution in the absence of that full package, might lead to decreased long-term efficacy and also presented a safety issue.[46]

In its decision, the Court held that the social rights in the constitution could not be construed so as to enable everyone to immediately demand the UN Minimum Core. Rather, they stipulated that government policy need only to reasonably seek to progressively bring about those rights and that courts were limited at best arbiters of

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[41] *Soobramoney v. Minister of Health (KwaZulu-Natal)*, [1998] 1 S.A. 430 ((D) 1997) para. 438.

[42] *Soobramoney v. Minister of Health (KwaZulu-Natal)*, 1997 ZACC 17 ((C) 1997) para. 32.

[43] See e.g., SARKIN, Jeremy. Health. **South African Human Rights Yearbook**, vol. 8, p. 101-103, 1998; SCOTT, Craig; ALSTON, Philip. Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise. **South African Journal on Human Rights**, vol. 16, 2000. p. 268.

[44] *Minister of Health and Others v Treatment Action Campaign and Others (No. 2)*, ZACC 15 (South Africa 2002) [hereinafter "TAC"].

[45] TAC, para. 10.

[46] TAC, paras. 51-4.

policy decisions.[47] While denying its ability to make policy, the Court asserted its authority to compel the state to act, holding that it was not a violation of separation of powers to compel adherence through injunction. Ultimately, the Court declared that the withholding of the drug was unreasonable, as the policy in place failed to provide a potentially lifesaving drug which could have been administered with little or no cost to the state.[48] The government was ordered to remove the restrictions on the drug and facilitate its use, and "take reasonable measures" to extend counselling and testing facilities in hospitals. Although a number of human rights commentators were troubled by the Court's rejection of the UN Minimum Core approach,[49] this case was widely seen as (correctly) walking back the level of deference accorded the state in the area of healthcare and a promising continuation of the pattern it set in its landmark housing decision in 2000.

2.2.2. Housing

Although the right to health was the first social right engaged with by the Constitutional Court, it is the right to housing, largely relating to constitutionality of evictions, that has constituted the bulk of its attention in this area. The first of these cases came in 2000.[50] In the *Grootboom* decision, the Court established the basis of its current "reasonableness" approach to the interpretation and application of South Africa's constitutionalized social rights. The case concerned the residents of an informal settlement near Cape Town who were forcibly evicted and sought relief via the courts. In its decision, the Court recognized that state capacities are inherently limited and that immediate realization of rights such as the right to housing is not always possible. Rather, what is required is that the state pursues "reasonable" measures to give effect to those rights. The key element of the decision, however, was that the Court also indicated that if the state failed to do so, courts can and must enforce these obligations. The Court also provided some degree of guidance with respect to the parameters of reasonable: if measures taken fail to make provision for providing for the needs of the most desperate, the Court held, they may not pass the test of reasonableness.[51] As the government's extant programs failed to make provision for temporary relief for the most disadvantaged, the Court issued a declaratory order requiring the state to devise and implement a program which provided relief (in terms of shelter) for the most desperate.

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[47] TAC, ZACC paras. 26, 34-8.

[48] TAC, ZACC para. 80.

[49] See e.g., BILCHITZ, David. Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence. **South African Journal on Human Rights**, vol. 19, 2003.

[50] *Government of the Republic of South Africa and Others v Grootboom and Others*, [2000] ZACC 19 (South Africa 2000) [hereinafter "Grootboom"].

[51] Grootboom, [2000] ZACC para. 44.

In subsequent cases, the decision to grant an eviction order has revolved around judicial consideration of whether, in the opinion of the court, "it is just and equitable to do so, after considering all the relevant circumstances."[52] As per the governing statute, these circumstances include whether land has been or can reasonably be made available by the state for the relocation of the evictees and the likely impact on groups, such as children and households headed by women, attracting special consideration.[53] In this jurisprudence, the courts have emphasized the importance of meaningful engagement and consultation regarding the development of housing policies,[54] the primary responsibility of the municipalities to provide alternative accommodation, [55] and the fact that the right to housing could justify temporarily limiting individuals' property rights where eviction could lead to homelessness.[56] Relatedly, the courts have also established that unreasonable delay on the part of the state in finding alternative accommodations or otherwise settling the issue with the property owner could attract "constitutional damages."[57] At the same time, the Courts have consistently maintained that they cannot be directly involved in the crafting of policy. Rather, the courts have restricted themselves to a largely procedural role, ensuring that the processes used to arrive at decisions take into consideration all relevant factors and that the decisions taken and actions based on those decisions are reasonable and taken in a timely fashion.

2.2.3. Education

In contrast to Brazil, the right to education has not been the subject of a significant body of litigation. The small volume of cases that have been considered dealt with the broad parameters of the right, including whether tertiary education was included (it is not), and various issues relating to language of instruction.[58] This is somewhat

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[52] "Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998" (1998) s.4(7); see also, "Constitution of South Africa" (1996) s.26(3); the remainder of this discussion draws heavily on WILSON, Stuart; CLARK, Michael. **Evictions and Alternative Accommodation in South Africa 2000-2016**: An Analysis of the Jurisprudence and Implications for Local Government. 2. ed. Johannesburg: Socio-Economic Rights Institute of South Africa, 2016.

[53] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 preamble; e.g., Port Elizabeth Municipality v Various Occupiers, [2004] ZACC 7 (2004) para. 30.

[54] Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others, ZACC 16 (CC 2009) paras 302-3, 378.

[55] Blue Moonlight Properties 39 (Pty) Limited v Occupiers of Saratoga Avenue and Another, [2010] ZAGPJHC 4 (2010) paras. 42-7, 57.

[56] Occupiers of Skurweplaas v PPC Aggregate Quarries, [2011] ZACC 36 (2011) para. 23; City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another, [2011] ZACC 33 (2011) paras. 16-18.

[57] Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd, [2004] ZASCA 47 (2004) paras. 41-43.

[58] M SELEOANE, Mandla. **Socio-Economic Rights in South Africa**: Theory and Practice Pretoria: Human Sciences Research Council, 2001. p. 48–52; MCCONNACHIE, Cameron; MCCONNACHIE, Chris. Concretising the Right

surprising in light of the serious issues facing South Africa's basic education system. There are numerous examples of effective and well-organized publicly-funded schools in South Africa, including in areas affected by poverty. They are not, however, the norm. Key issues include lack of basic infrastructure and services such as libraries, computers, clean water, and electricity, well-trained teaching staff, and effective administrators.[59] Over the past few years, however, a few issues relating to the right have been considered by the Courts.[60] For example, in 2015 the Supreme Court of Appeal held that "that s 29(1)(a) of the Constitution entitles every learner at public schools in Limpopo to be provided with every textbook prescribed for his or her grade before commencement of the teaching of the course for which the textbook is prescribed" and that it was the responsibility of the provincial and National Departments of education to do so.[61] At present, however, recent nature of the cases would make a sustained discussion of the jurisprudence or its effectiveness largely speculative.

2.3. Summary

In Brazil, litigation was initially concentrated in the area of the right to health – in particular the provision of pharmaceuticals. Although education claims—also largely individual—have increased significantly in the past decade, the right to health remains the focus. In contrast, the right to health was the initial focus of social rights litigation in South Africa, but it was quickly surpassed by right to housing claims, primarily dealing with the opposition to eviction orders for those residing in informal settlements.

With respect to the right to health in particular, the Brazilian judiciary after a period of experimentation and uncertainty relating primarily to whether or not anything beyond a declarative judgment could be issued where the state was found to have violated an individual's right to health, adopted an individualized approach to the adjudication of the right to health that demanded immediate realization. In contrast, in its first social right case, Constitutional Court of South Africa expressly rejected the idea that the right to health provided for in the South African Constitution could confer immediately realizable obligations, even in the face on imminent death (Soobramoney).

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to a Basic Education. **South African Law Journal**, vol. 129, 2012. p. 555-556..

[59] MNCUBE, Vusi S.; MADIKIZELA-MADIYA, Nomanesi. South Africa: Educational Reform - Curriculum, Governance and Teacher Education. In: HARBER, Clive (Ed.). **Education in Southern Africa**. London: Bloomsbury Academic, 2013. p. 177–79; see also, Nic SPAULL, Nicholas. **South Africa's Education Crisis**: The Quality of Education in South Africa 1994-2011. Johannesburg: Centre for Development and Enterprise, 2013; BADAT, Saleem; SAYED, Yusuf. Post-1994 South African Education: The Challenge of Social Justice. **The ANNALS of the American Academy of Political and Social Science**, vol. 652, no. 1, p. 127-148, 2014; DONOHUE, Dana; BORNMAN, Juan. The Challenges of Realising Inclusive Education in South Africa. **South African Journal of Education**, vol. 34, no. 2, p. 01-14, June 2014.

[60] See, e.g. MCCONNACHIE, Cameron; MCCONNACHIE, Chris. Concretising the Right to a Basic Education. **South African Law Journal**, vol. 129, 2012.

[61] Minister of Basic Education v Basic Education for All (December 5, 2015).

Subsequent litigation of social rights relied on organizations (for example, Treatment Action Campaign) or representatives of a larger, well-defined group (e.g. Mrs. Grootboom).

3. EXPLAINING THE VARIATION

While the explanation for the divergent jurisprudence in these two jurisdictions is assuredly a complex, involving reference to a variety of social, political, and economic factors. Two interrelated legal-institutional factors appear to have contributed significantly. The first of these is the distinctive "judicial cultures" of the two countries and the second is the design of their judicial institutions, particularly the mechanisms available for advancing rights claims.

3.1. Judicial Culture

At one extreme, the formalist understanding of judicial decision-making—to the extent that judicial review is deemed acceptable practice—conceives of rights interpretation as the application doctrine to legal problems by experts in the process in a manner that does not require reference to extra-legal material.[62] Critics of this approach have long argued that understanding law in this way is descriptively naïve—particularly with regard to its ability to account for structural bias—and prescriptively improbable, if not impossible. The attitudinal approach, on the other extreme, characterizes judicial decision-making as an exercise in the post-hoc rationalization of judges' personal preferences. This approach has been critiqued as overly cynical and accused of absurdly attributing legal decisions to "what the judge had for breakfast."[63] As with many academic debates, however, the bulk of the evidence suggests that the answer lies somewhere in the middle and the extremes are rarely, if ever, observed.

In practice, judges do appear to take principles and doctrine seriously, but even within particular legal communities there is an overwhelming tendency toward heterogeneity in their definition. In this vein, the idea of jurisdictionally-specific judicial

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[62] The ideal-type legal formalism in this sense is the "classical legal orthodoxy" of Christopher Columbus Langdell. Th GREY, Thomas C. Langdell's Orthodoxy. **University of Pittsburgh Law Review**, vol. 45, 1983. p. 6. ("Classical orthodoxy was a particular kind of legal theory—a set of ideas to be put to work from *inside* by those who operate legal institutions, not a set of ideas about those institutions reflecting an *outside* perspective, whether a sociological, historical or economic explanation of legal phenomena.").

[63] Although the origins of this phrase are somewhat unclear it relates to the work of the American Legal Realists, particularly that of Jerome Frank. See, e.g. SCHAUER, Frederick. **Thinking Like a Lawyer**: A New Introduction to Legal Reasoning Cambridge: Harvard University Press, 2009. p. 129. Humorous but for its implications, there is some evidence the judges' breakfasts do have an impact on their decisions, although the key element appears to be when they had them rather than what they had. DANZIGER, Shai; LEVAV, Jonathan; AVNAIM-PESSO, Liora. Extraneous Factors in Judicial Decisions. **Proceedings of the National Academy of Sciences**, vol. 108, no. 17, Apr. 2011. p. 6889–92.

"logics of appropriateness" may offer insight into behaviour of judges.[64] Premised on a sociological understanding of institutions, at the core of this approach is the proposition that,

> *Rules are followed because they are seen as natural, rightful, expected, and legitimate. Actors seek to fulfill the obligations encapsulated in a role, an identity, a membership in a political community or group, and the ethos, practices and expectations of its institutions. Embedded in a social collectivity, they do what they see as appropriate for themselves in a specific type of situation.* [65]

The implication is that individual behaviour is often guided by what the actor thinks—on the basis of the values and norms they have internalized—is the "right" thing to do in a given situation. In line with this messier understanding of behaviour, a number of scholars have identified judges' internalized norms about the appropriate role of courts in a political system as a key determinant of their decision-making.[66]

Of particular note is Hilbink's argument that the Chilean judiciary's internalized distinction between legal and political matters enabled them to reconcile their understanding of the judicial role with their compliance with the Pinochet regime. By asserting that objections to the regime were political matters, and therefore external to the legal system, judges were able to frame them as beyond their purview.[67] The logical extension of this line of reasoning suggests that the judicial interpretation of constitutional rights—including social rights—will be strongly shaped by a jurisdiction's "judicial culture." Put differently, allowing for variation among individual judges, a combination of socialization—via shared educational and professional experiences—and selection—via the hiring and promotion of individuals who have internalized the values and beliefs of their superiors—will result in a set of more or less commonly held beliefs about acceptable and unacceptable modes of legal reasoning in a given jurisdiction.[68] In combination with similarly shaped ideas about the appropriate role of judges and the role

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[64] Albeit at the price of parsimony.

[65] MARCH, James G.; OLSEN, Johan P. The Logic of Appropriateness. **Arena – Centre for European Studies Working Papers**, Paper n. 04/09, 2004. Available at: <https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2001-2010/2004/wp04_9.pdf>. p. 3; the seminal articulation of this theory is MARCH, James G.; OLSEN, Johan P. **Rediscovering Institutions**: The Organizational Basis of Politics. New York: Free Press, 1989.

[66] See, e.g. WHITTINGTON, Keith E. Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics. **Law & Social Inquiry**, vol. 25, no. 2, p. 601-634, Apr. 200.

[67] HILBINK, Lisa. **Judges Beyond Politics in Democracy and Dictatorship**: Lessons from Chile, Cambridge Studies in Law and Society. Cambridge: Cambridge University Press, 2009; see, more generally HILBINK, Lisa. The Origins of Positive Judicial Independence. **World Politics**, vol. 64, no. 4, p. 567-621, 2012.

[68] The specific mechanisms at work in this process are myriad and, in general, not mutually exclusive. See, e.g. RAMSEYER, Mark J.; RASMUSEN, Eric B. Why Are Japanese Judges So Conservative in Politically Charged Cases? **American Political Science Review**, vol. 95, no. 2, p. 331-344, 2001; POSNER, Richard A. Judicial Behavior and Performance an Economic Approach. **Florida State University Law Review**, vol. 32, 2004/2005. p. 62; EPSTEIN,

of law in society, these judicial-cultural norms will have a strong conditioning influence on how judges approach their work, including the interpretation of social rights.

3.1.1. Brazilian Judicial Culture

In Brazil, the culture of the judiciary has historically been both conservative and formalist. Through the 1970s judges aimed to be strict interpreters of "the law." At least in part, this was because of the protection from political interference offered by the approach. But it was also the product of a system of legal education and judicial selection that emphasized this approach as the correct way to fulfill the judicial function. The professoriate has traditionally been,[69] and with notable exceptions continues to be,[70] practicing lawyers for whom "[t]eaching is more like a hobby, with the main benefit being the prestige it offers."[71] Consequently, there is little emphasis placed on original research and a substantial resistance to change, both conceptually and pedagogically.[72]

The judiciary is a professional one, selected—as most Brazilian public positions are—by public examination. For the ordinary courts, examinations are specific to the jurisdiction and are both set and administered by the judiciary itself. The contents of the examinations have traditionally focused heavily on substantive knowledge of the law in force as opposed theoretical or conceptual knowledge. This approach has been criticized as resulting in a particular, narrow range of successful candidates who are familiar with doctrine but lack professional and administrative experience.[73] In the State of São Paulo, for example, Brinks notes that critics of the system of judicial selection

Lee; KNIGHT, Jack. Reconsidering Judicial Preferences. **Annual Review of Political Science**, vol. 16, no. 1, p. 11-31, 2013.

[69] HORACK, H. Claude. Legal Education in the Latin-American Republics. **Journal of Legal Education**, vol. 2, 1950. p. 288.

[70] FRAGALE FILHO, Roberto. Brazilian Legal Education: Curricular Reform That Goes Further without Going Beyond. **German Law Journal**, vol. 10, 2009. p. 763.

[71] Junqueira, for example, has observed that "We began the 1970s trying to increase the number of law programs. We end[ed] the 1990s afraid of the uncontrolled proliferation of law schools and worried about the quality of law programs and future legal professionals. The on-site inspections of all law schools attest[ed] to the low quality of the programs, which have large classes, little infrastructure, and professors without credentials." JUNQUEIRA, Eliane Botelho. Brazil: The Road to Conflict Bound for Total Justice. In: FRIEDMAN, Lawrence M.; PÉREZ-PERDOMO, Rogelio (Ed.). **Legal Culture in the Age of Globalization**: Latin America and Latin Europe. Stanford: Stanford University Press, 2003 p. 89.

[72] Fregale Filho, for example, notes that: "…a curriculum modification does not necessarily change old teaching habits and little has been said (or done) about it. Pedagogical and curricular innovations are foreign to Brazilian law school classrooms… Most of all, as the majority of Brazilian law teachers also practice another legal profession, the classroom becomes an extension of their professional offices where they recite and reproduce their most up-to-date everyday judicial experience. This teaching style has been under scrutiny as the legitimacy of teachers has been called into question in the wake of the higher education expansion and the implementation of an evaluative public system." " FRAGALE FILHO, Roberto. Brazilian Legal Education: Curricular Reform That Goes Further without Going Beyond. **German Law Journal**, vol. 10, 2009. p. 762.

[73] PRILLAMAN, William C. **The Judiciary and Democratic Decay in Latin America**: Declining Confidence in the Rule of Law. Westport, Conn.: Praeger, 2000. p. 77.

argue that the selection process privileges the memorization of existing doctrine at the expense of innovation, a preference that is seen to inhibit the development of socially conscious law.[74]

Nevertheless, by the mid-1980s, some judges began to confront the political establishment in the context of privatization. Although the STF generally overturned them, these decisions highlighted the relationship of law to social conditions and, to some degree, brought (and brings) into question the appropriateness of the strict legalist approach.[75] By the early 1990s, a generation of more progressively minded lawyers and judges had populated the junior ranks of the legal profession. Along with a smaller, more senior group of similarly disposed judges they sought to use their skill and position to aid the disadvantaged and foster progressive change in Brazil.[76] It seemed clear that the generous social rights guarantees entrenched in the 1988 constitution could be used to further these goals. However, the means of doing so without transgressing the boundary between law and politics instilled in them by their education and Brazilian judicial culture was not.

This confluence of events was a critical juncture—a point in time when two or more relatively stable trajectories are more or less equally possible and the factor(s) that result in movement along one trajectory over the other(s) are exogenous, and often somewhat arbitrary.[77] Applying the concept to the Brazilian experience, I argue that more or less by coincidence, willing ordinary court judges encountered a mobilized set of organizations seeking to advance HIV/AIDS awareness and treatment and a willing—or at least sufficiently fragmented as to be unable to mount effective opposition[78]—set of domestic political institutions.[79] These judges, then, were able to grant the individual

[74] BRINKS, Daniel M. **Legal Tolls and the Rule of Law**: The Judicial Response to Police Killings in South America. Paris: Notre Dame, 2004. p. 218; see also, HAMMERGREN, Linn A. **Envisioning Reform**: Improving Judicial Performance in Latin America. University Park: Pennsylvania State University Press, 2007. p. 104.

[75] JUNQUEIRA, Eliane Botelho. Brazil: The Road to Conflict Bound for Total Justice. In: FRIEDMAN, Lawrence M.; PÉREZ-PERDOMO, Rogelio (Ed.). **Legal Culture in the Age of Globalization**: Latin America and Latin Europe. Stanford: Stanford University Press, 2003. p. 90.

[76] Although the motivation for doing so is surely complex, I do not think it unreasonable to suggest that, in varying proportions, both altruism and a desire for personal and institutional prestige played a substantial role.

[77] There are extensive literatures on this type of analysis in political science, economics, and elsewhere. Particularly strong articulations of the relevant ideas can be found in: THELEN, Kathleen. Historical Institutionalism in Comparative Politics. **Annual Review of Political Science**, vol. 2, p. 369-404, 1999; PIERSON, Paul. Increasing Returns, Path Dependence, and the Study of Politics. **American Political Science Review**, vol. 94, no. 2, p. 251-267, 2000; BAUMGARTNER, Frank R., et al. Punctuated Equilibrium in Comparative Perspective. **American Journal of Political Science**, vol. 53, no. 3, p. 603-620, 2009.

[78] FEREJOHN, John A. Judicializing Politics, Politicizing Law. **Law and Contemporary Problems**, vol. 61, p. 41-68, 2002.

[79] See, generally PIOVESAN, Flavia, Brazil: Impact and Challenges of Social Rights. in the Courts. In: LANGFORD, M. (ed.). **Social Rights Jurisprudence**: Emerging Trends in International and Comparative Law. Cambridge: Cambridge University Press, 2009; NOVOGRODSKY, Noah. Duty of Treatment Human Rights and the HIV/AIDS Pandemic. **Yale Human Rights & Development Law Journal**, New Haven, vol. 12, 2009. p. 1.; HOFFMAN, Florian F.; BENTES, Fernando R. N. M. Accountability for Social and Economic Rights in Brazil. In: GAURI, Varun Gauri;

claims for state provision of antiretrovirals in accordance with their positivist norms because, by conceiving of the rights as absolutes, they could be decided syllogstically without violating the separation of law and politics. This combination of a supportive judiciary and a willing, observant "support structure" proved an important force in Brazilian politics. Indeed, it is generally seen as the primary motivating force behind the passage of Law 9313 (approved in 1996), which provides antiretrovirals free of charge.[80] More generally, Brazilian policy regarding HIV/AIDS is seen as highly successful, something that reflects well on the actions of the judiciary in this regard.[81]

Although the Brazilian legal tradition did not initially include substantive rights, the entrenchment of social rights in the 1988 Constitution coupled with the self-perception of the judicial community as a benevolent group of elites resulted in a desire and ability to use the law to aid those seeking the state-provision of antiretrovirals. In doing so, rather than challenging the fundamental assumptions about the nature of law as a separate, technical entity with objective answers, judges incorporated the right to health into the existing cannon, as an absolute principle. The initial success of the HIV/AIDS litigation strategy—that could succeed because it was a relatively clearly defined, limited policy with widespread support—established that approach as a viable means of achieving the twin goals of doing law and fostering progressive change. The acceptance of this norm effectively foreclosed engagement with socio-legal investigation of the effects of positive rights adjudication, domestically or internationally. Proportional or consequential reasoning were not in accordance with Brazilian legal culture; besides, the internal impetus for change had been satisfied.

3.1.2. South African Judicial Culture

The education, socialization, and professional norms of South African judges led them to approach social rights in a fundamentally different manner than their Brazilian counterparts. Three principal factors contributed to this difference and, in turn, to the divergent approach to social rights interpretation. The first was the relative amenability of the South African judges to the consideration of public policy and the process of

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BRINKS, Daniel M.(ed.). **Courting Social Justice**: Judicial Enforcement of Social and Economic Rights in the Developing World. New York: Cambridge University Press, 2008. p. 126.

[80] NOVOGRODSKY, Noah. Duty of Treatment Human Rights and the HIV/AIDS Pandemic. **Yale Human Rights & Development Law Journal**, New Haven, vol. 12, 2009. p. 28.

[81] PIOVESAN, Flavia, Brazil: Impact and Challenges of Social Rights. in the Courts. In: LANGFORD, M. (ed.). **Social Rights Jurisprudence**: Emerging Trends in International and Comparative Law. Cambridge: Cambridge University Press, 2009. p. 190. It should, however, be noted that as early as 2001 there was concern that "Uninformed judges facing inadequate prescriptions couched in the rhetoric of a life and death emergency would … all too easily fall prey to scientifically (and economically) unsound 'fashion prescriptions.'" HOFFMAN, Florian F.; BENTES, Fernando R. N. M. Accountability for Social and Economic Rights in Brazil. In: GAURI, Varun Gauri; BRINKS, Daniel M.(ed.). **Courting Social Justice**: Judicial Enforcement of Social and Economic Rights in the Developing World. New York: Cambridge University Press, 2008. p. 132.

balancing as compared to Brazilian judges. The South African courts did, like those in Brazil, exhibit a substantial degree of formalism during the authoritarian era. However, that formalism does not appear to have been as deeply ingrained in the judicial culture as it was in Brazil. Rather, it seems to have manifest in a subset of judges who, by virtue of judicial appointments being a discretionary power of the government of the day, were placed on the bench and assigned to the politically significant cases. As is the case in most jurisdictions, the bulk of the caseload was not politically sensitive. This meant that a relatively small number of sympathetic and/or compliant judges in the right positions could, and did, ensure that the majority of politically sensitive cases were heard by the "right people."[82] Nor was it as widely accepted in the broader legal community, as evidence by the variety and veracity of criticism of the apartheid legal order.[83] More broadly, although common law reasoning and argumentation is quite adaptable to formalism, it is also capable—much more capable than at least the Brazilian variant of civil law reasoning, I would argue—of incorporating the type of public policy considerations and balancing of competing interests.

The second factor is the nature of legal education in South Africa. In South Africa, the professoriate is substantially more likely to engage in teaching as a full-time occupation and, in turn, to engage in research. The products of this research were often quite critical of the apartheid regime and developed a variety of legally-grounded strategies and approaches for opposing it.[84] In addition, in contrast to the relatively limited pool of judges and defense lawyers engaged in anti-establishment lawyering in Brazil, the anti-apartheid movement was something approaching mainstream in the public law side of the legal academy, as evident in the affiliation of a number of legal clinics and research centres associated with the anti-apartheid movement that were affiliated with university law schools.[85]

The third is the difference in the nature of judging as a professional activity. South African judges are selected from the ranks of senior legal practitioners, traditionally those who had been accorded the title of Senior Counsel.[86] Invariably, the Bench was a

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[82] HODES, Peter. Interview on 29 Apr. 2016

[83] E.g., MILLNER, M. A. Apartheid and the South African Courts. **Current Legal Problems**, vol. 14, n. 1, p. 280-306, 1961; KENTRIDGE, Sydney. Telling the Truth About Law. **South African Law Journal**, vol. 99, no. 4, p. 648-655, 1982; WACKS, Raymond. **Judges and Injustice**. South African Law Journal, vol. 101, 1984. p. 264.

[84] See e.g., CAMERON, Edwin. Legal Chauvinism, Executive-Mindedness and Justice--L.C. Steyn's Impact on South African Law. **South African Law Journal**, vol. 99, p. 38-75, 1982; DUGARD, John. **Human Rights and the South African Legal Order**. Princeton: Princeton University Press, 1978; FORSYTH, C. F. **In Danger for Their Talents**: A Study of the Appellate Division of the Supreme Court of South Africa from 1950-80. Cape Town: Juta, 1985; cf. A BLERK, Adrienne E. Van. **Judge and Be Judged**. Cape Town: Juta, 1988.

[85] For example, the Centre for Applied Legal Studies, founded by John Dugard and affiliated with the University of the Witwatersrand.

[86] The term is analogous to United Kingdom's "Queen's Counsel," a title bestowed on barristers who have distinguished themselves in the profession through long service.

second career for those with both practice and life experience. This is a marked contrast to Brazilian judges of first instance, who tended to be young, steeped in formal reasoning, and have relatively limited experience outside of the formal study of law.

In combination, these factors produced a system of legal education, socialization, and professional norms that predisposed the judiciary to approach the issues raised by social rights adjudication in a more pragmatic, policy-oriented fashion concerned with maintaining a balance between the proper role of the courts and the necessity of giving effect to the transformative guarantees present in the Constitution.

3.2. Institutional Design

Three aspects of institutional design also contributed to the initial and continued divergence of the social rights jurisprudence of South Africa and Brazil. The first of these has to do with the actual number of judges in each jurisdiction, the second with doctrine of precedent, and the third with the nature of the apex courts.

In 2013, there were 239 permanent judges of the South African high courts; in Brazil there were a combined total of 12,810 judges in the federal and state courts.[87] This works out to roughly 0.45 judges per hundred thousand people in South Africa and 6.33 per hundred thousand in Brazil.[88] Thus, the number of judges capable of engaging in judicial review on constitutional grounds in each jurisdiction is radically different. In terms of workload, however, Brazilians are notoriously litigious. In the same year, 21.5 million new cases—just shy of 1,700 per judge—were filed with those courts and there were substantially more than that already in the systems.[89] While I have not been able to obtain comprehensive data on caseload or new filings for South Africa, court-specific comparisons suggest a significant difference in workload and, by extension, approach to adjudication. For example, the Constitutional Court of South Africa and the Supremo Tribunal Federal are both, in theory, the apex court for constitutional matters only. The South African Court deals with 40-50 cases per year, the STF deals with roughly 70,000. Quite simply, Brazilian judges lack the time to engage in the type of sustained research and analysis necessary to engage in policy-cognizant balancing and analysis.

The second institutional factor is the doctrine of *stare decisis*. In South Africa, hierarchical precedent is an accepted fact of the courts. When a court issues a clear decision on how the law is to be interpreted, that interpretation is almost invariably applied by courts lower in the judicial hierarchy. The matter, then, is settled. With

[87] LAW SOCIETY OF SOUTH AFRICA. St**atistics for Legal Education and Development (LEAD) and the Legal Profession, 2013-2014**, June 2014; CONSELHO NACIONAL DE JUSTIÇA. J**ustiça Em Números 2014** Brasília: Departamento de Pesquisas Judiciárias, 2014.

[88] Authors calculations based on World Bank population data for 2013.

[89] CONSELHO NACIONAL DE JUSTIÇA. J**ustiça Em Números 2014** Brasília: Departamento de Pesquisas Judiciárias, 2014.

certain exceptions,[90] Brazil has no formal system of binding precedent and the vast majority of decisions apply only to the dispute before the judge. Despite the fact that Brazilian judicial review exhibits a strong Anglo-American influence, the legal system and its procedure remain firmly grounded in the civil law tradition. And, in this respect, there is generally not a clear line of reasoning and decisions in the sense thought of by Anglo-American legal scholars. This is the case for at least two reasons. The first is the lack of a functional system of case citation that would enable various decisions to be tracked in order to determine if their reasoning and decisions had been upheld, ignored, or outright rejected. This is particularly problematic in a jurisdiction with dozens of autonomous or semi-autonomous judicial organs handling tens of millions of cases per year.[91] The second is the vigorously defended individual autonomy of individual judges at all levels to decide cases according to "the law" as opposed to directives from other judges.[92]

Finally, the marked differences in the composition and operation of the two apex constitutional courts has also contributed to the divergence in social rights interpretation. Although the 1988 Constitution is a transformative Constitution that included numerous social guarantees and mechanisms for their defense, the judiciary tasked with interpreting and applying it was not new. The judges initially tasked with its interpretation were the same ones who had been appointed and presided over the courts during the dictatorship. This included the apex court for all constitutional matters—the STF—which had vehemently lobbied against its replacement by a newly constituted constitutional court. Instead, the STJ was created as an attempt to reduce the non-constitutional caseload of the STF. An endeavor into constitutional engineering that has had only limited success, as evident in the STF's caseload, discussed above.[93] This meant that of the eleven judges on the court when the 1988 constitution came into effect, the unexpected president, Jose Sarney had appointed two and the remaining nine had been appointed by three different presidents during the military regime.[94]

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[90] Abstract review, the sole prerogative of the STF is, by definition, generally applicable. Additionally, Constitutional Amendment No. 45 of 2004 gave the STF the ability to create a weak form of vertical precedent—the *Súmula Vinculante*—when certain conditions were met.

[91] FALCÃO, Joaquim. Interview on 10 November 2014.

[92] OLIVEIRA, Maria Angela Jardim de Santa Cruz. Reforming the Brazilian Supreme Federal Court: A Comparative Approach. **Washington University Global Studies Law Review**, vol. 5, p. 139-142, 2006.

[93] Although the modern STJ was intended to function as the apex court for non-constitutional matters, leaving the STF free to deal with constitutional issues, in practice a broad definition of what constitutes a constitutional matter, a variety of institutional factors incentivizing successive appeals, and the limited impact of previous decisions have frustrated that intention.

[94] The eleven members of the Court at that time were Ministers Aldir Passarinho, Carlos Madeira, Célio Borja, Djaci Falcão, Francisco Rezek, Moreira Alves, Néri da Silveira, Octavio Gallotti, Oscar Corrêa, Rafael Mayer (President), and Sydney Sanches.

The South African Constitutional Court was a newly created body tasked solely with the adjudication of constitutional matters, given a strong mandate to defend the constitution, and accorded a great deal of leeway—including control over its docket—in how to do so. Perhaps most importantly, however, the Court was composed largely of progressive-minded judges and academics in contrast to the initial composition of Brazil apex constitutional court. The first South African Court was headed by Arthur Chaskalson, co-founder of the Legal Resources Center and included Ismael Mahomed, the first non-White judge in South Africa, as well as Albie Sachs, an advocate whose defence of those imprisoned under various racial and security statutes lead to his own imprisonment, exile, and eventual maiming. By populating the court with a combination of experienced judges, legal activists, and academics, the court had the capacity to draw on a multitude of perspectives as well as a predilection to advance the goals of the new constitution.

The decision-making procedure of the two courts is also radically different. The South African Court, with control over its docket tends to focus on a relatively limited number of cases per year, sitting almost exclusive as a full bench when considering the substance of any matter. Each judge, assisted by their clerks, is responsible for reviewing the submissions of the parties and conducting any additional research they feel necessary before oral arguments. Oral arguments are then followed by an in camera conference and the eventual assignment of opinion writing responsibilities. At the STF, the bulk of the decisions are actually handled by a single judge in Chambers (monocratic decisions). Nonetheless, something like 2,000 cases per year are decided by one of three collegiate bodies: the two sub-panels (*turmas*) of five Ministers (the President of the Court is not a member of either *turma*) and the plenary court. When a case formally enters the Court's docket, one of the Ministers (with the exception of the President of the Court) is randomly assigned as that case's reporter *(relator)*. The reporter is responsible for moving the case through the Court's bureaucracy and, if the case is judged by a collegiate body, the reporter must come to the collegiate session with (i) a summary of the facts, which is distributed beforehand to all Justices, and (ii) their written opinion—which is only announced to the rest of the Court during the public session. All deliberation between Ministers is therefore public and at least formally, there is no prior or private discussion of pending cases among the judges.[95] After the

[95] In interviews conducted by Fernando Fontainha as a part of the Supreme Court Oral History Project (História Oral do Supremo (1988-2013)), some Ministers do mention episodes in which they met prior to hearings—sometimes in an administrative (i.e., non-judicial, non-deliberative) session in the Court's building, sometimes in their own homes—to discuss important cases or crucial political events that might affect the Court and its decisions. See, for example, the interviews of Justices Carlos Velloso (unpublished interview, on file with the author), Rafael Mayer (unpublished interview, on file with the author) and Nelson Jobim (unpublished interview, on file with the author). Other Ministers vehemently deny that such meetings occur, and even the Ministers mentioned above do not describe these meetings as regular.

reporter has issued his opinion, the rest of Ministers issue their own opinions and vote, in reverse order of seniority. These subsequent opinions may be as simple as indicating agreement with the reporter or extremely detailed treatises on the subject. Although Ministers can explicitly state that they are following the opinion of this or that colleague, there is no formal aggregation of individual opinions into a collective majority opinion.[96]

3.3. Summary

In short countries with a highly decentralized system of judicial review, characterized by a large number of judges who are relatively inexperienced, steeped in formalism, and who are have little or no obligation to abide by previously decided cases will tend to develop an individualized social rights jurisprudence that focuses on remedying specific harms. Those with a more centralized system of judicial review, characterized by a small number of experienced judges more experienced in a consequentialist type of reasoning and operating in a system which has a strong adherence to stare decisis, will develop a more policy-oriented social rights jurisprudence that emphasizes the importance of addressing structural problems.

4. IMPLICATIONS

The individualized approach of the Brazilian judiciary, particularly in the area of right to health litigation, has attracted a great deal of attention. Initial analyses of social rights litigation in Brazil advanced a positive view of the judicialization of healthcare. Passarelli and Terto Júnior, for example, concluded that a key driver of Brazil's success in the treatment of HIV/AIDS was the use of the litigation to give force and effect to the principles underlying the unified health system.[97] Writing in 2008, Piovesan noted an emerging trend of right to health litigation that included "judicial rulings on the free provision of medicine, which, coupled with well-coordinated and efficient litigation strategies, have prompted changes in the law and the adoption of public policies that are considered exemplary."[98]

In addition to these more transformative decisions, litigation has also been seen as an effective means of ensuring accountability within the complex system of

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[96] For a critical analysis of the STF's decision-making practices, see SILVA, Virgílio Afonso da. Deciding without Deliberating. **International Journal of Constitutional Law**, vol. 11, no. 3, p. 557-584, 2013.

[97] PASSARELLI; TERTO JÚNIOR. Non-Governmental Organizations and Access to Anti-Retroviral Treatments in Brazil. **Divulgação em Saúde para Debate**, Rio de Janeiro, n. 27, p. 252-264, Aug. 2003. p. 256; FLYNN, Matthew. Public Production of Anti-Retroviral Medicines in Brazil, 1990–2007. **Development and Change**, vol. 39, no. 4, 2008. p. 520.

[98] PIOVESAN, Flavia, Brazil: Impact and Challenges of Social Rights. in the Courts. In: LANGFORD, M. (ed.). **Social Rights Jurisprudence**: Emerging Trends in International and Comparative Law. Cambridge: Cambridge University Press, 2009. p. 189.

government organizations that make up Brazil's public health system.[99] In a study of right to health litigation in Rio de Janeiro, for example, Borges and Ugá found that more than half (52%) of the medication being sought was officially supplied. This was taken to suggest inefficiency in the administration and/or delivery of required services.[100] Others, however, have suggested that this is a least partly the result of litigants including multiple medications—both covered and not—in their claims and claimants seeking medication for "off-label" (prescribed for condition other than one the drug was approved for) or off protocol (the patient does not meet the clinical criteria established for prescription) use.[101] It should also be remembered that this form of litigation is at least as much administrative as it is constitutional.

Nevertheless, as early as 2007 concerns were being raised about judicial involvement in the distribution of medicines. Vieira and Zucchi, for example, argued that "to take as a starting point the assumption that any claim for medication should be met, since the right to health is guaranteed, reveals… a lack of understanding of public health policies and the accompanying pharmaceutical management."[102] A number of empirical studies support this claim insofar as they identify substantial costs incurred by state actors in complying with judicial mandates of this type as well as exponential rises in pharmaceutical expenditures, and health expenditures more generally, that are correlated with increases in right to health litigation.[103]

Subsequently, Ferraz identified equity concerns with this "Brazilian model" of individualized right to health litigation for publicly-funded curative treatment in which litigants have an extremely high success rate. This model of adjudication, he argued,

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[99] Biehl et al., for example, found that "Many judges and public defenders working on right-to-health cases feel they are responding to state failures to provide needed drugs." BIEHL, et al. Judicialisation of the Right to Health in Brazil. **The Lancet**, vol. 373, no. 9682, June 2009. p. 2183.

[100] BORGES, Danielle; UGÁ, Maria Alicia Dominguez. Conflitos e Impasses Da Judicialização Na Obtenção de Medicamentos: As Decisões de 1a Instância Nas Ações Individuais Contra o Estado Do Rio de Janeiro, Brasil, Em 2005. **Cadernos de Saúde Pública**, v. 26, no. 1, p. 60–62, jan. 2010. p. 62–67.

[101] WANG, Daniel W. Liang; FERRAZ, Octavio Luiz Motta. Reaching Out to the Needy? Access to Justice and Public Attorneys' Role in Right to Health Litigation in the City of São Paulo. **SUR - International Journal on Human Rights**, vol. 10, no. 18, June 2013. p. 9.

[102] VIEIRA, Fabiola Sulpino; ZUCCHI, Paola. Distortions to National Drug Policy Caused by Lawsuits in Brazil. **Revista de Saúde Pública**, vol. 41, no. 2, 2007. p. 8.

[103] VIEIRA, Fabiola Sulpino; ZUCCHI, Paola. Distortions to National Drug Policy Caused by Lawsuits in Brazil. **Revista de Saúde Pública**, vol. 41, no. 2, 2007; CHIEFFI, Ana Luiza; BARATA, Rita de Cássia Barradas. Ações Judiciais: Estratégia Da Indústria Farmacêutica Para Introdução de Novos Medicamentos. **Revista de Saúde Pública**, vol. 44, no. 3, p. 421-429, 2010;
PEREIRA, Januária Ramos et al. Análise Das Demandas Judiciais Para o Fornecimento de Medicamentos Pela Secretaria de Estado Da Saúde de Santa Catarina Nos Anos de 2003 e 2004. **Ciência & Saúde Coletiva**, vol. 15, no. 3, p. 3551-3560, Nov. 2010; LOPES, Luciane Cruz et al. Rational Use of Anticancer Drugs and Patient Lawsuits in the State of São Paulo, Southeastern Brazil. **Revista de Saúde Pública**, vol. 44, no. 4, p. 620-628, Aug. 2010; MEDEIROS, Marcelo; DINIZ, Debora; SCHWARTZ, Ida Vanessa Doederlein. A Tese da Judicialização da Saúde Pelas Elites: Os Medicamentos Para Mucopolissacaridose. **Ciência & Saúde Coletiva**, vol. 18, no. 4, p. 1079-1088, 2013.

both impaired efficient allocation of resources and privileged those who are able to access the courts, an ability generally associated with socio-economic advantage. Although partly supported by subsequent research,[104] the difficulties associated with reliably tracking right to health litigation noted above in conjunction with those relating to the identification of litigants' socio-economic status have thus far impeded authoritative empirical analysis of this theory.

At the same time, several scholars have argued that these decisions have had positive indirect effects on access to social benefits. The prime example of this is Brazil's policy of universal antiretroviral provision. The move toward a national policy of universal provision is attributable to a number of actors, including the sanitaristas and various advocacy groups, however, there is a general agreement that the courts also played an important role in the creation of this policy in both São Paulo and Rio Grande do Sul and then at the federal level.[105] The 2012 creation of a federal institution to deal with the assessment of healthcare technology (the *Comissão Nacional de Incorporação de Tecnologias* or CONITEC), including pharmaceuticals, is likely a second such instance.[106], CONITEC has been criticised for a "[l]ack of objective clinical evaluation criteria… on what is more efficacious or safe [and the] absence of clear parameters for the analysis of cost effectiveness,"[107] as well as having a mandate that emphasizes new, high-cost medicines.[108]

This is not to say that the "reasonableness" approach is without it's criticisms as well. At least with respect to HIV, it may well be that the South African Constitutional Court's single, clear, and precedential decision regarding the necessity of a reasonable policy regarding the distribution of antiretrovirals, particularly with respect to the prevention of mother-to-child transmission, was expediently and effectively implemented. By 2010 (the first year for which reliable comparative data is available) 93% of pregnant

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[104] SILVA, Virgilio Afonso da; TERRAZAS, Fernanda Vargas. Claiming the Right to Health in Brazilian Courts: The Exclusion of the Already Excluded? **Law & Social Inquiry**, vol. 36, no. 4, p. 825-853, 2011; BRINKS, Daniel M; GAURI, Varun. Law's Majestic Equality? The Distributive Impact of Litigating Social and Economic Rights. **Policy Research Working Paper**, The World Bank Development Research Group, Mar. 2012. p. 383; WANG, Daniel W. Liang; FERRAZ, Octavio Luiz Motta. Reaching Out to the Needy? Access to Justice and Public Attorneys' Role in Right to Health Litigation in the City of São Paulo. **SUR - International Journal on Human Rights**, vol. 10, no. 18, June 2013.

[105] E.g., PASSARELLI; TERTO JÚNIOR. Non-Governmental Organizations and Access to Anti-Retroviral Treatments in Brazil. **Divulgação em Saúde para Debate**, Rio de Janeiro, n. 27, p. 252-264, Aug. 2003. p. 257.

[106] WANG, Daniel. Courts as Healthcare Policy-Makers: The Problem, the Responses to the Problem and Problems in the Responses. **Direito FGV Research Paper Series**, São Paulo, Paper n. 75. p. 44; BORGES, Danielle da Costa Leite. Individual Inputs and Collective Outputs: Understanding the Structural Effects of Individual Litigation on Healthcare in Brazil. **FGV Direito Rio – Working Paper**, 2014. p. 12-13..

[107] RODRIGUES, Tania; IZMIRLIEVA, Milena; ANDO, Gustavo. Analysis of Brazilian Public Funding Process for New Biologic Drugs. **Value in Health**, vol. 16, no. 7, 2013. p. A678.

[108] OSORIO-DE-CASTRO, Claudia G. S., et al. Policy Change and the National Essential Medicines List Development Process in Brazil Between 2000 and 2014: Has the Essential Medicine Concept Been Abandoned? **Basic & Clinical Pharmacology & Toxicology**, 2017. Available at: <https://doi.org/10.1111/bcpt.12932>.

women with HIV were receiving antiretroviral therapy for the prevention of mother-to-child transmission, a number which has remained relatively constant since. In Brazil, the rate of coverage in 2010 was 56%, although is increased to 89% by 2016.[109] However, the general rates of antiretroviral therapy coverage show a markedly different pattern. By 2000 (also the first year for which data is available), 27% of Brazilians with HIV were receiving antiretroviral therapy in contrast to a reported 0% in South Africa. It took until 2011 for South Africa to reach the level of coverage in Brasil in 2000, by which time the Brazilian coverage was 40%. As of 2016, coverage is 60% and 56%, respectively. More troublingly, however, is the massive variation in HIV prevalence. In 1990, 0.2% of Brazilians 15-49 were living with HIV as were 0.7% of South Africans. By 2000, it was 0.3% and 12.0% and by 2010, 0.5% and 18.2%. The South African Constitutional Court decision may have effected a significant structural change, but the sustained individualized litigation of the Brazilian context appears, at least on its face, to have proven more successful in addressing the broader public health issue.

5. CONCLUSION

Social rights guarantees are now a feature of the majority of the world's constitutions. They have been variously characterized as tools for the realization of progressive social transformation and window dressings aimed at diverting attention from ongoing human rights abuses, democracy enhancing and anti-majoritarian, good and bad. At present, however, we are still in the early stages of understanding the long term social, economic, and political effects of their constitutionalization and subsequent litigation and judicial interpretation. As we seek to develop our knowledge in this area, we should bear a number of things in mine. First, the institutional environment in which a constitution is interpreted and applied matters: professional cultures shape both what judges seek to achieve and how they are able to pursue those ends; formal institutional design determines the kinds of decisions they are able to make and, in turn, will shape whether and how interest groups, civil society actors, and individuals will seek judicial assistance in achieving their goals. Second, variations in institutional design and standard practices mean that one cannot assume that a focus on apex court decisions will provide an accurate understanding of a given country's interpretation and application of social rights. Finally, like most broad political phenomena, the trend toward the constitutionalization of social rights ought not be viewed as an inherent good, nor should the effects be expected to be uniform. It is better conceived of as a malleable process, subject to a variety of influences, the implementation and operation of which are sure to have consequences, intended and otherwise.

[109] Data in this section is based on UNAIDS estimates and was retrieved from the World Bank's World Development Indicators Database (https://data.worldbank.org/products/wdi) in February 2018.

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Constitutionalizing abortion in Brazil[*]

Constitucionalização do aborto no Brasil

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Abstract

Brazil has been constitutionalizing disputes on women's right to terminate unwanted pregnancy. This paper explains how this process started with the drafting of the new constitution in 1986-87, and evolved in different arenas, the legislative, the executive and in the public sphere. Most recently, it moved to the Supreme Court, primarily in its anencephalic pregnancy decision, brought as a Claim of Non Compliance with Fundamental Precept (ADPF 54). Decided in 2012, it was the first time since the adoption of the Penal Code in 1940 that the Brazilian Supreme Court moved the criminal boundaries to enable women to decide whether to terminate

Resumo

O Brasil tem constitucionalizado disputas pelo direito das mulheres a encerrar uma gravidez indesejada. O presente artigo examina como teve início esse processo, na Assembleia Constituinte em 1986-87, e como se desenvolveu em diferentes arenas de disputa, como o Legislativo, o Executivo e a esfera pública. Recentemente, o conflito se deslocou para o Supremo Tribunal Federal (STF), por meio da discussão sobre gravidez de fetos anencéfalos, trazida pela Arguição de Descumprimento de Preceito Fundamental (ADPF 54) em 2004 e julgada em 2012. Nessa ação, pela primeira vez, o STF moveu barreiras penais estabelecidas pelo Código Penal de 1940 para possibilitar a escolha de mulheres em

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anencephalic pregnancies. The purpose of this article is to examine how the ADPF 54 decision contributed to the constitutionalization of abortion. First, it established the right to life as a non-absolute right, granting constitutional legitimacy to the system of legal exceptions. Second, it signaled the balancing of constitutional rights as the reasoning paradigm for this issue. Third, in framing the controversy as a matter of balancing constitutionally protected rights, the positions established in the Court ultimately recognized crucial understandings of women's rights.

Keywords: Brazil; Constitution; anencephaly; pregnancy; abortion; women's rights.

manter ou não uma gravidez anencefálica. O objetivo deste texto é examinar como a decisão da ADPF 54 contribuiu para a constitucionalização do aborto. Em primeiro lugar, estabeleceu o direito à vida como não absoluto, garantindo legitimidade constitucional ao sistema de excludentes de ilicitude. Em segundo, indicou a ponderação de direitos constitucionais o modo de raciocínio paradigmático na questão. Em terceiro, ao enquadrar a controvérsia como questão de ponderação de direitos, as posições adotadas acabaram por expressar importantes avanços no reconhecimento de direitos das mulheres.

Palavras-chave: *Brasil; Constituição; anencefalia; gravidez; aborto; direitos das mulheres.*

CONTENTS

1. Introduction; **2.** The Constituent Assembly's Debates and Outcomes; **2.1.** Debating the Constitutional Text; **2.2.** The Constitution as Adopted; **3.** The Supreme Court's Interpretation of the Constitution; **3.1.** Overview of Plurality Judgments and Pending Cases; **3.2.** The Anencephaly Case; **3.2.1.** The Design of the Case; **3.2.2.** The Public Hearings; **3.2.3.** The Plurality Decision through Ten Opinions; **3.2.3.1.** The Right to Life; **3.2.3.2.** The Right to Health; **3.2.3.3.** Proportionality; **3.2.3.4.** Other Constitutional Principles; **4.** The Court's Record in Constitutionalizing Abortion; **5.** References.

1. INTRODUCTION

The celebration of the 30th anniversary of the Brazilian Constitution provides an opportunity to reflect on how the constitution has contributed, and how it might more effectively contribute, to the advancement of the citizenship rights of all Brazilian citizens, including its female citizens. As a way of understanding how the constitution has been and could be used to protect women's equal citizenship rights, this article focuses on one of the more contested constitutional issues, that of women to decide whether or not to continue with their pregnancies. To procure, consent to or assist in the termination of pregnancy is a crime under the Brazilian Penal Code of 1940. Women who initiate or consent to the practice can be punished with imprisonment from 1-3 years,[1] and those who perform abortion with women's consent can serve from 1-4 years in prison.[2] The Penal Code does not apply when there is a risk to the woman's life or in cases of rape.[3]

[1] Penal Code Art. 124. BRAZIL. Decreto-lei nº 2.848, de 7 de dezembro de 1940. **Penal Code**. <http://www.planalto.gov.br/ccivil_03/decreto-lei/Del2848compilado.htm>. Accessed on: 19 Mar. 2018.

[2] Penal Code Art. 126. BRAZIL. Decreto-lei nº 2.848, de 7 de dezembro de 1940. **Penal Code**. <http://www.planalto.gov.br/ccivil_03/decreto-lei/Del2848compilado.htm>. Accessed on: 19 Mar. 2018.

[3] Penal Code Art. 128. BRAZIL. Decreto-lei nº 2.848, de 7 de dezembro de 1940. **Penal Code**. <http://www.planalto.gov.br/ccivil_03/decreto-lei/Del2848compilado.htm>. Accessed on: 19 Mar. 2018.

The Penal Code regulation of abortion has been challenged by social movements through different strategies, especially since the end of the 1970s.[4] Prompted by the opportunity of the drafting of the new democratic constitution in 1986-1987, actors with different perspectives on abortion began to use the language of rights. Since the constitutional drafting, constitutional norms have been used to construct different narratives of injustice and to mediate social disagreements on abortion in formal and informal arenas. Although the first constitutional case on abortion was decided by the Brazilian Federal Supreme Court (the Supreme Court) in 2012,[5] the conflict was already "intelligible as a *constitutional* conflict"[6] because constitutional norms had already been invoked in various arenas.[7]

Constitutionalization of abortion can be understood as a multidimensional and dynamic process[8] that happens in the discursive interaction of players with different views, by their sharing constitutional values as a legitimizing language. This process started in Brazil with debates in its Constituent Assembly about how the Constitution should be framed to protect prenatal life consistently with women's rights to exercise their decisional autonomy regarding their pregnancies. Those debates have continued in the executive branch of government, especially the Ministry of Health, in the legislature, and in courts, including the Supreme Court. In public arenas, social movements have used the language of constitutional rights in non-institutional settings, including public campaigns, street mobilizations and informal debates. For example, the international action movement World March of Women launched a campaign in 2015 defending "the right to life of women."[9]

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[4] BARSTED, Leila de Andrade Linhares. Legalização e descriminalização do aborto no Brasil: 10 anos de luta feminista. **Revista Estudos Feministas**, Florianópolis, v. 0, n. 0, p. 104-130, 1992.

[5] BRAZIL. Supreme Court. Sentence. **Claim of Non Compliance with Fundamental Precept nº 54.** Judge-Rapporteur: Justice Marco Aurélio. Brasília, DF, April 30, 2013. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[6] SIEGEL, Reva. The Constitutionalization of Abortion. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Ed.). **Abortion Law in Transnational Perspective:** Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014. p. 13-35, at p. 20.

[7] See, e.g., LUNA, Naara. Aborto no Congresso Nacional: o enfrentamento de atores religiosos e feministas em um Estado Laico, **Revista Brasileira de Ciência Política** vol. 14, 83-109, 2014; ROCHA, Maria. A discussão política sobre o aborto no Brasil: uma síntese. **Revista Brasileira de Estudos Populacionais**. São Paulo, v. 23, n. 02, p. 369-374, jul./dez. 2006.

[8] See, e.g., SIEGEL, Reva. The Constitutionalization of Abortion. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Ed.). **Abortion Law in Transnational Perspective:** Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014. p. 13-35. BERGALLO, Paola; RAMÓN MICHEL, Agustina. Abortion. In: GONZALEZ-BERTOMEU, Juan F.; GARGARELLA, Roberto (Ed.). **The Latin American Casebook:** Courts, constitutions and rights. London: Routledge, 2016. p. 36-59.

[9] **"***pelo direito a vida das mulheres*" MARCHA MUNDIAL DAS MULHERES [World March of Women] *Em defesa da Legalização do Aborto, Marcha Mundial das Mulheres chega ao Rio Grande do Sul em mais uma etapa de sua IV Ação Internacional. [s.l.] Marcha Mundial das Mulheres, 24 set. 2015*. [Defending the legalization of abortion, the World March of Women arrives in Rio Grande do Sul in another stage of its IV International Action, 24 Sept., 2015] <http://www.marchamundialdasmulheres.org.br/

These debates find their way to courts in different types of cases – criminal cases against women and doctors, cases addressing specific authorizations to perform terminations and constitutional cases in the Supreme Court.[10] Although courts are an important setting for the constitutionalization of abortion, the political process to address or resolve abortion disputes in Brazil shows that many arenas are occupied by movements and counter-movements according to the balance of political opportunities.[11] The constitutional discourse pervades them all in dynamic processes of mutual influence and adaptation. These dimensions of the process are overlapping and intersecting. The different positions presented in the debates in the drafting of the constitution re-emerge in various arenas, including the Supreme Court's interpretation of the Constitution. The constitutionalization of abortion, therefore, is not dependent on the institution in which debates happen, but on whether constitutional norms and principles are mobilized and valued in debates in various sectors.[12]

Examples of how constitutional norms were mobilized and applied in the health sector are the initiatives of health professionals and women's health activists to address the grave consequences for women's health of opaque criminal laws. These initiatives operationalized the rape exception to the criminal prohibition of abortion initially through hospital guidelines,[13] continuing with health professional guidelines,[14] and ultimately ministerial guidelines to ensure women's access in the public health service.[15]

em-defesa-da-legalizacao-do-aborto-marcha-mundial-das-mulheres-chega-ao-rio-grande-do-sul-em-mais-uma-etapa-de-sua-iv-acao-internacional/>. Accessed on: 16 Mar. 2018.

[10] ALMEIDA, Eloísa Machado de. Perfil do litígio sobre aborto nos tribunais. **Manuscript,** 2018; GONÇALVES, Tamara Amoroso; LAPA, Thaís de Souza. **Aborto e religião nos tribunais brasileiros**. São Paulo: Instituto para a Promoção da Equidade, 2008.

[11] MACHADO, Marta Rodriguez de Assis; MACIEL, Débora Alves. The Battle over Abortion Rights in Brazil's State Arenas, 1995-2006. **Health and Human Rights Journal**, [s.l.], vol. 19, p. 119-131, jun. 2017. Ruibal, Alba. Social Movements and Constitutional Politics in Latin America: reconfiguring alliances, trainings and legal opportunities in the judicialization of abortion rights in Brazil. **Contemporary Social Sciences,** vol. 10. n. 4, p. 375-386, 2016.

[12] SIEGEL, Reva. Constitutional culture, social movement conflict and constitutional change: The case of the De Facto Era. **California Law Review**, [s.l.], vol. 94, n. 5, p. 1323-1419, oct. 2006.

[13] DINIZ, Debora; DIOS, Vanessa Canabarro; MASTRELLA, Miryam; MADEIRO, Alberto Pereira. A verdade do estupro nos serviços de aborto legal no Brasil. **Revista Bioética**, Brasília, vol. 22, n. 2, p.291-298, maio/ago. 2014; MACHADO, Carolina Leme; FERNANDES, Arlete Maria dos Santos; OSIS, Maria José Duarte; MAKUCH, Maria Yolanda. Gravidez após violência sexual: vivências de mulheres em busca da interrupção legal. **Cadernos de Saúde Pública**, Rio de Janeiro, vol. 31, n. 2, p.345-353, fev. 2015. PITANGUY, Jacqueline (Ed.); ROMANI, Andrea; LAWRENCE, Helen; MELO, Maria Elvira Vieira de (Org.). **Violence against women in the international context: challenges and responses**. Rio de Janeiro: CEPIA, 2007. p. 1-208.

[14] The Brazilian Federation of the Associations of Gynaecology and Obstetrics (FEBRASGO) guidelines (2010 version): FEDERAÇÃO BRASILEIRA DAS ASSOCIAÇÕES DE GINECOLOGIA E OBSTETRÍCIA. **Manual de Orientação Assistência ao Abortamento, Parto e Puerpério.** 2010. <http://professor.pucgoias.edu.br/SiteDocente/admin/arquivosUpload/13162/material/ASSIST%C3%8ANCIA%20AO%20PARTO,%20PUERP%C3%89RIO%20E%20ABORTAMENTO%20-%20FEBRASGO%202010.pdf>. Accessed on: 21 Mar. 2018.

[15] PITANGUY, Jacqueline; GARBAYO, Luciana Sarmento. **Relatório do Seminário** A **Implementação do Aborto Legal no Serviço Público de Saúde.** Rio de Janeiro: CEPIA, 1994. p. 1-96; DINIZ, Debora; DIOS, Vanessa

The Ministry of Health's technical norm regulating legal abortion[16] explicitly refers to the Constitution's Article 5 on the protection of intimacy, private life, honor and image; Article 196 on equal access to health care, and the disposition in Article 226 on free family planning. This technical norm also indicated that facilitating transparent access to legal abortion was required to ensure Brazil's compliance with its international obligations, whether found in international policy agreements, such as the Cairo Programme[17] and the Beijing Declaration,[18] or international treaties such as CEDAW,[19] or regional treaties such as the Convention Belém do Pará.[20]

Constitutional norms were mobilized in the legislature through both restrictive and progressive proposals. Legislative proposals invoked inviolability under Article 5 of the right to life to condemn abortion.[21] Legislative proposals invoked the equal rights clause[22] and fundamental principle of human dignity under Article 1.III[23] to protect the unborn. An example of a progressive legislative proposal was the use of Constitution's Article 226, §7º guaranteeing free family planning to expand abortion rights.[24]

Canabarro; MASTRELLA, Miryam; MADEIRO, Alberto Pereira. A verdade do estupro nos serviços de aborto legal no Brasil. **Revista Bioética**, Brasília, vol. 22, n. 2, p.291-298, maio/ago. 2014; MACHADO, Carolina Leme; FERNANDES, Arlete Maria dos Santos; OSIS, Maria José Duarte; MAKUCH, Maria Yolanda. Gravidez após violência sexual: vivências de mulheres em busca da interrupção legal. **Cadernos de Saúde Pública**, Rio de Janeiro, vol. 31, n. 2, p.345-353, fev. 2015.

[16] BRAZIL. CONSELHO NACIONAL DE SAÚDE. **Portaria GM/MS N° 737**: Política Nacional de Redução da Morbimortalidade por Acidentes e Violências. 2001. <http://conselho.saude.gov.br/comissao/acidentes_violencias2.htm>. Accessed on: 19 Mar. 2018.

[17] UNITED NATIONS GENERAL ASSEMBLY. **International Conference on Population and Development:** Programme of Action**.** Cairo: United Nations, 1994. <https://www.unfpa.org/sites/default/files/pub-pdf/programme_of_action_Web%20ENGLISH.pdf>. Accessed on: 19 Mar. 2018.

[18] UNITED NATIONS GENERAL ASSEMBLY**. Beijing Declaration and Platform for Action**, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995). <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>. Accessed on: 19. mar. 2018.

[19] UNITED NATIONS GENERAL ASSEMBLY, **Convention on the Elimination of All Forms of Discrimination against Women**, 18 December 1979, United Nations Treaty Series, vol. 1249, p. 13, http://www.refworld.org/docid/3ae6b3970.html [accessed 25 March 2018]

[20] ORGANIZATION OF AMERICAN STATES, **Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women:** Convention of Belém do Pará. Belém do Pará, 1994. <http://www.oas.org/juridico/english/treaties/a-61.html>. Accessed on: 19 Mar. 2018.

[21] BRAZIL. Congress. Chamber of Deputies. **Constituição (1995).** Bill of Law nº 999, de 1995. <http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=1134939&filename=Dossie+-PL+999/1995>. Accessed on: 16 Mar. 2018.

[22] BRAZIL. **Bill of Law nº 5.058, de 2005**. Regulates art. 226, § 7, of the Federal Constitution, providing for the inviolability of the right to life, defining euthanasia and voluntary termination of pregnancy as heinous crimes, in any case. <http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=295399&filename=PL+5058/2005>. Accessed on: 16 Mar. 2018.

[23] BRAZIL. **Bill of Law nº 1.190, de 2011**. Establishes the "Day of the Unborn", to be celebrated on October 8 of each year, and gives other measures. <http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=863669&filename=PL+1190/2011>. Accessed on: 16 Mar. 2018.

[24] BRAZIL. Congress. Chamber of Deputies. **Bill of Law nº 5.387, de 1990**. Establishes the services of assistance and guidance to family planning, and determines other measures. <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=227363>. Accessed on: 16 Mar. 2018.

Although this paper will focus on how the Supreme Court constitutionalized abortion, it is important to keep in mind that this judicial process is part of a broader process of mobilizing and valuing the constitutional norms in different arenas and for different purposes.

This paper begins with a brief exploration of the Constituent Assembly's debates and their outcomes, addressing briefly the provisions in the new democratic constitution adopted in 1988. These constitutional provisions supplied symbolic, normative and legal tools for the debates around abortion rights since then. It will then focus on how the Supreme Court has applied the Constitution to the anencephaly case. It will conclude by examining the Supreme Court's record in constitutionalizing abortion through this case.

2. THE CONSTITUENT ASSEMBLY DEBATES AND OUTCOMES

2.1. Debating the Text of the Constitution

The Brazilian National Constituent Assembly (1986-1987) created spaces for different civil society groups to debate their respective views on the protection of prenatal life, the fulfillment of women's dignity by respecting their reproductive autonomy, and the importance of accommodating women's differences in human reproduction to ensure their exercise of their citizenship rights. It was the first time in Brazil's history that abortion was openly discussed in a public space, and critical to understanding the future debates about the regulatory boundaries of abortion.

Representatives of the Catholic hierarchy and evangelical groups advocated in the Constituent Assembly for the inclusion of a constitutional provision on the protection of life from conception.[25] Counter-movements arose through country-wide women's mobilizations and campaigns resulting in the *Carta da Mulher Brasileira aos Constituintes* (Brazilian Woman's Letter to the Constituents), presented to the President of the Constituent Assembly. This historical document synthesized what women's activists understood as the conditions for women's "full exercise of citizenship." It addressed specific claims of equality in the areas of family, work, health, education, culture and national and international affairs. In the health section, together with the guarantee of integral or holistic health for women in all phases of their lives, two demands related more specifically to the right of choice about pregnancy: "the right to know and decide about her own body" and the "free option for maternity, including pre-natal, birth

[25] CORRÊA, Sonia. Cruzando a linha vermelha: questões não resolvidas no debate sobre direitos sexuais. **Horizontes antropológicos**, Porto Alegre, vol. 12, n. 26, p. 101-121, jul./dez. 2006.

and post-birth assistance, as well as the right to avoid and interrupt pregnancy without harm to health."[26]

This Letter was followed by the proposition of "popular amendments" to the Constitution on women's questions, including one on women's health addressing specifically the right to interrupt pregnancy.[27] According to this proposed amendment, public authorities should have the duty to offer integral health assistance to women, grant men and women the right to freely determine the number of their children and guarantee access to education, information and adequate methods to regulate fertility. Women should have the "right to conceive, avoid conception or interrupt pregnancy until 90 days after it starts" and the State would have the duty to guarantee the exercise of this right in the public service, respecting individuals' ethics and religious beliefs. This was the most contested proposal and was defended by the fact that, at that time, 4 million abortions were performed in Brazil annually, causing the death of more than 400,000 women and leaving more than 800,000 with serious permanent side-effects, such as infertility.[28]

The clash of propositions between the religious groups and the women's movement resulted in the agreement to omit specific provisions permitting or denying the choice to interrupt pregnancy, including a constitutional provision on protection of life from conception.[29] In the final text of Article 5, the protection of life was limited to a general statement that "all persons are equal before the law, without any distinction whatsoever (...), being ensured of inviolability of the right to life, to liberty, to equality, to security and to property".

The Constituent Assembly left unanswered the question of how to regulate abortion. That question would continue to be debated in other arenas. The first proposal of constitutional amendment was made one month after the promulgation of the Constitution. Since then, many attempts to include the protection of life from conception through constitutional amendments, and more than two hundred bills of laws have been proposed to further restrict or to expand access to abortion.[30] Without a specific constitutional provision on abortion, actors with varying points of view began to elaborate the general principles and rights to build the debate on constitutional

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[26] BRAZIL. Chamber of Deputies. **Carta das Mulheres: Aos Constituintes de 1987**. Brasília, 1987. <http://www2.camara.leg.br/atividade-legislativa/legislacao/Constituicoes_Brasileiras/constituicao-cidada/constituintes/a-constituinte-e-as-mulheres/Constituinte 1987-1988-Carta das Mulheres aos Constituintes.pdf>. Accessed on: 16 Mar. 2018.

[27] BACKES, Ana Luiza; AZEVEDO, Débora Bithiah de (Org.). **A sociedade no Parlamento: imagens da Assembléia Nacional Constituinte de 1987/1988**. Brasília: Câmara dos Deputados, Edições Câmara, 2008, p. 86.

[28] SILVA, José Afonso da. **Curso de Direito Constitucional Positivo**. 33. ed. São Paulo: Malheiros, 2011. p. 258.

[29] BARSTED, Leila de Andrade Linhares. Legalização e descriminalização do aborto no Brasil: 10 anos de luta feminista. **Revista Estudos Feministas**, Florianópolis, vol. 0, n. 0, p. 104-130, 1992.

[30] MACHADO, Marta Rodriguez de Assis; MACIEL, Débora Alves. The Battle over Abortion Rights in Brazil's State Arenas, 1995-2006. **Health and Human Rights Journal**, [s.l.], vol. 19, p. 119-131, jun. 2017.

grounds. As no substantial change was possible in the legislature, the battle eventually moved to the Supreme Court, where the Constitution was the center of disputes to assert women's reproductive rights. This has been a pattern in the process of constitutionalization of abortion: it starts with constitutions that are silent on the specific issue of abortion,[31] followed by judicialization of general constitutional principles, such as dignity, and rights, such as to life, health and equality, either to resist or to advance women's rights to choose.[32]

2.2. The Constitution as Adopted

The Brazilian Democratic Constitution has been called the "Citizen Constitution" for being a strong political document of transition from dictatorship to democracy, combining a charter of individual rights, the regaining of political rights and the recognition of social rights and social justice as a constitutional matter.[33] Articles 1 and 2 established the structure of the Brazilian political community, adopting as a fundamental principle, the form of a federative republic, a legal democratic state and the exercise of power by the people either directly or through free elections. It establishes the foundations of the Brazilian Democratic State, including principles of citizenship, the dignity of the person, the building of a free, just and solidary society, the eradication of poverty, marginalization and social inequalities, as well as the promotion of the well-being of all the people, without prejudice to origin, race, sex, color, age, and any other forms of discrimination. This declaration requires the State to pursue these principles as objectives, but also to interpret the whole legal order according to them.

Article 5 protects individual rights, ensuring the inviolability of the rights to life, liberty, equality, security and property, through 78 guarantees, among them, freedom of conscience and religion, free speech, intimacy, privacy, freedom from torture, inhuman or degrading treatment, and the elimination of discrimination and racism. The equal rights clause, equality in the marital relations and the condemnation of discrimination based on sex were victories for the women's movement.

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[31] RUBIO-MARÍN, Ruth. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. **Abortion Law in Transnational Perspective**: Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014, p. 36-54. Translated and published in RUBIO-MARÍN, Ruth. Aborto em Portugal: novas tendências no constitucionalismo europeu. **Revista Direito GV**, São Paulo, vol. 13, n. 1, p. 356-379, jan./abr. 2017.

[32] RUBIO-MARÍN, Ruth. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. **Abortion Law in Transnational Perspective**: Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014, p. 36-54. Translated and published in RUBIO-MARÍN, Ruth. Aborto em Portugal: novas tendências no constitucionalismo europeu. **Revista Direito GV**, São Paulo, vol. 13, n. 1, p. 356-379, jan./abr. 2017.

[33] CARVALHO, José Murilo de. **Cidadania no Brasil**. 23 ed. Rio de Janeiro: Civilização Brasileira, 2017, p. 201; BONETTI, Alinne; FONTOURA, Natália; MARINS, Elizabeth. Sujeito de direitos? Cidadania feminina nos vinte anos da constituição cidadã. **Políticas Sociais**: Acompanhamento e Análise (IPEA), Brasília, vol. 3, n. 17, p. 199-257, 2009.

Article 6 elaborates constitutional social rights: education, health, food, work, housing, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute. The significance given to the right to health made it one of the most important constitutional social rights to be pursued in the Brazilian order. Although many different interests were accommodated in this transition charter,[34] the combination between individual and collective rights is an important element of the Constitution's progressive potential and helped to fuel the debates on women's sexual and reproductive rights in different arenas.

The closest the constitution gets to articulating the right to decide on reproductive matters is the guarantee granted in Article 226, paragraph 7, protecting to the free choice of family planning as a matter of dignity: "based on the principles of human dignity and responsible parenthood, couples are free to decide on family planning; it is incumbent on the State to provide educational and scientific resources for the exercise of this right, prohibiting any coercion on the part of official or private institutions."

Article 4 states that the country will be guided in its international relations by the prevalence of human rights, and adoption of the monist system regarding international human rights treaties. Article 5, paragraph 2, continues: "the rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party." The Constitutional openness to international law provides an important legal opportunity for social movements to integrate international treaties to engender the debates around the Constitution's meaning. The integration of international documents into the national order has fueled national discourses in different directions - to support sexual and reproductive health and rights,[35] but also to call for the protection of life from conception and to propose a charter of rights for the unborn.[36]

In order to expand the means by which citizens can access justice, the Constituent Assembly discussed extending the right to propose judicial reviews beyond the Office of the Attorney General.[37] This was reflected in Article 103 of the new Consti-

[34] NOBRE, Marcos. Indeterminação e estabilidade. Os 20 anos da Constituição Federal e as tarefas da pesquisa em direito. **Novos Estudos do CEBRAP**, n. 82, nov. 2008.

[35] BRAZIL. Congress. Chamber of Deputies. Bill of Law nº 7.441, de 2010. <http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=776234&filename=PL+7441/2010>. Accessed on: 16 Mar. 2018.

[36] BRAZIL. Congress. Chamber of Deputies. **Bill of Law nº 2.155, de 2007**. Institutes the "Day of the Unborn". <http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=510011&filename=PL+2155/2007>. Accessed on: 19 Mar. 2018; BRAZIL. Congress. Chamber of Deputies. **Bill of Law nº 478, de 2007**. Institutes the prioritary protection of the unborn and increases abortion's penalty. <http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=510011&filename=PL+2155/2007>. Accessed on: 19 Mar. 2018.

[37] CARVALHO NETO, Ernani Rodrigues de. Ampliação dos legitimados ativos na constituinte de 1988: revisão judicial e judicialização da política. **Revista Brasileira de Estudos Políticos**, Belo Horizonte, vol. 96, p. 293-326, jul./dez. 2007.

tution, which authorizes bringing constitutional challenges to the Supreme Court by governmental and political authorities, political parties represented in the National Congress, and some types of civil society organizations. As part of this drive towards democratization of the constitutional jurisdiction, the two laws that came after the promulgation of the Constitution to regulate the mechanisms of constitutional challenge - the direct action of unconstitutionality and claim of non-compliance with a fundamental precept - introduced *amici curiae* and the public hearings.[38] Although there are criticisms of their functioning,[39] these mechanisms have increased civil society participation in constitutional jurisdiction.

3. THE SUPREME COURT'S INTERPRETATION OF THE CONSTITUTION

3.1 Overview of Plurality Decisions and Pending Cases

After the unsuccessful efforts to influence the constitutional text, to amend the constitution once it was adopted, and then to enact bills to liberalize or restrict women's access to abortion, groups turned to the Supreme Court in hopes of resolving the issue. Resolving the abortion issue through this Court is challenging, however, because it functions through a system of *plurality of opinions*. The Supreme Court does not grant a collective decision, something that could be called *the* majority judgment of the Court. It issues majority and minority opinions based on the judges' reasoning, each of them deciding the case on its own grounds. Reading a precedent in the Brazilian case law is not easy, because each judge reaches a final ruling through different reasons or different combinations of reasons, not necessarily consistent or coherent among themselves. In this sense, the reading of a decision is more likely to show partial agreements rather than a final judgment in terms of legal and constitutional interpretation.[40] Although a uniquely authoritative judgment from Court decision cannot be

[38] BRAZIL. **Lei nº 9.868, de 10 de novembro de 1999.** Dispõe sobre o processo e julgamento da Ação Direta de Inconstitucionalidade e da ação declaratória de constitucionalidade perante o Supremo Tribunal Federal. <http://www.planalto.gov.br/ccivil_03/leis/l9868.htm>. Accessed on: 20 Mar. 2018.
BRAZIL. **Lei nº 9.882, de 3 de dezembro de 1999**. Dispõe sobre o processo e julgamento da Arguição de Descumprimento de Preceito Fundamental, nos termos do § 1º do art. 102 da Constituição Federal. <http://www.planalto.gov.br/ccivil_03/Leis/L9882.htm>. Accessed on: 20 Mar. 2018.

[39] ALMEIDA, Eloísa Machado de. **Sociedade civil e democracia**: a participação da sociedade civil como amicus curiae no Supremo Tribunal Federal. São Paulo, 2006. Dissertação (mestrado em direito). 196p. Faculdade de Direito. Pontifícia Universidade Católica de São Paulo.

[40] MENDES, Conrado Hübner. **Constitutional courts and deliberative democracy**. Oxford: Oxford University, 2013, p. 111-112; RODRIGUEZ, José Rodrigo. **Como decidem as cortes?** Para uma crítica do direito (brasileiro). Rio de Janeiro: Editora FGV, 2013. p. 79-81.

extracted, each opinion offers a set of recognized constitutional meanings that serves as a foundation for future cases.

The first case on abortion arrived in the Supreme Court in 2004 via a *habeas corpus* application.[41] The litigation started when a Catholic priest appealed against an authorization granted by a lower court judge to interrupt an anencephalic pregnancy. After travelling several instances of appeal until the Supreme Court, the case was dismissed because the woman gave birth to an anencephalic baby while the case was pending. This *habeas corpus* case was followed by three challenges of constitutionality, the anencephalic pregnancy case filed in 2004 and decided in 2012,[42] and two pending cases: the Zika case to determine the constitutionality of how best to accommodate the needs of pregnant women with Zika and of their newborns with microcephaly filed in 2016,[43] and the non-compliance claim to determine whether the criminalization of abortion is unconstitutional filed in 2017.[44]

While advocacy strategies were focused on the pending Supreme Court decision in the Zika case, a Panel of five Justices of the Supreme Court announced an unexpected decision in a *habeas corpus* case in 2016.[45] The Panel, using different reasoning, released doctors accused of abortion from pre-trial detention. Three of the Justices declared that the criminalization of abortion during the first trimester is incompatible with the constitutional guarantees of women's fundamental right to autonomy as part of the constitutional principles of human dignity, physical and psychological integrity relating to health and security, sexual and reproductive rights, and gender equality. Like all *habeas corpus* decisions, this decision is limited to the specific facts of the case, and thus not generally applicable.

Indirectly related to the abortion debate and decided four years before the anencephaly decision, the Court had upheld the Biosafety Law that, among other things, permitting embryo research in certain circumstances.[46] In upholding the constitu-

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[41] BRAZIL. Brazilian Supreme Court. **Habeas Corpus nº 84.025-6/RJ**. Paciente: Gabriela Oliveira Cordeiro. Coator: Superior Tribunal de Justiça. Judge-Rapporteur: Justice Joaquim Barbosa. Brasília, DF, June 25, 2004. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=384874>. Accessed on: 16 Mar. 2018.

[42] BRAZIL. Brazilian Supreme Court. Sentence. **Claim of Non Compliance with Fundamental Precept nº 54.** Judge-Rapporteur: Justice Marco Aurélio. Brasília, DF, April 30, 2013. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[43] BRAZIL. Brazilian Supreme Court. **Direct Action of Unconstitutionality nº 5.581**. Associação Nacional dos Defensores Públicos - ANADEP. Brasília, DF, September 5, 2016. <http://www.agu.gov.br/page/download/index/id/36030134>. Accessed on: 16 Mar. 2018.

[44] BRAZIL. Brazilian Supreme Court. **Claim of Non Compliance with Fundamental Precept nº 442.** Judge-Rapporteur: Justice Rosa Weber. Filed in 8/03/2017 by the political party *Socialismo e Liberdade*.

[45] BRAZIL. Brazilian Supreme Court. Sentence. **Habeas Corpus nº 124.306/RJ**. Judge-Rapporteur: Justice Marco Aurélio. Brasília, DF, March 17, 2017. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=12580345>. Accessed on: 16 Mar. 2018.

[46] BRAZIL. Brazilian Supreme Court. **Sentence**. Direct Action of Unconstitutionality nº 3.510/DF. Judge-Rapporteur: Justice Ayres Brito. Brasília, DF, May 28, 2010. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=611723>. Accessed on: 19 Mar. 2018.

tionality of this law, the Court recognized that the protection of life under Article 5 of the Constitution is not absolute but that there are different degrees of protection, which differentiates the embryo from the unborn and a born person.[47] The decision, reached by 9 majority opinions against 2 minority opinions, with differences in the reasoning, established an important interpretive framework for the anencephaly decision.

3.2 The anencephaly case

In 2012, the Supreme Court went beyond the legal scenario established in the 1940 Penal Code, to include in the Brazilian legal order another reason to explain why the Brazilian Penal Code should not apply to the ending of anencephalic pregancies. According to the decision, taken pursuant to a non-compliance claim, women diagnosed with an anencephalic pregnancy have the right to decide whether or not to carry the pregnancy to term. The direct effects of the decision are significant. They stand for the legal recognition of self-determination of women carrying anencephalic pregnancies. The impact of this decision, however, goes beyond anencephalic pregnancies. It expands the interpretative possibilities of constitutional principles on abortion issues. Drawing from the documents of the case, the viewpoints expressed at the public hearings and on the opinions of the Justices, the following section reconstructs the case and discusses the decision.

3.2.1. The design of the case

According to the initial petition, anencephaly is a fetal malformation caused by defective closing of the neural tube during pregnancy. Medical experts testified that anencephaly is linked to incompatibility with prolonged life outside the womb.[48] Development of the technology of pre-natal diagnosis capable of detecting neural malformations while the fetus is in utero created a new problem for women – the suffering of living with this fatal fetal diagnosis during the gestation of the pregnancy. The Penal Code does not authorize termination of anencephalic pregnancies. Although the first of several attempts to change the law to allow such interruptions was proposed in 1996,[49] none were successful in the federal or state legislatures. Thus, given the threat

[47] ALMEIDA, Eloísa Machado de. Pesquisa com células tronco embrionárias: os argumentos e o impacto da decisão do Supremo Tribunal Federal. In: PIOVESAN, Flávia; SOARES, Inês Virgínia Prado. (Org.). **Impacto das Decisões da Corte Interamericana de Direitos Humanos na Jurisprudência do STF**. 1ed. Salvador: JusPodivm, 2016. p. 23-48.

[48] BRAZIL. Brazilian Supreme Court. **Initial Petition**. Claim of Non Compliance with Fundamental Precept nº 54. Author: Confederação Nacional dos Trabalhadores na Saúde. Rio de Janeiro to Brasília, June 16, 2004. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=339091>. Accessed on: 16 Mar. 2016.

[49] BRAZIL. Congress. Chamber of Deputies. **Bill of Law nº 1.956, de 1996**. <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=17451>. Accessed on: 19 Mar. 2018.

of criminal prosecution, women with anencephalic pregnancies had no choice but to continue them.

Commentators have observed that, in the realm of private medical services, there was more space for a "pact of solidarity" between health professionals and women to terminate such pregnancies and thus no need for judicial authorization.[50] Thus, the criminal prohibition affected particularly those women who relied on the public health system, where there is more surveillance and less space for pacts of solidarity. It was mostly poor women wanting to avoid the suffering caused by such pregnancies who had to seek judicial authorization with uncertain results. Exercising this right was conditioned on securing medical diagnostic and related information, obtaining legal assistance and on the moral and religious views of prosecutors and judges assigned to the case, as described in the initial petition of the case. Although most courts approved the procedure, some courts prohibited it causing uncertainty. Moreover, many of the decisions in favor of the pregnant women were meaningless because they were handed down after the women gave birth.[51]

In order to reach a stable decision with general effects, the *Confederação Nacional dos Trabalhadores da Saúde* (National Confederation of Health workers), with technical support of the *Instituto de Bioética, Direitos Humanos e Gênero* (ANIS), brought a claim of non-compliance with a fundamental precept to the Supreme Court to declare legal the "anticipated delivery" of an anencephalic fetus. The petition argued that the application of Articles 124, 126 and 128, I and II of the Penal Code to the premature delivery of anencephalic pregnancies would violate the following Constitutional provisions: human dignity (Articles 1ºIII), the legality principle (Article 5ºII), and the articles related to the right to health (Articles 6º, caput, and 196).

The termination of pregnancy of a viable fetus involves the tension of opposing values: the potential life of the viable fetus against the liberty and autonomy of the pregnant woman.[52] This tension, however, does not exist in an anencephalic pregnancy, since the fetus is inherently unviable.[53] This case was designed to avoid this tension. As a result, the case was framed as a legality matter: the Penal Code could not

[50] DINIZ, Debora; PENALVA, Janaína; FAÚNDES, Aníbal; ROSAS, Cristião. A magnitude do aborto por anencefalia: um estudo com médicos. **Ciência & Saúde Coletiva**, Rio de Janeiro, vol. 14, n. 0, supl. 1, p. 1623, set./out. 2009.

[51] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Brasília, DF, April 30, 2013, p. 20, 21, 23. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[52] Testimony of Debora Diniz, representative of the NGO ANIS. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54.** Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 28, 2008. p. 103. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf>. Accessed on: 13 Mar. 2018.

[53] DINIZ, Debora; VELEZ, Ana Cristina Gonzalez. Abortion at the Supreme Court: the anencephaly case in Brazil. **Revista Estudos Feministas**, Florianópolis, 16, 2, p. 647-652, may/aug. 2008.

be applied to prohibit abortion of anencephalic pregnancies because ending an anencephalic pregnancy is different from the terminating a pregnancy through abortion.[54]

Abortion is about terminating a pregnancy of a viable fetus. An anencephalic pregnancy is nonviable because of the fetal malformation. The initial petition stressed that the case is not about abortion, but rather about the authorization of therapeutic premature delivery.[55] The aim of the non-compliance claim was to provide an interpretation of the penal provisions on abortion that would not clash with the constitutional principles. More specifically, the petitioners asked the Supreme Court to declare that according to the Brazilian constitutional order the application of the Penal Code could not prevent women from accessing health services to end their anencephalic pregnancies.

The petitioners claimed that Penal Code does not prohibit the ending an anencephalic pregnancy. As a result, applying the Penal Code to the therapeutic delivery of an anencephalic pregnancy would offend the legality principle protected by the Constitution's Article 5º II. According to this principle, a basic pillar of the *rule of law*, it is unfair to apply the Penal Code because the act of premature delivery of an anencephalic fetus is not criminal.

The majority of the opinions confirmed that the premature delivery of an anencephalic fetus is not abortion because there is no viable life to protect. Abortion is a case of voluntary interruption of pregnancy, but not all cases of voluntary interruption of pregnancy are abortion for purposes of criminal law.[56] The Judge-Rapporteur of the case explained that it would be "unreasonable to say that the Supreme Court is examining the decriminalization of abortion, especially because there is a distinction between abortion and therapeutic anticipation of the delivery."[57] Another justice stressed that the Supreme Court is not deciding on abortion, but deciding whether the Penal Code prohibition of abortion should apply to the therapeutic premature delivery of anencephalic pregnancy.[58]

The final decision, issued 8 years after the case started, ended up expanding beyond the issue of legality brought by the initial petition. Before the judgment, the

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[54] BARROSO, Luís Roberto. Bringing Abortion into the Brazilian Public Debate: Legal Strategies for Anencephalic Pregnancy. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Eds.). **Abortion Law in Transnational Perspective:** Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014. p. 258-278.

[55] BARROSO, Luís Roberto. Bringing Abortion into the Brazilian Public Debate: Legal Strategies for Anencephalic Pregnancy. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Eds.). **Abortion Law in Transnational Perspective:** Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014. p. 268-271.

[56] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Carlos Britto, Brasília, DF, April 30, 2013, p. 260.

[57] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Brasília, DF, April 30, 2013, p. 33.

[58] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cármen Lucia, Brasília, DF, April 30, 2013, p. 172.

petitioners determined that it was possible to take the case further, and therefore petitioned the court with arguments on the impact of criminal prohibition on public health and women's reproductive rights, including their dignity, liberty and decisional autonomy.[59] The resulting decision expanded the legal framework by adopting a balancing paradigm that mediated among competing rights and values. The fact that judicial balancing involved weighing women's rights against those of a non-viable life did facilitate the outcome. Nonetheless, the Court constitutionalized a balancing approach to resolve any future abortion disputes.

3.2.2. The Public Hearings

In 2008, the judge-rapporteur arranged for the Supreme Court to hold public hearings that were broadcasted live in the media. The rapporteur allowed 26 participants to defend views for or against granting the request for approval of termination of anencephalic pregnancy through four sessions. Participants included religious, feminist, professional medical and health associations, government representatives and individual actors. The Supreme Court thereby provided a stage for greater public visibility of the movements and counter-movements on abortion– the greatest since the Constituent Assembly. Through the public hearings, the Court enlarged the "community of interpreters" of the Constitution,[60] and harnessed the energies of social conflict to engage through the Constitution rather than against it. Given the limitations of space, this paper cannot do justice to all the testimonies. Instead, it will highlight: the testimonies from women about their suffering due to their anencephalic pregnancies, the testimonies addressing the health, public health and clinical dimensions, and the testimonies addressing the scientific evidence.

Testimonies from women about their suffering: These public hearings were the first time that women went to the Supreme Court to talk about their reproductive lives. In the Constituent Assembly, women had dared to talk about abortion in public for the first time. Thirty years later, they went to the Supreme Court to talk about themselves. Through the public hearings, the Court broke the secrecy around abortion.[61] The power of "concrete factual narratives"[62] of the women faced with the anguish of anencephalic pregnancies allowed them to advance understandings of their gendered treat-

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[59] BARROSO, Luís Roberto. Bringing Abortion into the Brazilian Public Debate: Legal Strategies for Anencephalic Pregnancy. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Eds.). **Abortion Law in Transnational Perspective:** Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014. p. 268-277.

[60] HÄBERLE, Peter. **Hermenêutica Constitucional**: A sociedade aberta dos intérpretes da Constituição: contribuição para a interpretação pluralista e "procedimental" da Constituição. Trad. Gilmar Ferreira Mendes. Porto Alegre: Sergio A. Fabris, 1997, p. 11-12.

[61] SANGER, Carol. **About Abortion**. Cambridge: Harvard University Press, 2017, p. 1-320.

[62] JACKSON, Vicki. Gender equality, interpretation and feminist pluralism. In: IRVING, Helen (ed). **Constitutions and Gender**. Cheltenham: Elgar, 2017, p. 221–251 at p. 237.

ment. The conscription of their bodies for purposes unrelated to their own conscience required them, in the words of one testimony, to dig a grave and not prepare a cradle.[63]

Testimonies from women who had experienced anencephalic pregnancies put human faces on their claims for gender-sensitive public health policy. A moving testimony came through a video of Severina, an illiterate peasant showing how she dealt with the negative impact of criminalization in Brazil, requiring her to peregrine through hospitals and tribunals seeking an authorization to interrupt her anencephalic pregnancy. For Severina, she was not committing an abortion in the criminal sense, she was anticipating the delivery of a fetus who would not survive.[64] Most pro-choice organizations accepted this characterization of the medical procedure. Anti-abortion groups considered that this characterization was a euphemism, because they argued that it did not differ from other abortions.[65]

Pro-choice advocates underscored the need to permit women to terminate their anencephalic pregnancies in order to alleviate the emotional suffering generated by such pregnancies and to enable them to exercise their right of citizenship.[66] In contrast, pro-life advocates recognized women's suffering, but claimed that it should be addressed by offering emotional and psychological support to equip women to develop resilience to face the fatality.[67]

The then Chief of the Women Secretariat defended the right of these women to make free and informed decisions. Women should be seen as subjects of rights and respected as such. She opposed discourses that referred to women as not capable of making

[63] BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, September 4, 2008. p. 44-45. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_4908.pdf>. Accessed on: 13 Mar. 2018.

[64] The documentary "Uma História Severina" (Severina's Story), written and directed by Débora Diniz and Eliane Brum. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 28, 2008. p. 104-106. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf>. Accessed on: 13 Mar. 2018.

[65] Testimony of Lenise Aparecida Martins Garcia. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 28, 2008. p. 87. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf>. Accessed on: 03 Apr. 2018.

[66] Testimony of Dr. Jorge Neto, representative of the Brazilian Federation of Associations of OB-GYN Doctors, BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 28, 2008. p. 20. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf>. Accessed on: 13 Mar. 2018.

[67] Testimony of Dra. Elizabeth Kipman Cerqueira, Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54.** Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, September 16, 2008. p. 7-8. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_16908.pdf>. Accessed on: 13 Mar. 2018.

decisions, observing that "women don't need guardianship, they need information and support to take decisions on their own."[68] It was stressed that the human right to choose means respecting the decision of women both to continue and to interrupt pregnancy.[69]

Testimonies addressing the health, public health and clinical dimensions: Women's organizations stressed the elevated risks for women's physical health due to hypertension and higher risks of eclampsia. Pro-life advocates recognized the increased risk to their physical health, but argued that it was equal to the risks of a twin pregnancy, and should be addressed through prenatal medical support, not through permitting the termination the pregnancy. The representative of the *Conselho Nacional dos Direitos da Mulher* (National Council of Women Rights) expressed the injustice that women's "right to health, understood by the WHO as the right to physical and mental and social well-being, is not respected in a country where the Constitution considers "health as a right of all and a state duty."[70] The fact that Brazil has one of the highest rates of anencephaly in the world, requiring preventive measures, notably the increase of folic acid in women's nutrition,[71] is testimony to this injustice.

The Brazilian public health system is based on the core principles of universality, integrality and equity.[72] One testimony applied them to support the claim that reproductive rights of women are human rights. Universality means that all women have the right to health through public services of good quality; integrality means that all women have the right to be assisted by the public health system in their bio-psychological and social integrity; equity means that women cannot be discriminated against

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[68] Testimony of Nilcéa Freire, Chief of the Women Secretariat at time of the hearing. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, September 16, 2008. p. 38. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_16908.pdf>. Accessed on: 13 Mar. 2018.

[69] Testimony of José Gomes Temporão, Minister of Health in the time of the hearing. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54.** Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, September 4, 2008. p. 4. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_4908.pdf>. Accessed on: 13 Mar. 2018.

[70] Testimony of Jacqueline Pitanguy. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, September 4, 2008. p. 99. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_4908.pdf>. Accessed on: 13 Mar. 2018

[71] Testimony of José Pinotti. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 28, 2008. p. 70. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf>. Accessed on: 13 Mar. 2018.

[72] CAMPOS, Gastão W. S. Reflexões temáticas sobre equidade e saúde: o caso do SUS. **Saúde e Sociedade**, v. 15, n. 2, p. 23-33, maio-agosto 2006. Available at: <https://www.scielosp.org/pdf/sausoc/2006.v15n2/23-33/pt>. Access on 1 May 2018.

for their conditions of class, race, generation and/or other characteristics.[73] Building on these principles, the then Minister of Health explained that the Brazilian Public Health Service is fully equipped to produce a definitive diagnosis while the fetus is still in utero, and underscored the Ministry's duty to attend both to the healthy development of the newborn and care for the mother.[74]

The *Conselho Federal de Medicina* (Federal Medicine Council) was concerned about how state intervention into private medical decisions disrupts the doctor-patient relationship. They argued against the "judicialization of medicine" when doctors are thereby forbidden by law and the courts to practice what they think is necessary for the safeguarding of pregnant women's health.[75]

Testimonies addressing the scientific evidence: The scientific discussion focused on the nature and extent of the malformation, and its compatibility with life. A doctor associated with the *Sociedade Brasileira de Medicina Fetal* (Brazilian Society of Fetal Medicine) explained that medical examinations can prove beyond doubt the absence of cerebral brain in the anencephalic fetus to recognize it as a "neurologic stillborn."[76] As a result, there is no human life requiring legal protection.

Still arguing from science, another testimony took a different perspective to argue that even though the anencephalic fetus lacks cerebral brain activity, it does have a human genome, and therefore should be protected as a living human being from the moment of conception. This position defended the "intrinsic dignity of the person," affirming that "only by the fact of belonging to the human species, this individuum has

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[73] Testimony of Eleonora Menecucci de Oliveira. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, September 16, 2008. P. 23-24. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_16908.pdf>. Accessed on: 13 Mar. 2018.

[74] Testimony of Dr. José Gomes Temporão, then Ministry of Health. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54.** Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, September 4, 2008. p. 8. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_4908.pdf>. Accessed on: 13 Mar. 2018.

[75] Testimony of Dr. Roberto Luiz D'Ávila, spokesman for the Federal Medicine Council, BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54.** Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 28, 2008. p. 8. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf>. Accessed on: 03 Apr. 2018.

[76] Testimony of Dr. Heverton Neves Pettersen, spokesman for the Brazilian Society of Fetal Medicine, BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54.** Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 28, 2008. p. 30. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf>.
Ref. to testimony of Brazilian Society of Fetal Medicine. Accessed on: 03 Apr. 2018.

dignity."[77] As a result, "since the fetus has the human genome, all genetic facts needed in the life of this individual are present", and the fetus was and should be protected as "a living human being" albeit one "with a reduced life expectancy."[78]

One approach to resolving these contrasting views was suggested by the testimony raising the importance of secularity to viable democracies. It was explained that secularity "does not … ignore the importance of religion to the private life of people and moral communities, [but] recognizes that, for public life, the neutrality of the State is an instrument of security and, in this case, an instrument to protect the health and dignity of women."[79]

3.2.3. The Plurality Decision through Ten Opinions

3.2.3.1. The Right to Life

Historically, the purpose of the constitutional right to life has been to prohibit government from imposing capital punishment in an arbitrary way. Courts are beginning to move beyond the negative aspects of the right to require states to take positive measures to provide the conditions that guarantee a dignified life.[80] In addition to the elaboration of the positive nature of the right to life, some constitutions, such as those of many Mexican states,[81] have adopted constitutional provisions to protect life from

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[77] Testimony of Father Luiz Antonio Bento, spokesman for the National Bishops' Confederation, BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54.** Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 26, 2008. p. 6. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_26808.pdf>. Accessed on: 13 Mar. 2018.

[78] Testimony of Father Luiz Antonio Bento, spokesman for the National Bishops' Confederation, BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54.** Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 26, 2008. p. 6. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_26808.pdf>. Accessed on: 13 Mar. 2018; discussed in Julieta Lemaitre, in Catholic Constitutionalism on Sex, Women, and the Beginning of Life, See: LEMAITRE, Julieta. Catholic Constitutionalism on Sex, Women, and the Beginning of Life. In: COOK, Rebecca; ERDMAN, Joanna; DICKENS, Bernard (Eds.). **Abortion Law in Transnational Perspective:** Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014, p. 239-257 at p. 247.

[79] Testimony of Debora Diniz, representative of the NGO ANIS. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 28, 2008. p. 110. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf>. Accessed on: 13 Mar. 2018.

[80] COOK, Rebecca; DICKENS, Bernard; FATHALLA, Mahmoud F. **Reproductive Health and Human Rights**: Integrating Medicine, Ethics and Law. Oxford: Oxford University Press, 2003. p. 161. COOK, Rebecca; DICKENS, Bernard; FATHALLA, Mahmoud F. Saúde reprodutiva e direitos humanos: integrando medicina, ética e direito. Rio de Janeiro: CEPIA, 2004. 608 p.

[81] GRUPO DE INFORMACIÓN EN REPRODUCCIÓN ELEGIDA (GIRE). **Constitutionality of Abortion Law in Mexico City.** Mexico: GIRE, 2010. <https://gire.org.mx/publica2/ConstitutionalityAbortionLawMexicoCity_TD8.

conception provided this is done with due regard to the life of the pregnant woman.[82] Debates in countries with and without constitutional articles protecting life from conception focus on the nature of the right to life: whether it is an objective constitutional value or it accords the unborn a legal right. Courts, for example in Colombia[83] and Portugal,[84] distinguished between the value of life and the legal right to life, according the legal right only at birth.

In Brazil, pro-life groups have tried to project the duty to protect life from conception in all circumstances through the debates on the drafting of the Constitution in the Constituent Assembly, attempts at Constitutional amendment, through legislative proposals and court cases.[85] A categorical approach to the comprehensive protection of life was successfully challenged in this anencephaly case. This more nuanced understanding of the right to life reflects similar reasoning in other Latin American court decisions.[86] The opinions of Justices in the anencephaly decision variously addressed the existence and viability of fetal life in anencephalic pregnancy, the degree of protection that is warranted, and whether termination of such pregnancies amounts to abortion. The Justices debated the nature of life of the fetus and of the woman, often linking it to human dignity which is a fundamental principle protected by the Constitution.[87]

With regard to the existence of life of the anencephalic fetus, one of the minority Justices expressed the view that the absolute protection of life from the moment of conception was constitutionally required under Article 5. According to his explanation: "The anencephalic fetus has life, and even if short, his/her life is constitutionally protected."[88] This position reflects an essentialized understanding of life, where dignity is immanent to the condition of being human, and does not decrease just because the brain is incompletely formed.[89] The Justice accordingly observed that the "rationality of the uni-

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pdf> Accessed on: 21 Mar. 2018; MADRAZO, Carlos A. Más libres. **Debate Feminista**, Mexico City, n. 43, p.192-198, apr. 2011.

[82] COOK, Rebecca J. Modern Day Inquisitions. **University of Miami Law Review**, Miami, vol. 65, n. 3, p. 767-796, 2011. p. 784.

[83] COLOMBIA. Constitutional Court. **Sentencia nº C-355/06**. Bogotá, 2006.

[84] PORTUGAL. Constitutional Court. **Sentencia nº 75/2010**. Lisboa, 23 feb. 2010.

[85] BRAZIL. Supreme Court. Sentence. **Direct Action of Unconstitutionality nº 3.510/DF**. Judge-Rapporteur: Justice Ayres Brito. Brasília, DF, May 28, 2010. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=611723>, Accessed on: 19 Mar. 2018.

[86] BERGALLO, Paola; MICHEL, Agustina Ramón. Abortion. In: GONZALEZ-BERTOMEU, Juan F.; GARGARELLA, Roberto (eds). **The Latin American Casebook**: Courts, constitutions and rights. London: Routledge, 2016. p. 37-38.

[87] BARROSO, Luís Roberto. **A dignidade da pessoa humana no direito constitucional contemporâneo**: a construção de um conceito jurídico à luz da jurisprudência mundial. Belo Horizonte: Fórum, 2012.

[88] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cezar Peluso, Brasília, DF, April 30, 2013, p. 393. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[89] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cezar Peluso, Brasília, DF, April 30, 2013. p. 392. <http://

versal legal protection of life" lies in the fact that, independently of its concrete and singular psychosomatic organization, life is of worth by itself.[90] Another Justice disagreed, explaining that the constitutional protection of life is not linked to a biological essence, but to the development of "subjectivity, conscience and intersubjective relations."[91]

The majority of opinions explained that such life is not viable, basing their reasoning on the scientific explanations about the fatal nature of this developmental anomaly and the reliability of such diagnoses provided at the public hearing.[92] According to the rapporteur of the case, "anencephaly and life are antithetical terms (…) the anencephalic fetus has no life potential."[93] The Judge-Rapporteur continued that the case is not about abortion but about "therapeutic anticipation of delivery"[94]: "Abortion is a crime against life. It protects the potential life. In the case of an anencephalic fetus, there's no possibility of life."[95] Six majority Justices' opinions were based on this fact.

Although the majority agreed that there is no possibility of fetal life to conflict with women's rights, several Justices went further and reasoned that the legal protection of life, especially prenatal life, is not absolute. One of the Justices reasoned on the impossibility of absolute principles in legal orders that recognize fundamental rights.[96] Some Justices reasoned that since the Penal Code already allows for exceptions to the legal prohibition of abortion in cases where it is necessary to protect the life of the pregnant woman or girl and where they have been raped,[97] it cannot be concluded that

redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[90] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cezar Peluso, Brasília, DF, April 30, 2013. p. 393. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[91] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Rosa Weber. Brasília, DF, April 30, 2013. p. 111. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[92] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. P. 45. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[93] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. p. 54. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[94] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. p. 33. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[95] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. p. 54-55. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[96] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Luiz Fux, Brasília, DF, April 30, 2013. p. 160. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[97] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Celso de Mello, Brasília, DF, April 30, 2013. p. 352. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

the legal order protects the nonviable fetus to the detriment of the pregnant woman.[98] Some majority Justices reinforced their reasoning that the protection of life from conception is not constitutionally mandated by explaining that, even though the right to life is internationally protected, such protection is not due from conception.[99]

Some majority opinions emphasized the principle of human dignity to address the situation of the woman. A woman who makes the painful decision to interrupt an anencephalic pregnancy does so out of respect for the dignity of life, and that is why such interruption "cannot be a crime."[100] The right to life of the woman includes life with dignity, not just mere physical existence: "When the Penal Code affirms that there's no punishment in case of abortion to save the woman's life, we should understand it as a life with dignity**.**"[101] Other majority Justices explained that to give real meaning to the principle of human dignity would mean to respect constitutional proclamations that recognize, as basic prerogatives of every person, the rights to: life, health and liberty.[102] One Justice reasoned that human dignity requires "the fruition of life, liberty, self-determination, health and the full recognition of individual rights, especially sexual and reproductive rights."[103]

In contrast, a minority opinion thought that "any human being who is alive (even if dying, as a terminal patient or potentially causing suffering to another, as the anencephalic fetus) has dignity, in its plenitude."[104] The two minority Justices stated that permitting termination of anencephalic pregnancies was a eugenic practice, constitu-

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[98] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Rosa Weber, Brasília, DF, April 30, 2013. p. 123. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[99] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Celso de Mello. Brasília, DF, April 30, 2013. p. 353-355. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[100] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Carmen Lúcia. Brasília, DF, April 30, 2013. p. 179-180. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[101] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: JusticeCarmen Lúcia. Brasília, DF, April 30, 2013. p. 181-182. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[102] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Celso de Mello. Brasília, DF, April 30, 2013. p. 348-349. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[103] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. p. 33. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[104] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cezar Peluso, Brasília, DF, April 30, 2013. p. 383-384, 387-390. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018. BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Ricardo Lewandowski, Brasília, DF, April 30, 2013. p. 247-249. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

ting discrimination against people with disabilities in the exercise of their right to life.[105] This reason built on arguments made by the Catholic Church and pro-life organizations during the Public Hearing, and referenced the Convention on the Rights of Persons with Disabilities.[106] Three majority Justices took a different view, and explained that anencephalic fetuses are not comparable to people with disabilities because such fetuses are inherently not viable, living not long, if at all, beyond live birth.[107]

Using different reasoning five majority Justices referred to human dignity in their opinions. Another Justice dismissed it, explaining that it is not useful for solving this controversy, because it can be used by both sides.[108]

While the interpretation of human dignity remains open, the anencephaly decision brought an important consensus to interpreting the right to life as a non-absolute right. It brought constitutional legitimacy to the system of legal exceptions to the criminal prohibition of abortion. As a result, future proposals in any branch of government to limit women's rights based on the protection of human life from conception will have to address how this Constitutional Court has constitutionalized a system of non-absolute protection.

3.2.3.2. The Right to Health

The constitutional right to health can be framed narrowly as the right to health services, or broadly as a right to physical and mental health and social well-being,

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[105] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cezar Peluso, Brasília, DF, April 30, 2013. p. 390-398. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018. BRAZIL. Brazilian Supreme Court. **Sentence** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Ricardo Lewandowski, Brasília, DF, April 30, 2013. p. 247-290. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[106] See, for example, Congressman Luiz Bassuma's testimony during the public hearing: BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, August 28, 2008, p. 43. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_28808.pdf>. Accessed on: 13 Mar. 2018.

[107] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. p. 33. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.
BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Rosa Weber, Brasília, DF, April 30, 2013. p. 90. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.
BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cármen Lúcia. Brasília, DF, April 30, 2013. p. 206. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[108] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Gilmar Mendes, Brasília, DF, April 30, 2013. p. 288. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

consistently with World Health Organization's definition of health as "a state of complete physical, mental and social well-being, and not only the absence of disease or infirmity."[109] The Brazilian Constitution's Article 6 frames health as a social right along with other such rights, including nutrition, security and protection of motherhood. Article 196 stresses the importance of equal access, and explains that

> *Health is the right of all and the duty of the National Government and shall be guaranteed by social and economic policies aimed at reducing the risk of illness and other maladies and by universal and equal access to all activities and services for its promotion, protection and recovery.*

Article 226, paragraph 7, underscores the social well-being dimension of health by requiring the states to provide the means to plan one's family as a matter of human dignity, and Article 227 requires the allocation of a percentage of public health funds to assist mothers and infants.

In recognizing women's right to terminate their anencephalic pregnancies as part of their constitutional right to health, seven Justices understood health broadly to go beyond mere physical existence to include mental and social well-being. In so doing, they brought new meaning to the right to health. They recognized that "it's not only the life of physical health, it's also mental and psychological health" that are in question in the case.[110] Another Justice elaborated that denial of services in such situations has a "strong impact on women's mental health, including psychological distress, anguish, guilt, suicidal thoughts and fixation in the fetal image".[111] In referencing the World Health Organization's definition of health,[112] another justice explained that "it seems uncontroversial that imposing the continuation of the pregnancy of an anencephalic fetus can lead to a devastating situation for the woman (...) with morbid feelings, sadness and despair."[113] This same Justice was concerned about the social well-being

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[109] WORLD HEALTH ORGANIZATION. Constitution of the World Health Organization. 1946. <http://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1> Accessed on: 19 Mar. 2018.

[110] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Carmen Lúcia. Brasília, DF, April 30, 2013. p. 193. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[111] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Gilmar Mendes. Brasília, DF, April 30, 2013. p. 286. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[112] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. p. 60. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 20 Mar. 2018.
[See] FINE, Johanna; MAYALL, Katherine; SEPÚLVEDA, Lilian. The Role of International Human Rights Norms in Liberalization of Abortion Laws Globally. **Health and Human Rights Journal**, vol 19, n. 1, p. 74, jun. 2017. <http://sxpolitics.org/health-and-human-rights-journal-vol-19-issue-1-june-2017/17706>. Accessed on: 28 Mar. 2018.

[113] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. p. 62-63.

dimension of health. He referenced the anguish women faced when attempts are made to instrumentalize their bodies for other purposes that are not of their choosing,[114] such as the possibility of donating organs of an anencephalic newborn.

In emphasizing the social well-being dimensions of health, three judges compared this mental suffering as a component of the right to be free from torture and inhuman and degrading treatment. One Justice explained that "the continuation of the pregnancy generates in the woman a serious psychological damage; that is why forbidding the termination of the pregnancy under the threat of criminal law is equal to torture, forbidden by Article 5 of the Federal Constitution."[115] Another Justice referenced the UN Human Rights Committee's decision in the *K.L. v Peru* case, holding that forcing a woman to carry an anencephalic pregnancy to term was a form of torture.[116] Still other Justices reasoned that Brazil is obligated, as party to several American conventions,[117] not to subject women with anencephalic pregnancies to intense physical or psychological suffering, which they considered a form of torture and inhuman and degrading treatment.[118]

These majority opinions variously recognized that the Penal Code prohibition of abortion expropriates women's bodies for purposes "unrelated to their own priorities and aspirations."[119] The traumatic effects of such pregnancies on women's mental health and social well-being was one of the determining features of this Court's holding that such terminations were constitutionally permissible. In so holding, the Court constitutionalized a holistic concept of health to include mental and social well-being, not just a narrow physically-based meaning of health.

3.2.3.3. Proportionality

<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[114] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. p. 52. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 20 Mar. 2018.

[115] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Luiz Fux. Brasília, DF, April 30, 2013. p. 162. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[116] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio, Brasília, DF, April 30, 2013. p. 65. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[117] American Convention on Human Rights, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women and the Inter-American Convention to Prevent and Punish Torture.

[118] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cármen Lúcia, Brasília, DF, April 30, 2013, p. 220. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018. BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio, Brasília, DF, April 30, 2013. p. 67-68. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[119] CANADA. Supreme Court. **R. v. Morgentaler.** [1988] 1 SCR 30. Judgment nº 19556. Jan. 28, 1988.

Although most Justices "solved" the case discussing the right to life, they went further to engage in balancing-type approaches, recognizing constitutional rights of women, including their right to health. Justices did this in different ways: some using the proportionality rule, others discussing competing constitutional values and even considering the effectiveness of criminal law. They also considered different values in the meaning of health, liberty, dignity, privacy. Despite these differences, an important outcome is the recognition of the value of constitutional balancing to mediate different rights and values in abortion cases.

The proportionality approach is defined as the "three consecutive standards of assessment, through which a court must proceed in assessing the constitutionality of a statute."[120] In the abortion context, it requires that a court assess whether criminalization of abortion is: i. a suitable measure to protect unborn life; ii. necessary to achieve the constitutionally legitimate aim of protecting unborn life and whether criminalization is the least restrictive means available to protect unborn life; and iii. strictly proportionate, that is whether the benefits of criminalization that encroaches a constitutional right outweigh its burdens.[121] The criminal prohibition must pass each review in order to be declared constitutional. If one review fails, there is no need to continue with subsequent reviews, and the statute must be declared unconstitutional.[122]

In applying the proportionality framework, one Justice acknowledged that abortion might be a suitable measure to protect unborn life, but it is not the least restrictive means to do so, in view of the need "to protect the health, integrity and liberty of the pregnant woman…."[123] Other Justices simply balanced competing rights.

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[120] UNDURRAGA, Verónica. Proportionality in the constitutional review of abortion law. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Eds.). **Abortion Law in Transnational Perspective**: Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014, p. 82. Translated and published in UNDURRAGA, Verónica. O princípio da proporcionalidade no controle de constitucionalidade das leis sobre aborto, **Revista Publicum**, vol. 2, n.1, p.15-44, 2016. http://www.e-publicacoes.uerj.br/index.php/publicum/article/view/25160 Accessed Mar 28, 2018. SILVA, Virgílio Afonso da. O proporcional e o razoável. **Revista dos Tribunais**, n. 798, p. 23-50, 2002. p. 23. Available at: <http://www.revistas.unifacs.br/index.php/redu/article/viewFile/1495/1179>. Accessed on: 1 Mar. 2018.

[121] UNDURRAGA, Verónica. Proportionality in the constitutional review of abortion law. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Eds.). **Abortion Law in Transnational Perspective**: Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014, p. 81-94. Translated and published in UNDURRAGA, Verónica. O princípio da proporcionalidade no controle de constitucionalidade das leis sobre aborto, **Revista Publicum**, vol. 2, n.1, p.15-44, 2016. http://www.e-publicacoes.uerj.br/index.php/publicum/article/view/25160 Accessed Mar 28, 2018.

[122] UNDURRAGA, Verónica. Proportionality in the constitutional review of abortion law. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Eds.). **Abortion Law in Transnational Perspective**: Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014, p. 81-94. Translated and published in UNDURRAGA, Verónica. O princípio da proporcionalidade no controle de constitucionalidade das leis sobre aborto, **Revista Publicum**, vol. 2, n.1, p. 15-44, 2016. http://www.e-publicacoes.uerj.br/index.php/publicum/article/view/25160 Accessed Mar 28, 2018.

[123] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Rosa Weber. Brasília, DF, April 30, 2013. p. 130. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

For example, the rapporteur explained: "even though we recognize the right to life to the anencephalic fetus …, this right would give way in a balancing evaluation, to the right to dignity of the person, liberty in the sexual realm, autonomy, privacy, physical, psychological and moral integrity and health."[124]

Different Justices addressed the disproportionality of applying criminal law in the case. For example, one Justice asserts the *ultima ratio* principle of criminal law: "its intervention in social relations should be minimal, not only because it is not efficient as a regulator of conduct, but because this inefficiency generates social and economic costs."[125] Accordingly, criminal law should be used only when there is no better alternative to protecting prenatal life, and when it is rational, meaning the benefits of its use are greater than the costs – conditions that would not apply in this case.[126] One Justice reasoned that the use of the Penal Code to prohibit the ending of anencephalic pregnancies disproportionately impacts on women, especially poor women, with such pregnancies because of the physical and mental anguish that they suffer."[127] He continued, "the penalization of the pregnant woman of an anencephalic fetus doesn't reveal itself as necessary to the ends of the punitive law, but rather demonstrate the disproportionality of the sanction in face of the dignity of the unfortunate woman, foundation of the Democratic State and a guarantee of the category of fundamental right".[128]

The justices voting favorably on the claim balanced the rights of the anencephalic fetus with the rights of pregnant women to physical and psychological health, human dignity and to choose. According to one Justice, the case involved the balancing the right to life of the unborn with the sexual and reproductive rights of women, "the right to control their own fecundity and the right to choose, in a free, autonomous and responsible way about questions related to their own sexuality, which are the

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[124] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio, Brasília, DF, April 30, 2013, p. 69.

[125] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Rosa Weber. Brasília, DF, April 30, 2013. p. 130. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018. BARATTA, Alessandro. Princípios do direito penal mínimo: para uma teoria dos direitos humanos como objeto e limite da lei penal. **Doutrina Penal**, Burenos Aires, n. 10-40, p. 623-650, 1987. Available at: http://danielafelix.com.br/doc/ALESSANDRO%20BARATTA%20Principios%20de%20direito%20penal%20minimo.pdf. Accessed on: 1 Apr. 2018.

[126] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Rosa Weber. Brasília, DF, April 30, 2013. p. 134 <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[127] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Luiz Fux. Brasília, DF, April 30, 2013, p. 165 <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 03 Apr. 2018.

[128] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Luiz Fux. Brasília, DF, April 30, 2013, p. 169 <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018

expressive projection of the human rights recognized to women by the successive UN international conferences in the 90's."[129]

Six justices referenced the rights to liberty and the right to choose as constitutional rights to be balanced. Some Justices explicitly referred to the woman's right to choose in the case as a fundamental right: the "free exercise [...] of personal self-determination, freedom,"[130] or, as one Justice explains:

> *Protecting the woman in a case of non-viability of the extra-uterine life of the fetus is to guarantee concretely her freedom of choice on her reproductive role, recognizing her fundamental right. It is not in question the right of the fetus, but the right of the pregnant woman to determine her own choices and her own valorative universe. And it is precisely this that is being discussed in this case: the right of the woman to choose about the way she wants to live.*[131]

Going further, one Justice considered autonomy over the body as a condition to enjoy other rights: "Who is not free to know and live your own limits is not free to any other experience. Who does not dominate your own body, is not able to have any other right."[132]

Three Justices addressed women's decisional autonomy in the context of women's sexual and reproductive rights. The Justice Rapporteur affirmed that "granting the decision to women is a necessary measure facing the text of the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women, (...) in which article 4 includes as women's human rights the right to physical, mental and moral integrity, right to liberty, to dignity and not to be subjected to torture."[133] One Justice explained that the right to life, even though it has an "irrefutable magnitude", it should be balanced with women's sexual and reproductive rights, including "the right to perform, under certain circumstances, a safe abortion, the right to control her own fecundity and the right to choose, in a free, autonomous and responsible way, about questions rela-

[129] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Celso de Mello. Brasília, DF, April 30, 2013, pp. 317 <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018

[130] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Celso de Mello, Brasília, DF, April 30, 2013. p. 360. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 21 Mar. 2018.

[131] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Rosa Weber, Brasília, DF, April 30, 2013. p. 135. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[132] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Carmen Lúcia, Brasília, DF, April 30, 2013. p. 236. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[133] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio, Brasília, DF, April 30, 2013, p. 68-69. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 03 Apr. 2018.

ted to her sexuality." Accordingly, these rights are an "expressive projection" of the human rights recognized to women by the UN Conferences in Vienna, Cairo and Beijing.[134] One Justice referenced on these international documents and the Convention on the Elimination of All Forms of Discrimination against Women and the Inter-American Convention to Prevent and Punish Torture to explain how they "guarantee, in an effective way, the woman's right to make choices that will take her to the path to health and not suffering".[135]

One opinion questioned the effectiveness of the Penal Code prohibition of abortion in protecting prenatal life, explained that there is a "growing world tendency" to privilege "positive state actions to protect the fetus," consistency with women's rights, for example, through provision of voluntary counseling services, and the creation of social measures to support future mothers in the event they freely choose to continue with their pregnancies.[136]

Other constitutional courts have called for positive measure to protect prenatal life consistently with women's rights. For example, the Portuguese Constitutional Court, in upholding a law allowing women to decide whether to have an abortion during the first 10 weeks of pregnancy, considered non-directive counselling as sufficiently protective of unborn life.[137] It clarified that the purpose of counseling was to "explain, in a climate of tranquility and utter respect for the decisional autonomy of the pregnant woman, the existence of assistance measures which may lead, from her own initiative, to consider an alternative solution to that of the interruption of pregnancy."[138]

The Portuguese Court elaborated that positive measures to protect unborn life require the state to address risk factors for unwanted pregnancy through preventive policies supporting sex education, contraception and policies enabling motherhood, family life and child-friendly environments.[139] One commentator explains:

> *The 2010 Portuguese decision offers a framework to support abortion on request in a balance between women's dignity and reproductive autonomy, and the dignity and respect due to unborn human life, as long as the state lives up to its task of ensuring that*

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[134] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Celso de Mello, Brasília, DF, April 30, 2013. p. 317-318. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[135] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Carmen Lúcia, Brasília, DF, April 30, 2013. p. 220. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018

[136] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Gilmar Mendes, Brasília, DF, April 30, 2013. p. 285. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018,

[137] PORTUGAL. Portuguese Constitutional Court. **Sentence** nº 75/2010. Lisboa, 23 feb. 2010.

[138] PORTUGAL. Portuguese Constitutional Court. **Sentence** nº 75/2010. Lisboa, 23 feb. 2010, cfr. §11.9.2.

[139] PORTUGAL. Portuguese Constitutional Court. **Sentence** nº 75/2010. Lisboa, 23 feb. 2010, cfr. §11.4.18.

sufficient preventive and enabling policies are adopted to properly convey the constitutional imperative of not trivializing human reproduction.[140]

In adopting balancing method of judicial review, albeit in different ways, various majority opinions began to discipline their methods of judicial review, including by questioning the effectiveness of the Penal Code in protecting prenatal life. In the words of one commentator, some opinions recognized "the need for a less categorical approach, one that recognizes competing interests, and seeks to resolve constitutional conflict through a reasoned balance…curbing the tendency of judgments to be one-sided and insufficiently justified."[141]

3.2.3.4. Other Constitutional Principles

Although it is not possible to examine all the aspects of the opinions, it is important to mention that different judicial opinions also applied other constitutional principles, including separation of powers, secularity and equality, to the facts of this case.

The two Justices who voted against allowing the procedure addressed the question of separation of powers. They reasoned that the Supreme Court would not be the legitimate arena to resolve this issue because the creation of another legal exception to the criminal prohibition of abortion would be the role of the Congress. In this line, in granting the authorization, the Supreme Court would be usurping the role of Congress.[142] Two other Justices disagreed, explaining that the Court would be deciding only on the application of the criminal law.[143]

In contrast, one Justice affirmed that it is the particular role of the Supreme Court to guarantee the rights of vulnerable groups: "evidently, the majority principle has an

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140 RUBIO-MARÍN, Ruth. In COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Eds.) **Abortion Law in Transnational Perspective**: Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014, p. 36-55. Translated and published in RUBIO-MARÍN, Ruth. Aborto em Portugal: novas tendências no constitucionalismo europeu. **Revista Direito GV**, São Paulo, vol. 13, n. 1, p. 356-379, jan./abr. 2017.

141 UNDURRAGA, Verónica. Proportionality in the constitutional review of abortion law. In: COOK, Rebecca J.; ERDMAN, Joanna N.; DICKENS, Bernard M. (Eds.). **Abortion Law in Transnational Perspective**: Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014, p. 77. Translated and published in UNDURRAGA, Verónica. O princípio da proporcionalidade no controle de constitucionalidade das leis sobre aborto, **Revista Publicum**, vol. 2, n.1, p.15-44, 2016. http://www.e-publicacoes.uerj.br/index.php/publicum/article/view/25160 Accessed Mar 28, 2018.

142 BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Ricardo Lewandowski, Brasília, DF, April 30, 2013. p. 245. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

143 BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Rosa Weber, Brasília, DF, April 30, 2013. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018. 112-123. BRAZIL. Brazilian Supreme Court. **Sentence**.. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cármen Lúcia, Brasília, DF, April 30, 2013. p. 215-222. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

important role in the decision-making process that takes place within governmental instances, but we cannot legitimize, in terms of a substantive conception of constitutional democracy, the suppression, frustrations and annihilation of fundamental rights, like the free exercise of personal self-determination and freedom."[144]

Although the Constitution does not address separation between church and state expressly, three Justices discussed the importance of secularity in the judicial arena, referencing the freedom of conscience (Article 5, VI) and the prohibition of the establishment of religion (Article 19). The Rapporteur explained that judges are obligated to apply the law without moral and religious orientations.[145] Another Justice reasoned that in a secular republic, founded on a democratic basis, law cannot be subordinated to religion, explaining that the authorities are commissioned to apply the law, not impose their own religious convictions.[146] For a third Justice, secularity was a matter of respecting religious freedom and the equality principle, since there is a variety of religious beliefs.[147]

Justices from both sides addressed different dimensions of equality. Drawing on the Vienna Declaration, one Justice reasoned that when women's rights are recognized as part of universal human rights, the principle of equality has given centrality to the "full participation of women, in equal conditions, in the political, civil, economic, social and cultural lives, in national, regional and international levels."[148] One minority opinion thought that authorizing the termination of anencephalic pregnancy would be a "hateful form of discrimination" that equals racism, sexism and speciesism."[149] A majority opinion reasoned that the disproportionate impact of criminalization on poor women[150] makes

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144 BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Celso de Mello, Brasília, DF, April 30, 2013. p. 358. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

145 BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio, Brasília, DF, April 30, 2013. p. 43. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

146 BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Celo de Mello, Brasília, DF, April 30, 2013. p. 332-333. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

147 BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Carmen Lúcia, Brasília, DF, April 30, 2013. p. 229. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

148 BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Celso de Mello, Brasília, DF, April 30, 2013. p. 320. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

149 BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cezar Peluso, Brasília, DF, April 30, 2013. p. 383-384. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

150 BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Luiz Fux, Brasília, DF, April 30, 2013. p. 170. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

"society even more unequal."[151] The impact was exacerbated for poor women, because in order for them to obtain a court authorization, they need legal assistance that would be difficult for them to secure, given their lack of financial means.[152] As a result, these women face discrimination on grounds of their socio-economic conditions.[153]

Some Justices explained that the denial of termination services to women with anencephalic pregnancies has multiple discriminatory consequences for the exercise of their right to health. One Justice explained that the termination of anencephalic pregnancy is a matter of public health that affects poor women disproportionately.[154] Another Justice understood the denial of sex-specific health services as a form of sex discrimination: "If men would get pregnant, the authorization to interrupt the anencephalic pregnancy would always have been legal."[155] Another Justice stressed the obligations of Brazil as a party to the Convention on the Elimination of All Forms of Discrimination against Women to eliminate discrimination against women in the field of health care.[156]

The various opinions that addressed separation of powers, secularity and equality made these issues claimable as constitutional matters. Perhaps most important were the opinions that addressed the constitutional mandate to eliminate all forms of discrimination against women and to achieve their substantive equality. While some courts have been reluctant to hold that where the sex-specific reproductive health care needs of women and girls are not reasonably accommodated,[157] such lack of accommodation is a form of discrimination against women that is contrary to state obligations under the UN Convention of the Elimination of All Forms of Discrimination against Women.[158] In

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[151] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Carmen Lúcia. Brasília, DF, April 30, 2013. pp. 231-232. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[152] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cármen Lúcia, Brasília, DF, April 30, 2013. p. 201-202. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 21 Mar. 2018.

[153] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cármen Lúcia, Brasília, DF, April 30, 2013. p. 201-202. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[154] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Luiz Fux. Brasília, DF, April 30, 2013, p. 170. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[155] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Ayres Britto, Brasília, DF, April 30, 2013. p. 264. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[156] BRAZIL. Brazilian Supreme Court. **Sentence**. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Carmen Lúcia. Brasília, DF, April 30, 2013. p. 220. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[157] COOK, Rebecca; HOWARD, Susannah. Accommodating Women's Differences under the Women's Anti-Discrimination Convention. **Emory Law Journal**, vol 56, n. 4, 1040-1092, 2007. Available at: <https://ssrn.com/abstract=1029375>. Accessed on: 26 Mar. 2018.

[158] UNITED NATIONS COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW). **CEDAW General Recommendation nº 24:** Article 12 of the Convention (Women and Heath). [s.l.], A/54/38/Rev.1,

deciding not to apply the Penal Code prohibition of abortion to anencephalic pregnancies, this Court accommodated women's sex-specific health care needs. This decision is a promising step toward the achievement of substantive equality for women under the Constitution's Article 5, "men and women have equal rights and duties under the terms of this Constitution".

4. THE COURT'S RECORD IN CONSTITUTIONALIZING ABORTION

The record of the Supreme Court of Brazil in constitutionalizing abortion might best be determined by how the Court elaborated the meaning of women's "Full Exercise of Citizenship," a fundamental principle of the Constitution's Article 1, initially articulated in the *Carta da Mulher Brasileira aos Constituintes* (Brazilian Woman's Letter to the Constituents). Although the case was focused on anencephalic pregnancy, the Court advanced understandings of why abortion is necessary for women's exercise of their citizenship rights, consistent with the notion of the Constitution as the "Citizen Constitution". The Court moved from a religious narrative of constructing women's suffering as natural and in no need of justification, to a constitutional narrative where states have duties to comply with women's rights to life, health and to be free from torture and inhuman and degrading treatment. Where states do not comply, they now need to give reasons for noncompliance.

The majority opinions consolidated the meaning of the right to life as a non-absolute right. Their recognition of the exceptions to the criminal prohibition of abortion as constitutional and the acknowledgement that the interests of the unborn have to be protected consistently with women's rights, especially their right to health and well-being, is significant. They departed from the Catholic position expressed at the public hearings and in the minority opinions that assumes, without justification, that women can be forced by the criminal law to accept their 'natural' status as mothers, as opposed to their status as citizens with rights to decide to undertake the responsibilities of motherhood by choice.

An important step in the process of constitutionalization of abortion in Brazil can also be understood in how the Supreme Court recognized as constitutionally significant the harms women suffer through the criminal prohibition of termination services. One majority opinion relied on human rights treaties to explain that Brazil is obligated

chap. I, 1999. Available at: <http://www.refworld.org/docid/453882a73.html>. Accessed on: 21 Mar. 2018. para 11; **CEDAW General Recommendation** nº **28**, The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, forty-seventh session, UN Doc. CEDAW/C/GC/28, 2010. Available at: <http://www.refworld.org/docid/4d467ea72.html>. Accessed March 26, 2018; see; COOK, Rebecca; UNDURRAGA, Veronica. Article 12 [Health]. In: FREEMAN, Marsha M.; CHINKIN, Christine; RUDOLF, Beate (Eds.), **The UN Convention on the Elimination of All Forms of Discrimination against Women:** A Commentary. Oxford: Oxford University Press, 2012. p. 311-333.

to "guarantee, in an effective way, the woman's right to make choices that will take her on a path to health and not suffering."[159] The concrete narratives of the suffering caused by anencephalic pregnancies presented at the public hearings perhaps explain why the majority Justices did not apply the criminal prohibition in this case. In framing it as a harm to the right to health, they overcame the religious perspective that "finds redemptive value in suffering" that justifies the criminalization of abortion.[160] This mindset was apparent before the judgment, and found voice in one minority opinion.[161]

For the first time, the Supreme Court in several majority opinions has now considered women's rights to health and well-being to be protected in the constitutional architecture. In so doing, the Court constitutionalized integral or holistic concept of health to include mental and social well-being, as defined by the World Health Organization, not just as a narrow physically-based meaning of health. In a sense, the Court took important steps toward the constitutionalization of the three core principles of the Brazilian Public Health system of integrality, universality and equity, as explained at the Public Hearings.[162] The principle of integrality of the Brazilian Public Health system is based on a holistic concept of health, whereby physical, mental and social well-being are integral parts of health. The integral or holistic understanding of health is significant in this debate, because it has the potential to expand the meaning of the life exception to the criminal prohibition. Where the state's concern in women's well-being is limited only to "an interest in brute physical survival - reasoning about women as if they had no social, intellectual, or emotional identity that transcended their physiological capacity to bear children,"[163] that limitation offends the integrality principle of the Public Health system.

The universality principle means that all women have the right to public health services of good quality, requiring the state to deliver sex-specific health care services of good quality to women. Equity means that no women can be discriminated against on any ground, such as her sex, age, marital status, race, ethnicity or class,

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[159] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cármen Lúcia, Brasília, DF, April 30, 2013. p. 220. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

[160] LEMAITRE, Julieta. Catholic Constitutionalism on Sex, Women, and the Beginning of Life. In: COOK, Rebecca; ERDMAN, Joanna; DICKENS, Bernard (Eds.). **Abortion Law in Transnational Perspective** Cases and Controversies. Philadelphia: University of Pennsylvania Press, 2014. p. 246.

[161] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Cezar Peluso, Brasília, DF, April 30, 2013, p. 404-405.

[162] Testimony of Eleonora Menecucci de Oliveira. BRAZIL. Brazilian Supreme Court. **Transcription of the Public Hearing of the Claim of Non Compliance with Fundamental Precept n. 54**. Author: Confederação Nacional dos Trabalhadores na Saúde. Judge-Rapporteur: Justice Marco Aurélio Mello. Brasília, DF, September 16, 2008. P. 23-24. <http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/ADPF54__notas_dia_16908.pdf>. Accessed on: 13 Mar. 2018.

[163] SIEGEL, Reva. Reasoning from the body: A historical perspective on abortion regulation and questions of equal protection. **Stanford Law Review**, Stanford, vol. 44, n. 2, p. 261-381, jan. 1992. p. 362-363.

requiring the public health system to ensure that it does not overlook or neglect health services that only women, or subgroups of women, need, such as legal abortion services.

Building on UN Human Rights Committee's decision in *K.L.*,[164] the majority Justices in the anencephaly case found a violation of the right to be free from torture. The reasoning of these Justices has been followed in: two subsequent decisions of the UN Human Rights Committee,[165] a CEDAW Inquiry Report into failure of Northern Ireland to clarify and amend its criminal abortion law that does not allow abortion in cases of severe, including fatal fetal anomaly,[166] and the Northern Irish High Court holding that such failure violates the Northern Irish obligations under the European Convention on Human Rights.[167] When measured in transnational terms, the Brazilian Supreme Court's record in this case is significant.

In using proportionality-based reasoning, the Court moved beyond the dichotomous thinking of either protecting prenatal life or respecting women's rights. One important emerging discourse in the case recognized that there is a range of positive measures to protect prenatal life consistently with women's rights, such as counselling and social assistance for women.[168] Positive measures include those initiatives to pro-

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[164] The other Justices, in a collective vote, cited as an argument the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, established in the Human Rights Committee, General Comment No. 20, art. 7. See: UNITED NATIONS HUMAN RIGHTS COMMITTEE. **K.L. v. Peru -** Communication Nº 1153/2003. Peru, 2005. <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/KL%20HRC%20final%20decision.pdf>. Accessed on: 21 Mar. 2018.

[165] UNITED NATIONS HUMAN RIGHTS COMMITTEE. **Mellet v. Ireland.** Views Adopted by the Committee under article 5(4) of the Optional Protocol, Concerning Communication No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013.) 9 Jun. 2016. <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/CCPR-C-116-D-2324-2013-English-cln-auv.pdf>. Accessed on: 21 Mar. 2018; UNITED NATIONS HUMAN RIGHTS COMMITTEE. **Whelan v. Ireland** Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2425/2014, CCPR/C/119/D/2425/2014. 12 Jun. 2017. <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f119%2fD%2f2425%2f2014&Lang=en>. Accessed on: 21 Mar. 2018.

[166] UNITED NATIONS COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW). **Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women**. [s.l.], 2018. <http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/GBR/INT_CEDAW_ITB_GBR_8637_E.pdf>. Accessed on: 19 July 2018.

[167] NORTHERN IRELAND. High Court of Justice, Queen's Bench. Northern Ireland Human Rights Commission **Application for Judicial Review** in the Matter of the Law on Termination of Pregnancy in Northern Ireland. [2015] NIQB 96 (30 November 2015). <https:// www.judiciary-ni.gov.uk/sites/judiciary-ni.gov.uk/files/decisions/The%20Northern%20Ireland%20Human%20Rights%20Commission%E2%80%99s%20Application.pdf>. Accessed on: 21 Mar. 2018. In 2017, the Attorney General for Northern Ireland & Anor appealed form the High Court of Justice to The Northern Ireland Human Rights Commission (NICA 42), ant the appeal was allowed in 29 June, 2017. See: NORTHERN IRELAND. Northern Ireland Human Rights Commission. **The Attorney General for Northern Ireland & Anor v. The Northern Ireland Human Rights Commission**, NICA nº 42. 29 June, 2017. <http://www.bailii.org/nie/cases/NICA/2017/42.html>. Accessed on: 21 Mar. 2018.

[168] BRAZIL. Brazilian Supreme Court. **Sentence.** Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Gilmar Mendes. Brasília, DF, April 30, 2013. , p. 285. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334>. Accessed on: 16 Mar. 2018.

tect safety in childbirth, as required by the decision of the Committee on the Elimination of Discrimination against Women in the *Alyne* case. In that decision, Brazil was held accountable for failure to prevent post-partum hemorrhage, a preventable cause of maternal mortality,[169] most recently estimated in Brazil to be 44 maternal deaths per 100,000 live births.[170] Other health measures to protect prenatal life consistently with women's rights include reducing stillbirths of wanted pregnancies, now estimated in Brazil to be 8.6 stillbirths out of every 1,000 births,[171] and addressing the social determinants of healthy birth outcomes, such as by providing folic acid food supplements during pregnancy.[172] One study has found that if maternal intake of folic acid can be increased around the time of conception, the risk of fetal neural tube defects may be reduced by 60–70%.[173]

Underscoring the need to address abortion non-punitively in a broader context of reproductive justice, one commentator asserts that "States that protect new life selectively, favoring choice-restricting means over choice-supporting means of protecting life, deserve less deference, ethically, politically and legally."[174] Judicial scrutiny of whether a state protects life comprehensively across a spectrum of women-supportive policies that

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See also HC nº 124.306 decision. BRAZIL. Brazilian Supreme Court. **Sentence**. Habeas Corpus nº 124.306/RJ. Judge-Rapporteur: Justice Marco Aurélio. Brasília, DF, March 17, 201709 de agosto de 2016. Redator do Sentence Justice Luís Roberto Barroso. <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=12580345>. Accessed on: 20 Mar. 2018.

[169] COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW). **Alyne v. Brazil:** CEDAW/C/49/D/17/2008. [s.l.], 2011. <http://www2.ohchr.org/english/law/docs/CEDAW-C-49-D-17-2008.pdf>. Accessed on: 21 Mar. 2018. COOK Rebecca. Human Rights and Maternal Health: Exploring the Effectiveness of the *Alyne* Decision. **Journal of Law, Medicine and Ethics** 103-123, vol. 41 n. 1, 2013. Available at: <https://onlinelibrary.wiley.com/doi/abs/10.1111/jlme.12008>. Translated and published in "Direitos Humanos e Mortalidade Materna: Explorando a eficácia da decisão do Caso Alyne". **Interesse Público,** vol. 86, p. 145-178, 2014. Available at: <https://www.law.utoronto.ca/utfl_file/count/documents/reprohealth/Pub-AlynePortuguese.pdf>. Accessed on: 26 Mar. 2018.

[170] See: WORLD HEALTH ORGANIZATION, et al. **Trends in maternal mortality 1990 to 2015** Estimates by WHO, UNICEF, UNFPA, World Bank Group and the United Nations Population Division. Annex 7: Estimates of maternal mortality ratio (MMR, maternal deaths per 100 000 live births), number of maternal deaths, lifetime, risk, percentage of AIDS-related indirect maternal deaths and proportion of deaths among women of reproductive age that are due to maternal causes (PM), by country, 2015a. Geneva: World Health Organization, 2015. p. 51. <http://www.who.int/reproductivehealth/publications/monitoring/maternal-mortality-2015/en/>. Accessed on: 03 Apr. 2018.

[171] WORLD HEALTH ORGANIZATION. **Current Worldwide Stillbirth Rate**, 2015**.** <http://www.who.int/reproductivehealth/topics/maternal_perinatal/stillbirth/en/>. Accessed on: 21 March 2018.

[172] COOK, Rebecca J. Modern Day Inquisitions. **University of Miami Law Review**, Miami, vol. 65, n. 3, p. 767-796, 2011. p. 784.

[173] SANTOS, Leonor Maria Pacheco; LECCA, Roberto Carlos Reyes; CORTEZ-ESCALANTE, Juan Jose, SANCHEZ, Mauro Niskier; RODRIGUES, Humberto Gabriel. Prevention of neural tube defects by the fortification of flour with folic acid: a population-based retrospective study in Brazil. **Bulletin of the World Health Organization**, Geneva, vol. 94, n. 1, p.22-24, jan. 2016.

[174] SIEGEL, Reva. ProChoiceLife: Asking Who Protects Life and How -- and Why it Matters in Law and Politics. **Indiana Law Journal**, Bloomington, vol. 93, n. 1, p. 207-232, 2017-2018, Available at: <https://www.repository.law.indiana.edu/ilj/vol93/iss1/12>. Accessed on: 28 Mar. 2018.

address the risk factors for unwanted pregnancy and that provide the means to facilitate wanted pregnancies is growing.[175] For example, the U.S. Supreme Court in *Whole Woman's Health v. Hellerstedt*[176] questioned why the state singled out "abortion for onerous health regulation that the state did not impose on medical procedures of equal or greater risk."[177]

The Court's understanding of how the Penal Code disproportionately impacts subgroups of women who face barriers in accessing the health system, such as poor women, black and brown women and adolescent girls, is necessary if it is going to eliminate *all* forms of discrimination. The opinions recognized that the social costs of criminalization, including preventable maternal mortality and morbidity, for poor women, have to be balanced against the alleged benefits of the criminal prohibition in protecting prenatal life. Majority opinions recognized the ineffectiveness of the criminal law in reducing the rate of abortions,[178] and recognized that the Penal Code disproportionately impacts subgroups of women. One measure of the Court's record in national terms might be whether these decisions lead to the ability of all women, including poor women, to exercise their equal citizenship rights.

The current impasse on abortion in the legislative and executive branches of government suggests that the Supreme Court will be a main locus of resolving disputes on abortion. The Court's ability to resolve disputes based on constitutional reasoning will depend not only on its reasoning about particular rights, but also on how well the Court's decisions give meaning to women's equal citizenship. As a US Supreme Court Justice explained: "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life course, and thus to enjoy equal citizenship stature."[179]

In recognizing an important set of constitutional rights of women, the Brazilian Supreme Court has established that prenatal life has to be protected consistently with women's rights. This decision serves as a significant source of understanding of what it means for women to exercise their rights as equal citizens under the Brazilian Constitution. In so doing, it makes the decriminalization of abortion claimable in Brazil.

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Constitutionalism and rights protection in Mexico and Brazil: comparative remarks

Constitucionalismo e proteção de direitos no México e no Brasil: observações comparadas

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Abstract

Comparative exercises between constitutional law in Brazil and in Mexico may seem destined to be exercises of identifying a reduced set of commonalities in an ocean of difference. The article, however, aims to suggest to what extent the opposite might be closer to the truth, and provide some sense of the amount of parallels between the two countries when viewed through constitutional lenses. Despite divergent paths of historical evolution in the XIX and the XX centuries, there are elements that confer to contemporary constitutional systems in Brazil and Mexico an air of commonality. The article underlines at least three of them: (i) commonalities in patterns of constitutional genesis and change; (ii) the existence of generous constitutional declarations of rights coupled with a varied assortment of rights-protecting channels in both places; and (iii) the existence in the two countries of old Supreme Courts with extensive jurisdictional menus and ample space for transformative action at their disposal. On the other hand, the main differences identified and analyzed in the article occur in the domain of rights

Resumo

Realizar uma análise comparativa entre o Direito Constitucional no Brasil e no México pode parecer ser uma tarefa destinada a ser um exercício de identificação de um conjunto reduzido de pontos comuns em um oceano de diferenças. O artigo, no entanto, pretende sugerir que a posição exatamente oposta está mais próxima da realidade e assim fornecer alguma noção da quantidade de paralelos que podem ser traçados entre os dois países quando vistos através de lentes constitucionais. Apesar dos caminhos divergentes de evolução histórica nos séculos XIX e XX, há elementos que conferem aos sistemas constitucionais contemporâneos no Brasil e no México um ar de identidade. O artigo destaca pelo menos três deles: (i) semelhanças nos padrões de gênese e de reforma constitucional; (ii) a existência de generosas declarações constitucionais de direitos, combinadas com uma variedade de instrumentos de proteção desses direitos; e (iii) a existência nos dois países de Supremas Cortes antigas e com extensos "menus jurisdicionais" e amplo espaço à sua disposição para atuar de um modo transformador na sociedade. Por outro lado, as principais

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protection and include the system of judicial enforcement of rights and the public profile of the two Supreme Courts.

diferenças identificadas e analisadas no artigo ocorrem no domínio da proteção de direitos e incluem o sistema de execução judicial e o perfil público das duas Supremas Cortes.

Keywords: constitutionalism; Comparative Law; Brazil; Mexico; Supreme Court.

Palavras-chave: *constitucionalismo; direito comparado; Brasil; México; Suprema Corte.*

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1. Introduction; **2.** Constitutional genesis and constitutional change; **3.** Generous rights declarations and rights-protecting devices; **4.** Two big, monarchical Supreme Courts; **5.** A dis-analogy: rights revolution *versus* rights frustration; **6.** Conclusion; **7.** References.

1. INTRODUCTION

Doing comparative analysis between Mexico and Brazil is a thrilling prospect. At the outset, the two countries look like an odd couple —the surprising confluence of two Latin American giants with very little in common. They are far removed from one another in popular imagination, and even geographically, and both enjoy a tradition of thinking of themselves as self-standing societies —as almost separated "continents" within a wider Latin American space they are largely unaware of in daily life. The reading of Octavio Paz's famous portrayal of the Mexican soul, the *Labyrinth of Solitude,* already suggests that much,[1] and at a more pedestrian level there is little doubt that in Mexico many dimensions of life unfold with scarce external horizons: South America feels far removed, the United States represent the "other" one should ward off, and Central America and the Caribbean are systematically ignored. With regards Brazil, Roberto Unger eloquently evocates an analogous idea in *Democracy Realized* when identifying the country as one of the very few that enjoy the size and the social and cultural resources to "imagine itself as something of a world unto itself rather than as a satellite to some other system".[2]

Comparative exercises between Brazil and Mexico seem therefore destined to be exercises of identifying a reduced set of commonalities in an ocean of difference. In this exploratory contribution, I want to suggest to what extent the opposite might be closer to the truth, and provide some sense of the amount of parallels between the two countries when viewed through constitutional lenses —well beyond what would be expected from their naturally being two contemporary Latin American democracies.

[1] PAZ, Octavio. **El laberinto de la soledad**. Mexico City: Fondo de Cultura Económica, 1994.

[2] UNGER, Roberto Mangabeira. **Democracy realized. The progressive alternative**. London: Verso, 1998.

Where these commonalities come from, and what sort of underlying social and historical factors explain them, are questions that remain beyond the scope of the analysis. The idea is more simply to illustrate some of them, to subsequently develop an exercise in "most similar cases" comparison,[3] identifying a few, remarkable differences, in an ocean of resemblance.

Despite divergent paths of historical evolution in the XIX and the XX centuries —Brazil, for instance, was for long a monarchy after declaring Independence, and in the XX century it undergone periods of military rule that are absent in Mexico— there are elements that confer to contemporary constitutional systems in Brazil and Mexico an air of commonality. I will underline three of them: commonalities in patterns of constitutional genesis and change; the existence of generous constitutional declarations of rights coupled with a varied assortment of rights-protecting channels in both places; and the existence in the two countries of old Supreme Courts with extensive jurisdictional menus and ample space for transformative action at their disposal.

The differences I will identify occur in the domain of rights protection and include at least the following two features: first, access to justice and judicial enforcement of rights —particularly social, cultural and environmental rights— has been clearly more extensive in Brazil than in Mexico. And second, rights protection in the two countries has been led by two Supreme Courts that, while sharing many common elements in terms of institutional design and internal mode of operation, have progressively developed openly different public profiles. While the Brazilian Supreme Federal Tribunal has abandoned its initial "professional" outlook to become an activist body that does not refrain from addressing the hottest political issues of the day, the Mexican Supreme Court has not culminated any sort of "rights revolution" and maintains a contained public profile.

Our cursory comparative exercise invites inquiry in several directions, which in this occasion will be merely hinted at. First, and most obviously, at the level of institutional design: although the best explanations about rights protection and judicial behavior are grounded in multivariate theoretical frameworks and require extensive research, there are elements which seem to be clearly making a difference, like the existence in Brazil of specific rights protecting writs and collective actions, or the role displayed by agents of the *Ministerio Público* and other public servants in supporting the judicialization of claims —in comparison with the impeding role of the *amparo* in Mexico, coupled with the absence of supporting structures. On a much abstract level, the joint analysis of commonality and specific difference may help ground diagnoses

[3] I rely on the well-known contrast between two comparative methodologies ("most similar cases" and "most different" cases), initially distinguished by John Stuart Mill. For further explanation and examples, see HIRSCHL, Ran. On the blurred methodological matrix of comparative constitutional law. In: CHOUDHRY, Sujit. (ed.). **The migration of constitutional ideas**. New York: Cambridge University Press, 1995, p. 47-53.

about the main weaknesses of the respective constitutional systems. Thus, while both in Mexico and Brazil there are problems of "input" legitimacy —since constitution -making and constitutional amendment have been largely led by elite negotiation— in Brazil this has been probably compensated by the "output" legitimacy associated to, among other things, a robust practice of judicial rights protection. This source of output legitimacy is not available in Mexico. In Brazil, the danger might rather come from the sustainability of the model, given the seemingly non-balanced role that the Supreme Federal Tribunal (or even its individual Justices) plays in the constitutional system.

2. CONSTITUTIONAL GENESIS AND CONSTITUTIONAL CHANGE

In both Brazil and Mexico the current Constitution is the product of negotiations and concessions between different groups, rather than the product of broad popular mobilizations marking a moment of strong political discontinuity —like the ones that gave rise to the constitutions of Colombia, Bolivia or Ecuador. In the case of Brazil, after a period of military rule, the opposition won the 1985 presidential indirect election, and a constituent assembly was elected and started works in 1987. This assembly, however, entertained considerable bonds with the past. Thus, the same decrees that summoned it made it clear that amnesty for the crimes of the past was untouchable, and the assembly was actually composed of senators and deputies, some of whom had been elected during the authoritarian regime and continued to operate as ordinary legislators even after the new constitution entered into force.[4] Their center or center-right affiliations had therefore some weight, together with the views exposed by members of the party that had been the main site of opposition during the previous regime. The former opposition had certainly control of the thematic and systematization committees in charge of producing the text of the constitution —whose content was enriched by a process of broad popular participation that allowed citizens to present popular amendments and individual communications— but at one point conservative political forces changed the rules of procedure to increase their control of the product.[5] The 1988 constitution —which was not submitted to popular referendum[6]— is therefore consistent and progressive in many respects, but derives of a deep mix of past and

[4] SILVA, Virgílio Afonso da. **The Constitution of Brazil. A Contextual Analysis**. Oxford: Hart Publishing, 2019 (forthcoming). p. 39; 38. All page numbers refer to the manuscript version, on file with author.

[5] SILVA, Virgílio Afonso da. **The Constitution of Brazil. A Contextual Analysis.** Oxford: Hart Publishing, 2019 (forthcoming). p. 16, n. 8.

[6] There was, however, a referendum in 1993 that asked citizens about the form of government (parliamentarism versus presidentialism) and form of state (monarchy versus republic). The latter options were supported by large majorities. SILVA, Virgílio Afonso da. **The Constitution of Brazil. A Contextual Analysis.** Oxford: Hart Publishing, 2019 (forthcoming). p. 15.

present channeled through a contorted procedure that gave space and negotiation power to many different groups.

Subsequently, higher-lawmaking in Brazil has been advanced through elite-driven negotiation within the confines of the constitutional amendment formula. According to Article 60, proposals to amend the constitution must be discussed and voted twice in each House and supported by a three-fifth vote in very round —though, in contrast to what happens in Mexico, the States of the Federation remain outside the amendment process. There are moreover material limits to reform —since amendments cannot attempt to change the federal system, the separation of powers, individual rights, or the system of direct and universal elections— as well as temporal conditions —since amendments cannot be discussed in some circumstances, and rejected proposals cannot be reconsidered in the same year. Yet despite this formal rigidity, political elites in Brazil have managed to pass 99 amendments to date. Scholars agree that amendments have left the constitutional core untouched,[7] but there is no wonder that political and social elites have found in the constitution a pretty flexible carrier of their evolving political agendas.[8] The Supremo Tribunal has asserted its power to review the constitutionality of constitutional amendments (even ex ante, before their formal passing), thus slowing down change and further securing institutional control of higher-level legal change.[9]

In Mexico, the Constitution was initially a product of the Mexican revolution. Albeit the group that controlled the Constitutional Assembly in Querétaro represented a moderate section of the revolutionaries, the text nonetheless included part of the more radical claims other groups had endorsed in previous conventions.[10] But in the course

[7] BENVINDO, Juliano Zaiden. The Brazilian Constitutional Amendment Rate: A Culture of Change? **International Journal of Constitutional Law Blog.** Available at: http://www.iconnectblog.com/2016/08/the-brazilian-constitutional-amendment-rate-a-culture-of-change/ Accessed on: 11 Oct. 2017 (noting that amendments have not affected the constitutional core) and SILVA, Virgílio Afonso da. **The Constitution of Brazil. A Contextual Analysis.** Oxford: Hart Publishing, 2019 (forthcoming). p. 15 (noting that the only part that has been strongly affected is the one where state intervention in the economy is regulated).

[8] See BARBOSA, Leonardo Augusto de Andrade. Legislative Process and Constitutional Change in Brazil: On the Pathologies of the Procedure for Amending the 1988 Constitution. In: ALBERT, Richard; BERNAL, Carlos; BENVINDO, Juliano Zaiden (eds.). **Constitutional Change and Transformation in Latin America.** Oxford: Hart Publishing, 2019 (forthcoming) (describing with detail Parliamentary dynamics around amendment, including the practice of passing partial amendments) and COSTA, Alexandre Araújo; ASSUNÇÃO, Guilherme Sena de. On the Limits of the Supermajority Rule: The Brazilian Experience on Using Constitutional Amendments to Circumvent the System of Checks and Balances. In: ALBERT, Richard; BERNAL, Carlos; BENVINDO, Juliano Zaiden (eds.). **Constitutional Change and Transformation in Latin America.** Oxford: Hart Publishing, 2019 (forthcoming) (describing how constitutional amendment is used to circumvent the system of checks and balances built in ordinary lawmaking).

[9] On judicial review of constitutional amendments in Brazil, see SALGADO, Eneida Desiree; CHAGAS, Carolina Alves das. The Judicial Review of Constitutional Amendments in Brazil and the Super-Countermajoritarian Role of the Brazilian Supreme Court. In: ALBERT, Richard; BERNAL, Carlos; BENVINDO, Juliano Zaiden (eds.). **Constitutional Change and Transformation in Latin America**. Oxford: Hart Publishing, 2019 (forthcoming).

[10] MARVÁN LABORDE, Ignacio. **Cómo hicieron la Constitución de 1917.** Mexico City, CIDE, 2017. p. 168-186.

of the century, constitution-making fell progressively in the hands of the hegemonic party elites. As we have described elsewhere, when political dynamics slowly made room for political pluralism in the decades of the 80s and 90s, and in spite of the fact the amendment formula requires half of State legislatures to ratify the decisions adopted by the two chambers of the Federal Congress, the constitutional amendment rate increased exponentially.[11] Increase in political plurality did not translate into an increase of actual constitutional rigidity, but rather inaugurated a scenario in which amending the Constitution meant space for negotiation —and hence for political inclusion, at the level of political parties.[12] For many years, hyper-reformism consequently helped Mexico's peacefully transition to democracy.[13] Over time, however, its effects became increasingly problematic. On the one hand, the succession of piecemeal, non-systematic changes made the text increasingly heterogeneous, disorganized, and even openly contradictory, thus damaging the function of the constitution as a legal norm; on the other, amendment soon started to be taken by politicians as little more than legislation by other means —a dynamics the Supreme Court has not impeded, in refraining from reviewing the constitutionality of amendments— despite the fact some of the reforms, in contrast with the situation in Brazil, have been substantively far-reaching.[14] The end-result is that people is little acquainted with the actual contents of an extremely long and obscure text, authored by a distant and non-diverse Assembly of the past, which is modified continuously by the political elites without any special deliberation —often without society even noticing it.

As we can see, both Mexico and Brazil are, then, democracies that operate under Constitutions that have operated as flexible frameworks of mutual accommodation between different groups —including, most notably, political and social elites. Both constitutions face, to some degree, deficiencies in terms of original "input" legitimacy[15] and

[11] CASAR, María Amparo; MARVÁN, Ignacio. (eds.). **Reformar sin mayorías. La dinámica del cambio constitucional en México 1997-2012.** Mexico City: Taurus, 2014. p. 29-36.

[12] CASAR, María Amparo; MARVÁN, Ignacio. (eds.). **Reformar sin mayorías. La dinámica del cambio constitucional en México 1997-2012.** Mexico City: Taurus, 2014. As these authors document, from 1997 to 2014, 83% of constitutional amendments were positively voted by the three leading parties.

[13] POU GIMÉNEZ, Francisca; POZAS-LOYO, Andrea. **Are Constitutional Amendment and Judicial Review Substitutes?** Unexpected Lessons from Mexico and Brazil. Paper presented at the Law and Society Annual Meeting, Mexico City, 2017.

[14] POU GIMÉNEZ, Francisca; POZAS-LOYO, Andrea. **Are Constitutional Amendment and Judicial Review Substitutes?** Unexpected Lessons from Mexico and Brazil. Paper presented at the Law and Society Annual Meeting, Mexico City, 2017.

[15] I take inspiration in the distinction between input and output legitimacy as used in TSCHORNE, Samuel I. **The "legitimacy crisis" and the "constitutional problem" in Chile**: what is left? Paper presented at Seminario en Latinoamérica de Teoría Constitucional y Política 2018, San Juan de Puerto Rico, 2018. I use it with some licenses, as for Tschorne, questions of input legitimacy refer to questions of democratic representation and questions of output legitimacy to state problem-solving capacity.

preside over scenarios in which rigidity is a mirage.[16] In Brazil, because the Constitution was the product of a somewhat contorted procedural path, because it included at least implicit concessions to sectors that had been powerful during the dictatorship, and because it has been subsequently amended with ease by Brazilian politicians in interaction with the Supreme Court, without direct participation of the citizenry. In Mexico, because the initial constitution-making moment is one hundred years away, and because the content of the Constitution is at this point an obscure magmatic substance that politicians manipulate at their will. In both countries, the legitimacy of the Constitution will be importantly dependent on the outcomes (as opposed to inputs); there will have to be "legitimacy of exercise" to compensate for deficits in "legitimacy of origin". Virgílio Afonso da Silva gestures at this distinction when he remarks that the Brazilian constitution-making process has both weaknesses and undeniable merits, but that the relevant issue is, in any case, whether this affects the legitimacy of the constitution itself.[17] In comparative inquiries about the two countries, in sum, it will be interesting to monitor in what ways the arguable "imperfections" of constitutional origins are compensated by what the Constitution is perceived to deliver in terms of results.

3. GENEROUS RIGHTS DECLARATIONS AND RIGHTS-PROTECTING DEVICES

The Brazilian declaration of rights is formally compact, but dense and extensive —only Article 5, focused on freedom-based rights, contains 78 clauses— and it incorporates many of the novelties that would subsequently enter Latin American constitutional declarations of rights in the following decades. Most rights are found in Heading II ("Fundamental Rights and Guarantees"), which lists civil, political and social rights, but in Heading VIII ("Social Order"), there are additional provisions that impinge on the same or other rights —like the right to an ecologically balanced environment, rights of indigenous people, elderly people or cultural rights.[18] Most rights clauses are reasonably detailed, and include instructions to public authorities addressed to secure actual action in pursuance of real transformation. Equality-related provisions, for instance, include specific, action-requiring language, thus pointing to a model of substantive equality, with a particular concern for race and gender (though less for sexual orientation or the rights of migrants); traditional labor rights and other social rights are gene-

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[16] VELASCO, Mariana. Mexico's Constitutional Entrenchment Mirage: The Political Sources of Hyper-Reformism. In: ALBERT, Richard; BERNAL, Carlos; BENVINDO, Juliano Zaiden (eds.). **Constitutional Change and Transformation in Latin America.** Oxford: Hart Publishing, 2019 (forthcoming).

[17] SILVA, Virgílio Afonso da. **The Constitution of Brazil. A Contextual Analysis.** Oxford: Hart Publishing, 2019 (forthcoming). p. 40.

[18] SILVA, Virgílio Afonso da. **The Constitution of Brazil. A Contextual Analysis.** Oxford: Hart Publishing, 2019 (forthcoming). p. 16.

rously listed; provisions on the environment, in the various sections of Article 225, set forth a consequential list of government duties; provisions on indigenous communities' rights are also important and inaugurated a regional cycle that finds continuity in the very robust provisions of the Constitutions of Ecuador and Bolivia.[19]

The 1988 constitution includes also a clause according to which "the rights and guarantees established in this Constitution shall not exclude others derived from the regime and principles adopted by it, or from international treaties to which the Federative Republic of Brazil is a party" (Art 5 §2). Besides echoing the US tradition of guaranteeing un-enumerated rights, this clause has been crucial to align Brazil with a phenomenon that now traverses Latin American constitutionalism: the opening to international sources of rights, in particular the Inter-American system.[20] While at the beginning the Supreme Tribunal did not take the wording of this article as a reason to change its views on the hierarchical position of treaties, after a 2004 amendment declared that the treaties approved following certain conditions would be equivalent to constitutional amendments, the Tribunal eventually clarified the situation that now prevails: post-2004 treaties would enjoy constitutional status (if approved through the prescribed procedure), and pre-2004 ones supra-legal status.[21]

The Mexican declaration of rights has attained a seemingly analogous end-result through a different pattern of evolution. Although the enshrinement of a number of social rights made of the 1917 constitution a path-breaking document, it naturally missed, for several decades, many of the novelties of post-war constitutionalism. The decade of the 1990s and 2000s were then dominated by the intermittent, "retail" addition of fundamental rights to the Constitution —at the impulse of politicians that saw short-term legitimacy gains in doing so, and little costs, given the scarce degree of actual enforcement these rights obtained. The declaration of rights was object of a more consequential, "wholesale" reform in 2011. The reform declares rights included in the treaties ratified by Mexico to be part of the bill of rights, enshrines interpretive principles like universality, indivisibility, interdependence, progressivity, and pro persona, and includes the canonical list of State duties regarding rights, as have been developed

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[19] For a comprehensive, extremely informative overview of the constitutional bill of rights, with references to legislation and Supreme Court interpretations, see SILVA, Virgílio Afonso da. **The Constitution of Brazil. A Contextual Analysis.** Oxford: Hart Publishing, 2019 (forthcoming). p. 137-222. On the place of the Brazilian constitution in Latin American cycles of pluralist constitutionalism, see YRIGOYEN FAJARDO, Raquel Z. The panorama of pluralist constitutionalism: from multiculturalism to decolonization. In: RODRÍGUEZ-GARAVITO, César. (ed.). **Law and Society in Latin America. A New Map.** New York: Routledge, 2015.

[20] For an overview, see BOGDANDY, Armin von. MAC-GREGOR, Eduardo Ferrer; ANTONIAZZI, Mariela Morales; PIOVESAN, Flávia (eds.); SOLEY, Ximena (managing ed.). **Transformative Constitutionalism in Latin America:** The Emergence of a New Ius Commune. Oxford: Oxford University Press, 2017.

[21] BOGDANDY, Armin von. MAC-GREGOR, Eduardo Ferrer; ANTONIAZZI, Mariela Morales; PIOVESAN, Flávia (eds.); SOLEY, Ximena (managing ed.). **Transformative Constitutionalism in Latin America:** The Emergence of a New Ius Commune. Oxford: Oxford University Press, 2017, p. 186-188.

in international human rights law. The transformative impact of the reform is, however, somehow curbed by the fact the Constitution contains provisions at odds with those found in the treaties that the Supreme Court has declared to prevail[22] and because, after decades of un-ending constitutional amendment, many rights provisions —due process rights would be a case in point— are extremely contorted and almost impossible to apprehend by citizens.

Both the Constitution of Brazil and Mexico include, in short, generous declarations of rights. They are documents open to international human rights law that allow for the sort of integrative rights-protective interaction the Inter-American Court of Human Rights is so energetically promoting in the region.[23] Both Constitutions evince a concern for efficacy, though in Brazil the declaration is more transparent and more internally coherent than in Mexico, where in any case the presence of last-generation legal notions may boost substantive impact. Admittedly, in this rubric the two countries simply share in a feature common to all Latin America contemporary constitutions[24]. An additional, complementary feature that is also common to regional constitutionalism (and singularizes it in the comparative scenario) is the inclusion of numerous rights -protecting channels in the context of hybrid systems of judicial review.[25]

The Brazilian constitution sets forth a multifaceted system of judicial review. Its first component is abstract review, Kelsenian style, with presence in the country from 1946, operating at the moment through four different channels: the direct action of unconstitutionality, the direct action of unconstitutionality for omission, the declaratory action of constitutionality and the allegation of breach of fundamental precept.[26] The second dimension of the system is decentralized or diffuse review, which exists since

[22] On this ruling, see SILVA GARCÍA, Fernando. Derechos humanos y restricciones constitucionales: ¿reforma constitucional del futuro vs. interpretación constitucional del pasado? (comentario a la CT 293/2011 del Pleno de la SCJN). **Cuestiones constitucionales**, n. 30, p. 251-272, 2014, and POU GIMÉNEZ, Francisca; RODILES, Alejandro. Mexico. In: PALOMBINO, Fulvio (ed.). **Duelling for Supremacy**: International Law vs. National Fundamental Principles. Cambridge: Cambridge University Press, 2019 (forthcoming).

[23] BOGDANDY, Armin von. MAC-GREGOR, Eduardo Ferrer; ANTONIAZZI, Mariela Morales; PIOVESAN, Flávia (eds.); SOLEY, Ximena (managing ed.). **Transformative Constitutionalism in Latin America:** The Emergence of a New Ius Commune. Oxford: Oxford University Press, 2017.

[24] UPRIMNY, Rodrigo. The recent transformation of constitutional law in Latin America. Trends and challenges. In: RODRÍGUEZ-GARAVITO, César. (ed.). **Law and Society in Latin America. A New Map.** New York: Routledge, 2015.

[25] UPRIMNY, Rodrigo. The recent transformation of constitutional law in Latin America. Trends and challenges. In: RODRÍGUEZ-GARAVITO, César. (ed.). **Law and Society in Latin America. A New Map.** New York: Routledge, 2015.

[26] The first one is the most close to a classic Kelsenian abstract review; it is available only to certain state actors and delivers rulings with *erga omnes*. The second is also abstract, but is particularly addressed to combat state inaction that damages the effectiveness of the Constitution. The third one —the declaratory action— allows the Supremo Tribunal to unify legal interpretation when lower courts hold different criteria about the constitutionality or unconstitutionality of legislation. The fourth, introduced in 1999, is functionally almost indistinguishable from the first one, though it allows examination of municipal laws and statutes enacted before the 1988 constitution. See SILVA, Virgílio Afonso da. **The Constitution of Brazil. A Contextual Analysis.** Oxford:

1890, when the judiciary of the First Republic was created, following US parameters. Any Brazilian judge can set aside a statute if it believes it violates the constitution. These channels are instrumental to the guarantee of all constitutional contents, among them fundamental rights. Yet the 1988 Constitution includes also several writs —which may be filed before any judge— that offer specific protection before rights violations: the "mandado de segurança", de "mandado de injunçao", the habeas corpus, the habeas data and the popular action.[27] The Constitution has also regard for what it calls "functions essential to justice", which include the Public Ministry, Public Advocacy, the legal profession and the Public Defender's Office.[28]

In Mexico, the procedural menu is even broader, since the Constitution makes room for three modalities of review: centralized, semi-centralized and diffuse. As in Brazil, abstract review was an addition of the second half of the XX century, and is exercised in a channel called action of unconstitutionality —though when resolving conflicts of jurisdiction between States, Federation and municipalities, or between different power branches, in a channel called "constitutional controversy", the Supreme Court can also invalidate statutes with *erga omnes* effects. Decentralized or diffuse review was from the beginning a textual possibility, but the XX century was dominated by an interpretation of the Supreme Court that made judicial review the exclusive province of the Federal Judiciary. In 2011, the Court changed that interpretation and admitted diffuse review back into the country.[29] In any event, constitutional enforcement in Mexico is dominated by what occurs in a channel of semi-centralized review: the writ of *amparo.*

The *amparo* was first included in the State of Yucatán constitution by mid XIX century and, from 1847 onwards, in all federal Mexican constitutions. It is therefore an extremely old institution. It may be filed before federal judges before any act of public authority: administrative acts, statutes, regulations, judicial rulings. It fulfills, in theory, the functions displayed by the Brazilian specific writs, in addition to operate as a sort of cassation device, since it allows federal judges to review if applicable norms have been correctly applied in the case at hand. The institution grew tremendously in complexity after decades of operating as an ordinary third stage with regards almost all state and federal judicial proceedings. It is an institution mortgaged by path dependencies coming from very distant times, almost impossible to use without the help of a

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Hart Publishing, 2019 (forthcoming), p. 116-123, and ROSENN, Keith S. Procedural Protection of Constitutional Rights in Brazil. **The American Journal of Comparative Law**, v. 59, n. 4, p. 1009-1050, 2011, p.1039-1047.

[27] ROSENN, Keith S. Procedural Protection of Constitutional Rights in Brazil. **The American Journal of Comparative Law**, v. 59 n.4, p. 1009-1050, 2011, p. 1013-1033.

[28] SILVA, Virgílio Afonso da. **The Constitution of Brazil. A Contextual Analysis.** Oxford: Hart Publishing, 2019 (forthcoming). p. 133 and ff.

[29] See Mexican Supreme Court, Varios 912/2010, decided July 14, 2011. Available at: <https://www.sitios.scjn.gob.mx/codhap/sites/default/files/engrosepdf_sentenciarelevante/RADILLA%20VARIOS%20912-2010.pdf/>. Accessed on: 11 Oct. 2017.

specialized lawyer. The constitutional reform of 2011 addressed the *amparo* in addition to redesigning the bill of rights: standing requirements were softened, denounce of collective rights affectations was made possible, and the possibility of conferring *erga omnes* effects to certain determinations, through a special vote in the Supreme Court, was introduced. With the help of the interpretive principles now included in Article 1 of the Constitution, one would have expected these changes to boost rights enforcement. But as we will later see, changes have not substantially widened access to justice for those that need it most.

4. TWO BIG, MONARCHICAL SUPREME COURTS

When Mexican revolutionaries gathered in Querétaro to amend the 1857 Constitution and ended up by enacting a new one, the judiciary was not a priority. In their understanding, the revolutionary program was to be executed under the lead of the Executive and the Legislative, not the Judiciary.[30] While they placed labor and administrative courts under the orbit of the Executive —they were certainly important for the execution of the political program— they left untouched the judicial structure of the previous century, modeled after the US system, composed of District Judges, Circuit Courts, and a Supreme Court at the top. The worries all along were accumulation of pending suits —something that led to the creation of Collegiate Circuit Courts in the 1950s— but other than that, the federal judiciary stayed pretty stable until the 80s and 90s, when steps were taken to transform the Court into "a true Constitutional Tribunal". Thus, in a 1988 reform, the resolution of judicial *amparos* was transferred to the Collegiate Courts, allowing review before the Supreme Court only under specific conditions, and in the important 1994 reform —which created the Judiciary Council, in line with regional developments— abstract review was introduced and further measures were taken to diminish the caseload of the Court to make it focus on the most important constitutional issues.

In Brazil, the Supreme Federal Tribunal is also an institution with deep continuities with the past. It was created in 1890, by a decree, at the end of the Empire. The republican Constitution of 1891 ratified the institution, in a system structurally modeled, as in Mexico, largely after the US one. As Silva underlines, "note of the several institutional and constitutional breaks, regime changes, coups d'état and institutional and constitutional crisis has ever directly and immediately affected the composition of the Brazilian Supreme Court".[31]

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[30] COSSÍO DÍAZ, José Ramón. **Sistemas y modelos de control constitucional en México**. Mexico City: IIJ UNAM, 2013.

[31] SILVA, Virgílio Afonso da. **The Constitution of Brazil. A Contextual Analysis.** Oxford: Hart Publishing, 2019 (forthcoming), p. 102.

At the level of institutional design, the amount of similarities between the two Courts is remarkable. Both institutions are composed of eleven Justices. The Mexican ones are appointed for 15 years while the Brazilians have life tenure —although, as all other public servants, they must mandatorily retire at 65. The appointing procedure involves in both places collaboration between the President and the Senate —with more Presidential intervention in Mexico, since she presents to the Senate a shortlist of three candidates among whom to choose. Both in Mexico and Brazil the Court decides in Plenary or in two Panels composed of five Justices each —specialized by subject matter in Mexico, not in Brazil— although in Brazil many decisions are actually adopted by a single Justice.[32] The President of the Court is elected in both cases by the Justices themselves (for two years in Brazil and for four in Mexico), though in Brazil an informal rule of rotation in favor of the senior Justice is at work —something that liberates the Brazilian Court from the background battles and "campaigns" that infect its Mexican peer when the time to replace the President arrives. In both Courts the President participates (and directs the discussion) in the Plenary and does not sit in Panels. The Brazilian President can decide alone more issues than its Mexican pair and, in contrast to the latter, can exercise a casting vote. Both Courts have an unmatched influence in well-funded federal judiciaries,[33] but the Mexican Court clearly concentrates more power: its President is simultaneously the President of the Judiciary Council, it does not share space with other apex courts —while in Brazil the 1988 Constitution created the Superior Court of Justice— and its formal and informal influence on lower judges is enormous. While in Brazil no doctrine of binding precedent was traditionally in place, Mexico has a formalized system of precedents that lower judges cannot disregard on pain of sanction by the Judiciary Council. The fact that before 1994 lower judges and magistrates were selected by Justices was among the facts that contributed to install a feudalistic dynamics in the Mexican judiciary.[34]

Jurisdiction is extremely broad in both cases. The Brazilian Supreme Tribunal culminates the diffuse review tier and has ordinary and extraordinary appellate jurisdiction, together with original jurisdiction concerning certain specific matters or persons. It then concentrates, of course, all what concerns the four channels of abstract review, and resolves some additional issues —such as "complains" in case of non-compliance

[32] ARGUELHES, Diego Werneck; RIBEIRO, Leandro Molhano. 'The Court, it is I'? Individual judicial powers in the Brazilian Supreme Court and their implications for constitutional theory. **Global Constitutionalism,** v. 7, n. 2, p. 236–262, 2018.

[33] ROSENN, Keith S. Recent Important Decisions by the Brazilian Supreme Court. **The University of Miami Inter-American Law Review**, v. 45 n. 2, p. 297-334, 2013, p. 300.

[34] POZAS-LOYO, Andrea; RIOS FIGUEROA, Julio. Anatomy of an Informal Institution: Patronage Networks and the 'Gentlemen's Pact' in the Mexican Federal Judiciary, 1917-1994. **International Political Science Review**. vol. 39, n. 5, p. 647-661, 2018.

with its rulings.[35] In Mexico the Supreme Court decides actions of unconstitutionality, constitutional controversies (horizontal and vertical conflicts of jurisdiction), contradictions of thesis (when Collegiate courts decide the same issues differently because of interpretative differences), second-instance *amparos* (against judicial rulings, called *amparos directos*, and against administrative acts and statutes, called *amparos indirectos*); a wide array of individual or ancillary questions within major proceedings; non-compliance proceedings; proceedings related to violations of the System of Fiscal Coordination; modifications or substitution of binding precedents ("jurisprudencia"); reviews of Judiciary Council decisions suspending or expelling judges; and participates in the appointments of the Justices of the Electoral Tribunal and the members of the Judiciary Council —among others.[36]

Both Courts come from a tradition where *certiorari* had no place and have extreme caseloads. Numbers are astronomical in Brazil (around 70,000 a year, if one includes liminal decisions, around 20,000 if departs from other criteria)[37] and very high in Mexico (around 7,000 a year), although the Mexican court does better in terms of lag because of informal rules that put pressure on Justices to reasonably empty their drawers at the end of each year. Measures that in Brazil have helped control the number of cases are the dismissal of cases for "lack of general repercussion", the resolution of representative appeals that give guidance to lower Courts, or the creation of a system of summaries, called "súmulas", that if voted favorably are binding in character. In Mexico, where Supreme Court precedents are always binding under certain conditions, functionally similar devices are in place, like the categorical delegation of certain *amparos* in the Collegiate courts, the rule that allows review of direct *amparos* only if they contain questions of special importance and transcendence, or the rules set down in a General Agreement of 2015, which give further margin to the Court not to decide cases.[38]

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[35] SILVA, Virgílio Afonso da. **The Constitution of Brazil. A Contextual Analysis.** Oxford: Hart Publishing, 2019 (forthcoming), p. 110-129.

[36] See a detailed description, with figures showing which areas of jurisdiction are responsible for what percentage of the caseload in POU GIMÉNEZ, Francisca. Constitutional Change and the Supreme Court Institutional Architecture: Decisional Indeterminacy as a Problem for Legitimacy. In: CASTAGNOLA, Andrea; NORIEGA, Saúl López (eds.). **Judicial Politics in Mexico**: The Supreme Court and the Transition to Democracy. New York: Routledge, 2017, p. 124-128.

[37] For an explanation about the dimension of the caseload, see MENDES, Conrado Hübner. The Supreme Federal Court of Brazil. In: JAKAB, András; DYEVRE, Arthur; ITZCOVICH, Giulio (eds). **Comparative Constitutional Reasoning**. Cambridge: Cambridge University Press, 2017, p. 126-127, and the works cited there, and SILVA, Virgílio Afonso da. **The Constitution of Brazil. A Contextual Analysis.** Oxford: Hart Publishing, 2019 (forthcoming), p. 112-113. For statistics in the Brazilian Court, see http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica

[38] Mexican Supreme Court, Acuerdo General 9/2015, June 8, 2015, on the rules about admissibility and processing of review in *amparo directo* (Diario Oficial de la Federación, June 12, 2015) Available at: <http://dof.gob.mx/nota_detalle.php?codigo=5396550&fecha=12/06/2015/>. Accessed on: 11 Oct. 2017.

Both courts famously share, finally, a singular approach towards judicial communication and transparency. Both Courts have created Judicial Channels and broadcast Plenary deliberations and votes.[39] Although there are details that vary in the decision-making protocols of the Courts, the general dynamics is largely analogous, as the main advantages and disadvantages of the system seem also to be so. The advantages are associated to the legitimacy gained by the Court in political systems that have been dominated by distrust and, in the context of Court that decide thousands of cases, to the additional visibility and availability that some of the decisions acquire, once they enter the radar of popular attention; the disadvantages are associated to deliberative losses (since in the most important cases, Justices simply arrive and present their position, rather than listen to others and be prepared to change their view), and to increased difficulties to reconstruct the reasoning behind the rulings.[40]

This analogous approach to judicial communication shouldn't be conflated, however, with the sharing of an identical public profile.[41] Right after the enactment of the Constitution, the Supremo Tribunal Federal exhibited a sort of professionalized, politically temperate outlook,[42] but over time it has asserted a strong degree of independence and has incredibly enlarged its powers and public presence. As scholars have repeatedly noted, it is difficult to think of a court having changed so radically in one or two decades.[43] Although the bulk of the Brazilian docket is inconsequential cases, there is scarcely a public controversy that is not dealt with at the Tribunal. Recently, the Court has dealt with criminal proceedings on corruption cases that touch the core of the political system, like the famous Mensalão case, or then even more politically charged

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[39] For an overview of relations between courts and the press and the wider public worldwide, including contributions on the publicity of deliberations in Brazil and Mexico, see DAVIS, Richard; TARAS, David. (eds.). **Justices and Journalists**: The Global Perspective. New York: Cambridge University Press, 2017.

[40] See MENDES, Conrado Hübner. The Supreme Federal Court of Brazil. In: JAKAB, András; DYEVRE, Arthur; ITZCOVICH, Giulio (eds). **Comparative Constitutional Reasoning**. Cambridge: Cambridge University Press, 2017, and SILVA, Virgílio Afonso da. 'Deciding without Deliberating'. **International Journal of Constitutional Law**, v. 11 n. 3, p. 557-584, 2013.

[41] For an interesting comparative exercise between the two courts that warns about the limits of institutional commonalities in understanding their different positions in political system, see BENVINDO, Juliano Zaiden; GONÇALVES, Fernando José Acunha. O papel da política na atuação das Corte Supremas: Uma comparaçao entre Brasil e México. **Novos Estudos CEBRAP**, v. 37, n. 1, p. 57-79, 2018.

[42] In her study of the relations of between Courts and political branches in Brazil and Argentina in the domain of economic policy, Diana Kapiszewski (building on Mill's "differences" method and taking for granted many similarities between the two Courts) suggests explanation for the different patterns may be found in the different "character" of the courts: more professional, "statesman" Court in the Brazilian case (a stable partner of the other branches), and a more political and unstable in the Argentinian one. See KAPISZEWSKI, Diana. Economic Governance on Trial: High Courts and Elected Leaders in Argentina and Brazil. **Latin American Politics and Society**, v. 55, n. 4, p. 47-73, 2013. This is probably very different at this point.

[43] MENDES, Conrado Hübner. The Supreme Federal Court of Brazil. In: JAKAB, András; DYEVRE, Arthur; ITZCOVICH, Giulio (eds). **Comparative Constitutional Reasoning**. Cambridge: Cambridge University Press, 2017., p. 115-116, and SILVA, Virgílio Afonso da. **The Constitution of Brazil. A Contextual Analysis.** Oxford: Hart Publishing, 2019 (forthcoming), p. 96.

Lava Jato case.[44] The Mexican Court has, by contrast, preserved a contained role. From time to time, the Court gains public attention —it occurred, for instance, when it validated the first-trimester legalization of abortion in Mexico City, when it changed due process criteria in a famous case involving accusations against a French citizen, or when it authorized the recreational use of marihuana— but it hasn't systematically situated itself at the center of the public stage. This may be explained in part by the fact limited access to justice means that fewer things arrive at the Court. But in part it seems a consequence of a hesitant attitude that seems to have gained space these few last years. At the moment, several politically-charged cases —like the abstract challenge against the Interior Security Act— are pending, and the Court, maybe attentive to changes in the climate in view of the incoming Presidential election, stays passive. For some reason, the Mexican Court has not capitalized on the very profound discontentment with the political system that prevails in Mexican society. It is much closer to the other branches and far less politically disruptive than its Brazilian counterpart.

5. A DIS-ANALOGY: RIGHTS REVOLUTION *VERSUS* RIGHTS FRUSTRATION

As some authors have underlined, in post-dictatorial Argentina and Brazil, people initially turned to the courts to fight against economic deprivation.[45] They then used the panoply of institutional channels at their disposal to seek guarantee of many other constitutional entitlements. The reach and the intensity of constitutional rights litigation in Brazil are readily visible in any fast survey of the literature, where we find assessments of what is, by all accounts, a robust practice with regards pretty much all constitutionally protected entitlements.

The right to health is no doubt one of the areas where litigation in Brazil –and academic discussion about its effects – has been more intense. Even outside the country, the debate is well known among those who argue that the judicialization of health has not served the interests of those in most need and has increased inequalities, and those that show that, at least in some areas of the country, litigation has helped poor and older individuals which do not leave in metropolitan areas, who depend on the state to provide them with legal representation, and who had been denied medicines

[44] On the way the Court has changed its former criminal law doctrines in recent high-profile corruption cases, see PRADO, Mariana Mota; MACHADO, Marta. **The Promises and Perils of Using Criminal Law to Fight Corruption**: The Lava Jato Case. Paper presented at Seminario en Latinoamérica de Teoría Constitucional y Política 2018, San Juan de Puerto Rico, 2018.

[45] KAPISZEWSKI, Diana. Economic Governance on Trial: High Courts and Elected Leaders in Argentina and Brazil. **Latin American Politics and Society**, v. 55, n. 4, p. 47, 2013.

and services already listed on governmental formularies and plans.[46] Ana Paula de Barcellos has explored, on her part, how public law litigation has operated in Brazil in the shaping of public policy regarding some of the central determinants of health: sanitation policies. Her study covers 258 Court orders, issued in a period of ten years. She concludes that the Brazilian judiciary has been in general willing to improve access to sanitation services, though suits are very far from covering an important percentage of the municipalities with severe problems or from reaching the poorest cities.[47] Also worth mentioning, because of its great visibility outside, is experience with the judicialization of environmental claims,[48] which may be prolonged in a more general practice associated to the enforcement of collective and diffuse rights and interests.[49] While a detailed account of rights enforcement dynamics in Brazil would require far more than these spare examples, I believe the underlying premise is not contentious: Brazilian constitutional dynamics under the 1988 Constitution have definitely included an energetic practice of constitutional rights enforcement, under the lead of the Supremo Tribunal. As Conrado Hübner Mendes remarks:

> *The Supremo Tribunal Federal has been portrayed as one of the responsible actors, if not the foremost, for the main achievements in fundamental rights by Brazilian democracy since the beginning of the 2000s. Paradigmatic decisions taken during this period include the permission of marriage for same-sex couples, the confirmation of affirmative action programs, the authorization of the abortion of anencephalic fetuses, the validation of stem-cell research, intervention in health rights policies, and public officals' right to strike, to mention but a few.*[50]

There may be discussion on what rights enforcement has really meant in terms of problem-solving and social transformation, but not on the fact the Brazilian bill of

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[46] Compare FERRAZ, Ottavio L. Mota. The right to health in the courts of Brazil: Worsening health inequalities? **Health and Human Rights**, v. 11, p. 33-45, 2009, and DA SILVA, Virgilio Alfonso; TERRAZAS, Fernanda Vargas. Claiming the Right to Health in Brazilian Courts: The exclusion of the already excluded? **Law and Social Inquiry**, v. 36 n. 4, p. 825-853, 2011, to BIEHL, João; SOCAL, Mariana P.; AMON, Joseph J. The judicialization of health and the quest for state accountability: Evidence from 1262 lawsuits of access to medicines in Southern Brazil. **Health and Human Rights Journal** v. 18, n. 1, p. 209-220, 2016.

[47] BARCELLOS, Ana Paula de. Sanitation Rights, Public Law Litigation, and Inequality: A Case Study from Brazil. **Health and Human Rights**, v. 16, n. 2, p. 35-46. 2014.

[48] See MCALLISTER, Lesley. **Making Law Matter**: Environmental Protection & Legal Institutions in Brazil. Stanford: Stanford University Press, 2008, and MCALLISTER, Lesley K. Environmental Advocacy Litigation in Brazil and the United States. **Journal of Comparative Law** v. 6, n. 2, p. 203-219, 2011.

[49] For a classical account about Brazilian class actions, the different ways of enforcing collective and diffuse claims in the country, with remarks based on the experience of litigation, see GIDI, Antonio. Class Actions in Brazil - A Model for Civil Law Countries. **American Journal of Comparative Law**, v. 51, p. 311-408, 2013.

[50] MENDES, Conrado Hübner. The Supreme Federal Court of Brazil. In: JAKAB, András; DYEVRE, Arthur; ITZCOVICH, Giulio (eds). **Comparative Constitutional Reasoning**. Cambridge: Cambridge University Press, 2017, p. 117.

rights has become a sprightly collective enterprise that continuously engages citizens, judges, private actors and political and administrative branches.

In Mexico, Courts have accused fewer pressures on the part of the citizenry. Access to justice continues to be extremely limited. For sure, the times when all the cases reaching the Supreme Court involved mere "legality" controversies (as opposed to constitutional ones) are now behind, and the Court has issued important new criteria in several rights-related domains. But if we analyze these developments against the backdrop of a 120-million people country immersed in deprivation, poverty and state collapse, the reach and the low intensity of judicialization are hard to believe. In the area we have focused in the case of Brazil –health—the scenario couldn't be more contrasting. In a study where they search for all Supreme Court *amparos* possibly related with the judicialization of the right to health decided between 2011 and 2017 —after the allegedly rights-booming human rights reform — Cobo and Charvel find only 22 *amparos*, 12 of which are tort, malpractice cases.[51] An examination of the remaining 10[52] reveal a scenario in which the majority of petitioners are corporations, not citizens, elevating claims that have little to do with health rights, focusing instead on opposing health-protective regulations on the basis of economic freedom. Most of all, the number of cases is simply ridiculous. Even if granting that there are some health-related issues dealt with in procedural channels other than *amparo* —abortion and the morning-after, which involved health-related aspects, decided for instance as *acciones de inconstucionalidad* and *controversias*—; even granting that there might be criteria on other *amparos* that impinge on the matter which are not captured by the study's selection focus; and even granting that something might be happening at the level of Circuit Courts —yet in the extremely vertical Mexican judiciary little happens if it does not happen before in the Supreme Court— the numbers are anomalously low.

While the monitoring, systematization and critical assessment of judicial developments in Mexico is grossly insufficient, it is not risky to suggest that the scenario we find with regards health rights is the scenario we equally find in most rights-related

[51] COBO, Fernanda; CHARVEL, Sofía. **The Mexican Supreme Court and the right to health:** its problematic interpretations. Manuscript on file with author, 2018, p. 3-4.

[52] The specific issues are the following: a supermarket that challenges the regulation controlling the production and distribution of tobacco; a restaurant that challenges anti-tobacco exposure regulations; a group of HIV-positive persons that claim to receive medical attention in a building separate from the other patients to be safer from infections; a pharmaceutical company that claims its right to participate in a new drug registration proceedings; a person that challenges the regulations that prohibit vending of electronic cigarettes; a group of persons that challenge the prohibition to make recreational use of marijuana; a person that asks the public system to provide her with an expensive orphan drug; a corporation that challenges the prohibition to distribute soda drinks in high schools; a person that asks for drugs included in the Basic Package; and a homeless person that denounces State omissions in satisfying his basic needs. COBO, Fernanda; CHARVEL, Sofía. **The Mexican Supreme Court and the right to health:** its problematic interpretations. Manuscript, on file with author, 2018. p. 9-10.

areas.[53] By all accounts, there has been no "rights-revolution" in Mexico.[54] There is no debate in Mexico about inter-branch tensions derived of mass litigation of individual or collective claims. Most notably of all, in Mexico the structural, "experimental" judgments that have so famously occupied apex Courts in other Latin American countries are lacking.[55] The Supreme Court of Mexico remains within the confines of classical individual, bi-polar constitutional litigation, with "strong-review" classical techniques. There are no structural orders in the rulings; there is no monitoring; there are no "dialogic" solutions.

While this analysis is limited to register the patterns without much chance to deepen on possible explanations, there are elements that —in view of the literature on the determinants of judicialization— clearly distinguish the situation in the two countries. Some of these elements are "offer"-based and account for the attitude and action of the Courts. Others are "medium"-based and include not only the simplicity or complexity of rights-protecting channels, but also features like the regulation of precautionary measures,[56] or the mechanisms available to assure obedience to the Court.[57] Others, perhaps crucially, are "demand"- based. In this regard, the strength of public interest litigation in Brazil and its merely incipient nature in Mexico can surely explain many things. The 1988 Constitution created anew the Public Defender's Office and transformed the Public Ministry into a powerful, prestigious office with full guarantees of independence. As the literature has remarked, the Public Ministry has become "an institution (…) in charge of promoting, defending and expanding the public sphere in country,"[58] and has played a crucial role in defending individual and collective

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[53] For an overview of criteria by scholars and officials closely familiar with Mexican judicial dynamics, derived however from a non-systematic monitoring, see COSSÍO DÍAZ, José Ramón (coord.). **Constitución Política de los Estados Unidos Mexicanos Comentada**. Mexico City: Tirant lo Blanch, 2017

[54] See the contributions included in CASTAGNOLA, Andrea; NORIEGA, Saúl López (eds.). **Judicial Politics in Mexico**: The Supreme Court and the Transition to Democracy. New York: Routledge, 2017.

[55] For a survey of second-generation dialogical or "experimentalist" structural rulings in Latin America, see BERGALLO, Paola. Justicia y experimentalismo: la función remedial del poder judicial en el litigio de derecho público en Argentina. In: **Derecho y pobreza SELA**, 2005. Available at: <http://digitalcommons.law.yale.edu/yls_sela/45/>. Accessed on: 11 Oct. 2017, and ABRAMOVICH, Víctor; PAUTASSI, Laura. **La revisión judicial de las políticas sociales.** Buenos Aires: Editores del Puerto, 2008., RODRÍGUEZ-GARAVITO, César. (ed.). **Law and Society in Latin America. A New Map.** New York: Routledge, 2015, or several of the contributions in ALVIAR, Helena; KLARE, Karl; WILLIAMS, Lucy A. (eds.). **Social and Economic Rights in Theory and Practice:** Critical Inquiries. Oxon and New York: Routledge, 2015.

[56] In Mexico they are adopted by lower judges, while the Supremo Tribunal flexibly uses the interlocutory injunction. ROSENN, Keith S. Recent Important Decisions by the Brazilian Supreme Court. **The University of Miami Inter-American Law Review**, v. 45 n. 2, p. 297-334, 2013, p. 317.

[57] SILVA, Virgílio Afonso da. **The Constitution of Brazil. A Contextual Analysis.** Oxford: Hart Publishing, 2019 (forthcoming), p. 97.

[58] FERNANDES, Edesio; MCALLISTER, Lesley K. Making Law Matter: Environmental protection and Legal Institutions in Brazil. **Journal of Latin American Studies,** v. 41, n. 3, p. 629–630, 2009, p. 629.

fundamental rights and broadening access to justice.[59] In contrast to the situation in the United States, in Brazil most environmental suits are filed by the Public Ministry,[60] and the same has occurred with regards collective interests/class actions.[61]

6. CONCLUSION

Brazil has been compared to other countries more often than to Mexico. Studies in comparative constitutional change are maybe a first sign that the situation is starting to change.[62] This contribution has meant to suggest to what extent deepening along that comparative path is promising, taking the occasion to explore and assess some aspects of the constitutional systems and the constitutional dynamics that obtain in the two countries.

For sure, our brief focus has left many dimensions of constitutional life outside —there is no need to insist on the limitations of an analysis that does not address the study of federalism or the division of powers, nor articulates rights protection developments with these other dimensions. But it already gestures to features that might have been more difficult to identify without the comparative exercise.

The exercise confirms, in my view, a pessimistic forecast with regards to Mexico. Even with the limitations of a constitution-making process that was not perfect, Brazil is a country where thirty years of constitutional longevity have given both citizens and political actors the opportunity to appropriate the Constitution and use it intensively to manage collective problems —if not, admittedly, to solve them. In Mexico, by contrast, spending one hundred years without the experience of an expanded, intense constitutional moment has taken a heavy toll that is not finding compensation in terms of output legitimacy of the Constitution. The Mexican constitution is a clumsy collection of tools, some of them interesting when viewed in isolation, but un-articulated into a collective political project perceived by citizens as inclusive and normatively aligned with their right and needs. The judiciary —the single actor that in so many counties helps the constitutional legitimacy alchemy occur— has not been helpful enough, and

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[59] SILVA, Virgílio Afonso da. **The Constitution of Brazil. A Contextual Analysis.** Oxford: Hart Publishing, 2019 (forthcoming), p. 134-135.

[60] MCALLISTER, Lesley K. Environmental Advocacy Litigation in Brazil and the United States. **Journal of Comparative Law** v. 6, n. 2, p. 203, 2011.

[61] GIDI, Antonio. Class Actions in Brazil - A Model for Civil Law Countries. **American Journal of Comparative Law**, v. 51, p. 379-382, 2013.

[62] ALBERT, Richard; BERNAL, Carlos; BENVINDO, Juliano Zaiden (eds.). **Constitutional Change and Transformation in Latin America.** Oxford: Hart Publishing, 2019 (forthcoming), and POU GIMÉNEZ, Francisca; POZAS-LOYO, Andrea. **Are Constitutional Amendment and Judicial Review Substitutes?** Unexpected Lessons from Mexico and Brazil. Paper presented at the Law and Society Annual Meeting, Mexico City, 2017.

the country is now witnessing authoritarian regressions[63] and an unstoppable rise in popular frustration.

Although I am not in a position to advance strong conclusions, I dare say that when viewed under the comparative light that comes from Mexico, Brazil does look good. At its thirtieth anniversary, the 1988 Constitution enjoys a solid legitimacy that in Mexico is missing. The analysis suggests, perhaps, that even in countries where institutional design (and path-dependence) confer an extensive array of powers and responsibilities on courts, unbridled activism is not inevitable. A pressing question in the Brazilian context —yet one that can only be answered after a comprehensive survey, not after the sort of preliminary, selective, and exclusively "inviting" analysis we have pursued here— would probably be in what conditions the role now displayed by the Supremo Tribunal Federal is democratically sustainable.

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[63] ALTERIO, Micaela. NIEMBRO, Roberto. Constitutional Culture and Democracy in Mexico: A Critical View of the 100-Year-Old Mexican Constitution. In: GRABER, Mark; LEVINSON, Sanford; TUSHNET, Mark. (eds.). **Constitutional Democracy in Crisis?** New York: Oxford University Press, 2018.

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Abortion, the Irish Constitution, and constitutional change

Aborto, a Constituição irlandesa e mudança constitucional

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Abstract

Abortion in Ireland is regulated by a constitutional provision that was inserted following a referendum in 1983. In May 2018, the Irish people, will voted to remove this provision from the Irish Constitution. In this paper, I examine the reasons for the insertion of the provision; the problems that emerged with it over time; the factors that motivated the campaign for change; and the gradual process of negotiating a proposed change within the political system. The paper concludes by drawing general lessons that might be derived about the about the costs and consequences of the Irish experience of making abortion into a matter of constitutional law and debating its removal. Though somewhat effective in blocking political opponents, constitutionalising abortion has had unexpected consequences: creating uncertainty; involving the judiciary in the regulation of abortion; and perhaps creating a tendency to elevate social and political issues to the constitutional level.

Keywords Abortion; constitutional right to life of the unborn; referendums; constitutional change; citizen-led constitutional change; judicial power.

Resumo

O aborto na Irlanda é regulado por uma disposição constitucional que foi inserida após um referendo em 1983. Em maio de 2018, o povo irlandês votará a remoção desta disposição da Constituição irlandesa. Neste artigo, examinam-se as razões da inserção da provisão; os problemas que surgiram com o tempo; os fatores que motivaram a campanha pela mudança; e o processo gradual de negociação de uma mudança proposta dentro do sistema político. O artigo conclui tirando lições gerais que podem ser derivadas sobre os custos e consequências da experiência irlandesa de fazer o aborto em uma questão de direito constitucional e debater sua remoção. Embora um pouco eficaz no bloqueio de opositores políticos, a constitucionalização do aborto teve consequências inesperadas: criando incerteza; envolvendo o judiciário na regulação do aborto; e talvez criando uma tendência para elevar questões sociais e políticas ao nível constitucional.

Palavras-chave: *Aborto; direito constitucional à vida do nascituro; referendos; mudança constitucional; mudança constitucional liderada pelo cidadão; poder judicial.*

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1. INTRODUCTION

Ireland, like Brazil, is a predominantly Catholic country and, like Brazil, has restrictive laws on abortion. Ireland, however, has been somewhat more pronounced on both fronts. Ireland's Catholic population constitutes 78% of its population as of 2016, as opposed to around 64% in Brazil, though both countries have seemingly shrinking populations of practicing Catholics. Whereas Brazilian law currently permits abortion in cases of threat to life and rape, in Ireland, abortion is permitted only in cases where the life of the mother is at risk. Both Ireland and Brazil have had high-profile and controversial cases about the restrictiveness of their regimes. In Ireland, for the last thirty years, this issue has been a matter of *constitutional* law and politics: this restrictive position is dictated by Ireland's constitutional provisions on abortion inserted in 1983: Article 40.3.3, or, as it has come to be known, "the Eighth Amendment".[1]

However, political momentum on this question may be moving in somewhat opposite directions in each place. In response to a Supreme Court ruling suggesting decriminalisation of the law on constitutional grounds, a constitutional amendment to entrench even stricter abortion laws is being considered in Brazil, suggesting that, by judicial or legislative action, abortion in Brazil may become a domestic constitutional issue.[2] In Ireland, on the other hand, constitutional change has just been effected to remove the issue of abortion from the constitutional framework, and allow substantial liberalisation of the law. The Irish experiment of constitutionalising the issue has been the centre of public debate, as the Irish people return this question to the realm of ordinary politics, while Brazil may be beginning a new era of abortion as a domestic constitutional question. In this article, I offer an account of the Irish experience of constitutionalisation of abortion, and the debate that led to the recent change, to consider what broad lessons might be derived from the Irish experience about elevating this issue to a constitutional level.

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[1] Irish people do not usually refer to constitutional amendments by their number in this way, but this moniker took hold in the public debate, even though it is not entirely accurate. What is called the Eighth Amendment is in fact text created by the Eighth, Thirteenth and Fourteenth Amendments.

[2] Of course, Brazil is a party to the American Convention on Human Rights or Pact of San José, Article 4 of which provides that life is protected "in general, from the moment of conception."

2. THE INSERTION OF ARTICLE 40.3.3

Why did opponents of abortion lobby so fiercely to introduce a constitutional amendment on abortion in the 1980s? In some ways, there was little need to do this. There was, at the time, no prospect of the law on abortion being altered. The prohibition that had prevailed since the passage of the Constitution remained in place, and there was no talk of legislative change.[3] Constitutional change is "costly and time-consuming"[4] and incurs a high "bargaining cost" that would make one slow to pursue such change.[5] This is especially true in Ireland where every constitutional change – even minor ones – must be passed by both Houses of Parliament and be endorsed by a majority of voters in a referendum.[6] Why incur these cost to copper fasten a status quo that was in no danger of alteration?

There are several possibilities.[7] First, the proponents of this change may have considered that it was worthwhile, at a time when Irish society was strongly opposed to abortion, to constitutionally commit to this position in a way that would slow the pace of change and present obstacles for their opponents, should their strong position be eroded. Constitutional change is usually more durable than other political victories because of the significant hurdles one must overcome to undo it. Secondly, the change could have been symbolic, a statement of constitutional values and an assertion (or re-assertion) of constitutional identity.[8] The 1960s and 70s in Ireland had seen a drift away from certain aspects of Catholic social morality, and the Constitution as interpreted by the courts had played some role in this.[9] Asserting this core element of Catholic social teachings in the constitution might have been a way to reassert the power and significance of the religious side of secular-religious cleavage in Irish society.[10]

Finally, the Pro Life Amendment Campaign (PLAC) – the civil-society interest group that led the charge for the amendment – wished to forestall the possibility of

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[3] Abortion was made a crime pursuant to the Offences Against the Person Act 1861.

[4] LANDES, William; POSNER, Richard. The Independent Judiciary in an Interest-Group Perspective. **Journal of Law and Economics**, vol. 18, n. 3, p. 875-901, Dec. 1975. p. 892.

[5] DIXON, Rosalind. Constitutional Amendment Rules: A Comparative Perspective. In: GINSBURG, Tom; DIXON, Rosalind (eds.). **Comparative Constitutional Law**. Cheltenham: Edward Elgar, 2011. p 96-111. p. 104.

[6] See Article Article 46, Constitution of Ireland 1937.

[7] See DOYLE, Oran; KENNY, David. Constitutional Change and Interest Group Politics. In: ALBERT, Richard; CONTIADES, Xenophon; FOTIADOU, Alkmene (eds). **The Foundations and Traditions of Constitutional Amendment**. Oxford: Bloomsbury, 2017. p. 209-211.

[8] See ALBERT, Richard. The Expressive Function of Constitutional Amendment Rules. **McGill Law Journal** vol. 59, n. 2, p. 225-281, 2013; DIXON, Rosalind. Amending Constituting Identity. **Cardozo Law Review**, New York, vol. 33, n. 5, p. 1847-1859, 2012.

[9] See WHYTE, John Henry. **Church and State in Modern Ireland 1923-1979**. 2. ed. Dublin: Gill and MacMillan, 1980.

[10] SINNOTT, Richard. Cleavages, parties, and referendums: Relationships between representatives and direct democracy in the Republic of Ireland. **European Journal of Political Research**, vol. 41, p. 811-826, 2002.

judicial intervention that would liberalise the law even in the teeth of political opposition.[11] The Supreme Court had, in the early 1970s, struck down as unconstitutional the legislative ban on contraception as being a violation of the right to marital privacy.[12] There was a belief on the part of the Catholic Church that contraception would encourage fornication and sex before marriage that would create a demand for abortion.[13] Moreover, the United States Supreme Court, which the Irish Supreme Court had cited in the contraception case, had not long before delivered the judgment in *Roe v Wade*;[14] the step from marital contraception to abortion had taken not even taken 10 years in US constitutional jurisprudence.

In fact, this was probably not a major risk. The Irish courts had taken pains in the contraception case to note that their judgment should not be taken to extend to abortion,[15] and had also suggested on other occasions that the right to life of the unborn might be constitutionally protected.[16] One judge had gone out of his way in a privacy case to clarify that nothing in his judgment should be read to say that the law prohibiting abortion was "in any way inconsistent with the Constitution."[17] Given this, and the general outlook of the Irish courts of the day, it is fair to say that the risk of a *Roe v Wade* style judgment from the Irish Supreme Court was, in the short-to-medium term at least, minimal or nugatory.

However, the Court's assurances that the Constitution posed no threat to the abortion regime were insufficient, and suspicion that the courts might liberalise the law were a key factor in the setting up of PLAC and the willingness of political parties to cooperate with this agenda.[18] The pro-life movement was bolstered by the political

[11] GIRVIN, Brian. Social Change and Moral Politics: the Irish Constitutional Referendum 1983. **Political Studies**, London, vol. 34, n. 1, p. 61-81, 1986.

[12] McGee v Attorney General [1974] IR 284.

[13] WHYTE, John Henry. **Church and State in Modern Ireland 1923-1979.** 2. ed. Dublin: Gill and MacMillan, 1980. At 413, quoting a statement of Catholic hierarchy against contraception reform.

[14] 410 U.S. 113 (1973).

[15] "[T]he rights of a married couple to decide how many children, if any, they will have are matters outside the reach of positive law where the means employed to implement such decisions do not impinge upon the common good or destroy or endanger human life." McGee v Attorney General [1974] IR 284 at 312 per Walsh J. Two other justices, Henchy and Griffin JJ., also stated that any comments made about contraceptives did not apply to abortifacients, to which entirely different considerations might apply.

[16] "[T]he child... has the right to life itself and the right to be guarded against all threats directed to its existence whether before or after birth... The right to life necessarily implies the right to be born". G. v An Bord Uchtála [1980] IR 32 at 69 per Walsh J.

[17] Norris v Attorney General [1984] IR 36 at 102-103 per McCarthy J.

[18] The comments of the Minister for Justice introducing the amendment bill provide evidence: "it has become apparent that judicial decisions can alter fundamentally what had been accepted to be the law even to the extent of introducing what is virtually a system of abortion on demand... In this context, it is only necessary to think of the U.S. Supreme Court decisions on marital privacy". 339 Dáil Debates, col. 1354-56 (Feb. 9th, 1983). There was also – unfounded – fears that the relatively new and unknown forces of the European Court of Human Rights or the Court of Justice of the European Communities would intervene and force the liberalisation of abortion.

instability of the early 1980s, with both major political parties seeking the support of such organizations, and pledging to introduce an abortion amendment if elected.[19]

Eventually, the Fine Gael party, recently elected to government, agreed to hold the referendum. PLAC's preferred wording had been formulated by the main opposition party, Fianna Fáil. Advised by the Attorney General – the government's chief legal advisor – that this language was legally problematic,[20] the government proposed a simpler alternative formulation,[21] but this was not acceptable to the pro-life groups, and parliament favoured the original proposal.

Most opponents of the amendment claimed not to be in favour of legalised abortion, but said that it should be *legislatively*, not *constitutionally*, prohibited. They also complained that the wording was overly vague and ambiguous, a concern borne out by a series of Supreme Court judgments and subsequent amendment proposals needed to clarify the unclear meaning of the inserted text. Despite the opposition, the amendment proposal received overwhelming popular support. Eighth Amendment of the Constitution Act 1983 was approved by referendum on 7th of September 1983 and signed into law on the 7th of October of the same year. It passed with over two thirds of the vote.[22] It introduced a new clause, Article 40.3.3°:

"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

3. ARTICLE 40.3.3 IN PRACTICE

The affirmative protection of the right to life of the unborn – as opposed to a negative provision stopping judicial invalidation of an abortion, say – meant that there were some unanticipated consequences of this amendment. One such consequence was whether information about the availability of abortions in other countries could be lawfully distributed in Ireland. The Supreme Court held that the clause meant it could not.[23] Separately, in 1992, the Attorney General went to Court and obtained an injunction to stop a girl of 14, known to the courts as Ms. X, from travelling to the UK to procure an abortion. She had been the victim of rape and became pregnant, and was suicidal because of the pregnancy. She and her family travelled to England in order to procure

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[19] HOGAN, Gerard. Law and Religion: Church-State Relations in Ireland from Independence to the Present Day. **American Journal of Comparative Law**, vol. 35. n. 1, Jan. 1987. p. 87.

[20] Potentially problematic interpretations ranged from allowing abortions in many cases on the one hand, and demanding a much stricter abortion regime on the other. See 339 Dáil Debates col. 1357 (Feb. 9th, 1983).

[21] The opposition proposal simply read "[N]othing in this Constitution shall be invoked to invalidate or deprive of force or effect a provision of law on the grounds that it prohibits abortion."

[22] The referendum was carried by 841,233 to 416,136. There was a 50.3% turnout.

[23] Attorney General (SPUC) v Open Door Counselling [1988] IR 593.

an abortion, but on hearing of the court case, returned to await the outcome of the court proceedings when the injunction was sought. A majority of the Supreme Court, however, discharged the injunction, holding that the constitutional right to travel could not be restricted because a person intended, while abroad, to procure an abortion that would be legal in the foreign jurisdiction.[24] Furthermore, it held that the Constitutional prohibition did not prevent abortion in the cases where the life of the mother was in danger, and this included danger of suicide. Otherwise there would be insufficient regard shown for the life of the mother. Abortion was not permissible, however, where only the health of the mother was in danger, as the right to life of the unborn was more important in the constitutional hierarchy of rights than the health of the mother.

The *X* Case was controversial. Pro-life advocates thought that Article 40.3.3° was not intended to include risk of suicide as a threat to the life of the mother, and advocated for another constitutional amendment to overturn it. The Twelfth Amendment to the Constitution Bill 1992 proposed that the abortion prohibition should apply even in cases where the risk to the life of the mother was from potential self-harm. This failed, with almost two thirds of voters voting against it. The Thirteenth and Fourteenth Amendment, which were voted on at the same time as the Twelfth, respectively affirmed that the right to life of the unborn should not inhibit the right of any citizen to travel[25] and provided that dissemination of information about abortion available abroad would not be inhibited, overturning the earlier Supreme Court judgment.[26] Both of these measures passed with about 60% of the vote, suggesting a limit to the public support for constitutional restriction on abortion. In spite of the failure of the Twelfth Amendment, successive governments failed to provide, in law, for the provision of abortion in the case of risk of life by reason of suicide. Indeed, there was no legislative regime specifying when doctors could terminate a pregnancy to protect the life of the mother, and in the absence of such laws, doctors felt somewhat inhibited in their actions.

In 2002, another referendum was held on the Twenty-fifth Amendment to the Constitution Bill. This sought, once again, to overrule the *X Case* and remove threat of suicide as a ground for abortion. This was rejected, but by a much narrower margin than the Twelfth Amendment Bill: 50.4% of voters voted against it. Even though voters had (marginally) opted to once again affirm the *X* case, it took another 11 years, and tragic circumstances, for the *X* ruling to be reflected in law.

[24] **Attorney General *v* X** [1992] 1 IR 1.

[25] The following was added to Article 40.3.3°: "This subsection shall not limit freedom to travel between the State and another state."

[26] The following was similarly added to the Article: "This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."

4. EXPORTING THE PROBLEM AND THE SAVITA HALAPPANAVAR CASE

While problematic cases periodically arose before the Irish courts,[27] the effects of Ireland's abortion provisions were occluded by the fact that – particularly after the affirmation of the right to travel and distribute information – abortion was not banned so much as it was outsourced to Great Britain. The relatively low cost and ease of travel to Great Britain from Ireland, and the wide availability of abortion services there, meant that there was only modest barriers for those who wished to access these services. Between 1980 and 2016, almost 170,000 Irish women travelled to Great Britain to procure a termination.[28] In a sense, this provided a release valve; had these services not been available, it is possible that demand for liberalisation might have forced the issue to its crisis earlier.

Ultimately, the issue came to a head in 2013, following the death of a woman named Savita Halappanavar in a hospital in the west of Ireland in October 2012. She suffered from a septic miscarriage at 17 weeks' gestation. She had requested a termination when it had seemingly become apparent that miscarriage was inevitable, but since, at the time, she had not been diagnosed with sepsis, her physicians did not believe her life to be in danger, and refused the request. By the time sepsis was diagnosed, her life was deemed to be in danger, and a termination was attempted, it was too late; Savita Halappanavar died from cardiac arrest resulting from sepsis.

Various enquiries and investigations were launched into her death, and large protests were staged, demanding reform to the law to protect women in such situations. In part due to public pressure that resulted from this case, as well as an earlier adverse ruling from the European Court of Human Rights,[29] the Protection of Life During Pregnancy Act 2013 was ultimately enacted in July 2013, providing legal basis for terminations in line with the *X* case, including risk to life by reason of suicide. Though very limited, and only bringing the law into compliance with the binding judgment of the Supreme Court judgment in *X*, the Act was still controversial, and condemned by many pro-life commentators.[30]

However, in hindsight, we can now see the pressure campaign that followed Savita Halappanavar's death to have been the start of a bigger movement. During the

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[27] For example, D v HSE (unreported, High Court, McKechnie J., May 2007) where a girl in state care was prevented from travelling to procure an abortion; PP v HSE [2014] IEHC 622, where a woman was declared legally brain dead when pregnant, and the hospital, fearing the legal consequences of endangering the life of the unborn, intended to keep the woman on life support until the birth of the child; Roche v Roche [2009] IESC 82, [2010] 2 IR 321, where the Supreme Court considered if the protection for the unborn extended to human embryos.

[28] Irish Family Planning Association, <https://www.ifpa.ie/Hot-Topics/Abortion/Statistics>.

[29] A, B & C v Ireland [2010] ECHR 2032, (2011) 53 EHRR 13.

[30] See O'BRIEN, Breda. Fatally flawed legislation will not put abortion to bed. **The Irish Times**, 06 July 2013.

debate on the Protection of Life During Pregnancy Act, proposals were put forward to allow for abortion in certain other circumstances, such as "fatal foetal abnormalities" or "life-limiting conditions", where the child had a condition that would result in a no life, or a very short life, after birth. However, the government said that it had been advised by the Attorney General that this would be unconstitutional by virtue of Article 40.3.3. It was also widely agreed that an exception for, say, rape, would be unconstitutional, as the life of the mother would not be in jeopardy. In this way, the debate on the Act illustrated the very tight strictures of the Constitution on the legislature's ability to regulate termination of pregnancies.

By putting the issue to the fore of public debate, and prompting mobilisation of pro-choice groups, this created an organised and focussed campaign to lobby for the removal of the constitutional prohibition. Some of this was motivated by those who wished for broad liberalisation, but it also included those who favoured more limited liberalisation that was still not possible as a result of the constitutional strictures. Various groups pressed to keep the matter on the public agenda through 2013-2015, highlighting the number of women that travelled abroad to procure terminations and the lack of decision-making power Irish women had in respect of pregnancies. Bills were put forward in parliament to liberalise the law, but were resisted by the government as unconstitutional.[31] However, the campaigners to some degree opted to take a back seat to the campaign for constitutional change on same-sex marriage, which had been long sought, presumably fearing that distraction from this issue with an abortion amendment campaign might hurt either or both causes. When the same-sex marriage amendment was passed in 2015, a campaign began in earnest to, as the slogan went, "Repeal the Eighth" as the next social change that an increasingly less Catholic Ireland should undertake. The perception was also that since the Irish people had been willing to cut against the Catholic position on same-sex marriage, they might also be willing to do this in respect of abortion.

This became a major issue in the 2016 general election, with pressure put on all parties to propose some strategy or plan for reconsideration of the issue. The Fine Gael party was returned to government with a minority arrangement, and adopted an approach to this issue that had produced good results previously.

5. THE CITIZEN'S ASSEMBLY AND THE EIGHTH AMENDMENT COMMITTEE

In the run up to the 2011 general election, the Labour Party – which would become the minor coalition partner in the next government – committed to legalising

[31] O'REGAN, Michael. Government defeats Daly's abortion Bill with big majority. **The Irish Times**, 10 Feb. 2015.

same-sex marriage. Fine Gael, their majority coalition partner, was a more centre-right party that has historically been more socially conservative. In the programme for government, a compromise was reached: the question of same-sex marriage was referred to a Constitutional Convention, composed of randomly selected citizens and sitting politicians. The Convention considered a grab bag of other issues, such as the Constitution's blasphemy prohibition and political reform. In many respects, the constitutional mechanics of this constitutional change were simple, and the need for the Convention to investigate this topic was questionable. Indeed, the Convention – the result of which would not be binding – was seen by some as a way for Fine Gael to get political cover on the issue of same-sex marriage in the event that their supporters opposed the change, and to buy time to let public opinion shift in favour of the issue.[32] The Convention strongly favoured reform in 2013, and a referendum was eventually held, after further delays, in 2015. By this time, there was strong public support for same-sex marriage, and Fine Gael gave full-throated support to the proposal, which passed comfortably.[33]

Perhaps because of the success of this tactic, the same strategy was adopted by the Fine Gael minority government in respect of abortion after the 2016 election. It was decided that the question of changing or removing Article 40.3.3 would be put to a Citizen's Assembly composed of 100 randomly-selected citizens, who would hear from experts and consider the question. The Citizens were, like the Constitutional Convention, given a handful of other issues to address as well – such as the environment, referendums, and fix-term parliaments – but abortion was clearly its *raison d'etre*.

This was, again, criticised as a stalling tactic and move for political cover, but the Assembly proved to be influential in the process of reform.[34] Having only six months to discuss the issue, and with the citizens having no necessary background in the legal or medical issues, the chair – a retired Supreme Court judge – and expert advisory group assembled legal, medical, and policy experts that had not taken public positions on the question of abortion to testify to the Assembly. They also invited submissions from the public, set aside time for lobby groups to present cases on each side, and heard personal stories of those affected by Ireland's abortion regime. The citizens had a role in shaping the agenda of the Assembly and were allowed to ask questions of those presenting, as well as having time to deliberate at length amongst themselves.

In April of 2017, the Assembly took a final ballot on how to address the question of abortion, both on the constitutional and legislative levels. It proposed – in a move that surprised many – the removal of the constitutional bar, replaced only with

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[32] O'TOOLE, Fintan. Not doing anything about abortion. **The Irish Times**, 31 May 1997.

[33] 62% of voters voted in favour of the change, with a turnout of a little more than 60%.

[34] In the interests of full disclosure, I presented to the Citizen's Assembly in January of 2017 on the topic of the legislative process for passing laws that would govern the area in the event of removal of the constitutional ban.

an empowering provision giving the Oireachtas (parliament) the power to regulate the question of abortion. In respect of their preferred legislative choice, the Assembly recommended abortion for any reason up to 12 weeks, with termination beyond that available on certain listed grounds, such as fatal foetal abnormality.[35]

This was probably a more extensive liberalisation than many had expected. It was expected that the Assembly would favour a more limited solution, such as abortion on specific listed grounds put into the Constitution or into law. However, perhaps as a result of expert evidence suggesting that these solutions could be difficult, or because members were otherwise persuaded of the wisdom of a broader liberalisation, the Assembly favoured greater change. This surprise was welcomed by supporters of repealing the constitutional ban, but the process was strongly condemned by prominent opponents of abortion, who criticised the whole process, and alleged – with seemingly little basis – bias in selection of citizens and in the presentation of issues.[36]

The recommendations of the Assembly were not, however, binding, and did not commit the government or parliament to any particular proposal for change, or indeed, any change at all. The government responded to the Assembly's report by setting up another body – the Joint Oireachtas Committee on the Eighth Amendment – to examine the Assembly's recommendations.[37] Composed of parliamentarians from various political parties, from both houses of parliament, and from all parts of the spectrum on the abortion issue, this body was given three months to consider the Assembly's report, hear from witnesses, and make recommendations.

The Committee might have been seen as yet another exercise in political cover for the government. The Assembly had reported, and the government and parliament needed to decide what to do. How could a parliamentary committee aid this, and how would it not duplicate the work of the Assembly? It was, in some senses, duplicative in terms of the topics of hearings and the evidence heard. However, it was high profile, receiving far more media and public attention than any usual parliamentary committee. Several committee members changed their minds publicly to favour access to abortion for any reason in the first 12 weeks.[38] It also spelt the end of the possibility of libera-

[35] Detailed proposals included no time limit for risk to life (including by suicide), risk to health and fatal foetal abnormality; a 22 week time limit for other serious conditions; and ancillary recommendations about the related issues of healthcare, education etc. See First Report and Recommendations of the Citizens' Assembly, June 29th, 2017, available at <https://www.citizensassembly.ie/en/The-Eighth-Amendment-of-the-Constitution/Final-Report-on-the-Eighth-Amendment-of-the-Constitution/Final-Report-incl-Appendix-A-D.pdf>.

[36] CARSWELL, Simon. Citizens' Assembly: reaction from both sides of abortion debate. **The Irish Times**, 23 Apr. 2017.

[37] Again, in the interests of full disclosure, I testified before this committee in September 2017 on constitutional law questions surrounding the question of repealing or replacing the constitutional bar and judicial intervention.

[38] KELLEHER, Billy. Why I was persuaded abortion up to 12 weeks should be allowed. **The Irish Times**, 21 Mar. 2018.

lisation by means of specific, listed grounds in the Constitution, which at one point might have been thought the most likely option for reasons of political palatability. These were widely agreed to be unworkable by witnesses before the Committee, and dropped out of the debate.

In its report in December 2017, the Committee recommended the repeal of Article 40.3.3 *without any replacement*, and access to abortion for any reason up to 12 weeks, with access for stated reasons after that.[39] These were similar, though not identical to the Citizen's Assembly proposal.

6. THE GOVERNMENT'S PROPOSAL AND THE JUDICIAL REVIEW QUESTION

In January of 2018, the government's proposal for a referendum bill was revealed. The government broadly accepted the proposals of the Assembly and Committee. The government proposed the repeal of the provision and the replacement with a narrow enabling clause: "Provision may be made by law for regulation of termination of a pregnancy."[40] The government also supported the Assembly and Committee proposal to legislate liberalising abortion up to 12 weeks should the referendum pass, though there was dissent on the issue from some government ministers, and a free vote was promised so that parliamentarians could vote according to their conscience, leaving some doubt as to what legislation might follow the passage of the referendum.

This constitutional proposal hedged between the Assembly and Committee, which had disagreed on a major constitutional point: the question of simple repeal or limited replacement of Article 40.3.3. This touches upon a major point of contention between those who desired reform: whether to guard against the possibility of judicial intervention. The focus of the campaign had been removal of the clause in the constitutional text, or "repeal" as it had some to be known. But questions were raised by an eminent lawyer presenting to the Citizen's Assembly about the uncertainty attendant with this. He suggested that if the clause were removed and nothing were inserted in its place, then there was a small but real risk that the courts might subsequently intervene to invalidate legislation passed by parliament. This could be either on the pro-choice side – using the autonomy and bodily integrity rights of pregnant persons to invalidate a restrictive law – or on the pro-life side – using some unenumerated rights

[39] See Report of the Joint Committee on the Eighth Amendment to the Constitution, December 2017, available at <https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_the_eighth_amendment_of_the_constitution/reports/2017/2017-12-20_report-of-the-joint-committee-on-the-eighth-amendment-of-the-constitution_en.pdf>. As well as differing on the constitutional point discussed below, the Committee did not recommend allowing termination beyond 12 weeks for non-fatal abnormalities, which the Assembly had recommended.

[40] Thirty-sixth Amendment to the Constitution Bill 2018.

of unborn children, which may have been recognised by the courts before the insertion of Article 40.3.3, to invalidate a permissive regime. He suggested repeal without more created some significant uncertainty in this regard.[41] This might be offset by inserting some new clause clarifying that the power to regulate abortion was exclusively for the Oireachtas (parliament), or by excluding the power of judicial review in respect of such legislation. Ultimately, the Assembly, concerned about this risk, proposed the former solution.

Somewhat surprisingly, this was met with anger from many of those in favour of removal, who insisted that the clause should be repealed and nothing inserted in its place. This was surprising because the Assembly's proposal was repeal in all but name; the new clause would not act as any kind of restriction on abortion, as other forms of "replacement" might have.

The Eighth Amendment Committee heard evidence from lawyers and academics that broadly supported the testimony given to the Assembly in this respect, though stressed that complete certainty was never achievable, and it was a political choice as to whether replacement was necessary or appropriate to offset uncertainty. Taking its own legal advice, the Committee went further, deciding that replacement was unnecessary, and recommended repeal without more as the most certain option. However, the Attorney General advised the government that for reasons of certainty, a replacement clause should be inserted. The government, perhaps afraid of being seen to challenge the separation of powers in excluding the judicial branch, opted for a relatively loose empowering clause, which does not formally exclude judicial consideration of abortion legislation, but rather suggests to the courts that they should leave these matters to parliament. Repeal advocates acquiesced in this solution, even if they might have preferred simple repeal.

This was a curious dispute in some ways. Why would advocates of repeal be so unhappy with this minimal replacement? There are several possibilities. One is that they thought exclusion of judicial oversight would be unpopular and make the referendum harder to win. However, there is an equally plausible argument on the other side: that had judicial intervention not been hedged against, the risk of judicial liberalisation could have been a major issue in the campaign, as it had been in 1983. Another is that it was a rhetorical or totemic position: the campaign had articulated forcefully its desire for repeal, and built its campaign around the term, such that anything else – even something functionally equivalent – might seem to be a loss or compromise.[42] A third is that they may

[41] MURRAY, Brian. Legal consequences of retention, repeal, or amendment of Article 40.3.3 of the Constitution. **The Citizen's Assembly**, 04 Mar. 2017. Available at <https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_the_eighth_amendment_of_the_constitution/reports/2017/2017-12-20_report-of-the-joint-committee-on-the-eighth-amendment-of-the-constitution_en.pdf>.

[42] See, on the possibility that this was part of another campaign for constitutional change in Ireland, DOYLE, Oran; KENNY, David. Constitutional Change and Interest Group Politics. In: ALBERT, Richard; CONTIADES,

have wished to keep open the option of judicial intervention on their side in the event the legislature proved unwilling to legislate post repeal. This would have meant running the risk of judicial intervention *against* them, but this may have been deemed an acceptable risk. The truth of this matter is difficult or impossible to know.

Interestingly, shortly after the decision on the question was made, the Supreme Court issued a judgment that offered some clarity on the uncertainty in respect of court intervention on the pro-life side. In *IRM v Minister for Justice*,[43] a High Court judge had, in the context of an immigration case, unexpectedly held that Article 40.3.3 was not an exhaustive statement of the rights of the unborn in the constitution: there were rights of the unborn in other parts of the Constitution, such as in the Children's Rights provisions of Article 42A. The Supreme Court rejected this, stating that the rights of the unborn were limited to the rights contained in Article 40.3.3, and that it was never clear that, before Article 40.3.3 had been inserted in 1983, the unborn had any constitutional rights. The case was closely watched, because if the Supreme Court had agreed with the High Court judge, it would have been questionable if the plan of removing Article 40.3.3 would have been sufficient to achieve the desired result of removing the constitutional bar to liberalisation. This might have necessitated going back to the drawing board to write a new proposal.

The outcome of this case also means that the prospect of a judicial decision invalidating a liberalised regime would have been very slight in the event of a simple repeal, with or without an enabling clause. This does not mean that the enabling clause is without effect, however; judicial invalidation of a restrictive regime would still be possible on the grounds of the autonomy or privacy rights of pregnant persons, and is made less likely by the enabling clause.[44] Even for those who favour removal of the provision, the enabling clause might serve a use in the referendum campaign: it might persuade those who would fear judicial liberalisation that the legislature, not the judiciary, will get to decide the issue.

With this Supreme Court judgment, the government was happy to move the proposal forward in parliament, and it passed comfortably. The Irish people voted on the government's proposal in a referendum in late May. By an emphatic margin — 66% to 34% — the people approved the referendum.[45] Following delays caused by unsuc-

Xenophon; FOTIADOU, Alkmene (eds) **The Foundations and Traditions of Constitutional Amendment**. Oxford: Bloomsbury, 2017. p. 210-211.

[43] IRM v Minister for Justice [2018] IESC 14.

[44] The Court did suggest that the that the legislature would have an entitlement to legislate to protect unborn life as an aspect of the common good even aside of any specific rights of the unborn, which appears to be an indication that the legislature may still limit access to abortion even without Article 40.3.3 or specific constitutional rights of the unborn. IRM v Minister for Justice [2018] IESC 14 at [6.3].

[45] More precisely, 66.4 per cent voted in favour, and 33.6 per cent, with 1,429,981 votes in favour and 723,632 against. Turnout was 64.13 per cent.

cessful legal challenges to the referendum, the result amendment came into force on September 18th, 2018.

7. CONSTITUTIONAL CHANGE AND ABORTION: LESSONS FROM THE IRISH EXPERIENCE

Abortion is a question of acute and perhaps intractable moral conflict, a "clash of absolutes"[46] between two sides that may not yield readily, or at all, to compromise. The experience of each country in respect of abortion will thus be in many ways idiosyncratic and unique, and the experience of one place may not have ready transferability to another. At the same time, it is instructive to look at countries which have had unusual or distinctive experiences of constitutional change that may provide rules of thumb – heuristics that can inform our suppositions and assumptions more effectively than the pure speculation and conjecture which might otherwise be our guide. With this qualification, there are several general lessons that might tentatively be drawn from the Irish experience of negotiating the difficulties with abortion and constitutional change.

The first is that constitutional entrenchment of the abortion question was, to some significant degree, effective as a means of blocking political opposition. The pro -life campaign failed to win subsequent victories – such as the abortion information referendum or any of the three referendums related to the *X* case – and its success is also qualified by the reality of abortion being exported to the UK, which the movement failed not prevent. But the insertion of the constitutional provision restrained change in the law even after it was apparent that there was popular and political support for certain changes. It took 35 years from the insertion of the Amendment for the removal of Article 40.3.3 to be put to the people. On the other hand, the success this strategy enjoyed might be, in part, a feature of Ireland's moderately onerous amendment process.[47] Securing a referendum requires substantial political capital, and having had such capital in the 1980s, the pro-life campaign forced their opponents to do substantial political work to even have such changes put to a vote, let alone ratified by the people. Constitutional entrenchment may be less effective at stymying opponents where change is easier, but it would also be easier and less costly to effect such a strategy in

[46] See TRIBE, Laurence. **Abortion:** The Clash of Absolutes. New York: Norton, 1990.

[47] Of course, culture has to be accounted for alongside the formal obstacles in assessing the reality of how difficult an amendment process is. See generally GINSBURG, Tom; MELTON, James. Does the constitutional amendment rule matter at all? Amendment cultures and the challenges of measuring amendment difficulty. **International Journal of Constitutional Law**, Oxford, vol. 13, n. 3, p. 686–713, 2015. Ireland's relatively frequent amendments – particularly in the last thirty years – may suggest is not quite as difficult as it might seem, though there is a reluctance to hold too many referendums, by virtue of their significant cost; public confusion about proposals if too many referendums are held at the same time; and a risk of referendum fatigue amongst voters if they are repeatedly asked to vote on constitutional questions.

the first place, so the cost and the reward might still be congruent. The legitimacy or appropriateness of this tactic is open to debate, but its efficacy, on this example, is clear.

Secondly, this success may have added to or created a trend, noted by several scholars, for Irish politics to be excessively constitutionalised.[48] There is often a sense in Irish politics that major political and social change should be done at a constitutional level in order to be effective. This is true even when there is little or no need to elevate the matter to a constitutional level, or when non-constitutional political action is more important.[49] This trend was not apparent before the insertion of Article 40.3.3. It seems that the success of this change led to almost any political campaign for social change being thought apt for elevation to a constitutional level. Not only is this potentially wasteful of political capital, it also serves to impoverish the non-constitutional political sphere by suggesting that major issues should transcend ordinary politics rather than seriously engage with it. This might, over time, erode trust in representative democracy and politicians.[50] We can say that such a lack of trust is on display in Ireland, although its causes are multifarious, and discerning the influence of any one factor would be impossible.

Thirdly, moving the complex question of abortion to the constitutional sphere – particularly in the form of an unborn right to life, as adopted in Ireland – created a great deal of difficulty and uncertainty. The precise meaning and effect of the amendment were not entirely clear: its effect on the distribution of abortion information may not have been foreseen by voters; the Attorney General believed – erroneously, it transpired – that the clause required the government to injunct citizens from leaving the State to procure abortions abroad. That the government refused to legislate in line with *X* left doctors deeply uncertain of the legality of potential treatments. Only with the 2013 legislation was any functional certainty obtained, thirty years after the insertion of the amendment. Even then, the government was highly restrained by the constitutional provisions when legislating, and there were doubts raised about the constitutionality of that very limited legislation. Moreover, cases continued to arise where medical professionals were unsure of the balance of constitutional rights and the correct legal position, and they were forced to apply to court to know if the course suggested by their medical judgment was constitutional as the law essentially said nothing, and the

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[48] See generally DALY, Eoin. Reappraising judicial supremacy in the Irish constitutional tradition. In: HICKEY, Tom; CALLIHANE, Laura; GALLEN, James (eds.) **Judges, Politics and the Irish Constitution.** Manchester: Manchester University Press, 2017.

[49] Examples include campaigns to elevate the right to water and housing to a constitutional level. A less extreme version of this argument can be made against the Children's Rights Amendment proposed and passed in 2012. See DOYLE, Oran; KENNY, David. Constitutional Change and Interest Group Politics. In: ALBERT, Richard; CONTIADES, Xenophon; FOTIADOU, Alkmene (eds) **The Foundations and Traditions of Constitutional Amendment**. Oxford: Bloomsbury, 2017. p. 199-218.

[50] Tierney highlights this as a major potential risk of constitutional referendums. TIERNEY, Stephen. **Constitutional Referendums**: the theory and practice of republican deliberation. Oxford: OUP, 2012.

Constitution had regulative effect in the area.[51] The Irish case illustrates the potential negative effects for legal certainty and regulatory flexibility of raising abortion to the constitutional level.

Fourthly, and relatedly, though the amendment was in large part motivated by fear of judicial intervention, raising the matter to the constitutional level ironically involved courts very substantially in this area. Obviously, courts were prevented from invalidating a prohibition on abortion – which they probably would not have done in any event – but as a consequence of the new constitutional provision, the courts became intimately involved with setting abortion policy, as every question around the limits of abortion became a matter not of policy or politics, but of constitutional interpretation. The appropriateness of having these matters judicially determined is open to question, and is curiously at odds with the distrust of the judiciary that motivated putting the matter on a constitutional footing in the first place.

Fifthly, the issue being regulated on the constitutional level, and overseen by the judiciary, created a passive attitude to the issue in the executive and legislative branches. On one level this is understandable, as the issue was largely removed from their bailiwick. However, even when a legislative measure was invited or required – after the *X* case , say – the political branches declined to act, preferring repeatedly to offer referendums and let the public decide rather than act on matters plainly within their competence.[52] Removing this political issue from the ordinary contestation of politics allowed – and even encouraged – political abnegation of responsibility on any question related to it. When the time came to reconsider the question, the government placed two levels of intermediary – the Assembly and the Committee – between it and the making of the decision.

Sixthly, the Citizen's Assembly process of formulating constitutional change in Ireland – though thought by some to be cynical and a political ploy – was in fact seemingly influential in setting a baseline for the debate. The Assembly's findings primed subsequent debate in the Committee and probably in government, and the two core suggestions it made – to remove the clause from the Constitution and not replace it with any regulative provision, and to provide for abortion up to 12 weeks – were adopted by the Committee and the government. Neither of these two results seemed inevitable or even particularly *probable* before the Assembly met. Furthermore, it set the public debate on the constitutional position on abortion in motion, and did so in a carefully curated and controlled way, which may have helped to create a largely civil discourse following its conclusion. Finally, it may have changed people's minds: in the

[51] See PP v HSE [2014] IEHC 622.

[52] One leader even suggested legislating for the *X* case, but having his own party's senators vote against the measure, allowing for a never-used provision of the Constitution (Art 27) to be invoked to put the Bill to the people in a referendum. O'TOOLE, Fintan. Not doing anything about abortion. **The Irish Times,** 31 May 1997.

12 months of 2017, according to opinion polls, many people changed their minds on the abortion question.[53] It might have been the Assembly's recommendations – and/or the process of debate it spearheaded – that changed these minds. That a group of randomly chosen citizens, well informed by experts, reached the conclusion that this was the best path may have persuaded voters to reconsider their own views. The case for public participation in the formulation of change proposals is, on this example, strong.

Finally, having raised the issue to a constitutional level, it has been difficult to sever the constitutional question from the regulatory question in the public mind. The Assembly and the Committee dealt with the two issues separately – the removal of the issue from the Constitution and the legislation that might be introduced after the constitutional change might be made. Despite the fact that these are conceptually distinct questions – in principle, any regulatory regime could follow the constitutional change – they have been repeatedly elided in public debate, and opponents of the proposal painted a vote to change the Constitution as a vote for abortion up to 12 weeks,[54] even though the legislature could only decide what regime to introduce after a successful vote.[55] Once joined together, abortion and the constitutional order are, at the very least, difficult to disentangle. At the same time, exit polls suggest that the efforts to separate the issues in the minds of voters may have been effective: some voters did vote in favour of the referendum in spite of disagreeing the legislative regime that would likely follow a Yes vote.[56]

Given the outcome of referendum, Ireland's experiment in the constitutionalisation of abortion is, barring an unlikely subsequent judicial intervention, at an end. Even for those ideologically opposed to abortion, it would be hard to call this experiment an unqualified success. It may have prevented the liberalisation of abortion for a time, but its costs – to legal certainty, to the capacity of, and trust in, the political system, to the many who travelled to obtain abortions – have been significant. Time will tell what the

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[53] 19% of respondent to a. January 2018 poll said they had become more open to wider availability in abortion in that period. LOSCHER, Damian. Abortion poll findings dramatic but attitude change has been gradual. **The Irish Times**, 26 Jan. 2018.

[54] See BINCHY, William. Supreme Court has given us a clear choice in abortion referendum. **The Irish Times**, 14 Mar. 2018.

[55] Moreover, the current government lacks a majority in the Dáil and is backed by a confidence and supply arrangement by independent parliamentarians and the largest opposition party. This introduces more uncertainty and unpredictability into the legislative process than would be usual. Ireland's Westminster system is executive dominated, and heavy use of the party whip to ensure members vote as instructed means that the government has *de facto* control of the legislative process most of the time. The process of legislating for abortion after a referendum could potentially produce unexpected outcomes.

[56] This suggested that though 69.4% of respondents in the exit poll voted Yes, only 52% agreed that abortion should be available on request up to 12 weeks, which was the proposal that was promised to follow from a Yes vote, suggested that this group had severed the constitutional question from the legislative one. RTÉ and Behaviour and Attitudes, 'Thirty-sixth Amendment to the Constitution Exit Poll' at 131, available at < https://static.rasset.ie/documents/news/2018/05/rte-exit-poll-final-11pm.pdf> .

return of this issue to ordinary politics in Ireland might bring. But the Irish experience offers some cautionary tales to those who would consider raising abortion – or other complex and contested social questions – to a constitutional level and regulating them with constitutional text.

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Constitucionalismo popular: modelos e críticas

Popular constitutionalism: models and criticism

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Resumo

O artigo aborda o constitucionalismo popular em seus principais autores. Em seguida, analisa os modelos apresentados para materializar este constitucionalismo popular. Depois disso, aponta os principais críticos desta corrente do pensamento constitucional americano. A

Abstract

The article brings up the popular constitutionalism, discussing its main authors. Following, it analyses the existing models idealized to materialize this popular constitutionalism. Then, the article points the main critics to this tendency of the American constitutional thought. Departing from

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partir de todas estas exposições, o artigo busca, através de uma revisão bibliográfica crítica das principais obras de referência do constitucionalismo popular, encontrar a possibilidade de uma visão conciliatória entre supremacia judicial e participação popular e identificar as principais contribuições do constitucionalismo popular.

Palavras-chave: constitucionalismo popular; constitucionalismo americano; revisão judicial; supremacia judicial; democracia.

all these expositions, the article aims, through a critical bibliographic review of the best contributions of the popular constitutionalism, to find a possibility of reconciliation between judicial supremacy and popular engagement and identify the best contributions made by the popular constitutionalism.

Keywords: *popular constitutionalism; American constitutionalism; judicial review; judicial supremacy; democracy.*

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1. INTRODUÇÃO

"Nós não somos finais, porque somos infalíveis, mas nós somos infalíveis porque somos finais" (*We are not final because we are infallible, but we are infallible only because we are final*). Com estas palavras, o ministro Robert Jackson, no caso *Brown v. Allen*[1], descreveu não apenas a posição da Suprema Corte dos Estados Unidos, mas de muitas Supremas Cortes e Tribunais Constitucionais pelo mundo afora.

A revisão judicial sempre trouxe, nos Estados Unidos, uma grande preocupação quanto à legitimidade democrática dos tribunais para verificar os resultados obtidos pelo processo político. Esta polêmica se torna ainda maior quando se confere não apenas o poder ao Judiciário para invalidar leis que conflitam com a Constituição, mas também lhe concede a função de intérprete supremo, de instituição com o poder de dar a palavra final sobre o significado constitucional.

O presente artigo pretende analisar o regresso deste debate na academia norte-americana, ocorrida no começo deste século, através da corrente denominada *Constitucionalismo popular*.

A escolha por um marco teórico e um problema de pesquisa norte-americano é útil em virtude da natureza de relativa universalidade do constitucionalismo norte-americano, já que este é uma referência global no direito constitucional, sobretudo, em razão da supremacia da Constituição, com o marco do caso *Marbury v. Madison*. Assim, a discussão estadunidense possui grande importância para o próprio constitucionalismo

[1] UNITED STATES OF AMERICA. **Supreme Court of United States**. Brown v. Allen. 344 U.S. 443 (1953), tradução nossa. Disponível em: <https://supreme.justia.com/cases/federal/us/344/443/case.html>. Acesso em 29 de julho de 2017.

brasileiro, que também é marcado por um modelo de supremacia da Constituição e revisão judicial.

Deste modo, a pesquisa visa, a partir de um método de revisão bibliográfica, visitar as principais obras do constitucionalismo popular, notadamente Larry Kramer, Mark Tushnet, Richard Parker e Jeremy Waldron; procurar a sugestão de modelos de constitucionalismo popular ou que aumentem a participação do povo no significado da Constituição realizada por alguns autores; e, por fim, realizar um levantamento das principais críticas endereçadas ao Constitucionalismo Popular; expondo, desta maneira, o estado da arte sobre o tema.

O objetivo da pesquisa consiste em debater sobre um possível ponto de equilíbrio que não permita uma “tirania da maioria” na interpretação da Constituição, temida por muitos (explanaremos a este respeito ao longo do trabalho), e, ao mesmo tempo, fomentar a discussão que traga luzes para uma melhora institucional da participação popular nas decisões constitucionais, abandonando uma visão simplista e idealizada dos juízes.

Desta forma, na Parte I do artigo, realizaremos uma contextualização introdutória do constitucionalismo norte-americano pontuando às discussões que são tratadas pelo constitucionalismo popular. Na Parte II, trataremos diretamente do Constitucionalismo Popular, apresentando seus principais autores e buscando seus pontos em comum, bem como conceitos para esta corrente do pensamento constitucional. Na parte III, discutiremos modelos que já foram apresentados por autores norte-americanos de como aproximar a participação popular da interpretação constitucional. Na parte IV, expomos críticas ao constitucionalismo popular, citando autores que se opõem a ele. Por fim, chegaremos às considerações finais.

2. PANORAMA GERAL DA QUESTÃO DO *JUDICIAL REVIEW* NOS ESTADOS UNIDOS

> *Não é totalmente inválida a observação de que, ao declarar o que deve ser a lei suprema do país, a própria Constituição é a primeira a ser mencionada, e não as leis dos Estados Unidos genericamente, mas apenas aquelas feitas em conformidade com a Constituição, há esta ordem.*
>
> *Assim, a particular fraseologia da Constituição dos Estados Unidos confirma e intensifica o princípio, suposto de ser essencial a toda Constituição escrita, que a lei repugnante à Constituição é nula, e a Corte, como os demais departamentos, está vinculada a este instrumento.*[2]

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[2] Caso Marbury v. Madison (UNITED STATES. **Supreme Court of United States** Marbury V. Madison, tradução nossa. Disponível em: <https://supreme.justia.com/cases/federal/us/5/137/case.html>. Acesso em: 22 de julho de 2017).

Com estas palavras, John Marshall declarou inconstitucional o art. 13 da Lei Judiciária de 1789, no caso *Marbury v. Madison*, afirmando a Supremacia da Constituição, tornando a decisão emblemática no que tange à consagração da revisão judicial (*judicial review*).

A discussão sobre a competência da Corte para declarar a inconstitucionalidade de atos emanados pelo Congresso foi, de certa forma, aberta em razão de uma omissão dos constituintes, que não afirmaram, ao menos de forma inequívoca, que a Suprema Corte possuiria esta competência.

Westin sintetiza a posição dos comentaristas sobre as intenções dos constituintes em quatro grupos:

> *1º Os constituintes decidiram conscientemente que o Judiciário teria o poder de julgar os atos do Congresso, e isto afirmaram com palavras expressas no texto da Constituição.*
>
> *2º Os constituintes julgaram, conscientemente, que tal poder decorreria, por dedução normal, dos demais poderes conferidos à Côrte e da lógica de uma Constituição escrita definindo um governo com limitação de poderes.*
>
> *3º Os constituintes ficaram indecisos sobre se deveriam outorgar à Côrte o poder de revisão. A Convenção terminou os trabalhos sem uma resolução consciente sobre a matéria, e os convencionais se separaram com opiniões diferentes sobre se a revisão pelo Judiciário seria admitida ou não.*
>
> *4º Os constituintes examinaram a questão da revisão pelo Judiciário e decidiram omiti-la da Constituição, porque a maioria não estava convencida de seu acerto ou necessidade.*[3]

Sendo assim, a questão relativa à intenção original dos constituintes estadunidenses, tão reverenciados, permanece aberta e mal resolvida ao ponto de existirem posições extremamente antagônicas como a de que a Constituição expressamente afirma o *judicial review* e a de que a competência fora omitida, porque os constituintes não estavam convencidos de sua necessidade.

Para dificultar, ainda mais, a questão, John Marshall, em sua decisão em *Marbury v. Madison*, fez uma sustentação de pura lógica constitucional, não discutindo aspectos históricos como as práticas em tempos coloniais, debates durante a Convenção e a Ratificação.[4]

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[3] WESTIN, Alan F. Introdução. In: BEARD, Charles A. **A Suprema Côrte e a Constituição**. Trad. Paulo Moreira da Silva. Rio de Janeiro: Forense, 1965. p. 13.

[4] WESTIN, Alan F. Introdução. In: BEARD, Charles A. **A Suprema Côrte e a Constituição**. Trad. Paulo Moreira da Silva. Rio de Janeiro: Forense, 1965. p. 16.

A partir da década de 1880 em diante, houve um grande crescimento da pesquisa histórica a este respeito como de William M. Meigs[5], George Bancroft[6] e Charles Beard[7]. Modernamente, encontramos, por exemplo, Larry Kramer.[8] Os norte-americanos possuem forte apego à discussão relativa aos fundadores dos Estados Unidos, cujo debate é interminável.

A polêmica a respeito é tão complexa que acaba sendo pluripartidária e até mesmo pluri-ideológica, fazendo partidários tanto da direita, quanto da esquerda, liberais ou conservadores, defenderem ou questionarem o controle de constitucionalidade. Muitas das vezes, estas posições se confundem com satisfações ou insatisfações com decisões particulares, o que coloca um componente emocional bastante forte. A história dos Estados Unidos comprova esta diversidade e confusão de posicionamentos ao longo da evolução das decisões da Suprema Corte dos Estados Unidos, apresentando, inclusive, momentos bastante conturbados.

Na primeira metade do século XX, até pouco depois do *New Deal*, eram os progressistas que se queixavam do ativismo judicial ocorrido na Suprema Corte em sede de controle de constitucionalidade. Neste período, a Suprema Corte declarou como inconstitucionais diversas leis consideradas progressistas.

O caso emblemático desta onda conservadora foi *Lochner v. New York*[9]. Nesta, a Corte declarou uma lei de Nova Iorque que fixava a jornada máxima de dez horas nas padarias, considerando que era uma interferência indevida na liberdade do contrato[10]. Conforme relata Westin, este modo de agir, se seguiu em outras decisões, como *Adair v. United States* (1908), em que fora invalidada lei federal que punia empresas ferroviárias que obrigassem os trabalhadores a sair dos sindicatos e *Hammer v. Dagenhart* (1918) em que se anulou "a lei federal que regulava o trabalho de menores em estabelecimentos manufatureiros dedicados ao comércio interestadual"[11].

A continuação desta resistência, posteriormente, levou a uma das maiores crises da Suprema Corte dos Estados Unidos. A Corte, na década de 30, continuou seu

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[5] MEIGS, William M. **The Relation of the Judiciary to the Constitution**. New York: The Neale Publishing Company, 1919. Disponível em: <https://archive.org/details/relationjudicia00meiggoog>. Acesso em: 21 de julho de 2017.

[6] BANCROFT, George. **History of the Constitution of the United States**. New York: D. Appleton and Company, 1882. Disponível em: <https://archive.org/details/historyofformati01banc>. Acesso em: 21 de julho de 2017.

[7] BEARD, Charles A. **A Suprema Côrte e a Constituição**. Tradução de Paulo Moreira da Silva. Rio de Janeiro: Forense, 1965.

[8] KRAMER, Larry. **The people themselves**. Kindle Edition. Oxford: Oxford University Press, 2004.

[9] UNITED STATES OF AMERICA. **Supreme Court of United States**. Lochner v. New York. Disponível em: <https://supreme.justia.com/cases/federal/us/198/45/case.html>. Acesso em: 22 de julho de 2017.

[10] RODRIGUES, Lêda Boechat. **A Corte Suprema e o Direito Constitucional Americano**. 2. ed. Rio de Janeiro: Civilização Brasileira, 1992. p. 130.

[11] WESTIN, Alan F. Introdução. In: BEARD, Charles A. **A Suprema Côrte e a Constituição**. Trad. Paulo Moreira da Silva. Rio de Janeiro: Forense, 1965. p. 30.

ativismo e declarou a inconstitucionalidade de leis que buscavam a recuperação econômica dos Estados Unidos frente à crise. Em razão desta atuação, surgiram duas propostas: 1) sustentada por Roosevelt e denominada por *court-packing*, propunha, por intermédio de lei, o aumento no tamanho da Corte e aposentadoria dos ministros de mais de 70 anos, para a nomeação de novos juízes; 2) proposta por setores do Congresso, visava retirar da Suprema Corte a "última palavra", permitindo que o Legislativo poderia discutir definitivamente a revisão judicial.[12]

No entanto, nenhuma das propostas foram concretizadas. Em 1937, no caso *West Coast Hotel Co. v. Parrish*, em uma decisão de cinco votos a quatro, a Corte mudou sua orientação jurisprudencial e declarou a constitucionalidade de uma lei que estabelecia o salário mínimo para mulheres.[13]

Contudo, a partir da década de 50, os ventos mudaram e a Corte que, antes de 1937 era considerada ativista e conservadora, passou a ser ativista e progressista. Neste contexto, os papéis se inverteram e, então, os conservadores é que passaram a ser os críticos da revisão judicial[14].

Esta mudança tem como início o caso *Brown v. Board v. Education*, que reverteu a doutrina "separados, mas iguais", defendendo uma maior igualdade racial e questionamento da segregação racial[15]. Esta nova onda progressista se tornou ainda mais polêmica depois das decisões em *Griswold v. Connecticut* e *Roe v. Wade*. O primeiro declarou a inconstitucionalidade de uma lei de Connecticut que criminalizava o uso de anticoncepcionais, enquanto, o segundo permitiu o aborto em até 3 meses de gestação. Em ambas, sustentaram-se as decisões no direito à intimidade, implícito em vários dispositivos do texto constitucional.

No entanto, apesar desta inversão entre liberais e conservadores nos postos de críticos do *judicial review*, uma corrente constitucionalista acadêmica norte-americana

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[12] JÁCOME, Jorge González. ¿El poder para la gente? Una introducción a los debates sobre el Constitucionalismo popular…. In: CHEMERINSKY, Erwin; PARKER, Richard D.; JÁCOME, Jorge González. **Constitucionalismo Popular**. Bogotá: Siglo del Hombre Editores, 2011. p. 21-22.

[13] JÁCOME, Jorge González. ¿El poder para la gente? Una introducción a los debates sobre el Constitucionalismo popular…. In: CHEMERINSKY, Erwin; PARKER, Richard D.; JÁCOME, Jorge González. **Constitucionalismo Popular**. Bogotá: Siglo del Hombre Editores, 2011. p. 22.

[14] CHEMERINSKY, Erwin. In defense of judicial review: The perils of popular constitutionalism. **University of Illinois Law Review**, Champaign, n. 3. p. 673-690, 2004. Disponível em: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2144&context=faculty_scholarship>. Acesso em: 29 de julho de 2017.
[Kramer] discorda que os conservadores tenham se tornado críticos da revisão judicial, apontando que poucos conservadores rejeitaram a revisão judicial, tendo a maioria defendido a prática de uma supremacia judicial. Segundo ele, os autores liberais possuíam mais dificuldade em se posicionar com relação ao ativismo da Corte Warren (KRAMER, Larry. Popular Constitutionalism, Circa 2004. **California Law Review**, Berkeley, v. 92. p. 959-1012, jul. 2004. p. 965 e 967).

[15] JÁCOME, Jorge González. ¿El poder para la gente? Una introducción a los debates sobre el Constitucionalismo popular…. In: CHEMERINSKY, Erwin; PARKER, Richard D.; JÁCOME, Jorge González. **Constitucionalismo Popular**. Bogotá: Siglo del Hombre Editores, 2011. p. 24-25.

tem causado grande rebuliço no debate constitucional contemporâneo, trata-se do Constitucionalismo Popular.

3. O CONSTITUCIONALISMO POPULAR

Difícil tarefa é a de trazer uma definição para o Constitucionalismo Popular. Chemerensky, crítico desta corrente, afirma que nem os constitucionalistas populares conseguem se definir, havendo diferentes visões entre os próprios autores.[16]

Uma forma de tentar definir o constitucionalismo popular, é trazida por Larry Kramer ao opor o conceito de constitucionalismo popular com constitucionalismo legal. Em um sistema de constitucionalismo popular o povo não estaria confinado a atos constituintes ocasionais, mas estaria ativamente incluído na interpretação e efetividade do direito constitucional. Já, no constitucionalismo legal, a autoridade última de interpretação e de efetividade estaria no Judiciário, que possuiria a "palavra final"[17]. E, ainda, conforme o mesmo autor, o constitucionalismo popular defende que a interpretação jurídica autorizada possa acontecer não apenas nos tribunais, mas, antes, pressupõe que um processo de interpretação igualmente válido possa ser empreendido nos poderes políticos.[18]

Mark Tushnet apresenta um conceito de Constitucionalismo Popular como sendo um processo dialógico. Neste, o povo mobilizado, seus representantes políticos e as Cortes oferecem suas interpretações constitucionais ao mesmo tempo. Sendo assim, a interação de todos estes atores produziria direito constitucional. No entanto, a principal diferença do constitucionalismo popular é que neste as Cortes não são protagonistas no diálogo. Neste modelo, o povo e os Poderes Legislativo e Executivo podem aceitar decisões da Corte, mas podem, contudo, também rejeitá-las, ignorando o que fora decidido pelo Judiciário[19]. Em *Taking the Constitution away from the Courts*, Mark Tushnet afirma que o Constitucionalismo Popular "se baseia na ideia de que todos nós deveríamos participar na criação de direito constitucional através de nossas ações na política"[20].

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[16] CHEMERINSKY, Erwin. In defense of judicial review: The perils of popular constitutionalism. **University of Illinois Law Review**, Champaign, n. 3. p. 673-690, 2004. Disponível em: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2144&context=faculty_scholarship>. Acesso em: 29 de julho de 2017. p. 675-676.

[17] KRAMER, Larry. Popular Constitutionalism, Circa 2004. **California Law Review**, Berkeley, v. 92. p. 959, jul. 2004.

[18] KRAMER, Larry. Democracia Deliberativa e Constitucionalismo Popular: James Madison e o "Interesse do Homem". In: BIGONHA, Antonio Carlos; MOREIRA, Luiz (org.). **Limites do Controle de Constitucionalidade**. Rio de Janeiro: Lumen Juris, 2009. p. 89. Tradução de Adauto Villela.

[19] TUSHNET, Mark V. Popular Constitutionalism As Political Law. **Chicago-Kent Law Review**, Chicago, v. 81. p. 999-1000, 2006.

[20] TUSHNET, Mark.**Taking the Constitution away from the Courts**. Kindle Edition. Princeton: Princeton University Press, 1999, posição 2338, tradução nossa. Em razão da inexistência de regras da ABNT acerca da citação

David Pozen categoriza o constitucionalismo popular em três correntes de pensamento. O primeiro é o Constitucionalismo popular modesto que aceita que as Cortes derrubem leis e preferências majoritárias ocasionalmente, no entanto, defendem que isto não interrompa o diálogo constitucional, devendo os atores extrajudiciais, inclusive o próprio povo, se manifestar sobre as decisões e participar do processo decisório. Ou seja, a partir deste pensamento, a Corte não deve ser vista como um "oráculo com o monopólio da verdade constitucional", devendo o povo se manifestar de forma mais próxima às Cortes, criticando-a quando discordar e tomando ação quando discordar fortemente.[21]

A segunda corrente do Constitucionalismo Popular seria o Constitucionalismo Popular Robusto. Esta defende o encolhimento do poder de revisão judicial, procurando não apenas eliminar a supremacia judicial, mas a interpretação judicial como prevalecente na cultura constitucional. Alguns, como Mark Tushnet, chegariam a defender a total eliminação da revisão judicial.[22]

A terceira corrente, cuja caracterização como Constitucionalismo Popular é bastante duvidosa, é o Departamentalismo. Segundo esta, os três poderes deveriam realizar uma interpretação constitucional coordenada, não havendo uma autoridade independente para interpretar a Constituição. O próprio Pozen afirma, no entanto, que diversos autores afirmam que o Departamentalismo não é uma forma de Constitucionalismo Popular, já que não foca no povo propriamente dito, mas em seus representantes.[23]

Os principais autores do Constitucionalismo Popular são normalmente apontados como sendo: Larry Kramer, Richard Parker, Jeremy Waldron e Mark Tushnet.

Larry Kramer é talvez quem tenha dado maior contribuição bibliográfica ao constitucionalismo popular. Helen Knowles e Julianne A. Toia apontam, com base em dados, que o número de trabalhos acadêmicos sobre o tema cresceu muito depois da obra *The People Themselves: Popular Constitutionalism and Judicial Review*[24].

Kramer realiza uma abordagem histórica, defendendo que o constitucionalismo popular sempre foi a intenção dos fundadores da nação norte-americana. Segundo sua

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de livros eletrônicos e a falta de organização em páginas da maioria das obras no formato Kindle, adotar-se-á a citação por "posição" e não por página (já que esta, na maioria das vezes, não existe neste formato).

[21] POZEN, David E. Judicial Elections as Popular Constitutionalism. **Columbia Law Review**, New York, v. 110, n. 8. p. 2047-2134, dec. 2010. p. 2060-2061.

[22] POZEN, David E. Judicial Elections as Popular Constitutionalism. **Columbia Law Review**, New York, v. 110, n. 8. p. 2047-2134, dec. 2010. p. 2061-2062.

[23] POZEN, David E. Judicial Elections as Popular Constitutionalism. **Columbia Law Review**, New York, v. 110, n. 8. p. 2047-2134, dec. 2010. p. 2063.

[24] Cf. KNOWLES, Helen J.; TOIA, Julianne A. Defining "Popular Constitutionalism": The Kramer Versus Kramer Problem. **Southern University Law Review**, Baton Rouge. p. 1-40, 9 abr. 2014. Disponível em: <https://ssrn.com/abstract=2395465>. Acesso em: 17 de setembro de 2017.

concepção: "na era da Fundação era diferente. Naquela época, o poder de interpretar (e *não* apenas o poder de criar) a norma constitucional, pensava-se, residir com o povo".[25]

Em *The People Themselves*, sua principal obra bibliográfica sobre o tema, realiza ampla revisão histórica defendendo que o pensamento constitucional americano que prevaleceu durante grande parte da história norte-americana, mas sobretudo nas primeiras décadas, foi o do constitucionalismo popular.

Segundo ele, os fundadores dos Estados Unidos estavam profundamente comprometidos a criar um sistema constitucional cujo protagonista seria o povo, que concederia ao governo direção e energia. A invocação do "povo", desta forma, não era meramente retórica, mas expressava os sentimentos e objetivos dos líderes americanos[26]. Conforme suas próprias palavras: "Constitutionalismo americano designou aos cidadãos comuns a função central e crucial na implementação constitucional"[27]. Assim, a "palavra final" em matéria constitucional residiria no povo.[28]

O autor ressalta em diversos trechos da obra, no entanto, que, o Constitucionalismo Popular não se opõe à revisão judicial, mas defende, todavia, que a interpretação constitucional realizada pelo Judiciário não está acima daquela realizada por outros Poderes, e que todas estas formas de interpretação, inclusive a judicial, estariam subordinadas ao entendimento do povo[29]. Desta maneira, *a oposição do Constitucionalismo Popular, segundo Kramer, não está em relação à revisão judicial, mas à supremacia judicial*.

Helen Knowles e Julianne Toia demonstram que muitos trabalhos acadêmicos confundem o propósito de Kramer, apontando que este faria a crítica da revisão judicial, quando, no entanto, o enfrentamento se dá em relação à supremacia judicial. Este desentendimento dos objetivos de Kramer deu ao Constitucionalismo Popular ares de radicalismo que não necessariamente representa o movimento[30]. Kramer deixa bem claro em seu livro que o constitucionalismo popular, em sua concepção, nunca negou às Cortes o seu poder de revisão, mas negava o poder dos juízes de falar por último[31].

Voltando à revisão histórica de Kramer, o constitucionalista relata que, ao criarem a Constituição Americana de 1787, os constituintes pouco se preocuparam com o *judicial review* em nível federal, havendo apenas certa aceitação no que dizia respeito à

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[25] KRAMER, Larry. "Democracia Deliberativa e Constitucionalismo Popular: James Madison e o "Interesse do Homem". In: BIGONHA, Antonio Carlos; MOREIRA, Luiz (org.). **Limites do Controle de Constitucionalidade**. Rio de Janeiro: Lumen Juris, 2009. p. 87. Tradução de Adauto Villela.

[26] KRAMER, Larry. **The people themselves**. Kindle Edition. Oxford: Oxford University Press, 2004. p. 6-7.

[27] KRAMER, Larry. **The people themselves**. Kindle Edition. Oxford: Oxford University Press, 2004. p. 8, tradução nossa.

[28] KRAMER, Larry. **The people themselves**. Kindle Edition. Oxford: Oxford University Press, 2004. p. 8 e 208.

[29] KRAMER, Larry. **The people themselves**. Kindle Edition. Oxford: Oxford University Press, 2004. p. 8 e 60.

[30] KNOWLES, Helen J.; TOIA, Julianne A. Defining "Popular Constitutionalism": The Kramer Versus Kramer Problem. **Southern University Law Review**, Baton Rouge. p. 21, 9 abr. 2014. Disponível em: <https://ssrn.com/abstract=2395465>. Acesso em: 17 de setembro de 2017.

[31] KRAMER, Larry. **The people themselves**. Kindle Edition. Oxford: Oxford University Press, 2004. p. 208.

revisão judicial de leis estaduais[32]. Entendia-se, no período constituinte, que o controle constitucional seria realizado pelo povo através da política, utilizando-se de diversos meios como as eleições, júris, protestos populares, etc[33].

Kramer afirma que os fundadores daquela nação, tanto Federalistas quanto Anti-Federalistas, reconheciam os perigos que "inclinações majoritárias" poderiam causar nas legislaturas. No entanto, para resolver este problema, optaram por retardar o processo político estabelecendo um sistema de pesos e contrapesos[34].

A questão da revisão judicial, no entanto, passou a ganhar mais espaço a partir da década de 1790, sem que, contudo, houvesse um clamor para que as Cortes tivessem uma especial ou exclusiva responsabilidade em interpretar a Constituição[35]. O Judiciário possuiria o dever de declarar nula a lei inconstitucional, assim como os outros Poderes também possuiriam este dever, endossando a teoria departamentalista[36], anteriormente mencionada.

Com o passar do tempo é que a teoria da revisão judicial começou a se tornar mais ambiciosa, levando ao que, modernamente, entendemos como modelo de supremacia judicial. Já, na época da decisão de *Marbury v. Madison* (1803), alguns federalistas defendiam algo próximo ao que se entende por supremacia judicial.

Contudo, para Kramer, a decisão em *Marbury v. Madison* apenas consagrava a revisão judicial e não a supremacia, já que Marshall, em seu voto, *não* disse que interpretar a Constituição era dever *apenas* das Cortes, mas que "a Corte, assim como, os outros departamentos está vinculada" à Constituição.[37]

No decorrer das décadas, entretanto, a ideia da supremacia judicial foi ganhando espaço gradualmente. Em 1958, a Suprema Corte dos Estados Unidos, no caso *Cooper v. Aaron*, afirmou explicitamente a supremacia da interpretação judicial. Neste período, já se conseguia perceber que a ideia de supremacia constitucional já era amplamente aceita. A partir da década de 1960, passou-se a questionar as decisões das Cortes, enquanto a postura de negar a "palavra final" à Suprema Corte acabou praticamente desaparecendo.[38]

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[32] KRAMER, Larry. **The people themselves**. Kindle Edition. Oxford: Oxford University Press, 2004. p. 73-77.

[33] KRAMER, Larry. **The people themselves**. Kindle Edition. Oxford: Oxford University Press, 2004. p. 83.

[34] KRAMER, Larry. **The people themselves**. Kindle Edition. Oxford: Oxford University Press, 2004. p. 80.

[35] KRAMER, Larry. **The people themselves**. Kindle Edition. Oxford: Oxford University Press, 2004. p. 98.

[36] KRAMER, Larry. **The people themselves**. Kindle Edition. Oxford: Oxford University Press, 2004. p. 106.

[37] KRAMER, Larry. **The people themselves**. Kindle Edition. Oxford: Oxford University Press, 2004. p. 125-126, tradução nossa. Neste sentido de Kramer, Mark Tushnet afirma que são possíveis duas interpretações do caso *Marbury v. Madison*. A primeira trata a atuação da corte em declarar a inconstitucionalidade de leis sem implicar em superioridade em relação aos outros Poderes, que possuem o mesmo dever. Já a segunda, encara não apenas a Constituição como suprema, mas também a interpretação constitucional das Cortes (TUSHNET, Mark. **Taking the Constitution away from the Courts**. Kindle Edition. Princeton: Princeton University Press, 1999, posição 114-117).

[38] KRAMER, Larry. **The people themselves**. Kindle Edition. Oxford: Oxford University Press, 2004. p. 106.
KRAMER, Larry. **The people themselves**. Kindle Edition. Oxford: Oxford University Press, 2004. p. 221.

Além de Larry Kramer, encontramos, no Constitucionalismo Popular, Jeremy Waldron, que realiza uma diferenciação entre revisão judicial forte e revisão judicial fraca. No modelo de revisão judicial forte, o Judiciário possui o poder de definir que determinada lei não será aplicada, tornando-a letra morta. Já em um modelo de revisão judicial fraca, as Cortes podem aferir se as leis estão em conformidade com os direitos individuais, mas não podem se negar a aplicá-las. Cita como exemplo de revisão judicial fraca o caso do Reino Unido em que, apesar da decisão judicial não afetar a validade da lei, nem obrigar outras autoridades, estas últimas podem vir a rever a decisão a partir da declaração de incompatibilidade proferida pelo Judiciário, até mesmo através de um processo legislativo mais rápido para corrigir a incompatibilidade. Waldron deixa claro que a sua crítica à revisão judicial se limita apenas ao modelo de revisão judicial forte.[39]

Outra fonte de críticas importante é Richard Parker, que apresenta uma abordagem discursiva, para defender o constitucionalismo popular. O autor foca no que ele chama de energia política do povo comum (*political energy of ordinary people)*, se referindo à participação das pessoas, da coletividade em geral, na política[40]. Diz Parker que sobre esta participação das pessoas comuns, é possível ter-se duas posições: a "Sensibilidade Populista" e a "Sensibilidade Anti-Populista".[41]

Segundo ele, a Sensibilidade Anti-Populista, que iremos chamar aqui de Posicionamento Anti-Populista, enxerga a energia política do povo comum como um

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[39] WALDRON, Jeremy. The core of the case against judicial review. **The Yale Law Review**, New Haven, v. 115. p. 1354-1355, 2006.

O posicionamento contra a revisão judicial forte de Jeremy Waldron, no entanto, é condicionado a quatro premissas: 1. as instituições democráticas estão funcionando razoavelmente, com representação no Poder Legislativo eleita por sufrágio universal; 2. um conjunto de instituições judiciais, formadas por membros não eleitos e que estão destinados para acompanhar disputas e fazer valer o estado de direito; 3. um comprometimento da maior parte da sociedade no sentido de fazer valer os direitos individuais e os direitos das minorias; 4. a existência de um desacordo de boa-fé sobre estes direitos. A questão, todavia, se torna complexa quando ao menos uma destas premissas não está encontrada. Ocorrendo, isto, Jeremy Waldron afirma que não necessariamente será o caso de apoiar a existência de revisão judicial, já que é possível que o Poder Judiciário em nada possa contribuir a depender da falha institucional existente (WALDRON, Jeremy. The core of the case against judicial review. **The Yale Law Review**, New Haven, v. 115. p. 1360 e 1402, 2006). Em seminário sobre controle constitucional e política ocorrido no Tribunal Constitucional da Colômbia, Jeremy Waldron afirma que o posicionamento contra a revisão judicial forte deve levar em conta algumas circunstâncias próprias de cada país. Uma delas é o desempenho e reputação do Poder Legislativo e que corpos legislativos corruptos e de pouca representatividade aumentam a legitimidade da jurisdição constitucional para atuar. Assim, Waldron aceita que os argumentos contra a revisão judicial forte não podem ser absolutos, mas relativizados em certas circunstâncias (Cf. Profesor Jeremy Waldron de la Universidad de Nueva York, en la Corte Constitucional, seminario sobre control de constitucionalidad y política. Publicado por: Corte Constitucional. Bogotá: Tribunal Constitucional da Colômbia, 2017. Youtube (1h40min). Disponível em: <https://www.youtube.com/watch?v=8l_WGqY3qMA>. Acesso em: 23 de setembro de 2017).

[40] Cf. PARKER, Richard Davies. "Here, the people rule": a constitutionalist populist manifesto. **Valparaíso University Law Review**, Valparaíso, v. 27, n. 3. p. 531-584, 1993. Disponível em: <https://dash.harvard.edu/handle/1/12967873>. Acesso em: 23 de julho de 2017.

[41] PARKER, Richard Davies. "Here, the people rule": a constitutionalist populist manifesto. **Valparaíso University Law Review**, Valparaíso, v. 27, n. 3. p. 552-553, 1993. Disponível em: <https://dash.harvard.edu/handle/1/12967873>. Acesso em: 23 de julho de 2017.

problema, como uma ameaça à paz e risco à opressão. Esta forma de enxergar o povo o veria como uma multidão de "qualidade inferior" e de embasamento político menos refinado. Para Parker, este posicionamento anti-populista veria uma elite como racional, bem informada, complexa, de visão a longo prazo, com espírito público e de mente aberta, enquanto o "povo ordinário" seria emocional, impulsivo, ignorante, egoísta, ensimesmado e mente fechada. Para os que pensam assim, o povo possui dois problemas: além de fazer política de baixa qualidade, é perigoso[42].

Já o Posicionamento Populista (Sensibilidade Populista) veria a ausência da energia política do povo comum como um problema, uma passividade popular, sendo, desta forma, um mal. Para os que possuem este modo de ver, a participação do povo comum melhora a qualidade do governo e é essencial para evitar a opressão. Enquanto os Populistas veem a participação popular como algo positivo e o insulamento como um problema, os Anti-Populistas enxergam exatamente o contrário.[43]

Parker encara o contramajoritarismo, ou seja, a ideia de que o Direito Constitucional possui uma função de contrapeso à regra majoritária da democracia, como um *clich*ê[44]. Além disso, Parker sustenta que o Constitucionalismo contemporâneo se baseia em dois grandes fetiches: 1) a ideia de que a Constituição apresenta sempre um significado "correto" e não uma variedade de interpretações possíveis; 2) a superioridade qualitativa do Direito Constitucional, que é vital e vulnerável, podendo qualquer infecção realizada pela política ordinária levar a um completo desastre.[45]

Encara a "tirania da maioria" como um exagero ridículo. Segundo ele, a maior parte da opressão é realizada por minorias, ou melhor, uma espécie de elite ou minoria elitista[46]. Seguindo raciocínio de Richard Parker, Kramer concorda dizendo que boa parte dos defensores da supremacia judicial apresentam um medo da política popular, acreditando ser perigosa e arbitrária. Segundo Kramer, "a tirania da maioria" seria meramente um slogan.[47]

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[42] PARKER, Richard Davies. "Here, the people rule": a constitutionalist populist manifesto. **Valparaíso University Law Review**, Valparaíso, v. 27, n. 3. p. 552-554, 1993. Disponível em: <https://dash.harvard.edu/handle/1/12967873>. Acesso em: 23 de julho de 2017.

[43] PARKER, Richard Davies. "Here, the people rule": a constitutionalist populist manifesto. **Valparaíso University Law Review**, Valparaíso, v. 27, n. 3. p. 552 e 556, 1993. Disponível em: <https://dash.harvard.edu/handle/1/12967873>. Acesso em: 23 de julho de 2017.

[44] PARKER, Richard Davies. "Here, the people rule": a constitutionalist populist manifesto. **Valparaíso University Law Review**, Valparaíso, v. 27, n. 3. p. 558, 1993. Disponível em: <https://dash.harvard.edu/handle/1/12967873>. Acesso em: 23 de julho de 2017.

[45] PARKER, Richard Davies. "Here, the people rule": a constitutionalist populist manifesto. **Valparaíso University Law Review**, Valparaíso, v. 27, n. 3. p. 564-565, 1993. Disponível em: <https://dash.harvard.edu/handle/1/12967873>. Acesso em: 23 de julho de 2017.

[46] PARKER, Richard Davies. "Here, the people rule": a constitutionalist populist manifesto. **Valparaíso University Law Review**, Valparaíso, v. 27, n. 3. p. 569-570, 1993. Disponível em: <https://dash.harvard.edu/handle/1/12967873>. Acesso em: 23 de julho de 2017.

[47] KRAMER, Larry. Popular Constitutionalism, Circa 2004. **California Law Review**, Berkeley, v. 92. p. 1004-1006, jul. 2004.

Kramer ilustra este debate através de um diálogo criado por James Madison em um ensaio denominado *Who are the Best Keepers of the People's Liberties?*[48]. Neste, Madison cria dois personagens: um Republicano e um Anti-Republicano. O Republicano responderia à pergunta de "Quem é o melhor guardião das liberdades do povo?", dizendo: "o próprio povo" (*"[t]he People Themselves"*). Em seguida, o anti-republicano replicaria: "O povo é estúpido, suspeito e licencioso", "não se pode neles confiar" e ainda que "quanto mais você faz do governo independente e hostil em relação ao povo, melhor segurança confere aos direitos e interesses das pessoas". Concluindo, Kramer afirma que os defensores da supremacia judicial seriam os aristocratas de hoje[49].

Aliás, Richard Parker afirma que sequer existe algo como "a maioria". O autor afirma que a ideia de regra da maioria é falha em razão da transformação de maiorias em coalisões que representam grupos de interesses, atuando distanciados do envolvimento e influência do "povo ordinário".[50]

O mais "radical" dos constitucionalistas populares, no entanto, talvez seja Mark Tushnet. O autor não apenas rejeita a noção de supremacia judicial, como defende a extinção do modelo de revisão judicial. Apresenta esta ideia de forma explícita em seu livro *Taking the Constitution away from the Courts*, cujo capítulo 7 se intitula *Against Judicial Review*[51]. Em breve comentário de 2011, idealiza uma proposta de emenda constitucional com as seguintes palavras: "The constitutionality of acts of Congress shall not be reviewed by any court in the United States". Esta redação seria inspirada no artigo 120 da Constituição dos Países Baixos em que: "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts"[52].

No entanto, como demonstrado, o alvo em comum que pode ser identificado no Constitucionalismo Popular é a "supremacia judicial". A revisão judicial acaba sendo um alvo a depender do pensamento específico de cada autor, de onde se conclui que existe uma razoável variação nesta corrente do constitucionalismo americano.

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[48] Cf. MADISON, James. Who Are the Best Keepers of the People's Liberties?.**National Gazette**, 22 dec. 1792. Disponível em: <http://www.constitution.org/jm/17921222_keepers.htm>. Acesso em: 23 de julho de 2017.

[49] KRAMER, Larry. Popular Constitutionalism, Circa 2004. **California Law Review**, Berkeley, v. 92. p. 1007-1008, jul. 2004.

[50] PARKER, Richard Davies. "Here, the people rule": a constitutionalist populist manifesto. **Valparaíso University Law Review**, Valparaíso, v. 27, n. 3. p. 573, 1993. Disponível em: <https://dash.harvard.edu/handle/1/12967873>. Acesso em: 23 de julho de 2017.

[51] TUSHNET, Mark. **Taking the Constitution away from the Courts**. Kindle Edition. Princeton: Princeton University Press, 1999.

[52] TUSHNET, Mark. Abolishing Judicial Review. **Constitutional Commentary,** Minneapolis, v. 27. p. 581-589, 2011. Disponível em: <https://conservancy.umn.edu/bitstream/handle/11299/163457/8-Tushnet-273-AbolishingJudicialReview.pdf?sequence=1>. Acesso em: 18 de setembro de 2017.

3.1. Eleição para Ministros da Suprema Corte

David Pozen pensa a possibilidade de promoção do constitucionalismo popular através da eleição de juízes. Esta proposta não é nenhuma novidade para os norte-americanos já que a eleição de juízes, inclusive, para Supremas Cortes existe em diversos estados norte-americanos. Segundo Pozen, mais de três quartos dos Estados norte-americanos realizam eleições periódicas para juízes, dando aos cidadãos uma poderosa ferramenta de controle da interpretação constitucional. As Cortes Estaduais julgam muito mais casos que as Cortes Federais e tem uma grande importância em diversos casos polêmicos como, por exemplo, o casamento homoafetivo. Além disso, não expõem apenas as Constituições Estaduais, como também a própria Constituição Federal.[53]

O autor aponta que a eleição de juízes apresenta características e consequências tanto fora da Corte como dentro dela. Das características e consequências fora da Corte, apresenta as seguintes: 1. O exercício da soberania do povo ao eleger juízes; 2. Cria um mecanismo de *accountability*, podendo o povo registrar suas discórdias em relação à atuação judicial; 3. A eleição de juízes como agente de mudanças constitucionais: a alteração dos juízes poderia provocar mudanças na interpretação constitucional; 4. O diálogo entre povo e Judiciário: as eleições de juízes encorajariam que estes tivessem uma maior comunicação com o povo.[54]

Dentro da Corte, os efeitos e características seriam outros: 1. Geraria uma maior contenção da atuação judicial: os juízes atuariam mais como reguladores, minimizando a interferência no processo político, agindo à moda de James Thayer[55]; 2. Populismo judicial: os juízes incorporarão os credos populares ao tomar suas decisões.[56]

Em uma alternativa bem mais cautelosa, Jonathan Siegel sugere que sejam conferidos mandatos temporários aos ministros da Suprema Corte em vez de mandatos vitalícios como é atualmente. Em um novo modelo, os juízes possuiriam mandatos com termo de oito anos, sendo que um mandato expiraria a cada dois anos.[57]

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[53] POZEN, David E. Judicial Elections as Popular Constitutionalism. **Columbia Law Review**, New York, v. 110, n. 8. p. 2047-2134, dec. 2010. p. 2050-2051.

[54] POZEN, David E. Judicial Elections as Popular Constitutionalism. **Columbia Law Review**, New York, v. 110, n. 8. p. 2047-2134, dec. 2010. p. 2068-2074.

[55] James Thayer, no clássico *The Origin and Scope of the American Doctrine of Constitutional Law*, escreveu que um ato produzido politicamente só deve ser declarado constitucional "quando aqueles que possuem o direito de produzir leis não apenas cometem um erro, mas cometem um erro bem claro – tão claro que não está aberta a um questionamento racional" (THAYER, James Bradley. **The Origin and Scope of The American Doctrine of Constitutional Law**. Boston: Little, Brown, and Company, 1893, tradução nossa. Disponível em: <https://archive.org/details/originandscopea00thaygoog>. Acesso em: 29 de julho de 2017. p. 18). Desenvolvendo, assim, uma espécie de minimalismo.

[56] POZEN, David E. Judicial Elections as Popular Constitutionalism. **Columbia Law Review**, New York, v. 110, n. 8. p. 2047-2134, dec. 2010. p. 2076-2086.

[57] SIEGEL, Jonathan R. The institutional Case for Judicial Review. **Iowa Law Review**, Iowa City, v. 97. p. 1198, 2012.

3.2. O Constitucionalismo Popular Mediado de Barry Friedman

A tese de Barry Friedman em *Mediated Popular Constitutionalism* é que, na verdade, existe, na prática, um Constitucionalismo Popular mediado, isto é, a Suprema Corte segue o entendimento popular, mesmo que isto não ocorra exatamente como sonham os constitucionalistas populares.[58]

Como ocorreria este fenômeno? A teoria se chamaria do "Constitucionalismo Popular Mediado", porque esta influência popular nas decisões da Suprema Corte não seria direta, mas seria "mediada" por outros atores políticos. Estes autores seriam: os agentes políticos, a mídia e as lideranças da sociedade, em geral.

Para chegar a esta conclusão, Friedman se baseia no empirismo das pesquisas das ciências sociais[59]. Esta ideia de que as decisões se baseiam no entendimento popular se sustenta sobre três pilares: 1. As decisões judicias se assentam sobre uma aceitabilidade da maior parte das pessoas; 2. Mesmo que o público não apoie certas decisões, ele aceita o *judicial review*; 3. Se o povo estivesse insatisfeito com o *judicial review*, ele poderia tomar ação.[60]

Conforme relata Friedman, isto é confirmado por pesquisas empíricas que apontam que as decisões judiciais comportam as preferências majoritárias ou a uma grande pluralidade de pessoas. Outras pesquisas apontam, que mesmo quando há dissonância com o entendimento popular, a opinião majoritária estava evoluindo no sentido adotado da Suprema Corte.[61]

O apontamento de juízes, inclusive os da Suprema Corte, ocorre com certa congruência à opinião popular e às decisões da Suprema Corte. E ainda, os juízes precisam das pessoas. Ter o apoio da opinião popular é a chave para se proteger de ataques dos outros Poderes.

O relacionamento da Suprema Corte com o povo é mediado por três motivos: 1. Juízes não são eleitos; 2. O povo expressa sua opinião sobre a manutenção da Corte através dos representantes eleitos; 3. As decisões da Suprema Corte são filtradas pela mídia.[62]

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[58] FRIEDMAN, Barry. Mediated Popular Constitutionalism. **Michigan Law Review**, Ann Arbor, v. 101. p. 2597, 2004. Disponível em: <https://www.researchgate.net/profile/Barry_Friedman2/publication/228186449_Mediated_Popular_Constitutionalism/links/0deec52568b6842140000000.pdf>. Acesso em: 29 de julho de 2017.

[59] FRIEDMAN, Barry. Mediated Popular Constitutionalism. **Michigan Law Review**, Ann Arbor, v. 101. p. 2597 e 2601, 2004. Disponível em: <https://www.researchgate.net/profile/Barry_Friedman2/publication/228186449_Mediated_Popular_Constitutionalism/links/0deec52568b6842140000000.pdf>. Acesso em: 29 de julho de 2017.

[60] FRIEDMAN, Barry. Mediated Popular Constitutionalism. **Michigan Law Review**, Ann Arbor, v. 101. p. 2604, 2004. Disponível em: <https://www.researchgate.net/profile/Barry_Friedman2/publication/228186449_Mediated_Popular_Constitutionalism/links/0deec52568b6842140000000.pdf>. Acesso em: 29 de julho de 2017.

[61] FRIEDMAN, Barry. Mediated Popular Constitutionalism. **Michigan Law Review**, Ann Arbor, v. 101. p. 2605, 2004. Disponível em: <https://www.researchgate.net/profile/Barry_Friedman2/publication/228186449_Mediated_Popular_Constitutionalism/links/0deec52568b6842140000000.pdf>. Acesso em: 29 de julho de 2017.

[62] FRIEDMAN, Barry. Mediated Popular Constitutionalism. **Michigan Law Review**, Ann Arbor, v. 101. p. 2611, 2004. Disponível em: <https://www.researchgate.net/profile/Barry_Friedman2/publication/228186449_Mediated_Popular_Constitutionalism/links/0deec52568b6842140000000.pdf>. Acesso em: 29 de julho de 2017.

Friedman aponta a teoria do suporte, desenvolvida pelo cientista político David Easton, segundo a qual haveria dois tipos de suporte às políticas públicas: um suporte difuso e um suporte específico. Aplicando estes conceitos às decisões judiciais, o suporte difuso estaria relacionado ao apoio popular dado à instituição como um todo, isto é, a impressão de que a instituição está fazendo "um bom trabalho". O suporte específico, em contrapartida, diz respeito a determinadas decisões.[63]

Contudo, em pesquisas posteriores, constatou-se que esta diferenciação entre suporte específico e suporte difuso é bastante difícil, isto porque haveria uma barreira permeável entre ambos. O suporte específico acaba por se confundir com o suporte difuso. Isto ocorre porque o apoio das pessoas à Suprema Corte acaba por se confundir com decisões específicas e este efeito acaba durando um longo tempo. Por exemplo, os cientistas políticos Greg Caldeira e James Gibson identificaram que a opinião em relação ao aborto, ou seja, relativa ao suporte específico, determinava a própria opinião quanto à Corte, isto é, o suporte difuso[64]. Resumindo, determinadas decisões da Suprema Corte acabam influenciando a visão popular da Corte como um todo.

Conforme aponta Friedman, pesquisas sugerem que o povo americano sabe mais sobre as decisões da Suprema Corte do que se pode acreditar. No entanto, o recebimento da informação de como o Judiciário trabalha é mediada por dois atores: a mídia e os líderes políticos. Entretanto, apenas uma pequena fração do trabalho da Suprema Corte vai ao conhecimento do público, apenas uma parcela dos casos chama a atenção da opinião pública.[65]

Por estas razões, Friedman apresenta que existe uma relação entre povo e Judiciário e que esta é mediada.

4. AS CRÍTICAS AO CONSTITUCIONALISMO POPULAR

Erwin Chemerinsky realiza uma crítica ao constitucionalismo popular utilizando a bastante debatida, em território americano, função contramajoritária da revisão judicial. A possibilidade de um abuso das maiorias, organizadas na forma de facções, é descrita por Madison, no artigo federalista n. 10[66]. Décadas depois, Alexis de Tocqueville

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[63] FRIEDMAN, Barry. Mediated Popular Constitutionalism. **Michigan Law Review**, Ann Arbor, v. 101. p. 2612-2613, 2004. Disponível em: <https://www.researchgate.net/profile/Barry_Friedman2/publication/228186449_Mediated_Popular_Constitutionalism/links/0deec52568b6842140000000.pdf>. Acesso em: 29 de julho de 2017.

[64] FRIEDMAN, Barry. Mediated Popular Constitutionalism. **Michigan Law Review**, Ann Arbor, v. 101. p. 2615-2617, 2004. Disponível em: <https://www.researchgate.net/profile/Barry_Friedman2/publication/228186449_Mediated_Popular_Constitutionalism/links/0deec52568b6842140000000.pdf>. Acesso em: 29 de julho de 2017.

[65] FRIEDMAN, Barry. Mediated Popular Constitutionalism. **Michigan Law Review**, Ann Arbor, v. 101. p. 2618-2620, 2004. Disponível em: <https://www.researchgate.net/profile/Barry_Friedman2/publication/228186449_Mediated_Popular_Constitutionalism/links/0deec52568b6842140000000.pdf>. Acesso em: 29 de julho de 2017.

[66] MADISON, James. Federalist No. 10 – The Same Subject Continued: The Union as a Safeguard Against Domestic Faction and Insurrection. In: **The Federalist Papers**. New York Packet, 23 nov. 1787. Disponível em: <https://

faz abordagem semelhante ao se referir à "tirania da maioria"[67]. No âmbito da jurisdição constitucional, esta questão ficou consagrada com a expressão "dificuldade contramajoritária" de Alexander Bickel.[68]

Chemerinsky afirma que com o fim da revisão judicial ou da supremacia judicial, os contrapesos em favor das minorias seriam dramaticamente reduzidos, se não eliminados, deixando as minorias dependentes das maiorias. Em se tratando de direitos de minorias, o processo político e o constitucionalismo popular não podem ser confiados. Além disso, o autor teme que as críticas promovidas pelo Constitucionalismo Popular produzam contenção por parte dos juízes progressistas que, temerosos, não avançariam na promoção da igualdade e da liberdade.[69]

Um problema exemplificativo em relação da tensão entre maiorias e minorias é o caso da Proposição 8 (*Proposition 8*) da Califórnia, citado por JÁCOME[70] ao comentar o artigo de Erwin Chemerinsky. Após a Suprema Corte da Califórnia decidir que limitar o casamento de pessoas do mesmo sexo feria a Constituição do Estado, cidadãos californianos formularam a Proposição 8 para emendar aquela Constituição, definindo que casamento seria apenas a união entre homem e mulher. Então, casais do mesmo sexo que desejavam se casar, ajuizaram ação na justiça federal, contra o Governador do Estado e outras autoridades, defendendo a inconstitucionalidade da Proposição 8 perante a Constituição dos Estados Unidos.

Estas autoridades se recusaram a defender a proposição, tendo a Corte Distrital permitido que os peticionários a defendessem. Apesar disso, esta corte defendeu que a Proposição era inconstitucional. Os peticionários recorreram à Nona Corte de apelações (*Ninth Court of Appeals*), que confirmou a decisão da Corte Distrital pela inconstitucionalidade. A partir disto, o caso foi para a Suprema Corte dos Estados Unidos.

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www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-10>. Acesso em: 29 de julho de 2017.
Kramer critica o uso do Federalista n. 10 para defender o controle de constitucionalidade. Segundo ele, o pensamento de James Madison, o federalista não era compatível com a supremacia judicial. Aponta que quando Madison pensou em formas de obstruir as facções, em seu artigo federalista n. 10, ele não citou o Judiciário (Ainda, segundo Kramer, Madison acreditava que era função do povo fiscalizar o governo republicano e que o povo era o verdadeiro soberano em cada governo livre (KRAMER, Larry. "Democracia Deliberativa e Constitucionalismo Popular: James Madison e o "Interesse do Homem". In: BIGONHA, Antonio Carlos; MOREIRA, Luiz (org.). **Limites do Controle de Constitucionalidade**. Rio de Janeiro: Lumen Juris, 2009. Tradução de Adauto Villela. p. 93-94 e 107).

[67] TOCQUEVILLE, Alexis de. **A Democracia na América**. São Paulo: Folha de São Paulo, 2010. p. 194.

[68] BICKEL, Alexander. **The Least Dangerous Branch**. 2ª ed. New Haven: Yale University Press, 1986. p. 16-21.

[69] CHEMERINSKY, Erwin. In defense of judicial review: The perils of popular constitutionalism. **University of Illinois Law Review**, Champaign, n. 3. p. 673-690, 2004. Disponível em: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2144&context=faculty_scholarship>. Acesso em: 29 de julho de 2017. p. 683; 689.

[70] JÁCOME, Jorge González. ¿El poder para la gente? Una introducción a los debates sobre el Constitucionalismo popular…. In: CHEMERINSKY, Erwin; PARKER, Richard D.; JÁCOME, Jorge González. **Constitucionalismo Popular**. Bogotá: Siglo del Hombre Editores, 2011. p. 53 e 55.

No entanto, a Suprema Corte negou-se a julgar o mérito do caso, ou seja, a constitucionalidade da Proposição 8, por uma questão processual: a inexistência de um caso concreto. Fundamentou-se, assim, no artigo III da Constituição dos Estados Unidos, que exige que haja uma controvérsia real (*actual controversy*)[71].

Contudo, os constitucionalistas populares subestimam o problema das minorias, colocando todas as confianças de que não há qualquer risco a elas. Larry Kramer e Richard Parker, sobretudo, acusam aqueles que defendem a supremacia judicial, de aristocratas e de estarem contra o povo. Adotam uma lógica de que se está a favor da supremacia judicial, se está contra o povo. Esta visão caricaturista e bipolarizada, entretanto, é equivocada e não permite pensar modelos que reconheçam a importância da revisão judicial e o contrapeso contramajoritário e, ainda, incentivar a participação popular na interpretação e efetivação da Constituição.

Em uma espécie de "terceira via", estão Robert Post e Reva Siegel. Estes autores acreditam ser possível uma conciliação entre supremacia judicial e constitucionalismo popular, discordando de Kramer o qual acredita que supremacia judicial e constitucionalismo popular são mutuamente excludentes, embora concordem com o autor que existe uma tensão entre supremacia judicial e constitucionalismo popular[72].

Post e Siegel creem que não há uma mútua exclusão, porque o conceito de supremacia judicial não significa que as cortes podem determinar ou obrigar as convicções dos cidadãos respeito da Constituição. Um cidadão poderia, desta forma, discordar da interpretação da Corte, havendo a possibilidade, inclusive, da decisão da Corte ser vencida por uma emenda à Constituição subsequente.[73]

A Corte, inclusive, a partir da visão de Post e Siegel, seria importante para o constitucionalismo popular, já que para o povo exercer o seu poder de manifestação a respeito dos valores constitucionais é preciso que haja uma defesa da liberdade de

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[71] UNITED STATES OF AMERICA. **Supreme Court of United States**. Hollingsworth v. Perry. Disponível em: <https://www.supremecourt.gov/opinions/12pdf/12-144_8ok0.pdf>. Acesso em: 28 de julho de 2017.

[72] "Em contraste à Kramer, nós não entendemos que supremacia judicial e constitucionalismo popular são sistemas constitucionais mutuamente excludentes. Kramer define supremacia judicial sob um conceito de finalidade judicial. Ainda, algumas formas de finalidade judicial são essenciais para o estado de direito, que é necessário ao funcionamento da democracia. Por esta razão, tanto a supremacia judicial, quanto o constitucionalismo popular contribuem indispensavelmente para a política americana. Eles estão de fato dialeticamente interconectados e por muito tempo coexistiram" (POST, Robert C; SIEGEL, Reva B. Popular Constitutionalism, Departamentalism, and Judicial Supremacy. **California Law Review**, Berkeley, v. 92. p. 1029, 2004, tradução nossa. Disponível em: <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1177&context=fss_papers>. Acesso em: 18 de setembro de 2017).

[73] POST, Robert C; SIEGEL, Reva B. Popular Constitutionalism, Departamentalism, and Judicial Supremacy. **California Law Review**, Berkeley, v. 92. p. 1030, 2004. Disponível em: < http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1177&context=fss_papers>. Acesso em: 18 de setembro de 2017.
Vale aqui destacar a ressalva de que o modelo de reforma constitucional americano é bem mais árduo que o brasileiro, pois além de exigir o debate no Poder Legislativo, demanda ainda a ratificação de três quartos dos Estados. Fato que torna as mudanças constitucionais formais extremamente difíceis.

expressão contra formas de censura. Ou seja, para que o povo possa se manifestar, é preciso que seus direitos constitucionais sejam salvaguardados.[74]

Para haver uma acomodação entre supremacia judicial e constitucionalismo popular, seria necessário um equilíbrio entre direito constitucional e Constituição. "A partir desta nomenclatura, 'direito constitucional' refletiria o julgamento e opiniões das cortes, enquanto que 'Constituição' expressaria as crenças fundamentais do 'We the people'"[75]. Permitir que o Direito Constitucional dite o que é Constituição é arriscado, podendo as crenças constitucionais da nação serem suplantadas pela estreita visão das Cortes e, ao mesmo tempo, permitir o mero julgamento político da Constituição é perigoso por colocar os direitos constitucionais e valores da democracia em situação de vulnerabilidade.[76]

Quanto maior o direito constitucional, mais os atores não judiciários estão vinculados às visões das Cortes e menor o espaço para a criação política da Constituição. Por isto, Post e Siegel enfatizam a necessidade de um equilíbrio entre Constituição e Direito Constitucional para que Supremacia Judicial e Constitucionalismo Popular coexistam.[77]

Robert Post e Reva Siegel defendem o que denominaram de "Constitucionalismo democrático" o qual equilibra a participação dos representantes do povo e os próprios cidadãos e também das cortes na interpretação constitucional.

> ***Diferentemente do constitucionalismo popular,*** *o constitucionalismo democrático não procura tirar a Constituição das cortes. Constitucionalismo democrático reconhece a participação essencial da interpretação judicial dos direitos na Política americana. Diferentemente de um foco juricêntrico, o constitucionalismo democrático aprecia a essencial participação do engajamento público em guiar e legitimar as instituições e práticas da revisão judicial.*[78]

[74] POST, Robert C; SIEGEL, Reva B. Popular Constitutionalism, Departamentalism, and Judicial Supremacy. **California Law Review**, Berkeley, v. 92. p. 1036, 2004. Disponível em: <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1177&context=fss_papers>. Acesso em: 18 de setembro de 2017.

[75] POST, Robert C; SIEGEL, Reva B. Popular Constitutionalism, Departamentalism, and Judicial Supremacy. **California Law Review**, Berkeley, v. 92. p. 1038, 2004, tradução nossa. Disponível em: < http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1177&context=fss_papers>. Acesso em: 18 de setembro de 2017.

[76] POST, Robert C; SIEGEL, Reva B. Popular Constitutionalism, Departamentalism, and Judicial Supremacy. **California Law Review**, Berkeley, v. 92. p. 1038, 2004. Disponível em: < http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1177&context=fss_papers>. Acesso em: 18 de setembro de 2017.

[77] POST, Robert C; SIEGEL, Reva B. Popular Constitutionalism, Departamentalism, and Judicial Supremacy. **California Law Review**, Berkeley, v. 92. p. 1040, 2004. Disponível em: <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1177&context=fss_papers>. Acesso em: 18 de setembro de 2017.

[78] POST, Robert C; SIEGEL, Reva B. Roe Rage: Democratic Constitutionalism and Backlash. **Harv. Civil Rights – Civil Liberty Law Review.**, Cambridge, v. 42. p. 379, 2007, tradução nossa e grifos nossos.

Os dois autores interpretam o fenômeno do *backlash*[79] como algo positivo. Segundo eles, o *backlash* é uma forma de contestação das decisões judiciais e tentativa de influenciar a interpretação no direito constitucional.[80]

Alguns autores como Roberto Niembro, Ana Micaela Alterío e Lee Strang classificam o constitucionalismo democrático de Post e Siegel como uma espécie de constitucionalismo popular já que confere grande participação ao povo e aos movimentos sociais[81]. Não concordamos com esta concepção. Embora possua traços em comum com o constitucionalismo popular, o constitucionalismo democrático é modelo próprio que se interpõe entre o constitucionalismo popular e o constitucionalismo mais ortodoxo, em uma espécie de conciliação. Alterío, por exemplo, reconhece que o modelo proposto por Post e Siegel apresenta compatibilidade entre engajamento popular e supremacia judicial[82]. O principal alvo do constitucionalismo popular é a supremacia judicial que de certa forma é defendida por Post e Siegel e, portanto, se difere do constitucionalismo popular embora, como enfatizado anteriormente, guarde pontos em comum.

Além da questão contramajoritária e dos direitos individuais, outra crítica está no excesso de confiança nos agentes eleitos. Chemerinsky afirma que os constitucionalistas populares apresentam uma fé injustificada nos ramos de poder eleitos de que estes conseguem cumprir a Constituição adequadamente[83]. Interessante, que como já adiantado, em outro tópico, Richard Parker problematiza uma questão de representação e distanciamento do eleitorado sem, no entanto, desenvolver. Durante seu artigo, Parker realiza uma crítica da revisão judicial por, supostamente, ser mais distanciado do "povo comum", contudo, ele próprio admite que o mesmo ocorre com a política ordinária que, em tese, deve ainda mais satisfação do povo comum, que conferiu seus

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[79] Os próprios autores definem *backlash* como sendo "forças contrárias desencadeadas para evitar mudanças no *status quo*" (POST, Robert C; SIEGEL, Reva B. Roe Rage: Democratic Constitutionalism and Backlash. **Harv. Civil Rights – Civil Liberty Law Review.**, v. 42. p. 389, 2007.).

[80] POST, Robert C; SIEGEL, Reva B. Roe Rage: Democratic Constitutionalism and Backlash. **Harv. Civil Rights – Civil Liberty Law Review.**, Cambridge, v. 42. p. 383, 2007.

[81] Cf. NIEMBRO, Roberto. Uma mirada al constitucionalismo popular**. Isonomía**, Ciudad de México, n. 38. p. 203-?, abr. 2013; ALTERÍO, Ana Micaela. Corrientes del constitucionalismo contemporáneo a debate. **Anuario de Filosofia y Teoria del Derecho**, Ciudad de México, n. 8, jan.-dez. p. 227-306, 2014. Disponível em: <http://www.scielo.org.mx/pdf/is/n38/n38a7.pdf>. Acesso em: 18 de setembro de 2017.; STRANG, Lee J. Originalism as Popular Constitutionalism?: Theoretical Possibilities and Practical Differences. **Notre Dame Law Review**, Notre Dame, v. 87 p. 253-292, 2013. Disponível em: <http://scholarship.law.nd.edu/ndlr/vol87/iss1/5>. Acesso em: 18 de setembro de 2017. p. 256.

[82] "Desde allí, Post y Siegel propician un diálogo constitucional inclusivo, especialmente sensible a los movimientos sociales, donde el pueblo debe retener la última palabra sobre el significado de la constitución, pero compatible con la idea de supremacía judicial" (ALTERÍO, Ana Micaela. Corrientes del constitucionalismo contemporáneo a debate. **Anuario de Filosofia y Teoria del Derecho**, Ciudad de México, n. 8, jan.-dez. p. 227-306, 2014. Disponível em: <http://www.scielo.org.mx/pdf/is/n38/n38a7.pdf>. Acesso em: 18 de setembro de 2017. p. 268).

[83] CHEMERINSKY, Erwin. In defense of judicial review: The perils of popular constitutionalism. **University of Illinois Law Review**, Champaign, n. 3. p. 673-690, 2004. Disponível em: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2144&context=faculty_scholarship>. Acesso em: 29 de julho de 2017. p. 679.

mandatos a partir do voto. O Direito Constitucional e o Judiciário se tornam alvo das críticas, no entanto, ao Parlamento são endereçadas poucas palavras.

Outra questão levantada por Chemerinsky é que não existe apenas o controle de constitucionalidade dos atos produzidos por agentes democraticamente eleitos, mas também de atos produzidos por outros agentes não eleitos, como agentes de polícia e agências reguladoras.[84]

Diferentemente dos autores anteriormente mencionados, Jonathan Siegel realiza uma crítica ao constitucionalismo popular partindo de uma perspectiva institucional do problema. Para tal, o autor realiza uma exposição comparativa entre o *judicial review* com o processo eleitoral e os processos legislativos. Assim, procura demonstrar que o Poder Judiciário possui características peculiares que o colocam em vantagem para a efetividade do direito constitucional e garantia dos direitos fundamentais, sobretudo dos direitos individuais.[85]

Segundo Jonathan Siegel, algumas pessoas acreditam que o processo eleitoral poderia ser um mecanismo de efetivar a Constituição contra violações. Esta ideia viria da seguinte lógica: se determinado político viola a Constituição, a população não votará mais nele.[86]

Contudo, o autor apresenta argumentos demonstrando que o processo eleitoral não é apropriado para isso. Em primeiro lugar, porque não há correlação necessária entre a violação constitucional e a represália do eleitorado. Isto porque o processo eleitoral não é focado em uma determinada matéria, muito menos constitucional. A ausência de votos de um político na próxima eleição pode ser confundida com vários outros problemas, como questões políticas, econômicas, morais, etc. Além disso, as eleições não apresentam oportunidades claras para expressar visões sobre aspectos constitucionais. Diferentemente, o processo judicial é focado em um caso específico, sendo em matéria constitucional, a violação da Constituição.[87]

Outra diferença entre o processo eleitoral e o judicial é que o segundo é transparente, enquanto o segundo é inescrutável[88]. Obviamente, o processo judicial não é

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[84] CHEMERINSKY, Erwin. In defense of judicial review: The perils of popular constitutionalism. **University of Illinois Law Review**, Champaign, n. 3. p. 673-690, 2004. Disponível em: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2144&context=faculty_scholarship>. Acesso em: 29 de julho de 2017. p. 682.

[85] Cf. SIEGEL, Jonathan R. The institutional Case for Judicial Review. **Iowa Law Review**, Iowa City, v. 97. p. 1147-1199, 2012. Disponível em: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2079129>. Aceso em 18 de setembro de 2017.

[86] SIEGEL, Jonathan R. The institutional Case for Judicial Review. **Iowa Law Review**, Iowa City, v. 97. p. 1165, 2012. Disponível em: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2079129>. Aceso em 18 de setembro de 2017.

[87] SIEGEL, Jonathan R. The institutional Case for Judicial Review. **Iowa Law Review**, Iowa City, v. 97. p. 1168-1169, 2012. Disponível em: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2079129>. Aceso em 18 de setembro de 2017.

[88] SIEGEL, Jonathan R. The institutional Case for Judicial Review. **Iowa Law Review**, Iowa City, v. 97. p. 1171, 2012. Disponível em: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2079129>. Aceso em 18 de setembro de 2017.

totalmente transparente, isto porque nem sempre os juízes são claros em apresentar as razões que os levam a tomar suas decisões. No entanto, o processo judicial é muito mais transparente que o processo eleitoral.[89]

Por fim, outra vantagem importante do *judicial review* é que este é individual, enquanto o processo eleitoral depende de uma coletividade, ou seja, o processo eleitoral ignora as violações constitucionais vivenciadas por indivíduos isolados. O autor, entretanto, reconhece que os constitucionalistas populares não esperam que a Constituição seja preservada apenas através pelo processo eleitoral, mas por todo o processo político, incluindo a legislatura, a imprensa, o direito de petição, interesses de grupos, etc.[90]

Por isto, o mesmo comparativo que Jonathan Siegel faz do *judicial review* com o processo eleitoral, ele faz do *judicial review* para com os processos legislativos. Afirma o autor que embora os processos legislativos sejam capazes de promover debates constitucionais, não existe qualquer garantia de que estes serão realizados. Os Cidadãos não teriam qualquer poder para fazer com que o corpo legislativo aprecie uma questão constitucional separadamente. Sendo assim, o autor demonstra que embora o processo legislativo tenha uma possibilidade muito melhor de levar em conta questões constitucionais do que o processo eleitoral, ainda fica atrás do processo judicial.[91]

A mesma lógica é aplicada pelo autor no quesito transparência. Diferentemente do processo eleitoral, no processo legislativo é possível que os parlamentares exponham suas razões para a tomada de determinadas decisões. No entanto, não há qualquer garantia de que haverá fundamentação das decisões. Resumindo, a principal diferença é que, no processo legislativo, a atuação é discricionária, enquanto no processo judicial é mandatória.[92]

Sintetizando a sua crítica, o autor explica: "A combinação da natureza discricionária do processo legislativo com a não focada e inescrutável natureza do processo eleitoral é um obstáculo duplo que torna o processo político como um todo um veículo pobre de efetivação dos direitos constitucionais"[93]. Referindo-se, evidentemente, aos direitos individuais.

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[89] SIEGEL, Jonathan R. The institutional Case for Judicial Review. **Iowa Law Review**, Iowa City, v. 97. p. 1173-1174, 2012.

[90] Outras vantagens do *judicial review* em relação ao processo eleitoral apresentadas pelo autor são: que este é baseado em um sistema de precedentes e, ainda, em direitos; enquanto o processo eleitoral não possui qualquer sistema de precedentes e tem um caráter meramente majoritário (SIEGEL, Jonathan R. The institutional Case for Judicial Review. **Iowa Law Review**, Iowa City, v. 97. p. 1177, 2012).

[91] SIEGEL, Jonathan R. The institutional Case for Judicial Review. **Iowa Law Review**, Iowa City, v. 97. p. 1178-1180, 2012. Disponível em: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2079129>. Aceso em 18 de setembro de 2017.

[92] SIEGEL, Jonathan R. The institutional Case for Judicial Review. **Iowa Law Review**, Iowa City, v. 97. p. 1181-1182, 2012. Disponível em: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2079129>. Aceso em 18 de setembro de 2017.

[93] SIEGEL, Jonathan R. The institutional Case for Judicial Review. **Iowa Law Review**, Iowa City, v. 97. p. 1185, 2012. Disponível em: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2079129>. Aceso em 18 de setembro de 2017.

5. CONSIDERAÇÕES FINAIS

Os constitucionalistas populares defendem um modelo em que o Poder Judiciário não tenha protagonismo na interpretação constitucional, transferindo este protagonismo ao povo, o verdadeiro detentor da Constituição. Alguns autores, como Larry Kramer e Richard Parker partem, em alguns momentos, para discursos bastante críticos dos que defendem um modelo de supremacia judicial, chamando-os de aristocratas.

No entanto, ao fazer isto, os constitucionalistas populares ignoram duas questões importantes. A primeira é a possibilidade de uma posição mais conciliatória, que defenda o controle de constitucionalidade no sentido forte e, ainda, incentive o engajamento popular para que este se posicione a respeito das decisões em sede de revisão judicial. Este posicionamento mais moderado pode ser visto no constitucionalismo democrático de Robert Post e Reva Siegel.

Outro problema do constitucionalismo popular é subestimar o problema do abuso do governo da maioria, que pode levar a opressão de minorias. Importante ter-se em mente que a ideia de um problema contramajoritário não significa que as maiorias irão atormentar as minorias recorrentemente. Apesar da função contramajoritária das cortes, espera-se que esta função tenha de ser exercida muito raramente.

Por fim, a crítica de Jonathan Siegel, em uma perspectiva institucional demonstra as vantagens que a revisão judicial possui em comparação com outros processos políticos para preservar os direitos e liberdades constitucionais. A proposta dada pelo autor de conferir aos ministros da Suprema Corte (ou do Supremo Tribunal Federal, no Brasil) um mandato submetido a um termo é interessante para que os representantes do povo possam substituir ministros que não estejam realizando uma interpretação condizente com os ideários do povo ou reconduzi-los se estiverem.

A principal contribuição do constitucionalismo popular é atacar uma visão juricêntrica, iludida com personalidades vestidas em togas e com uma visão de que a Constituição deve ser interpretada por semideuses em um Monte Olimpo. É preciso, de fato, trazer o povo para o debate constitucional e empoderá-lo para que possa participar das transformações constitucionais. Os juízes constitucionais devem ter sempre em mente que servem ao povo, como nas palavras de Larry Kramer: "a Suprema Corte é nosso servo e não nosso mestre"[94]. Ou como, na Constituição Brasileira: "todo poder emana do povo"[95], "todo poder" inclui o Judiciário.

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[94] KRAMER, Larry. **The people themselves**. Kindle Edition. Oxford: Oxford University Press, 2004. p. 248, tradução nossa.

[95] BRASIL. Constituição da República Federativa do Brasil de 1988. Brasília, DF, 5 out. 1988. Disponível em: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>. Acesso em: 20 de setembro de 2017.

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Desafios ao constitucionalismo na América Latina: uma visão geral sobre o "novo golpismo"

Challenges to Latin-American constitutionalism: an overview of the "new coup"

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Resumo

O artigo aborda os recentes fenômenos de mudanças presidenciais ocorridos em países da América Latina de forma a investigar as nuances do conceito de "novo golpismo". Discutimos em que medida os eventos até aqui intitulados de golpes institucionais podem indicar os desafios a serem enfrentados pelo constitucionalismo

Abstract

This article seeks to investigate nuances in recent presidential changes took place in Latin America countries, a phenomenon called "new coup". It argues what challenges these situations may show to consolidate democratic regimes in societies marked by coloniality. The study compares Latin American constitutionalism's state of the art with recent

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naquelas sociedades, marcadas pelo modo colonial de reprodução das relações de poder. O estudo compara o atual estado da arte do constitucionalismo latino americano com os recentes acontecimentos institucionais que invocam uma possível fragilidade nas estruturas desses Estados Democráticos de Direito. Realizamos, para tanto, uma pesquisa bibliográfica e documental, centrada nas interfaces do tema com a Ciência Política. A análise explora, a partir dessa aparente contradição, as relações entre colonialismo, colonialidade e direito, no intuito de buscar possíveis respostas aos desafios do fortalecimento da democracia em sociedades periféricas.

Palavras-chave: constitucionalismo latino-americano; novo golpismo; Estado de Direito; democracia; colonialidade.

institutional disruptions that indicates any possible structural weakness in the democratic rule of law. Developing a documental e bibliographic research, related with a different area, political science, we explore the relations between colonialism, coloniality and law, to present a possible answer to empower democracy in marginal societies.

Keywords: *Latin-American constitutionalism; new coup; rule of law; democracy; coloniality.*

SUMÁRIO

1. Introdução; **2.** América Latina, constitucionalismo e democracia; **3.** Os golpes no século XXI no contexto da democracia ocidental: conceitos e características; **4.** Colonialismo e direito: relações entre direito e política e aportes do pensamento descolonial; **5.** Considerações Finais; **6.** Referências.

1. INTRODUÇÃO

Este artigo tem como objetivo traçar os principais desafios e perspectivas para o constitucionalismo democrático na América Latina, considerando as recentes rupturas democráticas ocorridas em três países do continente: Honduras, em 2009, Paraguai, em 2012 e Brasil, em 2016. Nosso objetivo é problematizar o conceito de golpe institucional, ou golpe parlamentar, delineado por alguns autores da Ciência Política, no contexto de sociedades ainda bastante marcadas por relações coloniais de poder. Para tanto, utilizamos os aportes do pensamento descolonial para refletir sobre a complexidade existente no processo de consolidação do Estado Democrático de Direto em países do Sul global. O artigo insere-se no bojo de uma hipótese mais ampla de pesquisa, segundo a qual seria necessário entender as origens coloniais do desenvolvimento do constitucionalismo na América Latina, para assim descortinar os novos elementos e características no fenômeno político-jurídico que se convencionou chamar golpe institucional ou parlamentar.

De forma mais ampla, essa discussão está inserida em estudos já existentes sobre o assunto, em especial do campo da Ciência Política. Aproxima-se de uma reflexão bastante atual sobre a teoria do Estado, na qual se identifica um possível descenso na onda democrática vivenciada pelos países da América Latina a partir do final do século XX. As três últimas mudanças presidenciais repentinas ocorridas no século XXI podem

ser aproximadas, no intuito de se investigar as potencialidades e os desafios do constitucionalismo democrático – e sua história – na América Latina? De forma um pouco mais desafiadora, e de acordo com o referencial teórico aqui adotado, esses processos podem indicar a inadequação, bem como o esfacelamento, de um modelo de Estado e de democracia modernos nunca pensados para sociedades *abigarradas*, como as latino-americanas?

Pretendemos refletir sobre os problemas que enfrenta a teoria constitucional latino-americana, mais especificamente na relação entre direito e política. Na busca por respostas à problemática do golpe institucional, ou novo golpismo em nosso continente, utilizamos os aportes teóricos do pensamento descolonial. Esses autores refletem sobre a constituição da América Latina como o lado "negado" da Modernidade, e com isso podem nos oferecer pistas importantes sobre a inadequação de certos modelos constitucionais em contextos marcados por relações coloniais de poder.

2. AMÉRICA LATINA, CONSTITUCIONALISMO E DEMOCRACIA

Do Estado de direito ao Estado constitucional, como pontua Zagrebelsky[1], existem inúmeras possibilidades de construção de sentidos, mais ou menos densos, acerca do papel desempenhado pelo direito e pelas leis em cada contexto e em épocas distintas. O autor destaca de forma lúcida que, mais importante que saber se o Estado "constitucional" é ou não uma versão particular de Estado de direito, é não identificá-lo como uma continuidade histórica e linear – típica de uma abordagem acrítica dos fenômenos.

Nesse âmbito, segundo o autor, o Estado constitucional pode ser caracterizado como a construção de uma convergência genérica sobre certos aspectos estruturais da convivência política e social. A Constituição ganha força como ferramenta de legitimação das leis e fiel da balança do próprio conceito de legalidade[2]. Com esse ponto de partida pretendemos identificar as rusgas existentes nesse modelo, ou seja, os elementos que esgarçam, por assim dizer, os pontos de consenso do acordo político e social. Ao fim e ao cabo, são esses estabelecidos pela necessidade de equilíbrio entre as forças que centralizam e administram o poder político institucional em nossa sociedade.

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[1] ZAGREBELSKY, Gustavo. **El Derecho dúctil**. Ley, derechos, justicia. Madrid: Editorial Trotta. Madrid, 2007, p. 21-45.

[2] La ley, un tiempo medida exclusiva de todas las cosas en el campo del derecho, cede así el paso a la Constitución y se convierte ella misma en objeto de medición. Es destronada en favor de una instancia más alta. Y esta instancia más alta asume ahora la importantísima función de mantener unidas y en paz sociedades enteras divididas en su interior y concurrenciales. Una función inexistente en otro tiempo, cuando la sociedad política estaba, y se presuponía que era en sí misma, unida y pacífica. En la nueva situación, el principio de constitucionalidad es el que debe asegurar la consecución de este objetivo de unidad. ZAGREBELSKY, Gustavo. **El Derecho dúctil**. Ley, derechos, justicia. Madrid: Editorial Trotta. Madrid, 2007. p. 39.

Pretendemos inserir, sendo assim, as mudanças presidenciais aqui analisadas no contexto histórico e político do constitucionalismo latino-americano, sem cair em uma distinção essencialista e latino-americanista e sem negar, por outro lado, a relevância e o peso das construções teóricas até então delineadas tendo como base o contexto dos países europeus ou norte-americano.

A década de 90 marca uma fase de superação dos regimes ditatoriais que vigoraram na América Latina, de maneira a permitir a uma certa abertura social capaz de dar ensejo a potentes processos de mobilização social. Com Ferrajoli[3], esse cenário é classificado a partir da expressão "regimes democráticos de terceira geração". Até recentemente subalternos às culturas jurídicas europeia e estadunidense, segundo Ferrajoli[4], os países latino-americanos inverteram a relação, pois algumas de suas ordens jurídico-constitucionais marcam o início de uma nova fase, a partir da previsão de sistemas de garantias e instituições mais complexas e articuladas.

Autores como Yrigoyen Fajardo[5], Viciano Pastor e Martínez Dalmau[6] também já ressaltaram e caracterizaram esse processo, com investigações relevantes acerca de suas consequências, limites e possibilidades. Tais aproximações devem relacionar-se ao contexto político-jurídico de cada local, sob pena de ingressarmos em uma análise homogeneizante e simplista de processos. Nesse sentido, importa destacar a leitura de Alberto Moreiras, citada por Castro-Gómez, segundo o qual o "latinoamericanismo", assim como o orientalismo de Edward Said, pode ser construído de maneira a abarcar diferenças e identidades, por meio de uma representação fetichizada, que pode servir, inclusive, para controlar essas subjetividades[7].

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[3] FERRAJOLI, L. O Constitucionalismo garantista e o estado de direito. Tradução de A. K. Trindade. In: FERRAJOLI, L.; STRECK, L. L.; TRINDADE, A. K. (Orgs.). **Garantismo, hermenêutica e (neo)constitucionalismo**: um debate com Luigi Ferrajoli. Porto Alegre: Livraria do Advogado, 2012. p. 232.

[4] FERRAJOLI, L. O Constitucionalismo garantista e o estado de direito. Tradução de A. K. Trindade. In: FERRAJOLI, L.; STRECK, L. L.; TRINDADE, A. K. (Orgs.). **Garantismo, hermenêutica e (neo)constitucionalismo**: um debate com Luigi Ferrajoli. Porto Alegre: Livraria do Advogado, 2012. p. 233.

[5] YRIGOYEN FARJARDO, R. El horizonte del constitucionalismo pluralista: del multiculturalismo a la descolonización. In: **El derecho en America Latina**: un mapa para el pensamiento jurídico del siglo XXI. RODRIGUES GARAVITO, C. (coord..). 1ª ed. Buenos Aires: Siglo Vientiuno Editores, 2011, p. 139-160.

[6] VICIANO PASTOR, Roberto, MARTÍNEZ DALMAU, Rubén. Los procesos constituyentes latinoamericanos y el nuevo paradigma constitucionalius. **Revista del Instituto de Ciencias Jurídicas de Puebla A.C**. Puebla, México, n. 25, 2010, sem mês, 2010. Disponível em: <http://www.redalyc.org/articulo.oa?id=293222977001> . Acesso em 24 ago 2017.

[7] "Es preciso aclarar que el 'Latinoamericanismo' al que se refiere Moreiras es una forma de conocimiento académico que en los Estados Unidos forma parte de los llamados 'Area Studies'. Éstos nacen después de la segunda guerra mundial como apoyo científico a la política exterior de los Estados Unidos, que buscaba identificar y eliminar los obstáculos estructurales que impedían el tránsito hacia la modernidad en los países del 'Tercer Mundo'. El Latinoamericanismo se vio reforzado con el recrudecimiento de la guerra fría y el intento de impedir la propagación del comunismo en el sur del continente. Tanto Moreiras como Mignolo identifican este tipo de saberes como pertenecientes a la 'tercera fase de la occidentalización', liderada por los Estados Unidos a partir de 1945. Y la imagen humanista y letrada de América Latina propagada por estos discursos constituye precisamente la 'herencia colonial' que el subalternismo busca superar. Como en el caso de Beverley, Moreiras

Entretanto, como bem pontua Wolkmer[8], a tradição legal e constitucional latino-americana é pautada em uma noção de cidadania culturalmente homogênea, a partir da adoção dos princípios liberais nascidos no bojo das sociedades europeia e norte-americana, que marcam o conceito de Estado de Direito. No mesmo sentido, a partir da análise de Jorge Esquirol (1997), é possível observar a existência de um Direito Europeu na América Latina, legitimando o engajamento dos juristas latino-americanos na tarefa de elaborar uma ciência jurídica aos moldes europeus e imitar o seu modelo de sociedade[9].

De outra ponta, o chamado "surpreendente século XXI"[10] na América Latina destaca-se pela presença de governos não somente representativos, mas que se apoiam em instrumentos reais de participação direta da população. De outro lado, as origens étnicas, sociais e culturais dos movimentos de contestação, em alguns países, também inauguram o chamado constitucionalismo de feição ecocêntrica[11], que reconhece os direitos da natureza e a cultura do Bem Viver. Conforme salienta Uprimny[12], as diversidades nacionais são inúmeras, o que reflete a existência de duas tendências básicas de mutações constitucionais na região: constitucionalismos transformadores, de um lado, reformas constitucionais que permitiram a manutenção das ordens sociais e políticas, de outro[13].

Gargarella[14] afirma que a maioria de nossas constituições fundacionais, que representam as bases das instituições, com exceção daquelas de Equador e Bolívia, foram

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piensa que esta herencia se halla depositada principalmente en las universidades, en los departamentos de literatura y estudios latinoamericanos, o en las instituciones que requieren de un saber científicamente avalado sobre Latinoamérica para legitimar determinadas políticas socio-económicas". CASTRO-GÓMEZ, Santiago. Latinoamericanismo, modernidad, globalización. Prolegómenos a una crítica poscolonial de la razón. In: CASTRO-GÓMEZ, Santiago; MENDIETA, Eduardo. **Teorías sin disciplina:** latinoamericanismo, poscolonialidad y globalización en debate. México: Miguel Ángel Porrúa, 1998, p. 10-11. Disponível em <http://ensayo.rom.uga.edu/critica/teoria/castro/> Acesso em 17 de maio de 2017.

[8] WOLKMER, A. C. Pluralismo e Crítica do Constitucionalismo na América latina. **Anais do IX Simpósio Nacional de Direito Constitucional**, Curitiba, PR: ABDConst. p. 143-155, 2011. Disponível em <http://www.abdconst.com.br/revista3/anaiscompletos.pdf>. Acesso em 10 fev 2017.

[9] Essa visão também pode ser encontrada na perspectiva de William Twinning (2009), sobre o colonialismo na forma de difusão do direito. In: BRAGATO, F.F.; CASTILHO, N.M. A importância do pós-colonialismo e dos estudos descoloniais na análise do novo constitucionalismo latino-americano. In: VAL, E. M.; BELLO, E. (org.) **O pensamento pós e descolonial no novo constitucionalismo latino-americano**. Caxias do Sul, RS: Educs, p. 11-25, 2014. Disponível em <https://www.ucs.br/site/midia/arquivos/pensamento_pos.pdf> Acesso em 28 ago 2016.

[10] MAGALHÃES, J. L. Q. **Estado plurinacional e direito internacional**. 1 ed. Curitiba: Juruá, 2012.

[11] MORAES, G. O constitucionalismo ecocêntrico na América Latina, o Bem Viver e a nova visão das águas. **Revista da Faculdade de Direito**, Fortaleza, v. 34, n. 1, jan./jun. p. 123-155. 2013.

[12] UPRIMNY, R. Las transformaciones constitucionales recientes em América Latina: tendencias y desafios. In: RODRIGUES GARAVITO, C. **El derecho en América Latina**: un mapa para el pensamento jurídico del siglo XXI. 1 ed. Buenos Aires: Siglo Veintiuno Editores, p. 109-138, 2011.

[13] Visão presente também em SERRANO. p. E. A. P. **Autoritarismo e Golpes na América Latina**: breve ensaio sobre jurisdição e exceção. São Paulo: Editora Alameda, 2016. p. 6.

[14] GARGARELLA, R. Pensando sobre la reforma constitucional en América Latina. In: RODRIGUES GARAVITO, C. **El derecho en América Latina**: un mapa para el pensamiento jurídico del siglo XXI. 1 ed. Buenos Aires: Siglo Veintiuno Editores, p. 87 – 108, 2011.

produtos de um pacto entre elites liberais e conservadores. Esse pacto opõe-se, na visão do autor, a qualquer tipo de movimento tendente a ampliar a participação popular na política. Gargarella[15] continua a reflexão aduzindo que, nesse processo, o constitucionalismo latino-americano consolidou mecanismos que dificultaram a participação política das massas populares e conferiram poder de decisão a órgãos e instituições que não passavam pelo controle popular. Esse modelo dominou a cena do constitucionalismo latino-americano, de forma mais ou menos intensa, mesmo após a emergência do ciclo do constitucionalismo "multicultural", expressão de Yrigoyen Fajardo[16] para demarcar o início de um ciclo de modificações constitucionais voltadas ao reconhecimento de uma composição multicultural da sociedade.

De certa forma, isso se confirma quando observamos a recente história democrático-constitucional brasileira, iniciada com a Constituição de 1988. De lá para cá, foram poucos e raros os processos de inclusão da população – ainda que por meio dos instrumentos legalmente admitidos, tais como referendos e plebiscitos – nos debates e decisões políticas. Ainda quando se analisa o governo do Partido dos Trabalhadores.

A emergência de ordens jurídicas democráticas na América Latina coincidiu com expansão do neoliberalismo no continente, nas décadas finais do século XX[17]. Assim, o recente processo de redemocratização teria se transformado, também e em certa medida, em um marco institucional adaptado a essa vertente econômico-política[18]. Para García Villegas, os motivos dos abismos entre a lei e a realidade na América Latina - o que envolve uma cultura de não cumprimento às leis - explicam-se também por meio do desenho (e da transferência) legal e institucional de nossas sociedades.

Como explica o autor acima, a história política e institucional da América Latina pode resumir-se à história da infrutífera recepção de instituições estrangeiras que não conseguem reproduzir os seus bons resultados em nossas sociedades[19]. Nosso obje-

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[15] GARGARELLA, R. Pensando sobre la reforma constitucional en América Latina. In: RODRIGUES GARAVITO, C. **El derecho en América Latina**: un mapa para el pensamiento jurídico del siglo XXI. 1 ed. Buenos Aires: Siglo Veintiuno Editores. p. 90, 2011.

[16] YRIGOYEN FARJARDO, R. El horizonte del constitucionalismo pluralista: del multiculturalismo a la descolonización. In: **El derecho en América Latina**: un mapa para el pensamiento jurídico del siglo XXI. RODRIGUES GARAVITO, C. (coord..). 1ª ed. Buenos Aires: Siglo Vientiuno Editores. p. 141, 2011.

[17] Como exemplo de maior amplitude e destaque, temos as consequências do Consenso de Washington, que desempenhou uma intensa pressão nas lideranças políticas latino-americanas e exigiu o compromisso com projetos políticos que, de certa forma, congelaram a dimensão dogmática das Constituições recém criadas, especialmente àquela relacionada com os direitos fundamentais econômicos e sociais.

[18] SADER, E. Dos momentos del pensamiento social latino-americano. **Critica y Emancipaccion**, n. 1, jun. p. 9-20, 2008. p. 10-11. Disponível em <http://biblioteca.clacso.edu.ar/ojs/index.php/critica/article/viewFile/192/177> Acesso em 20 jul 2016.

[19] E continua o autor: "Esta no es una idea nueva en el continente; ya en la primera mitad del siglo XIX, Juan Batista Alberdi y sus colegas argentinos – los de la llamada Generación del 30: Esteban Echeverría y Domingos Faustino Sarmiento, entre otros – sostenían la imperiosa necesidad de conocer las condiciones sociales y culturales antes de importar instituciones europeas. ¿Cómo es posible entonces que esta idea no haya suscitado más atención entre los políticos y diseñadores de instituciones en América Latina? Quizás esto se deba a que el desconocimiento

tivo não é analisar todos os desafios que envolvem o constitucionalismo latino-americano nos dias de hoje. Mas se trata de situar alguns temas – pontuados e analisados por diversos juristas – que podem contribuir para a análise dos golpes de estado na região no período pós ditaduras civis-militares[20]. O problema trabalhado neste artigo também reflete as questões epistemológicas por quais passam o pensamento jurídico latino-americano.

Segundo Rodrigues Garavito [21], há a uma consolidação muito clara do lugar periférico da América Latina no campo jurídico global, bem como uma reprodução incompleta da realidade sócio jurídica de nosso continente. Isso se expressa, conforme o autor, nas melhores análises também produzidas por autores críticos no Norte global. O quadro proposto por Rodrigues Garavito[22] nos fornece elementos importantes para descobrir porque, no bojo do entusiasmo acerca do -*novo constitucionalismo latino-americano*, não conseguimos identificar a continuidade de certos elementos "westfalianos", como aduz o autor. Tais elementos continuam se reproduzindo em estruturas normativas imersas em contextos sociais, econômicos e políticos arcaicos, que em muitos casos ainda não conseguiram alcançar o patamar mínimo de respeito às liberdades individuais e à integridade física de certos grupos sociais[23].

Com essa breve contextualização do cenário político e institucional latino-americano, a investigação acerca do conceito de golpe institucional torna-se inquietante, na medida em que nos leva a pensar nas estruturas de nossas ordens jurídico-políticas. Assim, consideramos importante destacar aspectos inovadores das recentes quedas presidenciais, e o que elas podem representar para o contexto latino-americano.

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de las condiciones fácticas en las que operan las instituciones no sólo se explica como un fracaso, el de quienes están encargados de la recepción o de la importación de instituciones foráneas, sino también como una estrategia política. Una estrategia política que consiste en crear instituciones para obtener los beneficios de legitimación política provenientes de la institución importada, sin que ello implique aceptar los efectos prácticos de su puesta en funcionamiento". GARCÍA VILLEGAS, M. Ineficacia del derecho y cultura del incumplimiento de reglas em América Latina. In: **El derecho en America Latina**: un mapa para el pensamiento jurídico del siglo XXI. RODRIGUES GARAVITO, C. (coord..). 1 ed. Buenos Aires: Siglo Vientiuno Editores, p. 161-185 (p. 180), 2011.

[20] Segundo Atílio Borón (2010), em artigo intitulado "Invisibilizando golpes de estado: Lo que la teoría hegemónica en la ciencia política no quiere ver", ocorreram golpes de estado na Venezuela, em 2002, em El Salvador, em 1979, na Bolívia, nos anos de 1978, 1979 e 1980 e, por fim, no Haiti em 1988, 1990, 1991 e 2004. In: BORÓN, A. Invisibilizando golpes de estado. **Rebelion**. Publicado em 04 jan 2010 Disponível em <http://www.rebelion.org/noticia.php?id=98071> Acesso em 18 ago 2016.

[21] RODRIGUES GARAVITO, C. Navegando la globalización: un mapamundi para el estudio y la práctica del derecho en América Latina. In: **El derecho en America Latina**: un mapa para el pensamiento jurídico del siglo XXI. GARAVITO, C. R. (coord..). 1 ed. Buenos Aires: Siglo Vientiuno Editores, p. 69-86, 2011.

[22] RODRIGUES GARAVITO, C. Navegando la globalización: un mapamundi para el estudio y la práctica del derecho en América Latina. In: **El derecho en America Latina**: un mapa para el pensamiento jurídico del siglo XXI. GARAVITO, C. R. (coord..). 1ª ed. Buenos Aires: Siglo Vientiuno Editores. p. 69, 2011

[23] Referência à manutenção de estruturas de poder conservadoras, que por um lado mantém os privilégios de determinados grupos – a exemplo da bancada ruralista no Congresso Nacional brasileiro, das famílias detentoras das concessões de rádio e televisão – e por outro reproduz a seletividade racial e econômica ainda marcante de nossas instituições jurídicas e sociais.

3. OS GOLPES NO SÉCULO XXI NO CONTEXTO DA DEMOCRACIA OCIDENTAL: CONCEITOS E CARACTERÍSTICAS

O conceito de golpe constitucional sofre alterações durante os séculos XIX, XX e XXI[24], e alcança uma expressão moderna, na medida da sofisticação das formas de exercício do poder no interior do sistema institucional. De meio para subversão do poder instituído – golpe de estado moderno[25] – o termo continua sofrendo adaptações a partir da especificidade das mudanças institucionais e sua inadequação à definição moderna[26]. Destaca-se que a ideia precisou ser novamente revisitada, pois se mostrou insuficiente para explicar as destituições presidenciais ocorridas na América Latina no período pós década de 80, acompanhadas de massivas mobilizações sociais contrárias à agenda neoliberal[27].

No contexto desses processos, autores como Pérez Liñán, Kathryn Hochstetler e Leiv Marsteintredet[28] apontavam para o fato de que, diferentemente do ocorrido no passado, as quedas de presidentes não mais se dão necessariamente com a ajuda das forças militares. Os autores chamam a atenção para o paradoxo das quedas presidenciais sucessivas nos países da América do Sul sem prejuízo para o regime, ou para a

[24] Nos termos de VICIANO PASTOR, R.; MARTÍNEZ DALMAU, R. Fundamentos teóricos y prácticos del nuevo constitucionalismo latinoamericano. **Gaceta Constitucional**, Lima, Peru, n 48. p. 307-328, 2011. Disponível em <http://www.gacetaconstitucional.com.pe/sumario-cons/doc-sum/GC%2048%20%20Roberto%20VICIANO%20y%20Ruben%20MARTINEZ.pdf> Acesso em 10 fev 2016.

[25] "The concept is now used to describe not only political practices of absolutism, but ant set of events tha threatens to cancel or revert modern achievements, or worse, their very possibilities and ends." (BARTELSON, 1997. p. 338). Importante destacar, conforme Matthews, que a definição de golpe não deve ser confundida com a de revolução, que possui o objetivo de realizar uma completa reorganização social e política. Segundo o autor, o conceito de golpe evolui na medida em que as nações implementam a noção de soberania popular. In: MATTHEWS, A. Perspectives on Instability: Honduras and Paraguay. Security and Defense Studies Review. **Interdisciplinary Journal of the William J. Perry Center for Hemispheric Defense Studies**, Washington, vol. 13. p. 131-152, 2013. p.132.

[26] MATTHEWS, A. Perspectives on Instability: Honduras and Paraguay. Security and Defense Studies Review. **Interdisciplinary Journal of the William J. Perry Center for Hemispheric Defense Studies**, Washington, vol. 13. p. 131-152, 2013. p. 132.

[27] SOLER, L. Golpes de estado en el siglo XXI. Un ejercicio comparado: Haití (2004), Honduras (2009) y Paraguay (2012). **Cadernos Prolam**. São Paulo: Universidade Estadual de São Paulo, n. 26. p. 77-89, (p. 80), 2015. Disponível em <http://www.revistas.usp.br/prolam/article/viewFile/103317/105950> Acesso em 25 ago 2016.

[28] Respectivamente, em: PÉREZ LIÑÁN, A. ¿Juicio Político o Golpe Legislativo? Sobre las crisis constitucionales en los años noventa. **América Latina Hoy**, n. 26. p. 67-74, 2000. Disponível em <http://biblioteca2012.hegoa.efaber.net/system/ebooks/10412/original/Juicio_Politico_o_Golpe_Legislativo.pdf> Acesso em 19 ago 2016; PÉREZ LIÑÁN, A. Instituciones, coaliciones callejeras e inestabilidad política: perspectivas teóricas sobre las crisis presidenciales. **América Latina Hoy**, Salamanca, Espanha, n. 49, ago, p. 105-126, 2008. Disponível em <http://www.redalyc.org/pdf/308/30804906.pdf> Acesso em 19 ago 2016.; HOCHSTETLER, K. Repensando el presidencialismo: desafíos y caídas presidenciales en el cono sur. **América Latina Hoy**, Salamanca, Espanha, n. 49, ago, p. 51-72, 2008. Disponível em <http://www.redalyc.org/pdf/308/30804904.pdf> Acesso em 15 ago 2016; MARSTEINTREDET, L. Las consecuencias sobre el régimen de las interrupciones presidenciales. **América Latina Hoy**, Salamanca, Espanha, n. 49, ago, p. 31-50, 2008. Disponível em <http://www.liderazgos-sxxi.com.ar/bibliografia/Las-consecuencias-sobre-el-regimen-de-las-interrupciones.pdf> Acesso em 25 jul 2016.

emergência de democracias estáveis com governos instáveis. Segundo Soler[29] essas chaves de análises voltam-se para os fenômenos de destituição presidencial ocorridos no pós-80 e seriam insuficientes para compreender as rupturas mais atuais, que ocorrem de dentro para fora do sistema institucional e não contam com mobilizações sociais relacionadas a uma agenda de esquerda[30].

Segundo Marcos Roitman Rosenmann[31], no pós-Guerra Fria, a técnica de golpe de Estado passa a ser praticada a partir dos despachos do poder industrial e financeiro, com a conivência do parlamento ou do poder judicial. Howard J. Wiarda e Hillary Collins[32], ao discutirem o conceito de golpe constitucional, demonstram que o problema já não se encontra mais centrado nas intervenções militares, mas nas desigualdades sociais e regionais somadas à fragilidade das instituições, o que ocorre em grande parte dos países da América Latina[33]. Para esses autores, os golpes dessa natureza podem ser efetivados com um grau considerável de legitimidade constitucional[34]. Matthews[35] desenvolve mais a noção, conceituando a expressão "golpe constitucional", na qual enfatiza a legalidade da remoção de um determinado presidente. O autor reconhece, contudo, que esses eventos são por vezes marcados por falta de legitimidade ou métodos aparentemente inconstitucionais.

No bojo dessa discussão, Juan Gabriel Tokatlian utiliza a expressão "*novo golpismo*":

> *[...] a diferencia del golpe de Estado tradicional, el "nuevo golpismo" está encabezado más abiertamente por civiles y cuenta con el apoyo tácito (pasivo) o la complicidad*

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[29] SOLER, L. Golpes de estado en el siglo XXI. Un ejercicio comparado: Haití (2004), Honduras (2009) y Paraguay (2012). **Cadernos Prolam**. São Paulo: Universidade Estadual de São Paulo, n. 26. p. 77-89, (p. 80), 2015. Disponível em <http://www.revistas.usp.br/prolam/article/viewFile/103317/105950> Acesso em 25 ago 2016.

[30] SOLER, L. Golpes de estado en el siglo XXI. Un ejercicio comparado: Haití (2004), Honduras (2009) y Paraguay (2012). **Cadernos Prolam**. São Paulo: Universidade Estadual de São Paulo, n. 26. p. 80, 2015. Disponível em <http://www.revistas.usp.br/prolam/article/viewFile/103317/105950> Acesso em 25 ago 2016.

[31] ROITMAN, M. R. **Tiempos de oscuridad**. Historia de los golpes de Estado en América Latina. Madrid: Akal, 2013.

[32] WIARDA, H. J. Wiarda; COLLINS, H. **Constitutional Coups?** Military interventions in latin America. Washington, DC, june, 2011. p. 10. Disponível em <https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/110627_Wiarda_ConstitutionalCoups_Web.pdf> Acesso em 15 ago 2016.

[33] Ainda assim, destaca-se que os autores, por meio de um estudo comparado, analisam neste artigo o papel desempenhado pelas forças armadas nas Constituições de cada país da América Latina. Discutem em que medida a previsão de utilização das forças armadas para a defesa da "soberania nacional" (presente em 60% das Constituições, conforme o estudo) afeta a política de estímulo à democracia desempenhada pelos Estados Unidos e pela Organização dos Estados Americanos (OEA) no continente.

[34] WIARDA, H. J. Wiarda; COLLINS, H. **Constitutional Coups?** Military interventions in latin America. Washington, DC, june, 2011. p. 10. Disponível em <https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/110627_Wiarda_ConstitutionalCoups_Web.pdf> Acesso em 15 ago 2016.

[35] MATTHEWS, A. Perspectives on Instability: Honduras and Paraguay. Security and Defense Studies Review. **Interdisciplinary Journal of the William J. Perry Center for Hemispheric Defense Studies**, Washington, vol. 13. p. 131-152, 2013. p. 132.

> *explícita (activa) de las Fuerzas Armadas, pretende violar la constitución del Estado con una violencia menos ostensible, intenta preservar una semblanza institucional mínima (por ejemplo, con el Congreso en funcionamiento y/o la Corte Suprema temporalmente intacta), no siempre involucra a una gran potencia (por ejemplo, Estados Unidos) y aspira más a resolver un impase social o político potencialmente ruinoso que a fundar un orden novedoso*[36].

Para ele, trata-se de um fenômeno gradual, no qual os grupos civis vão criando condições para a instabilidade e se tende a invocar a opção de uma saída constitucional, legal, institucional. O novo golpismo reconhece que os governos foram eleitos democraticamente, mas argumenta que eles não governam democraticamente. Essa ambiguidade caracteriza os golpes de Estado do século XXI, nos quais seria possível observar uma continuidade institucional no intuito de dissimular práticas antidemocráticas[37].

Enquanto Wiarda e Collins[38] e Abott Matthews[39] definem golpe constitucional de forma bastante resumida, enfatizando principalmente o contraste entre a legalidade da remoção presidencial e a falta de legitimidade para o ato ou o uso de métodos inconstitucionais, Tokatlian[40] discorre um pouco mais sobre o processo que leva a esses golpes, tratando inclusive de novos protagonistas políticos – como os meios de comunicação de massa, por exemplo. Entretanto, é interessante notar que os três convergem na ideia de que esses processos buscam solucionar impasses sociais, políticos e econômicos ou retirar presidentes que têm sua performance considerada ruim, mais do que criar uma nova ordem institucional. Sendo assim, o "desempenho" dos presidentes com relação aos aspectos socioeconômicos parece contar bastante neste processo.

Na visão de Wanderley Guilherme dos Santos, os sistemas representativos não estão imunes à possibilidade de que seu corpo de representantes sequestre as prerrogativas do poder constituinte originário, cujo detentor é o povo[41]. Nossa hipótese, no entanto, parte da percepção de que a marca da colonialidade – da qual trataremos no

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[36] TOKATLIAN, J. G. El auge del neogolpismo, **La Nación**, 24 de junio de 2012. Disponível em: <http://www.lanacion.com.ar/1484794-el-auge-del-neogolpismo> Acesso em 21 ago 2016.

[37] TOKATLIAN, J. G. El auge del neogolpismo, **La Nación**, 24 de junio de 2012. Disponível em: <http://www.lanacion.com.ar/1484794-el-auge-del-neogolpismo> Acesso em 21 ago 2016.

[38] WIARDA, H. J. Wiarda; COLLINS, H. **Constitutional Coups?** Military interventions in latin America. Washington, DC, june, 2011. p. 10. Disponível em <https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/110627_Wiarda_ConstitutionalCoups_Web.pdf> Acesso em 15 ago 2016.

[39] MATTHEWS, A. Perspectives on Instability: Honduras and Paraguay. Security and Defense Studies Review. **Interdisciplinary Journal of the William J. Perry Center for Hemispheric Defense Studies**, Washington, vol. 13. p. 131-152, 2013. p. 132.

[40] MATTHEWS, A. Perspectives on Instability: Honduras and Paraguay. Security and Defense Studies Review. **Interdisciplinary Journal of the William J. Perry Center for Hemispheric Defense Studies**, Washington, vol. 13. p. 131-152, 2013. p. 132.

[41] SANTOS, W. G. dos. **A democracia impedida**: o Brasil no século XXI. 1 ed. Rio de Janeiro: FGV Editora. Edição do Kindle, 2017, locais do Kindle 64-66.

tópico seguinte – oferece contornos específicos ao fenômeno constitucional na América Latina, criando condições mais favoráveis, por assim dizer, à proliferação de golpes constitucionais e parlamentares.

Na visão desse autor, o fenômeno do golpe parlamentar, apesar de manter quase intocada a estrutura institucional anterior, realiza, a partir da prática legislativa rotineira, extensa subversão política, econômica e social da ordem destituída[42]. Diferencia-se completamente das conhecidas intervenções militares, ou das substituições inconstitucionais de governo e é distinto das demais violências institucionais[43]. Golpes parlamentares não são orquestrados por figuras estranhas ao parlamento: "Por 'golpe parlamentar', aqui, indica-se uma substituição fraudulenta de governantes orquestrada e executada por lideranças parlamentares."[44].

É possível identificar pontos de conexão entre os autores trazidos, pois em todos esses processos a reação dos derrotados, por assim dizer, viola os pactos e consensos formalmente estabelecidos, como pontuamos no primeiro tópico com Zagrebelsky. Assim, as dinâmicas entre direito e política adquirem um maior grau de complexidade, na medida em que o apelo à legislação constitucional passa a ser utilizado, como pontua Santos. Não se faz mais imprescindível a construção de bandeiras ideológicas e movimentos massivos pelo fim do governo A ou B[45].

Tal complexidade, em nossa visão, está seriamente articulada com o a forma do sistema-mundo moderno[46] e o desenvolvimento do capitalismo em esfera mundial. O fim da Segunda Guerra mundial e a ascensão do modelo de democracia constitucional do Ocidente – marcado também pela missão de combater o totalitarismo stalinista, identificado como comunismo – influenciaram de forma decisiva os sistemas jurídico políticos que emergiram posteriormente. Ao citar o estudo realizado pelos cientistas políticos Martin Gilens, da Princeton University, e Benjamin I. Page para a American

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[42] SANTOS, W. G. dos. **A democracia impedida**: o Brasil no século XXI. 1 ed. Rio de Janeiro: FGV Editora. Edição do Kindle, 2017, locais do Kindle 161-163.

[43] SANTOS, W. G. dos. **A democracia impedida**: o Brasil no século XXI. 1 ed. Rio de Janeiro: FGV Editora. Edição do Kindle, 2017, locais do Kindle 381-383.

[44] SANTOS, W. G. dos. **A democracia impedida**: o Brasil no século XXI. 1 ed. Rio de Janeiro: FGV Editora. Edição do Kindle, 2017, locais do Kindle 381-386.

[45] Sabemos que, no caso brasileiro, as manifestações de rua contribuíram para o enfraquecimento do governo destituído. Entretanto, foram as estratégias e acordos parlamentares que garantiram o cumprimento à risca – e de forma bastante célere – do processo de impeachment de Dilma Roussef.

[46] Segundo Wallerstein, a história do sistema-mundo moderno envolveu e exigiu uma racionalidade própria, uma moralidade do próprio sistema que se definiu a partir da expansão e conquista da quarta parte do mundo até então não "conhecida", a América. O moderno sistema mundo destaca-se a partir do universalismo europeu, que consiste no conjunto de doutrinas e pontos de vista éticos que derivam do contexto europeu e ambicionam ser valores universais globais – aquilo que muitos de seus defensores chamam de lei natural – ou como tal são apresentados. É uma doutrina oralmente ambígua porque ataca os crimes de alguns e passa por cima dos crimes de outros, apesar de usar critérios que se afirmam como naturais. In: WALLERSTEIN, Immanuel. **O universalismo europeu**. São Paulo: Boitempo, 2007. p. 30.

Political Science Association, no qual concluem que a democracia norte-americana tornou-se um espaço em que as decisões políticas era tomadas por poderosas organizações financeiras e um punhado de americanos, Bandeira analisa o grau de dependência entre o funcionamento do regime democrático e interesses do capital financeiro "[...] entrelaçados com os interesses das corporações de gás e petróleo, da indústria bélica e sua cadeia produtiva." Segundo o autor, tais interesses condicionam as decisões políticas de Washington não somente mediante o lobby político "mas, inter alia, através das contribuições para a campanha eleitoral dos candidatos aos cargos eletivos. E, uma vez no governo ou Congresso, os eleitos tinham necessariamente de atender e compensar os interesses de seus *benefactors*"[47].

Observamos, no caso brasileiro, aspectos bastante semelhantes desse fenômeno, se analisarmos o conteúdo das denúncias de corrupção da operação Lava-Jato. Isso nos leva a uma observação importante realizada por Santos, obtida a partir da análise do relatório *The Changing Nature of Parliamentary Representation*, produzido em abril de 2012 por Greg Power, subsidiado pela União Interparlamentar das Nações Unidas. O autor aduz que as denúncias de corrupção, por si, não são capazes de gerar golpes de Estado: se faz necessário associá-las a outros objetivos e, de preferência, a discursos de "repúdio a mobilizações sociais e econômicas de setores subalternos da população"[48].

Em um sentido semelhante, Souza defende a tese de que a definição do que é corrupção é "arbitrária e pode ser aplicada ao bel-prazer de quem realiza o ataque."[49] E esse ataque, no cenário brasileiro, deu-se sobre o pretenso discurso de crescimento exagerado dos gastos estatais – especialmente com políticas públicas garantidoras de direitos sociais – e inviabilidade econômica das contas públicas. Essa narrativa criou o pano de fundo para o que o autor conceitua como saque ou "assalto à inteligência nacional".

Na medida em que observamos as conclusões de Bandeira, é possível concluir que a corrupção (entendida como descumprimento às regras do jogo) desenvolve-se lado a lado com o regime democrático, na medida em que as investidas militares protagonizadas ou apoiadas pelos Estados Unidos no século XXI (os bombardeios da OTAN na Líbia, a intervenção na Rússia, conflitos na Turquia, Palestina, Iraque, *putsch* na

[47] BANDEIRA, L. A. M. **A desordem mundial**: O espectro da dominação: guerras por procuração, terror, caos e catástrofes humanitárias. Rio de Janeiro: Editora José Olympio. Edição do Kindle, 2016, locais do Kindle 12537-12541.

[48] O estudo apontou que "a incidência majoritária de tentativas bem-sucedidas de golpe mostram as denúncias de corrupção associadas ao repúdio a mobilizações sociais e econômicas dos setores subalternos da população.". In: SANTOS, W. G. dos. **A democracia impedida**: o Brasil no século XXI. 1 ed. Rio de Janeiro: FGV Editora. Edição do Kindle, 2017, locais do Kindle 522-527.

[49] SOUZA, J. **A tolice da inteligência brasileira**. Rio de Janeiro: Leya Brasil. Edição do Kindle, 2015, locais do Kindle 4801-4803.

Ucrânia e as guerras por procuração na Líbia, Síria e alhures[50]) representam sérias violações ao catálogo de direitos civis e direitos humanos previstos na legislação nacional e internacional.

As rupturas democráticas na América Latina, nessa perspectiva, precisam ser analisadas de um ponto de vista crítico à própria constituição da democracia ocidental. Construímos até esse ponto uma narrativa que evoca, sob um primeiro aspecto, as especificidades do chamado constitucionalismo latino-americano, para aduzir como se adaptam bem a esse cenário as definições atuais do que aqui vamos intitular, conforme Tokatlian[51], de "novo golpismo". Nessa perspectiva, indicamos que se faz importante situar geopoliticamente o regime democrático ocidental, desde uma perspectiva crítica. Isso nos ajuda a entender até mesmo em que medida certos discursos – como o da corrupção, a partir do exemplo brasileiro – situam-se em um contexto de disputas de projetos políticos, econômicos e sociais. No próximo tópico, vamos destacar a possível relevância da perspectiva descolonial para análise dos fenômenos traduzidos como "novo golpismo" ocorridos na América Latina do século XXI[52].

4. COLONIALISMO E DIREITO: RELAÇÕES ENTRE DIREITO E POLÍTICA E APORTES DO PENSAMENTO DESCOLONIAL

Dialogando com a constatação de Rodrigues Garavito sobre o problema epistemológico que embasa o pensamento jurídico latino-americano, o pensamento descolonial aponta elementos capazes tanto de explicitar as origens de nosso pacto liberal-conservador, quanto de contribuir para uma crítica do fenômeno do "novo golpismo". O pensamento descolonial afirma-se com uma certa unidade – centralizando o seu *lócus* de enunciação – a partir do surgimento do projeto modernidade/colonialidade.[53]

[50] BANDEIRA, L. A. M. **A desordem mundial**: O espectro da dominação: guerras por procuração, terror, caos e catástrofes humanitárias. Rio de Janeiro: Editora José Olympio. Edição do Kindle, 2016, locais do Kindle 12537-12541.

[51] BANDEIRA, L. A. M. **A desordem mundial**: O espectro da dominação: guerras por procuração, terror, caos e catástrofes humanitárias. Rio de Janeiro: Editora José Olympio. Edição do Kindle, 2016, locais do Kindle 12537-12541.

[52] Podemos considerar que os eventos ocorridos em Honduras, Paraguai e Brasil, possuem aspectos em comum. Conforme Santos: "É plausível que o assalto noticiado no Paraguai, em junho de 2012, tenha transcorrido segundo padrão assemelhado. Não estou familiarizado com a vida política paraguaia o suficiente para sugerir comparações. Todavia, a sentença do Tribunal Internacional da Democracia, reunido no Rio de Janeiro, em 19 e 20 de julho de 2016, concluindo constituir golpe de Estado o processo de impedimento da presidente Dilma Rousseff, lista o episódio paraguaio e outro, o hondurenho, como acontecimentos semelhantes." In: SANTOS, W. G. dos. **A democracia impedida**: o Brasil no século XXI. 1 ed. Rio de Janeiro: FGV Editora. Edição do Kindle, 2017, locais do Kindle 120-123.

[53] "[...] Em 2001, na Duke University, um grupo se dispôs a discutir o conhecimento e o ato de conhecer, intentando elucidar a face visível da modernidade e seu lado "outro", o colonialismo. O evento contou com a participação de Walter Mignolo, Aníbal Quijano, Catherine Walsh, Enrique Dussel, Edgardo Lander, Fernando Coronil, Zulma Palermo, Javier Sanjinés, Arturo Escobar, dentre outros. A partir daí, o projeto estruturou-se e passou a organizar uma série de volumes com artigos dos membros desse coletivo.". BRAGATO, F.F.; CASTILHO,

Por meio da categoria de *colonialidade do poder* é possível traçar uma crítica fundamentada ao processo de formação dos Estados nacionais na América Latina, que se estabeleceram a partir da opressão e do silenciamento das chamadas vítimas da modernidade[54]. O conceito de *colonialidade do poder* assume, de acordo com Aníbal Quijano dois componentes, um ligado ao conceito de raça, determinante para a reprodução do capital, e outro ligado ao sistema capitalista entendido como totalidade heterogênea, um complexo no qual todas as formas de exploração social produzem mercadorias para um novo mercado mundial sob hegemonia do capital[55].

Desse modo, a expropriação das populações colonizadas, a repressão e a apreensão da cultura dos dominadores – elementos que compõem a colonialidade – foram eventos responsáveis pela contínua renovação da Totalidade moderna, em um processo que também implicou a colonização das perspectivas cognitivas, dos modos de produzir sentido às experiências empíricas, do imaginário e da própria cultura[56]. A construção política, cultural e científica da ideia de raça, nesse sentido, conecta esse conceito à outra categoria fundamental ao entendimento da proposta descolonial, qual seja, a matriz colonial do poder, ou colonialidade do poder, de Aníbal Quijano. A referência à colonialidade incorpora colonialismo e imperialismo[57], indo além deles exatamente porque não termina com o fim da colonização, por meio da independência formal dos estados-nações latino-americanos, mas rearticula-se nos termos do fim da Segunda Guerra Mundial e da posição imaginária de três mundos consolidada na Guerra Fria, conforme afirma Escobar. Mesmo com a derrubada do muro de Berlim, a colonialidade de poder e de conhecimento rearticula-se novamente, tomando a forma de globalidade imperial (nova ligação global entre poder econômico e militar) e colonialidade global.

O colonialismo refere-se estritamente a uma estrutura de dominação e exploração antiga, que não necessariamente implica relações racistas de poder. Nesta estrutura

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N.M. A importância do pós-colonialismo e dos estudos descoloniais na análise do novo constitucionalismo latino-americano. In: VAL, E. M.; BELLO, E. (org.) **O pensamento pós e descolonial no novo constitucionalismo latino-americano**. Caxias do Sul, RS: Educs, 2014, p. 11-25, (P. 19). Disponível em <https://www.ucs.br/site/midia/arquivos/pensamento_pos.pdf> Acesso em 28 ago 2016.

[54] DUSSEL, E. **20 Tesis de Politica**. 2 ed. México: Siglo XXI, 2006. Assume-se, no bojo do projeto modernidade/colonialidade, a percepção de que, em momento algum, o desenvolvimento do projeto moderno destacou-se de seu lado obscuro e invisibilizado. Este "outro lado" representa os oprimidos, excluídos e dominados que, também no bojo do desenvolvimento da modernidade, lograram por articular suas lutas a projetos intelectuais e políticos de transformação e ruptura.

[55] QUIJANO, A. Colonialidad del Poder y Des/Colonialidad del Poder. Conferencia dictada en el XXVII Congreso de la Asociación Latinoamericana de Sociología, el 4 de Septiembre de 2009. Disponível em <http://www.ceapedi.com.ar/imagenes/biblioteca/libros/51.pdf> Acesso em 01 fev 2017.

[56] QUIJANO, A. Colonialidade do poder, eurocentrismo e América Latina. In: LANDER, E. (Org). **A colonialidade do saber**: eurocentrismo e ciências sociais. Perspectivas latino-americanas. Buenos Aires: CLACSO. p. 227-278, (p. 232), 2005. (Colección Sur Sur). Disponível em: <http://bibliotecavirtual.clacso.org.ar/ar/libros/lander/pt/Quijano.rtf> Acesso em: 13 ago. 2012.

[57] ESCOBAR, A. Beyond the Third World: imperial globality, global coloniality and anti-globalization social movements. **Third World Quarterly**, v. 25, n.1, p. 207-230 (p. 219), 2004.

o controle da autoridade pública, dos recursos e da produção de uma determinada população é exercido por outra, de identidade diferente, cuja sede central encontra-se em outra jurisdição territorial. A colonialidade foi engendrada no interior do sistema colonialista, no entanto se tornou muito mais profunda e duradoura que o próprio colonialismo, exatamente pelas raízes intersubjetivas que gerou na reprodução cultural, social e política dos países a ela submetidos[58].

Falar em ordem constitucional no contexto da exterioridade constituída a partir da totalidade moderna, ou seja, dos povos e sujeitos oprimidos na América Latina, consiste em um exercício de des-naturalização de conceitos que caracterizam uma realidade hegemônica e eurocentrada[59]. É nesse sentido que o projeto colonialidade/modernidade e sua proposta epistêmica apontam-se como um aporte teórico importante em relação à capacidade de crítica e interpretação dos fenômenos que envolvem o constitucionalismo democrático na América Latina. Além disso, também pode contribuir para pensar projetos de democratização das nossas instituições – e da própria cultura institucional – na medida em que dialoga com os sujeitos subalternos, que estão fora do pacto liberal-conservador que funda nossa ordem constitucional[60].

A descolonialidade como projeto conecta atualmente pensadores, ativistas, acadêmicos, jornalistas, etc. em distintas partes do mundo, inclusive e especialmente na União Europeia e nos Estados Unidos. Apresenta-se como ligação entre todos aqueles e aquelas que produzem conhecimento a partir do sentido do mundo e da vida surgido com a tomada de consciência da ferida colonial. Grosfoguel e Mignolo[61] apontam também que a opção descolonial contesta essencialmente o domínio hegemônico do capitalismo, pois afirmam que a culminação do projeto imperial leva a uma uniformidade global organizada em torno do capitalismo, da democracia em sua versão iluminista europeia e da formação de sujeitos modernos e seculares que compõem a sociedade civil. Nesta lógica, cada sujeito e cultura do planeta pode manifestar-se livremente, "siempre que respeten la economía capitalista, el Estado (neo) liberal, la sociedad civil dispuesta a respetar el voto democrático según el modelo europeo y estadounidense y la dominación etno-racial blanca, masculina, heterosexual."[62]. A contraposição a tal

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[58] QUIJANO, A. Colonialidad del poder y clasificacion social. **Journal of world-systems research**, Special Issue: Festchrift for Immanuel Wallerstein – Part I, v. 2. p. 342-380, summer/fall 2000. p. 350.

[59] MIGNOLO, W. **Desobediência Epistêmica**: retórica da modernidade, lógica da colonialidade e gramática da descolonialidade. Buenos Aires, Argentina, Ediciones del Signo, 2010.

[60] GARGARELLA, R. Pensando sobre la reforma constitucional en América Latina. In: RODRIGUES GARAVITO, C (org.). **El derecho en América Latina**: un mapa para el pensamiento jurídico del siglo XXI. 1 ed. Buenos Aires: Siglo Veintiuno Editores, p. 87 – 108, 2011.

[61] GROSFOGUEL, R.; MIGNOLO, W. Intervenciones Descoloniales: una breve introducción. **Tabula Rasa**. Bogotá, Colombia, n. 9, jul./dez, p. 29-37, 2008.

[62] GROSFOGUEL, R.; MIGNOLO, W. Intervenciones Descoloniales: una breve introducción. **Tabula Rasa**. Bogotá, Colombia, n. 9, jul./dez. p. 36, 2008.

estado de coisas pode se dar na medida em que se desconecte do fundamentalismo eurocêntrico[63].

Não se trata de desconhecer ou ignorar as categorias do pensamento moderno, na verdade, trata-se de romper com a submissão a um modo de pensar, que impede a concepção de outros parâmetros de análise da realidade que não sejam ocidentais[64]. Em nosso caso, isso se torna ainda mais visível a partir das análises de Gargarella e Rodrigues Garavito no sentido de que se fazem urgentes propostas criativas, capazes de originar um ordenamento legal mais igualitário[65]. O projeto descolonial relaciona-se intimamente com esses objetivos, em especial com a necessidade de dar vazão às histórias negadas e excluídas dos processos de produção e/ou aplicação do direito. Assim, institucionalmente, trata-se da necessária construção de espaços democráticos, marcados pelo poder não só de discussão, mas também de decisão.

A compreensão dos conceitos trazidos pelo projeto Modernidade\Colonialidade contribui para o entendimento dos fenômenos de mudança presidencial ("novo golpismo", conforme Tokatlian). Especialmente porque, conforme também já destacamos, são fenômenos relacionados a disputas de poder mais amplas, que também envolvem a existência de projetos políticos distintos para a sociedade. A ausência de um controle social mais sólido das instituições, as relações – e interfaces – entre mídia e Judiciário, a quase inexistência de pluralidade de fontes de informação, a criminalização dos partidos políticos, a polarização exagerada de certos debates etc. todos são fatores que se destacam no processo brasileiro, por exemplo, mas que puderam ser observados nos processos Hondurenho e Paraguaio[66].

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[63] GROSFOGUEL, R.; MIGNOLO, W. Intervenciones Descoloniales: una breve introducción. **Tabula Rasa**. Bogotá, Colombia, n. 9, jul./dez. p. 36, 2008.

[64] MIGNOLO, W. **Desobediência Epistêmica**: retórica da modernidade, lógica da colonialidade e gramática da descolonialidade. Buenos Aires, Argentina, Ediciones del Signo, p. 33-34, 2010

[65] Segundo Gargarella, por isso mesmo, é crucial que os setores progressistas comecem, o quanto antes, a se comprometer seriamente no assunto até desenhar um programa constitucional novo, amplo, consistente, articulado e potente, como o que requerem os nossos países com urgência. In: GARGARELLA, R. Pensando sobre la reforma constitucional en América Latina. In: RODRIGUES GARAVITO, C (org.). **El derecho en América Latina**: un mapa para el pensamiento jurídico del siglo XXI. 1 ed. Buenos Aires: Siglo Veintiuno Editores, p. 87 – 108, (p. 107), 2011.

[66] Em livro de 2015 organizado pelos cientistas políticos Sebastião Velasco e Cruz, André Kaysel e Gustavo Codas, que tem como tema a direita política brasileira, a discussão sobre o momento político no país aventava a possibilidade de um impeachment da presidente Dilma Rousseff, tratado pelos autores como um possível golpe. Neste contexto, o livro contém artigos sobre diversos temas relacionados à direita no Brasil, e finaliza com um artigo sobre o impeachment de Lugo no Paraguai. Os autores justificam essa inclusão afirmando que o processo paraguaio salientaria um traço do comportamento da direita no Brasil e na América Latina no século XXI, que seria o de derrubar presidentes eleitos – e que encampam políticas progressistas, ainda que de forma moderada – através de golpes sem a utilização de intervenção militar. Ainda que não citem os autores aqui discutidos, eles esboçam uma definição desses processos: "A derrubada de um presidente eleito, sem amparo em a acusações alicerçadas em fatos concretos, para a qual se busca legitimação formal do legislativo e/ou do judiciário, tudo orquestrado pelos meios de comunicação de massas monopolizados é uma quebra da ordem democrática, tanto como o foram as quarteladas e pronunciamentos militares do passado (...). Desejamos alertar os leitores

O que pretendemos apontar aqui, ainda como uma hipótese inicial, é que o conceito de colonialidade do poder (que não serve apenas para explicar a erosão da democracia na América Latina, mas em todo o globo), contribui para questionar as bases desse modelo democrático ocidental que, conforme caracterizado por Bandeira, não se faz possível enquanto os Estados Unidos e as grandes potências capitalistas impulsionem e financiem guerras "(...) tão somente a fim de defender suas necessidades e interesses econômicos e geopolíticos, seus interesses imperiais."[67]

Ou seja, essa perspectiva pode nos oferecer chaves interpretativas de fenômenos jurídico-políticos que dão sustentação ao cenário de instabilidade institucional aqui analisado. E, ainda, a perspectiva descolonial pode nos ajudar a compreender de que maneira a valorização do saber autóctone ou de inserção de perspectivas, conceitos e modos de pensar e viver oriundos dos saberes oprimidos e contra-hegemônicos, pode contribuir para a construção de novas propostas e desenhos institucionais.

Os três últimos acontecimentos envolvendo rupturas presidenciais na América Latina revelam muitas características do que trabalhamos no segundo tópico e intitulamos, com Toklatican, "novo golpismo". Para Abott Matthews, "os casos de Honduras e do Paraguai sugerem que a redefinição dos tipos de golpes, impeachments, e outras interrupções na democracia demandam definições mais claras e geram expectativas para casos futuros"[68]. E eis que, 4 anos depois da deposição de Lugo, o Brasil passou por um processo de impeachment comparável em alguns aspectos aos casos hondurenhos e paraguaios, conforme destacamos.

O fenômeno do "novo golpismo", trabalhado de forma superficial neste artigo, necessita de maiores e mais aprofundadas incursões, especialmente no cenário latino-americano. A tese defendida consiste em afirmar que não é possível analisar esse fenômeno sem considerar a colonialidade do poder e demais categorias trabalhadas por autores do pensamento descolonial. Justificamos tal impossibilidade pelo fato de que os países latino-americanos não poderem mais ser considerados como de "modernidade tardia": precisamos compreender de uma vez por todas que a Modernidade constituiu uma Exterioridade, local e epistemologicamente situada. Essa Exterioridade, por sua vez, elaborou formas jurídicas e políticas singulares, que ainda carregam a marca de um conjunto de privilégios apenas formalmente desconstituídos.

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dos perigos para a democracia (...)". In: CRUZ, S. V. e; KAUSEL, A.; CODAS, G. (org.) **Direita volver!**: o retorno da direita e o ciclo político brasileiro. São Paulo: Editora Fundação Perseu Abramo, 2015. p. 11.

[67] BANDEIRA, L. A. M. **A desordem mundial**: O espectro da dominação: guerras por procuração, terror, caos e catástrofes humanitárias. Rio de Janeiro: Editora José Olympio. Edição do Kindle, 2016, locais do Kindle 13394-13395.

[68] BANDEIRA, L. A. M. **A desordem mundial**: O espectro da dominação: guerras por procuração, terror, caos e catástrofes humanitárias. Rio de Janeiro: Editora José Olympio. Edição do Kindle, 2016, locais do Kindle 13394-13395.

5. CONSIDERAÇÕES FINAIS

Os aportes do pensamento descolonial podem representar uma nova abordagem no campo do pensamento jurídico latino-americano, na perspectiva de melhor compreender esses processos e buscar, ao fim e ao cabo, o fortalecimento os regimes democráticos na América Latina. As referências às dificuldades de consolidação da democracia na região são recorrentes, e os processos recentes trouxeram à tona discussões que pareciam resolvidas. Observamos, nesse estudo, que essas dificuldades têm características estruturais, que permanecem no tempo. Por isso, pesquisar os processos concretos sob a luz de uma perspectiva teórica que busca localizar histórica e culturalmente a América Latina no contexto do Ocidente e da Modernidade pode trazer contribuições importantes para a compreensão dos fenômenos jurídicos no continente. Recuperar o lado colonial da modernidade implica na importante tarefa de ponderar quais foram os principais processos históricos e normativos que deram lugar a uma determinada configuração de direitos.

Trabalhar com o conceito de golpe institucional, ou novo golpismo, no cenário latino-americano, pode ser considerada uma tarefa urgente para o pensamento jurídico local. Precisamos nos debruçar sobre esses processos, sobre a proximidade fática e temporal entre eles, para entender de que maneira podem representar a manutenção dos antigos pactos de conservação de uma ordem desigual e injusta, que historicamente configura o funcionamento de nossas instituições. Além disso, essa reflexão, aqui iniciada, contribui para identificar os problemas nos transplantes jurídicos, conforme destacado nesse estudo, e em que medida eles ofuscam ou impedem a emergência de desenhos institucionais democráticos, que possam consolidar uma ordem constitucional justa.

A análise das intervenções jurídicas em cada processo e a possibilidade de serem comparados tem como pano de fundo os desafios impostos ao desenvolvimento do constitucionalismo na América Latina. Nessa perspectiva, as categorias do pensamento descolonial acrescentam à análise a perspectiva crítica necessária à não idealização da ideia de Estado de Direito, na medida em que sustenta os limites históricos dessa construção nos países periféricos, segundo o conceito de modernidade/colonialidade. Por fim, acreditamos que a tarefa do pensamento jurídico latino-americano também consiste em tentar compreender quais são os desafios do constitucionalismo na América Latina, o que implica na proteção judicial de direitos fundamentais capaz de promover mecanismos de participação popular e abertura democrática.

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O mito de *Marbury v. Madison*: a questão da fundação da supremacia judicial

The myth of Marbury v. Madison: the question of the foundation of judicial supremacy

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Resumo

Marbury desempenha um importante papel no debate sobre a legitimidade do judicial review no sistema constitucional norte-americano. Diante disso, o artigo objetiva analisar teses críticas ao uso retórico do caso com o objetivo principal de desconstruir o mito de Marbury que garantiu que o tornasse a principal fonte de reivindicação da supremacia judicial. Para tanto, analisa contribuições revisionistas a fim de identificar a atual e real causa do louvor à decisão. Tem enquanto foco demonstrar como as citações de Marbury pela Suprema Corte não são apenas para justificar o *judicial review* em casos controversos, mas principalmente para afirmar a superioridade ou exclusividade judicial na interpretação constitucional. No

Abstract

Marbury plays an important role in the debate over the legitimacy of judicial review in the American constitutional system. Thus, this article aims to analyze critical theses to the rhetorical use of the case, with the main objective of deconstructing Marbury myth, which ensures that the case became the main source of the claim of judicial supremacy. Therefore, it analyzes revisionist contributions in order to identify the current and real cause of decision-making. Its focus is to show how Marbury's Supreme Court citation is not only to justify judicial review in controversial cases, but also primarily to assert judicial superiority or exclusivity in constitutional interpretation. In the end, the historical analysis of the political aspects of the case will allow a

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final, a análise histórica dos aspectos políticos do caso permite uma leitura contextualizada, restando claro que a decisão de Marshall afastou-se da doutrina da supremacia judicial para adotar uma postura consistente com as premissas do constitucionalismo popular.

Palavras-chave: *Marbury v. Madison*; supremacia judicial; *judicial review*; constitucionalismo popular; departamentalismo.

contextualized reading, making clear that Marshall's decision moved away from the doctrine of judicial supremacy to embrace a consistent position with the premises of popular constitutionalism.

Keywords: *Marbury v. Madison; judicial supremacy; judicial review; popular constitucionalism; departmentalism.*

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1. Introdução; **2.** O revisionismo de *Marbury*; **3.** As teses críticas de Larry Kramer e Keith Whittington ao uso retórico de *Marbury* para afirmar a supremacia judicial; **4.** O contexto histórico-político da decisão e o contraste entre as concepções federalistas e republicanas sobre o papel da Corte; **5.** Considerações finais; **6.** Referências.

1. INTRODUÇÃO

O célebre caso *William Marbury v. James Madison*[1] de 1803 entrou para a história como o marco primeiro da incorporação definitiva do *judicial review* ao direito estadunidense. Reverenciado por grandes nomes do direito constitucional e na doutrina tradicional, o caso tornou-se objeto do revisionismo histórico e a sua invocação como precedente na contemporaneidade passou a ser alvo de críticas. Recentemente, afirma-se que tamanha ênfase resultou na criação de um mito.

Este trabalho não pretende rebaixar *Marbury* a um caso trivial. Como restará demonstrado, a circunstância politicamente delicada enfrentada por Marshall e sua solução estratégica ao declarar, pela primeira vez, de forma clara, a inconstitucionalidade de lei federal dos Estados Unidos - uma disposição do *Judiciary Act* de 1789 - adicionaram importância ao caso, singularizando a sua decisão.

A questão proposta neste trabalho pode fornecer uma outra perspectiva para o debate sobre o desenvolvimento da supremacia judicial; contra o uso retórico de *Marbury* na defesa deste arranjo institucional específico, que confia aos juízes a autoridade final de decidir sobre a inconstitucionalidade das leis. Pretende-se discutir e analisar como o precedente é associado com a atual prática do *judicial review*.

Essa análise é importante porque uma das questões mais salientes na atualidade busca um lugar; uma justificativa plausível para afirmação do judiciário como detentor da última palavra na interpretação da constituição. Assim, o debate sobre a origem dessa doutrina pode contribuir para refutar certas justificativas para sua adoção, como a afirmação convencional de que desde *Marbury* a Suprema Corte é a mais privilegiada intérprete da lei constitucional.

[1] 5 U.S. (1 Cranch) 137 (1803).

Sabendo que uma clara compreensão do *judicial review* contemporâneo requer a compreensão de suas raízes, no que segue, pretende-se analisar teses pioneiras e atuais do revisionismo de *Marbury*: as teses críticas traçadas por Larry Kramer e Keith Whittington ao seu uso retórico e, por fim, o contexto histórico-político da decisão, que evidencia o contraste entre a perspectiva de republicanos e federalistas sobre o papel da Corte.

2. O REVISIONISMO DE *MARBURY*

É um pensamento comum que o *Chief Justice* Marshall e a Suprema Corte dos Estados Unidos estabeleceram (ou criaram) o *judicial review* no caso de *Marbury v. Madison* em 1803. Descrita como "a mais importante decisão do direito constitucional americano"[2], *Marbury* tornou-se objeto do revisionismo histórico legal. A recente doutrina revisionista sobre o caso tem desafiado esse entendimento em três aspectos, questionando o pioneirismo da decisão para o *judicial review*, a originalidade dos seus argumentos e a recepção e reconhecimento da decisão como significativa no seu próprio tempo.

Estes novos estudos não são apenas uma resposta à tradicional ênfase na importância de *Marbury*, isto é, à concepção tradicional que lhe confere o *status* de decisão histórica; são também uma resposta às frequentes invocações do caso pela *Corte Rehnquist* para apoiar o exercício controverso do *judicial review*. Tais trabalhos exploram as concepções americanas iniciais do instituto do controle de constitucionalidade e reexaminam o significado e o impacto de *Marbury* no estabelecimento desta doutrina.

Com efeito, diversos estudiosos têm observado que *Marbury* apenas se tornou parte do cânone constitucional após assumir uma forma mítica. Desmistificar o caso tornou-se necessário. Neste intento analisar-se-á as contribuições revisionistas, com foco nos aportes explicativos sobre o processo de ascendência constitucional do precedente e o surgimento de sua aura mítica.

Marbury foi uma decisão importante para seu tempo, sob as circunstâncias as quais foi proferida. Contudo, os elogios ao caso não são direcionados à decisão da Suprema Corte em exercer originariamente a jurisdição ou por discutir o uso adequado do mandado de segurança. Ao contrário, a doutrina tradicional foca na associação do caso ao princípio do *judicial review*. Desse modo, a grandeza de *Marbury* não é lembrada pelas qualidades intrínsecas da decisão nem pelo significado histórico quando foi proferido. Ao invés, "goza de grandeza porque a doutrina o associou intimamente com o *judicial review*".[3]

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[2] CHEMERINSKY, Erwin. **Federal Jurisdiction**. New York: Aspen Publishers, 2007. p. 12.

[3] DOUGLAS, Davison. The Rhetorical Use Of Marbury V. Madison: The Emergence Of a "Great Case", **Wake Forest Law Review**, vol. 38, p. 375-413, 2003. p. 378.

Em primeiro lugar, *Marbury* não estabeleceu o *judicial review*, uma vez que a prática já tinha encontrado larga aceitação antes da histórica decisão, com um punhado de casos nos tribunais estaduais e federais e um pequeno número de casos na Suprema Corte.[4] Larry Kramer registra que "comentadores geralmente parecem surpresos com o volume de evidências suportando *judicial review* antes de *Marbury*. Também ficam desconcertados pela aparente ausência de significativa controvérsia" sobre isso.[5]

A construção do raciocínio do *Chief Justice* Marshall não se deu ao acaso, apesar da ausência de norma constitucional expressa acerca do instituto do *judicial review*. Como registra William Treanor, cortes estaduais e federais já haviam começado a exercer o *judicial review* e fornecido justificativas para a possibilidade do controle antes de *Marbury*.[6] Para ilustrar, em 1792, no caso *Hayburn*[7], pela primeira vez, os juízes da Suprema Corte assumiam claramente que tinham o poder de invalidar um ato do Congresso. Em 1796, no caso *Hylton v. United States*[8], a Suprema Corte contou, pela primeira vez, com o *judicial review* para decidir a constitucionalidade de um ato do Congresso. E, ainda três anos antes de *Marbury*, o Juiz Samuel Chase, resumia o estado de coisas, no caso *Cooper v. Telfair*: "isso é, de fato, uma opinião comum, que é expressamente admitido por todos os tribunais e alguns dos juízes têm, individualmente, no *Circuits,* decidido que a Suprema Corte pode declarar um ato do Congresso inconstitucional e, portanto, inválido". Mas, ele adicionou, "não há julgamento da Suprema Corte sobre o assunto".[9]

Apesar da notoriedade alcançada pelos argumentos de Marshall em *Marbury*, nada do que ele afirmou sobre o *judicial review* era novo. É bem verdade que *Marbury* foi o primeiro caso no qual a Suprema Corte inequivocamente declarou a inconstitucionalidade de um ato do Congresso, contudo, esta possibilidade já havia sido discutida, como no caso *Hylton v. Unites States* e na declaração do Juiz Chase em *Cooper v. Telfair.* Até a lógica da decisão de Marshall não foi original, teve como precursora aquilo que James Iredell[10] e Alexander Hamilton[11] haviam dito anos antes.

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[4] Sobre este fato vide KRAMER, Larry D. **The People Themselves**: Popular Constitutionalism and Judicial Review, New York: Oxford University Press, 2004; Também vide: RAKOVE, Jack N. The Origins of Judicial Review: A Plea for New Contexts. **Stanford Law Review**, vol. 49, p. 1060-64, 1997.

[5] KRAMER, Larry. **The People Themselves**: Popular Constitutionalism and Judicial Review. New York: Oxford University Press, 2004. p. 98.

[6] TREANOR, William Michael. Judicial Review Before Marbury. **Stanford Law Review**, vol. 58, p. 455-462, 2005.

[7] 2 U.S. (2 Dall.) 409 (1792).

[8] 3 U.S. (3 Dall.) 171 (1796).

[9] O termo "*Circuits*" utilizado por Samuel Chase refere-se aos circuitos regionais da justiça federal. (4 U.S. (4 Dall.) At 19. (1800))

[10] Vide: MCREE, Griffith John. **Life and Correspondence of James Iredell**: One of the Associate Justices of the Supreme Court of the United States, D. Appleton, 1857. Disponível em: https://books.google.com.br/books?id=e1F7AAAAMAAJ. Acesso em 09 mai. 2017.

[11] Vide: The Federalist Papers, n. 78, 1788. Disponível em: <https://www.congress.gov/resources/display/content/The+Federalist+Papers>. Acesso em 09 mai. 2017.

Marbury não teve um papel fundamental na criação da doutrina do *judicial review*. Aliás, a defesa da doutrina no caso é defeituosa[12] É verdade que a linguagem eloquente e precisa empregada por Marshall começou a ser notada por alguns juízes em meados do século XIX, mas, no geral, quando juristas daquela época buscavam uma autoridade para explicar o poder do *judicial review*, geralmente, citavam o ensaio de Alexander Hamilton no *Federalist Papers,* os escritos de *St. George Tucker* de Blackstone ou a decisão de *Justice* Samuel Chase no caso *Calder v. Bull*[13] ao invés da opinião de John Marshall.[14]

Para célebres juristas do século XIX, *Marbury* era lembrado como um caso que havia exposto a doutrina do *judicial review* de forma clara, sem contudo, nenhuma força criativa.[15] Apenas, após um longo tempo, o caso passou a ser identificado como pedra de fundação do controle de constitucionalidade. Mas não evidenciou, como assinala Larry Kramer "um novo território para a teoria do *judicial review*".[16] Michael Klarman, por sua vez, acusou a decisão de Marshall de fazer "nada para facilitar a aquisição pela Corte do ato político necessário para fazer o *judicial review* praticamente, como também, teoricamente significante".[17]

Em 1803, portanto, o poder do *judicial review* já estava suficientemente bem estabelecido. A novidade da decisão de Marshall estava em outro ponto: era o primeiro caso no qual a Suprema Corte declarava a inconstitucionalidade de um ato do Congresso. Esclarece Keith Whittington que, assim como foi percebido nos anos iniciais da República, o caso foi apenas um exemplo entre outros da afirmação do poder do *judicial review.* Mas não foi o caso que estabeleceu ou criou o instituto. Foi o caso onde a Suprema Corte "exerceu" ou "explicou" o *judicial review*.[18]

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[12] A crítica clássica aos defeitos de Marbury na defesa do judicial review foi feita por BICKEL. Alexander. **The Least Dangerous Branch**: The Supreme Court At The Bar Of Politics. New Haven: Yale University Press, 1962. p, 1-14; vide também a crítica elaborada por ALSTYNE, William Van. A Critical Guide to Marbury v. Madison, **Duke Law Journal**, vol. 18, p. 1-47, 1969.

[13] Calder V. Bull, 3 U.S. 386 (1798).

[14] WHITTINGTON, Keith; RINDERLE, Amanda, Making. A Mountain Out Of A Molehill? Marbury And The Construction Of The Constitutional Canon. **Hastings Constitutional Law Quarterly**, Forthcoming, fev. 2012

[15] A obra Commentaries on American Law de James Kent, a qual celebra e enfatiza o judicial review, afirma que apenas em Marbury a questão sobre o judicial review havia recebido "clara e elaborada discussão". KENT. James. Commentaries on American Law. 1826; A obra de Hampton Carson por sua vez caracterizou todas as decisões anteriores a Marbury como "lentas, tímidas e à passos curtos". CARSON, Hampton L. The History Of The Supreme Court Of The United States, 1891. In: WHITTINGTON, Keith; RINDERLE, Amanda, Making A Mountain Out Of A Molehill? Marbury And The Construction Of The Constitutional Canon. **Hastings Constitutional Law Quarterly**, Forthcoming, fev. 2012.

[16] KRAMER, Larry. **The People Themselves**: Popular Constitutionalism and Judicial Review. New York: Oxford University Press, 2004. p. 115.

[17] KLARMAN, Michael. How Great were the 'Great' Marshall Court Decisions?, **Virginia Law Review**, vol. 87, p. 1111-1154, oct, 2001. p. 1126.

[18] WHITTINGTON, Keith; RINDERLE, Amanda. Making A Mountain Out Of A Molehill? Marbury And The Construction Of The Constitutional Canon. **Hastings Constitutional Law Quarterly**, Forthcoming, fev. 2012.

No início do século XXI, *Marbury* tem um significado particular e ocupa um lugar especial e relevante do direito constitucional, mas nem sempre teve a importância que hoje lhe é dada. A doutrina revisionista observou que a importância e a identidade acerca da decisão mudaram ao longo do tempo. Aquilo que havia sido pouco notado e associado ao *judicial review* no século XIX, tornou-se, no século XX, um importante precedente para as cortes e para comentadores que buscavam justificar o mecanismo de controle jurisdicional.

Para analisar quando e como *Marbury* ganha importância, uma análise da quantidade e qualidade das citações do caso é necessária. Robert Clinton, talvez o primeiro a observar a que a Suprema Corte raramente notou o caso ou o associou ao *judicial review* durante o século XIX, sugere três padrões diferentes no nível de citação do judiciário quanto ao uso de *Marbury* pela Suprema Corte. O primeiro período de tempo abrange os primeiros cem anos depois que *Marbury* foi proferido. Durante este período, o caso foi pouco notado e raramente citado. Quando citado, não o era para apoiar a ideia do *judicial review,* mas para tratar de jurisdição e do uso do mandado de segurança. O segundo período se estende desde o centenário de aniversário de *Marbury*, em 1903, até *Cooper v. Aaron*, em 1958, quando apenas oito referências foram feitas ao caso em contraste com cinquenta casos nos quais a Corte citou *Marbury* para apoiar o *judicial review* durante o terceiro período.[19]

Em um recente artigo revisionista, Keith Whittington[20] criou um original conjunto de dados para análise das citações do caso Marbury ao incluir os tribunais federais e estaduais, além da Suprema Corte, e ao examinar também referências ao caso em documentos do legislativo e executivo federais, bem como em livros e comentários jurídicos do século XIX. Este estudo fornece uma base mais abrangente do acolhimento e uso do mesmo, servindo de indicador para quando o caso se tornou historicamente importante. Os dados levantados neste trabalho contestam a afirmação de Robert Clinton, de que *Marbury* teria sido pouco notado em seu tempo. O caso era pouco notado se comparado aos níveis de citação que atingiu após o século XX. Segundo os dados, o padrão de citação mostra um aumento da taxa de citação de *Marbury* na Suprema Corte, nos tribunais federais, nos tribunais estaduais e nos debates políticos ao longo do tempo.

O comportamento de citação dos tribunais e da Corte, neste estudo, indica que *Marbury* tomou um novo significado no século XX. Se no século XIX era pouco lembrado como precedente de autoridade sobre o *judicial review*, logo que as controvérsias sobre o *judicial review* começaram a crescer durante a era Lochner, sua importância, de

[19] CLINTON, Robert Lowry. **Marbury V. Madison and Judicial Review**, Lawrence: University of Kansas Press, 1989.

[20] WHITTINGTON, Keith; RINDERLE, Amanda. Making A Mountain Out Of A Molehill? Marbury And The Construction Of The Constitutional Canon. **Hastings Constitutional Law Quarterly**, Forthcoming, fev. 2012.

igual modo começou a crescer. E, se no período de menor controvérsia sobre o *judicial review*, ocorrida durante o New Deal, a importância de *Marbury* tendeu a diminuir, a reviravolta ocorreu após o caso *Cooper*. Após 1958, a taxa de citação do caso, inclusive especificamente como precedente para o poder do *judicial review*, obteve crescimento extraordinário, com a Suprema Corte liderando o caminho, acompanhada dos tribunais federais e estaduais.

As evidências sugerem que juízes passam a citar com maior frequência *Marbury* e focar na associação deste caso ao *judicial review* quando a legitimidade dos tribunais em exercer este poder passa a ser mais questionada. Whittington explicou esse fenômeno: "como o poder do *judicial review* se tornou mais saliente para o sistema constitucional e político e também mais contestado, juízes e comentadores 'se voltaram' para a poderosa retórica de John Marshall para ajudar a legitimar a instituição para as novas gerações".[21]

A narrativa federalista de um célebre *Chief Justice*, como John Marshall, começou a ser propagada nos anos iniciais da república. A ascendência de *Marbury* no direito constitucional americano, entretanto, se deu muito mais tarde, quase um século após ser proferido, somente quando seu significado foi reformulado de uma forma "mítica" e após ser colocado para o uso argumentativo.[22]

Juízes, entretanto, não foram os únicos a perceber e construir o significado de *Marbury*. Ao analisar uma variedade de obras de autores que primeiramente comentaram e discutiram sobre o caso, Whittington observou que o caso não era tratado com a reverência especial que lhe foi conferida posteriormente, com notáveis exceções. Para ele, "a visão heroica de John Marshall e a força de sua opinião em *Marbury* para a história constitucional americana foi propagada por famosos juristas, como James Kent, Joseph Story e George van Santvoord".[23] Estes autores, entusiastas do *judicial review* e, pelo menos, quanto à James Kent e Joseph Story, amigos pessoais e aliados ideológicos do *Chief Justice* Marshall, começaram a exaltar o precedente, tornando-se, em parte, responsáveis pela aura mítica que envolve o caso nos dias de hoje.

O processo de canonização de *Marbury* se deu mais em razão da grande utilidade do precedente para a construção do poder das cortes em determinar o significado constitucional e exercer o *judicial review* do que pela importância do caso em seu próprio tempo. Whittington anota que, um caso, quando canonizado, torna-se

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[21] WHITTINGTON, Keith; RINDERLE, Amanda. Making A Mountain Out Of A Molehill? Marbury And The Construction Of The Constitutional Canon. **Hastings Constitutional Law Quarterly**, Forthcoming, fev. 2012. p. 826.

[22] RUGER, Theodore. "A Question Which Convulses A Nation": The Early Republic's Greatest Debate About Judicial Review Power. **Harvard Law Review**, vol. 117, p. 826-890, 2004. p. 890.

[23] WHITTINGTON, Keith; RINDERLE, Amanda. Making A Mountain Out Of A Molehill? Marbury And The Construction Of The Constitutional Canon. **Hastings Constitutional Law Quarterly**, Forthcoming, fev. 2012. p. 859-860.

importante não como um precedente, mas como um "símbolo" ou um "ícone judicial" com pouca relação com o caso original, mas com uma função simbólica para quem o usa.[24]

Conforme havia registrado Robert Clinton, a Suprema Corte, entre 1803 e 1887, não havia citado *Marbury* para o propósito de tratar sobre o *judicial review*, mesmo em casos altamente controversos como *Dred Scott v. Sandford*[25] ou os *Civil Rights Cases*[26], que invalidaram atos do Congresso. Por essa razão, o uso de *Marbury* pela Corte durante o século XIX sugere que a decisão era mais importante para as discussões pertinentes ao mandado de segurança, ao poder executivo ou à jurisdição original da Suprema Corte do que para discussão do *judicial review.*[27]

Ao final do século XIX, entretanto, quando o *judicial review* se tornou enraizado com questões altamente polêmicas[28] e os tribunais passaram a ser instados pelos conservadores a exercer o *judicial review* de forma mais agressiva, *Marbury* passou a ser utilizado como instrumento para legitimar reivindicações por uma concepção expansiva de *judicial review.* A esse respeito, observa-se que:

> *Tanto para conservadores como para liberais, Marbury se tornou uma importante ferramenta retórica no debate em curso sobre o papel apropriado da Corte. Mas os juízes tem usado Marbury não apenas para defender o judicial review em casos controversos. Eles têm abraçado Marbury para outros propósitos instrumentais em particular, para fazer as interpretações constitucionais da Corte mais preeminentes do que aquelas de outros atores governamentais, um movimento que constitui a extensão do próprio Marbury.*[29]

O uso de *Marbury* para conferir maior autoridade as interpretações constitucionais judiciais em relação as interpretações dos outros atores é uma visão expansiva do caso. Conforme explica Whittington, pelo menos duas leituras podem ser feitas do caso, a estreita interpreta a decisão como aquela julgou que tribunais federais podem declarar inconstitucionais os atos do Congresso. Para a ampla, "*Marbury* passou a representar

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[24] Whittington busca descrever o processo de canonização de Marbury que teria possivelmente tornado o precedente substancialmente atraente para citações na prática judicial. WHITTINGTON, Keith; RINDERLE, Amanda. Making A Mountain Out Of A Molehill? Marbury And The Construction Of The Constitutional Canon. **Hastings Constitutional Law Quarterly**, Forthcoming, fev. 2012.

[25] 60 U.S. (19 How.) 393 (1857)

[26] 109 U.S. 3 (1883)

[27] CLINTON, Robert Lowry. **Marbury V. Madison and Judicial Review**, Lawrence: University of Kansas Press, 1989.

[28] Durante o final do século XIX e início do século XX, o judiciário envolveu-se na proteção dos direitos de propriedade e em frequente intervenção contra a legislação progressista promulgada sob a influência dos movimentos populistas e dos trabalhadores.

[29] DOUGLAS, Davison. The Rhetorical Use Of Marbury V. Madison: The Emergence Of a "Great Case", **Wake Forest Law Review**, vol. 38, p. 375-413, 2003. p. 378.

uma proposição geral que cortes têm a última palavra na interpretação da Constituição e o poder de rever a validade dos atos dos outros ramos do governo".[30]

Barry Friedman afirma que tanto a interpretação restritiva quanto a ampliativa do caso criam mitos. Ele acredita que hoje há três tipos de mitos sobre *Marbury*. Denomina o primeiro de "Mito da Criação", uma visão maximalista de *Marbury* segundo a qual o *judicial review* nasceu por um ato do *Justice* John Marshall. O segundo mito, denominado de "Mito da História da Criação Desacreditada" conta uma história modesta de *Marbury*, nela o *judicial review* preexistia a Marshall, entretanto, o poder de estabelecer e manter o exercício deste instrumento sempre estivera com os juízes. E o último, o "Mito da Usurpação", tem uma visão minimalista de *Marbury*, segundo a qual o judiciário é o "ramo menos perigoso do governo" muito embora tenha, em algum momento, usurpado o poder da legislatura ou dos ramos políticos.[31]

Para Friedman estas visões são erradas porque nenhuma delas considera o importante papel do povo na manutenção do sistema do *judicial review*. Acredita ser improvável que juízes tenham estabelecido o *judicial review* sozinhos. Para ele, existe uma relação entre a opinião pública e a manutenção do *judicial review* frequentemente desconsiderada hoje.[32]

O foco histórico sobre o caso de *Marbury* na perspectiva do poder judicial também obscurece o entendimento acerca do papel do executivo e do legislativo. Cientistas políticos contemporâneos têm desafiado a afirmação comum que o *judicial review* é criado ou mantido em grande parte pelas decisões judiciais, adicionando uma voz a mais no coro do revisionismo de *Marbury*. O constitucionalista e cientista político Mark Graber[33], por exemplo, criticou as obras constitucionais por promover uma visão juriscêntrica do *judicial review.*

Como visto, *Marbury* se tornou um ícone judicial no século XX; no entanto, o caso não tem sido apenas supervalorizado, mas também incompreendido. São frequentes as associações deste caso com a prática moderna do *judicial review*, bem como citações do mesmo para justificar o ativismo judicial. Conforme anotou Larry Kramer, o caso tornou-se "a pedra angular da jurisprudência" da Corte Rehnquist.[34] Quanto a

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[30] WHITTINGTON, Keith; RINDERLE, Amanda. Making A Mountain Out Of A Molehill? Marbury And The Construction Of The Constitutional Canon. **Hastings Constitutional Law Quarterly**, Forthcoming, fev. 2012. p. 829.

[31] FRIEDMAN, Barry. The Myths of Marbury. In: TUSHNET, Mark. (Ed.). **Arguing Marbury v. Madison**. California: Stanford University Press, 2005.

[32] FRIEDMAN. Barry. **The Will Of The People**: How Public Opinion Has Influenced The Supreme Court And Shaped The Meaning Of The Constitution. Farrar, Straus and Giroux: New York, 2009.

[33] Ao invés de enfatizar o poder judicial na criação no judicial review, Mark Graber descreve como oficiais eleitos e principalmente The Judiciary Act de 1789 fizeram mais em estabelecer o judicial review nos Estados Unidos do que a decisão de Marbury, vide: GRABER, Mark A. Establishing judicial review: Marbury and the Judicial Act of 1789. **Tulsa Law Review**, v. 38, n. 4, p. 609-650, 2003.

[34] KRAMER, Larry. Marbury And The Reatreat From Judicial Supremacy. **Constitutional Commentary**, Vol. 20, n. 2, p. 205-230, summer, 2003. p. 205.

isso, revisionistas têm argumentado que a origem da moderna prática não pode ser atribuída a Corte de John Marshall.[35] Isso porque a natureza do instituto tem mudado ao longo da história norte-americana, razão pela qual a prática moderna assumiu uma forma bem diferente daquela empregada por Marshall. [36]

Assim, o tipo de *judicial review* endossado em *Marbury não guarda muita semelhança com a prática dos dias de hoje.* Apesar de juristas, cientistas políticos e historiadores usarem o termo "*judicial review*" para descrever ambas as práticas, do século XVIII e do século XXI, o poder de *judicial review* que Marshall exerceu e que outros juízes exerceram em outros casos naquele tempo era mais modesto do que o exercido pela moderna Suprema Corte.

Segundo a breve análise das teses revisionistas empreendidas nas linhas antecedentes, pretendeu-se demonstrar que o caso não estabeleceu ou criou o *judicial review,* e que, há muito tempo, a invocação do caso pelos tribunais tem seguido padrões de conflitos judiciais e políticos com a intenção de justificar a prática controversa do *judicial review.* Ademais, atualmente, os tribunais têm se agarrado a Marbury para outros propósitos específicos, em especial, para afirmar a superioridade das interpretações constitucionais judiciais, provocando uma profunda perda no trato da intenção original.

3. AS TESES CRÍTICAS DE LARRY KRAMER E KEITH WHITTINGTON AO USO RETÓRICO DE *MARBURY* PARA AFIRMAR A SUPREMACIA JUDICIAL

A teoria constitucional tradicional tende a associar o ideal democrático com sua manifestação mais direita, a instituição do parlamento, enquanto a corte constitucional seria a representação do constitucionalismo. Nesse retrato, as controvérsias sobre quem deve ter a última palavra sobre a respeito do sentido da Constituição são classificadas a partir de duas inclinações contrapostas, a supremacia legislativa ou a supremacia judicial.

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[35] Vide, por exemplo, a influente obra revisionista de: WOLFE, Christopher. **The Rise Of Modern Judicial Review**: From Constitutional Interpretation To Judge-Made Law. New York: Basic, 1986; Vide também a posição de: SNOWISS, Sylvia. **Judicial Review and the Law of the Constitution**. New Haven: Yale University Press. 1990. p. 109-175, 195. (Nesta obra revisionista da origem do judicial review, Snowiss argumenta que o judicial review moderno foi desenvolvido por Marshall, contudo, isso teria ocorrido não no caso Marbury, mas em outros casos sobre contratos e a clausula da supremacia. Salienta que tal construção teria adquirido a forma madura apenas algum tempo após o final da Corte Marshall.)

[36] Vide: WOLFE, Christopher. **The Rise Of Modern Judicial Review**: From Constitutional Interpretation To Judge-Made Law, 1986; GRIFFIN, Stephen. The Age of Marbury: Judicial Review in a Democracy of Rights. In: TUSHNET, Mark. (Ed.). **Arguing Marbury v. Madison**. California: Stanford University Press, 2005; SNOWISS, Sylvia. **Judicial Review and the Law of the Constitution**. New Haven: Yale University Press. 1990. p. 196. ("That Marbury cannot support authoritative judicial exposition of the Constitution is not surprising").

Ressurge, contemporaneamente, na literatura da teoria constitucional um terceiro tipo de resposta que desafia a supremacia judicial, sem, contudo, rejeitar o *judicial review.* Trata-se do princípio do constitucionalismo popular, o qual tem disputado espaço, praticamente desde o começo, na teoria constitucional norte-americana, com o constitucionalismo legal.

Uma das visões mais influentes do constitucionalismo popular foi apresentada por Larry Kramer, cujos trabalhos defendem o sistema no qual "o papel do povo não se limita a atos ocasionais de construções constitucionais, mas inclui controle ativo e contínuo sobre a interpretação e aplicação da lei constitucional"[37] em oposição ao sistema largamente aceito hoje, que realoca esta autoridade interpretativa no judiciário.

Outro autor que tem se empenhado na defesa da interpretação extrajudicial da Constituição, argumentando alguma variação do constitucionalismo popular é Keith Whittington. Em suas obras *Constitutional Interpretation* e *Constitucional Construction,* o autor, respectivamente, defende o originalismo e descreve como atores políticos ajudam a formular o significado constitucional. Whittington reivindica a soberania popular sustentando a intenção original dos *framers* da Constituição na adoção do departamentalismo.

O departamentalismo ou construção coordenada é um sistema no qual cada um dos três departamentos do governo possuem independentes e coordenadas autoridades para interpretar a constituição. Cada departamento possui um poder delegado pelo povo. Este sistema pode ser reconhecido como um autêntica expressão do constitucionalismo popular por preservar a essência deste princípio em uma forma mais complexa.[38]

Ambos autores argumentam a adoção de uma alternativa para a supremacia judicial. Preconizam um arranjo institucional que confira maior ênfase à perspectiva coletiva de autogoverno democrático de sorte que a capacidade e responsabilidade políticas do povo não acabe enfraquecida.

Larry Kramer, em seu trabalho revisionista da origem histórica do *judicial review*, *The People Themselves,* contribuiu para desmistificação de que *Marbury* seria a origem do que ele chamou de primeira concepção do *judicial review* e oferece uma leitura de como os argumentos empregados no caso teriam seguido as premissas do constitucionalismo popular.

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[37] KRAMER, Larry. Popular Constitutionalism, Circa 2004. **California Law Review**, vol. 92, n. 4, p. 959-1011, jul. 2004. p. 959.

[38] Essa perspectiva é oferecida por Larry Kramer que elabora fusão entre o constitucionalismo popular e o departamentalismo. Este autor refere-se a teoria departamentalista como maior expressão institucional do constitucionalismo popular, vide: KRAMER, Larry. **The People Themselves**: Popular Constitutionalism and Judicial Review, New York: Oxford University Press, 2004. p.106-201.

Neste trabalho, Larry Kramer observou que há "excessiva celebração de *Marbury v. Madison*, cuja grande significância parece imune a correção histórica". [39] Ele descreve como o caso tem tido grande destaque nas narrativas que retratam a Corte sublimemente em uma tendência de confundir a história constitucional com a história da doutrina da Suprema Corte. Nestas histórias, as resistências as visões constitucionais da Corte são ignoradas, quando não demonizadas, e os momentos do constitucionalismo popular, minimizados. Para ele, o maior objetivo disso seria fazer parecer que sempre houve larga aceitação da supremacia judicial.

Mais recentemente, Keith Whittington se juntou a crítica elaborada por Larry Kramer com a seguinte assertiva: "o mito de *Marbury* afirma que a supremacia judicial sempre esteve conosco desde o início".[40] Para Whittington, a supremacia judicial na história dos Estados Unidos tem fundações políticas e o intuito da criação do mito de *Marbury* é esconder este fato; é evitar as questões sobre a origem da afirmação que a Corte tem o papel na definição dos sentidos constitucionais. A esse respeito, ele ridiculariza a autoconfiança da Corte Rehnquist em citar algumas sentenças de *Marbury* neste intento, afirmando que isto é puramente um "pensamento ilusório por parte dos juízes".[41]

A Suprema Corte, entretanto, não é a única expositora desta visão. Whittington acredita que mito de *Marbury* permanece forte principalmente porque progressistas e conservadores celebram o caso para propor uma visão de autoridade judicial errada, apesar deste golpe judicial já ter sido denunciado há tempos.[42]

Este autor também tem criticado os argumentos de acadêmicos defensores da Corte que assumem que a supremacia judicial é essencial ao constitucionalismo americano, sem contudo, enfrentar as questões sobre as fundações desta doutrina. A esse respeito, Whittington apontou Ronald Dworkin como exemplo de acadêmico que só teria aumentado os mistérios sobre esta questão ao afirmar que a "autoridade interpretativa já havia sido distribuída pela história, e detalhes da responsabilidade institucional dependem de

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[39] KRAMER, Larry. **The People Themselves**: Popular Constitutionalism and Judicial Review, New York: Oxford University Press, 2004. p. 229-230; Vide também comentários de Kramer à obra do historiador legal William Nelson (Marbury v. Madison: The origens and Legacy of Judicial Review) criticando à incapacidade de historiadores legais de aceitar a desconstrução final e completa do mito de Marbury, pois não se cansam de buscar outras razões para celebrar o caso, em: KRAMER, Larry. The Pace and Cause of Change. **Marshall Law Review**, vol. 37, n. 2, p. 357-389, winter, 2004.

[40] WHITTINGTON, Keith. **Political Foundations of Judicial Supremacy**. Princeton: Princeton University Press, 2007. p. 9.

[41] WHITTINGTON, Keith. **Political Foundations of Judicial Supremacy**. Princeton: Princeton University Press, 2007. p. 4-9 e 280. (O autor registra que a Corte Rehnquist utilizou a máxima de John Marshall, é dever do judiciário "dizer o que a lei é", em trinta e sete casos entre 1986 e 2004)

[42] WHITTINGTON, Keith. **Political Foundations of Judicial Supremacy**. Princeton: Princeton University Press, 2007. p. 285.

interpretação e não de criação a partir do nada".[43/44] Por outro lado, n*ão somente* fãs do judiciário fazem este tipo de argumento ou revelam desconhecer as origens da supremacia judicial. Kramer criticou muitos acadêmicos, inclusive revisionistas como Silvia Snowiss e Robert L. Clinton, de contribuir para "uma nova mitologia em que a supremacia é tratada como o ponto de vista lógico e inexorável de um progresso benéfico".[45]

O argumento de que a supremacia judicial é um desenvolvimento muito recente na história constitucional não é novo, mas até então as fundações dessa doutrina permaneciam pouco exploradas. Larry Kramer suspeita que talvez a maioria das pessoas que apoiam a supremacia judicial hoje não pensam muito sobre isso, ou acreditam que "isto decorre naturalmente do status de lei da Constituição ou que a supremacia foi originariamente intencionada ou estabelecida desde o começo"[46], assunções que, para ele, são evidentemente erradas.

Em que pese esse pensamento comum, Kramer e Whittington alertam que os argumentos de Marshall não podem ser usados para afirmação da supremacia judicial porque a prática do *judicial review* naquele tempo era mais modesta do que a exercida nos dias atuais pela Suprema Corte. Whittington descreveu os argumentos de Marshall como "temperados". Segundo ele, Marshall havia temperado sua forte afirmação da autoridade judicial sobre a interpretação constitucional, porque no contexto temporal no qual *Marbury* foi proferido, "estava claro que outras instituições políticas tinham ativa atuação na interpretação da Constituição e tais interpretações eram largamente aceitas como obrigatórias".[47]

Para este autor, apenas em meados do século XX os juízes da Suprema Corte teriam abandonado a modéstia de suas afirmações. Isto ocorreu mais especificamente em 1958, quando o Chief Justice Earl Warren interpretou à sua maneira a famosa sentença de John Marshall a qual declara ser dever judicial "dizer o que é a lei" para afirmar que o judiciário federal é supremo expositor da lei constitucional. Foi no caso Cooper v. Aaron, portanto, que o Chief Justice Earl Warren "transformou *Marbury* em um símbolo moderno de poder judicial", ao remodelar os argumentos de Marshall tornando-os um "standard judicial e retórico legal".[48]

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[43] DWORKIN, Ronald. **Freedom's Law**: The Moral Reading of the American Constitution, Harvard University Press, 1996. p. 34-35.

[44] WHITTINGTON, Keith. **Political Foundations of Judicial Supremacy**. Princeton: Princeton University Press, 2007. p. 9.

[45] KRAMER, Larry. Marbury And The Reatreat From Judicial Supremacy, **Constitutional Commentary**, Vol. 20, n. 2, p. 205-230, summer, 2003. p. 205-206.

[46] KRAMER, Larry. **The People Themselves**: Popular Constitutionalism and Judicial Review, New York: Oxford University Press, 2004. p. 234.

[47] WHITTINGTON, Keith. **Political Foundations of Judicial Supremacy**. Princeton: Princeton University Press, 2007. p. 2-9.

[48] WHITTINGTON, Keith; RINDERLE, Amanda. Making A Mountain Out Of A Molehill? Marbury And The Construction Of The Constitutional Canon. **Hastings Constitutional Law Quarterly**, Forthcoming, fev. 2012. p. 825.

Igualmente contra a tradição da supremacia judicial inventada por John Marshall, Larry Kramer afirmou que a decisão em *Marbury* é totalmente consistente com as premissas do constitucionalismo popular.[49] Este autor fez contundente crítica à interpretação das palavras de Marshall na decisão feita pela Corte Warren na decisão *Cooper v. Aaron*. Segundo ele, os juízes em Cooper não estavam tentando reproduzir os argumentos de Marshall, ao invés, estavam tentando produzir novos argumentos. Para ele, a Corte "induziu forçosamente a reafirmação de sua supremacia" insistindo que *Marbury* disse algo que, na verdade, não disse.[50]

A famosa expressão da decisão "enfaticamente, é a província e o dever do Poder Judiciário dizer o que é a lei", conforme esclarece Larry Kramer, quando lida isoladamente, "com nossos olhos modernos", e fora do contexto histórico em que foi escrito, pode ser entendida como um dever unicamente da corte de dizer o que a constituição significa, entretanto, a partir de análise histórica da formação constitucional norte-americana, é possível entender que Marshall, na verdade, buscava, tão somente, reafirmar o poder do Judiciário no processo de interpretação constitucional.[51]

Kramer apoia a leitura revisionista de *Marbury* ao afirmar que o caso, quando lido em contexto, é melhor compreendido como "fuga" ou "recuo" da doutrina da supremacia judicial. Para ele, as palavras usadas por Marshall, na decisão, com intuito de justificar o *judicial review* de forma nenhuma pode ser lida para endossar tal ideia. Isso porque Marshall reiterou e insistiu que o judiciário não era menos encarregado pelo cumprimento da Constituição do que os demais ramos, a exemplo da famosa afirmação: "cortes, assim, como os outros departamentos, são limitados por este instrumento"[52], de modo que teria explicitamente abraçado a teoria do *judicial review* limitado, agrupada na abordagem departamental da separação de poderes defendida por Madison e Thomas Jefferson.[53]

Nessa concepção republicana moderada, a interpretação constitucional é uma responsabilidade compartilhada entre os iguais e coordenados departamentos do governo. Assim, o entendimento do *judicial review* na posição de John Marshall no caso *Marbury* está longe de ser um clamor por uma superioridade ou exclusividade judicial no poder de interpretar.

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[49] KRAMER, Larry. **The People Themselves**: Popular Constitutionalism and Judicial Review. New York: Oxford University Press, 2004. p. 125.

[50] KRAMER, Larry. **The People Themselves**: Popular Constitutionalism and Judicial Review. New York: Oxford University Press, 2004. p. 221.

[51] KRAMER, Larry. **The People Themselves**: Popular Constitutionalism and Judicial Review. New York: Oxford University Press, 2004. p. 125-126; KRAMER, Larry. Marbury And The Reatreat From Judicial Supremacy. **Constitutional Commentary**, Vol. 20, n. 2, p. 205-230, summer, 2003. p. 214.

[52] 5 U.S. (1 Cranch) 137 (1803) p. 180.

[53] Registra ainda que, apesar de John Marshall não ter adotado os argumentos federalistas na decisão de Marbury, sua crença pessoal na supremacia da Suprema Corte parece clara em M'Culloch v. Maryland, 17 U.S. (4 Wheat.) p. 316, 401. (KRAMER, Larry. Marbury And The Reatreat From Judicial Supremacy. **Constitutional Commentary**, Vol. 20, n. 2, p. 205-230, summer, 2003. p. 214, 228.)

A supremacia judicial é encarada por Larry Kramer como o principal inimigo do constitucionalismo popular.[54] Isso porque, no mundo do constitucionalismo popular é impensável que a Constituição seja entregue nas mãos dos juízes e que o povo fique com pouca autoridade interpretativa. Este sistema não nega aos juízes o poder do *judicial review,* mas nega que o Judiciário seja o supremo expositor do sentido constitucional.

A nova jurisprudência da Corte é clara em identificar a autoridade judicial como a última interprete da Constituição. Tal qual a Corte Warren, a Corte Rehnquist empregou citações de *Marbury* para este efeito. O caso *City of Boerne v. Flores*[55] é paradigmático nesse sentido. No mesmo propósito, três anos depois, o *Chief Justice* Rehnquist escreveu em *United States v. Morrison*: "Não há dúvidas que os ramos políticos tem um papel na interpretação e aplicação da Constituição, mas desde *Marbury* esta Corte tem permanecido a última expositora da texto constitucional".[56]

Como se observa, a Suprema Corte não tem feito muito mais para justificar sua afirmação como árbitro final do sentido constitucional do que apontar os argumentos de Marshall e citar a famosa frase "é a província e o dever do judiciário dizer o que é a lei". Este fato demonstra que a Corte já não se preocupa em se justificar por uma teoria do *judicial review* e sugere que a supremacia judicial segue sem grandes desafios.

Em um artigo publicado na Harvard Law Review, em 2001, Larry Kramer ofereceu poderosa crítica os fundamentos originalistas da Corte Rehnquist e ao modo como ela citou *Marbury* para propor que a leitura judicial da Constituição é 'a correta'. Pretende desnaturalizar um conjunto de suposições da Corte porque os juízes:

> *(...) eles estão enganados. Quanto a isso, não segue automaticamente que eles estão errados em ampliar o alcance de sua autoridade. Mas, é certo que eles precisam de uma explicação e uma justificativa que eles ainda não forneceram. Certamente, é preciso fazer mais do que citar Marbury fora do contexto ou oferecer interpretações realmente ruins da Fundação".*[57]

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[54] Nas palavras do autor, "Judicial supremacy is an intellectual construct whose whole function and effect is to forestall popular constitutionalism and to extend how far courts can go before triggering a popular reaction. As such, it pervades the whole edifice of constitutional law, giving the justices freedom not just at the outer edges but also in areas that are not hugely controversial." (KRAMER, Larry. Generating Constitutional Meaning. **California Law Review**, vol. 94, n. 5, p. 1439-1453, 2006. p. 1452.).

[55] A decisão City of Boerne empregou uma citação de Marbury argumentando que "If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, ... alterable when the legislature shall please to alter it." Marbury v. Madison, 1 Cranch, at 177." (City of Boerne v. Flores. 521, U.S. (1997)).

[56] United States v. Morrison, 529 U.S. 598 (2000).

[57] KRAMER, Larry. The Supreme Court 2000 Term: Foreword: We the Court. **Harvard Law Review**, vol. 115, p. 4-169, jan., 2001. p. 162-163.

Pela inexistência de justificativa plausível apresentada pela Corte, Whittington percebeu que hoje a evidência para atribuir a autoridade interpretativa aos tribunais é simples, é *Marbury*. A Suprema Corte tem sido a grande expositora desta afirmação, mas não está sozinha. Defensores da supremacia judicial geralmente recorrem a *Marbury* para fazer acreditar que a supremacia judicial sempre esteve entre nós. Whittington e Kramer não caem, no entanto, na defesa convencional de uma superioridade ou exclusividade judicial na interpretação constitucional. Para eles, existe robusta tradição de autoridade interpretativa constitucional fora das cortes que afronta a narrativa da supremacia judicial.

Estes autores pretendem assim demonstrar que a supremacia judicial não emergiu como uma teoria constitucional dominante nos anos iniciais da história norte-americana, da forma como os juristas que enfatizam o precedente de *Marbury* sugerem. Foi ao longo do tempo que o judiciário veio ganhando mais autoridade sobre a interpretação constitucional. Conforme Larry Kramer explica, o sistema do constitucionalismo popular precedeu a doutrina da supremacia judicial e foi o princípio dominante na maior parte da história norte-americana. Neste sistema, o judiciário, assim como o legislativo, não possuía a autoridade interpretativa final, a qual residia no "*the people themselves*".[58]

O curso da história norte-americana é marcado por luta entre vários atores políticos pela autoridade de interpretar a Constituição. Uma luta com variadas intensidades e também com momentos de maior deferência de um dos ramos perante outro. Atualmente, há maior deferência dos ramos executivo e legislativo ao judiciário. Neste ponto, esclarece Whittington que os demais ramos encontraram na supremacia judicial certos benefícios políticos.[59] Somando a isso, há uma passividade atual do povo relativamente a autoridade da Corte.[60]

A autoridade judicial de interpretar a Constituição, portanto, não é absoluta. Estes autores argumentam que a Constituição norte-americana não fez a opção por este tipo de arranjo institucional específico. A autoridade constitucional é dinâmica e não pode ter sido distribuída uma vez por todas. O poder para distribui-la não está na tradição, nem na história. Em uma palavra: o poder de decidir reside no povo.

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[58] KRAMER, Larry. Popular Constitutionalism, Circa 2004. **California Law Review**, vol. 92, n. 4, p. 959-1011, jul. 2004.

[59] WHITTINGTON, Keith. **Political Foundations of Judicial Supremacy**. Princeton: Princeton University Press, 2007. p. 15-27.

[60] Segundo Kramer, deve ser reconhecida como uma questão aberta pelo povo americano se o constitucionalismo popular deve prevalecer, pois o povo ainda pode insistir no seu direito de controlar a Constituição. Nas suas palavras: "Judicial supremacy is not the logical or inevitable product of experience and progress. It remains now, as it was in the beginning, but one side in a recurrent and ongoing struggle to determine the proper role of ordinary citizens in a republic." (KRAMER, Larry. Marbury And The Reatreat From Judicial Supremacy. **Constitutional Commentary**, Vol. 20, n. 2, p. 205-230, summer, 2003. p. 230.) Vide também: KRAMER, Larry. **The People Themselves**: Popular Constitutionalism and Judicial Review, New York: Oxford University Press, 2004. p. 227-248.

A questão proposta por estes autores é: quem deve ter a autoridade de estabelecer os casos difíceis? Ou ainda, a Corte deve ser a suprema expositora do significado constitucional? Isto é desafiar a supremacia judicial. Trata-se de buscar as justificativas por que as interpretações constitucionais feitas pelo judiciário devem ter forte deferência pelos outros atores constitucionais. Responder a estas questões, por sua vez, requer mais do oferecer uma interpretação descontextualizada de *Marbury*. Quanto a isso, basta ler o caso em seu contexto para que as percepções iniciais sobre uma afirmação da supremacia judicial por Marshall desapareçam.

4. O CONTEXTO HISTÓRICO-POLÍTICO DA DECISÃO E O CONTRASTE ENTRE AS CONCEPÇÕES FEDERALISTAS E REPUBLICANAS SOBRE O PAPEL DA CORTE

A conjuntura política à época da decisão, em 1803, era marcada por um embate político entre federalistas e republicanos. O partido republicano disputou as eleições presidenciais no final do ano de 1800, ganhando pelo voto popular. Derrotados nas urnas, os federalistas tomaram uma série de ações em um esforço para preservar vestígios da influência do partido durante a próxima administração, como a adoção do *Circuit Courts Act*. Este ato reduzia o número de juízes da Suprema Corte de seis para cinco, aliviava a Corte de serviço enquanto estabelecia seis novos tribunais no circuito, com dezesseis juízes ao todo, que foram rapidamente nomeados pelo presidente John Adams e aprovados pelo Senado.

Imediatamente após Thomas Jefferson assumir o cargo da presidência ordenou ao Secretário de Estado James Madison que mantivesse em suspenso as posses dos juízes que ainda não tinham sido entregues. Uma dessas era devida à William Marbury. Em 1801, Marbury impetrou um *writ of mandamus* na Suprema Corte para obrigar Madison a realizar sua posse. Uma série de questões importantes e políticas surgiram, mas a questão do *judicial review* surgiu apenas após um ano, em 1802, enquanto o caso de Marbury ainda estava pendente e quando o Congresso Republicano debatia sua autoridade para revogar o *Circuit Courts Act*.

Com a revogação do *Circuit Courts Act* pelo Congresso, os partidos reagiram. Para os federalistas, o *Repeal Act* representou muito mais um grave ataque a independência do judiciário do que uma falha da administração em realizar algumas posses, como na circunstância do caso de Marbury.[61] Eles argumentavam a inconstitucionalidade do ato de revogação e condenavam seus efeitos fatais contra a Constituição,[62] enquanto republicanos pensavam que esta era a vitória do Republicanismo.

[61] FRIEDMAN. Barry. **The Will Of The People**: How Public Opinion Has Influenced The Supreme Court And Shaped The Meaning Of The Constitution. New York: Farrar, Straus and Giroux, 2009. p. 52-55.

[62] Os Federalistas sustentavam a inconstitucionalidade do Repeal Act. Para Friedman: "The Federalists staked their case on the Constitution. Article III of the Constitution states that judges are to "hold their Offices during

Apesar do clamor dos federalistas pela inconstitucionalidade do ato de revogação do Congresso que anulou a posse de juízes, a Suprema Corte não pode fazer mais do que se submeter ao ato. Evidentemente, desafiar diretamente os republicanos poderia apenas prejudicar a Corte. Então, ao fazer uso de uma tática para evitar conflito direito com a posição de Jefferson[63], a Corte decidiu que lhe faltava jurisdição para julgar o caso e declarou inconstitucional a seção 13 do *Judiciary Act* de 1789 por ter concedido jurisdição original não autorizada pela Constituição.

Possivelmente a posição extremamente precária da Corte teria conduzido Marshall a fazer uso do *judicial review*.[64] Como salienta Christopher Wolfe, a decisão deve ser interpretada como um ato de timidez do judiciário federalista frente ao partido republicano dominante nos departamentos legislativo e executivo, visto que qualquer afronta à presidência poderia prejudicar a posição pública do departamento judicial, que ainda não havia estabelecido completamente seu poder aos olhos da nação.[65]

A esse respeito, observa-se que a Suprema Corte, naquele contexto, não contava com um amplo apoio difuso e, certamente, não era um departamento forte, capaz de desafiar o executivo e o legislativo em um só ato. Há apenas alguns anos, Alexander Hamilton havia se expressado que não haveria porque se preocupar com um departamento tão fraco, referindo-se ao judiciário, como "o departamento menos perigoso" dos três departamentos do governo.[66] Ademais, e como já esperado, as decisões da Corte durante este período não tinham o cunho de desafiar outros ramos, ao invés, eram muito bem planejadas para alinhar a Corte à visão dos demais atores nacionais.[67]

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good Behavior" and may be removed only by impeachment. Because the new circuit court positions the Republicans sought to abolish had already been filled Federalists argued, the move to repeal the Circuit Judges Act represented an unconstitutional removal of the judges". (FRIEDMAN. Barry. **The Will Of The People**: How Public Opinion Has Influenced The Supreme Court And Shaped The Meaning Of The Constitution. New York: Farrar, Straus and Giroux, 2009. p. 53.).

[63] Existe certo consenso na doutrina que Marshall utilizou uma tática brilhante na decisão, entretanto, autores divergem se isso foi uma jogada claramente política ou a mais neutra possível, vide, por exemplo: "It was a risky strategy. Marshall's lecture infuriated Jefferson, who perceived it as a politically motivated attack on his presidency". (KRAMER, Larry. **The People Themselves**: Popular Constitutionalism and Judicial Review, New York: Oxford University Press, 2004. p. 123); "His aim was to isolate the judiciary from partisan politics as much as possible". (WOOD, Gordon. The Origins Of Judicial Review Revisited, Or How The Marshall Court Made More Out Of Less. **Washington & Lee Law Review**, vol. 56, n. 3, p. 787-803, 1999. p. 806); "While it is commonplace for historians and legal commentators to assert that Marshall's interpretation of the statute was motivated by crass political aims…what were those "political" purposes: were they partisan or "constitutional"?" (WOLFE, Christopher. **The Rise Of Modern Judicial Review**: From Constitutional Interpretation To Judge-Made Law, New York: Basic, 1986. p. 86-87.).

[64] Segundo Larry Kramer o mesmo resultado poderia ter sido obtido facilmente em outras circunstâncias sem a necessidade da anulação de uma lei, vide: KRAMER, Larry. **The People Themselves**: Popular Constitutionalism and Judicial Review, New York: Oxford University Press, 2004. p. 123-124.

[65] WOLFE, Christopher. **The Rise Of Modern Judicial Review**: From Constitutional Interpretation To Judge-Made Law, New York: Basic, 1986. p. 87.

[66] The Federalist Papers, n. 78, 1788. Disponível em: <https://www.congress.gov/resources/display/content/The+Federalist+Papers>

[67] WHITTINGTON, Keith. **Political Foundations of Judicial Supremacy**. Princeton: Princeton University Press, 2007. p. 111.

Os federalistas na época haviam começado a expor uma teoria mais ampla de *judicial review* e mais ambiciosa - teoria hoje reconhecida como supremacia judicial. Entretanto, diante da clara impotência da Corte naquele período dificilmente Marshall teria adotado os argumentos federalistas em *Marbury*, contrariando a maioria republicana. Marshall, teria temperado seus argumentos na decisão ao afirmar que "é evidente que os *framers* da constituição contemplaram o instrumento como uma regra para os tribunais, assim como para a legislatura".[68]

Assim, embora Marshall fosse um federalista, ele evitou os argumentos federalistas na decisão, pois "as circunstâncias de *Marbury* conduziram Marshall a escrever cautelosamente e a formular a autoridade da Corte em nulificar a legislação de forma conservadora".[69] Nesse mesmo sentido, o eminente historiador Gordon Wood afirma que a decisão de Marshall "não iniciava uma cruzada pela supremacia judicial", ao invés, era tão sutil que parecia que os Republicanos haviam gostado mais dela do que os Federalistas.[70]

A decisão de Marshall não discordou explicitamente da posição de Jefferson, apesar de não julgar o caso a favor dos Republicanos. Na verdade, Larry Kramer e Keith Whittington argumentam que a decisão de Marshall se aproxima mais da teoria departamentalista defendida por Jefferson do que uma defesa da supremacia judicial conforme advogado pelos federalistas.

Por certo Thomas Jefferson foi um presidente comprometido com a teoria departamentalista, explicou e defendeu seu bom cumprimento. Ele negou que qualquer ramo do governo federal pudesse ser exclusivo ou final quanto aos poderes delegados pela Constituição. Sobre seu entendimento sobre a interpretação constitucional, argumentou que os departamentos do governo deveriam ser "coordenados e independentes", pois "cada ramo tem igual direito de decidir por si mesmo o sentido da Constituição".[71]

Para os republicanos, a teoria departamentalista significava que "a autoridade das constituições estão acima dos governos, e a soberania do povo acima das constituições".[72] De modo geral, este partido não rejeitava o *judicial review*. Na verdade, aceitava a possibilidade de cada departamento do governo expressar sua visão. Por outro lado, nenhum dos departamentos poderia ter a palavra final, pois as controvérsias

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[68] 5 U.S. (1 Cranch) 137 (1803).

[69] KRAMER, Larry. **The People Themselves**: Popular Constitutionalism and Judicial Review, New York: Oxford University Press, 2004. p. 125.

[70] WOOD, Gordon. The Origins Of Judicial Review Revisited, Or How The Marshall Court Made More Out Of Less. **Washington & Lee Law Review**, vol. 56, n. 3, p. 787-803, 1999. p. 806.

[71] JEFFERSON, Thomas. The Writtings of Thomas Jefferson. In: WHITTINGTON, Keith. **Political Foundations of Judicial Supremacy**. Princeton: Princeton University Press, 2007. p. 32-33.

[72] KRAMER, Larry. **The People Themselves**: Popular Constitutionalism and Judicial Review, New York: Oxford University Press, 2004. p. 137.

constitucionais deveriam ser resolvidas em última instância pelo povo. Em síntese, os republicanos rejeitavam a supremacia judicial.

Federalistas evidentemente discordavam. Compostos predominantemente pela elite norte-americana, mantinham certo temor em relação ao populismo e a demagogia, ao tempo em que defendiam a ideia de passiva deferência dos cidadãos e de respeito destes para com as autoridades constituídas.[73] Com uma ideologia construída para frear a parcela do povo ativo na política, federalistas começaram a defender um novo e radical papel para os tribunais. Este partido tornou o argumento de evitar a tirania da maioria o âmago da justificativa para a existência do *judicial review,* além de uma boa razão para preferir os juízes e não os legisladores como intérpretes finais da Constituição.[74]

Com efeito, o medo das maiorias tirânicas era ubíquo entre os federalistas, que adotaram como cânone o argumento surgido em meados de 1800 de que as cortes eram especialmente responsáveis pela interpretação constitucional e que sua palavra deveria ser final[75]– teoria que é reconhecida atualmente como supremacia judicial. As palavras de James Kent, professor e dedicado federalista, em sua obra, enfatizam bem esse sentimento do partido com relação as cortes e ao povo ao afirmar que os juízes "são os adequados e pretendidos *guardiões* dos limites da Constituição" protegendo "os direitos da minoria" das "paixões e da vingança da maioria".[76]

Esta ideia de supremacia judicial advogada pelos federalistas não foi desde logo acolhida, ao contrário, foi decisivamente repudiada por um longo período após seu surgimento. Nos anos que se seguiram a decisão de *Marbury*, houve um longo período de domínio político republicano, contribuindo para que o partido Federalista se dissolvesse. Com isso, os princípios republicanos e o entendimento republicano de constitucionalismo tornaram-se prevalecentes entres os norte-americanos. Quanto à ideia de supremacia judicial, esta ficou hibernada, sem contudo desaparecer, ressurgindo apenas algumas décadas depois.[77]

A partir desse contorno, observa-se que a decisão de Marshall em *Marbury* é melhor compreendida ao considera-la também um assunto político e não meramente jurídico[78], tendo sido proferida quando os ideais do constitucionalismo popular

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[73] KRAMER, Larry. "The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy. **Valparaiso University Law Review**, vol. 41, n. 2, p. 697-754, winter, 2006.

[74] KRAMER, Larry. **The People Themselves**: Popular Constitutionalism and Judicial Review, New York: Oxford University Press, 2004. p. 111, 129-132.

[75] KRAMER, Larry. **The People Themselves**: Popular Constitutionalism and Judicial Review, New York: Oxford University Press, 2004. p. 135, 139.

[76] KENT, James. **An Introductory Lecture To A Course Of Law Lectures**, New York: Printed by Francis Childs, 1794. Disponível Em: <https://books.google.com.br/books?isbn=1886363919>.

[77] KRAMER, Larry. **The People Themselves**: Popular Constitutionalism and Judicial Review, New York: Oxford University Press, 2004. p. 140-144.

[78] Vide: "To understand Marbury fully, we must appreciate it not simply as a case deciding a legal dispute between William Marbury and James Madison, but as a political act contributing to the establishment of a

vigoravam e eram dominantes. Neste contexto, a ideia de supremacia judicial era marginal, defendida por uma minoria de pessoas, e dada a fragilidade do departamento judiciário, dificilmente este teria se arrogado o intérprete final do sentido constitucional.

É no decorrer da história, portanto, que a doutrina da supremacia judicial passou a ganhar mais visibilidade. E não se pode afirmar outra coisa senão que Marshall, em razão de uma circunstância politicamente delicada em *Marbury*, somada a impotência da Corte, evitou os argumentos federalistas e ambiciosos em relação ao *judicial review* para simplesmente afirmar que as cortes tinham o mesmo dever e a mesma obrigação de aplicar a Constituição que outros departamentos do governo.

5. CONSIDERAÇÕES FINAIS

Por muito tempo se pensou que o problema do uso retórico de *Marbury* estaria na reformulação deste precedente em uma forma mítica, mais especificamente para elevá-lo como caso que criou ou estabeleceu o *judicial review*. Há pouco tempo, teses revisionistas chamaram atenção para outra dimensão da utilidade do mito sobre o precedente, que é a dimensão abraçada pela Suprema Corte e seus acadêmicos defensores, que escondem as fundações da supremacia judicial fazendo parecer que esta doutrina sempre foi dominante na teoria constitucional norte-americana. Em resposta as afirmações agressivas do poder judicial, este, entre tantos outros, aspectos das histórias contadas para justificar a supremacia judicial são expostos pelo movimento crítico denominado constitucionalismo popular.

Como visto, a defesa da supremacia judicial segundo um raciocínio inspirado na decisão *Marbury v. Madison* somente torna-se possível em uma interpretação descontextualizada. Este tipo de interpretação do caso não segue sem objeções. Por desconsiderar o papel dos demais intérpretes constitucionais no contexto temporal da decisão é alvo de críticas.

As teses críticas de Larry Kramer e Keith Whittington buscam fazer repensar certos argumentos que são quase ritualisticamente proferidos para justificar a primazia do judiciário na interpretação constitucional ao identificar o erro em apontar *Marbury* como pedra de fundação da prática contemporânea do *judicial review* associada à doutrina da supremacia judicial. Assim, a leitura proposta por estes autores pode ser entendida como um clamor por uma coerente teoria que justifique a ampliação do alcance da autoridade judicial, que segundo eles, ainda não foi apresentada.

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discourse of constitutionalism in which the realms of law and politics merge". (O'FALLON, James. Marbury, **Stanford Law Review**, vol. 44, n. 2, jan. p. 219-260, 1992. p. 221.)

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RESENHA:

"Unconstitutional constitutional amendments: the limits of amendment power", de Yaniv Roznai

BOOK REVIEW:

"Unconstitutional constitutional amendments: the limits of amendment power", written by Yaniv Roznai

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A expressão "emendas constitucionais inconstitucionais" é uma dificuldade ontológica do constitucionalismo, que se digladia continuamente com a ideia de mudança, de um lado, e os limites dessa mudança, de outro. Há, nesse conflito, muito de uma disputa normativa sobre o significado do constitucionalismo, dos princípios liberais que normalmente o informam e da expectativa de governo limitado pelo direito que está na base do conceito de "rule of law". Yaniv Roznai, professor na Radzyner Law School to Interdisciplinary Center Herzliya em Israel e certamente um dos maiores expoentes sobre o tema, recentemente lançou o livro *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2017), fortemente aclamado pela crítica como o mais completo estudo em Direito Constitucional Comparado sobre o conceito de "emendas constitucionais inconstitucionais" já publicado. Seu livro é, de fato, o resultado de uma pesquisa de fôlego (ele examina nada menos que 742 constituições nacionais desde 1789 até 2015, além dos diversos desenvolvimentos jurisprudenciais sobre a temática no mundo). Porém, não apenas isso: sua pesquisa é brilhantemente desenhada para justificar a existência de "emendas constitucionais inconstitucionais" a partir de uma premissa normativa que ele próprio intitula "estruturalismo fundacional". A tese naturalmente traz suas inevitáveis controvérsias e polêmicas - qual tese do Direito Constitucional não as traz? -, mas Yaniv Roznai vai no âmago da teoria constitucional e, especialmente, do conflito entre poder constituinte originário e derivado para, a partir dali, construir seu argumento. É um passeio bem realizado na história de diferentes constitucionalismos e na história de várias teorias sobre o poder constituinte.

Seu livro inicia-se, na primeira parte, com o claro objetivo de contextualizar o leitor sobre os principais desenvolvimentos daquilo que ele intitula "Comparative Constitutional Unamendability", isto é, uma análise comparada de como os constitucionalismos no mundo têm, de forma crescente, adotado a tese de que certas emendas constitucionais podem ser consideradas inconstitucionais. O primeiro capítulo destina-se a demonstrar que, ao longo dos anos, constituições ao redor do mundo passaram a, explicitamente, estabelecer limites ao poder constituinte secundário, o que, em língua portuguesa, normalmente chamamos de "cláusulas pétreas". Segundo Roznai, "não apenas as 'cláusulas pétreas' *(unamendable provisions)* cresceram em número, elas cresceram também em extensão, complexidade e detalhamento".[1] Porém, se há um crescimento da adoção de cláusulas pétreas nos diversos constitucionalismos mundiais, há também uma ampliação da adoção de teorias que buscam defender a constituição mesmo sem a previsão, no texto constitucional, de cláusulas pétreas. É aqui que aparece o grande nó da discussão: será que podemos limitar o poder constituinte secundário - termo

[1] ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments:** The Limits of Amendment Powers. Oxford: Oxford University Press, 2017, p. 21.

que ele prefere ao tão utilizado "poder constituinte derivado"[2] - a partir de um critério normativo implícito ou, ao menos, não exatamente configurável de acordo com o que chamamos de cláusulas pétreas em diferentes desenhos constitucionais? O segundo capítulo de seu livro destina-se a exatamente demonstrar os desenvolvimentos globais em torno da construção dessa tese, com especial destaque à expansão da "basic structure doctrine" indiana e, também, da "doutrina da substituição constitucional", que ganhou corpo no constitucionalismo colombiano. Para tornar ainda mais completo seu panorama sobre os mecanismos de defesa constitucional contra "emendas constitucionais inconstitucionais", Yaniv Roznai também dedica todo seu terceiro capítulo ao debate sobre critérios supraconstitucionais, como referências ao direito natural e ao direito internacional, que também têm sido usados para esse fim, embora ele próprio reconheça que, ao final, a referência ao direito nacional domine: "… é por meio dessas limitações, explícitas ou implícitas, que as normas internacionais e supranacionais podem gerar limitações aplicáveis aos poderes de emenda constitucional".[3]

A tese que Roznai desenvolve vai ficar mais claramente delineada a partir da segunda parte de seu livro - e é também o momento em que sua análise ganha um corpo mais teórico, desenvolvendo um rico estudo sobre as diferentes concepções e compreensões sobre o poder constituinte. É nesta parte de seu livro, a começar pelo quarto capítulo, que ele explora a divisão entre "poder constituinte" e "poder constituído", passeando desde os clássicos *Qu'est-ce que le tiers* état*,* de Abbé Sieyès, *Verfassungslehere,* de Carl Schmitt, até construções mais contemporâneas, como Giorgio Agamben, Antonio Negri e Andreas Kalyvas. Sua tese vai se desenhando, primeiro, pela afirmação que o "poder de emenda é *sui generis*"[4], que "não é tido como outra forma de poder constituído nem, tampouco, equiparado ao poder constituinte".[5] Posteriormente, afirma que o poder de emenda é delegado e que isso implica, explícita ou implicitamente, ser um poder limitado formal e materialmente.[6] Portanto, os princípios básicos da constituição "são exclusivamente não-emendáveis *(unamendable*) no sentido de que eles não podem ser alterados por meio de um exercício do poder constituinte secundário".[7] A tese da delegação impõe, dessa forma, uma limitação intrínseca ao poder de emenda, na medida em que apresenta apenas "poder fiduciário, portanto, tem de ser *ipso facto* intrinsecamente limitado por natureza"[8] e somente

[2] ROZNAI, Yaniv. *Op. Cit.,* p., 122.

[3] ROZNAI, Yaniv. *Op. Cit.,* p. 102.

[4] ROZNAI, Yaniv. *Op. Cit.,* p. 110.

[5] ROZNAI, Yaniv. *Op. Cit.,* p. 113.

[6] ROZNAI, Yaniv. *Op. Cit.,* p. 120.

[7] ROZNAI, Yaniv. *Op. Cit.,* p. 126.

[8] ROZNAI, Yaniv. *Op. Cit.,* p. 133.

pode atingir os princípios básicos por meio da "reemergência do poder constituinte primário".[9]

A sua tese, todavia, precisa ser provada como operacional e, para tanto, ele dedica o quinto capítulo de seu livro a demonstrar como o poder de emenda é limitado e que existe também uma hierarquia entre poder constituinte primário, cláusulas pétreas e poder constituinte secundário - nessa ordem.[10] Há também uma hierarquia de valores no âmbito do texto constitucional interpretado como uma unidade.[11] O capítulo é recheado de interessantes exemplos históricos, que tratam de situações como emendas constitucionais que se auto-definem cláusulas pétreas[12]; emendas a cláusulas pétreas já existentes; o chamado "procedimento de dupla emenda", que busca alterar, primeiramente, as cláusulas pétreas e, na sequência, efetuar a alteração da matéria antes coberta de proteção. A tese de Roznai é que cláusulas pétreas, mesmo que não haja uma previsão expressa indicando que são elas próprias não-emendáveis, "devem ser implicitamente reconhecidas como não-emendáveis".[13] Também é neste capítulo que Roznai aprofunda sua tese de "estruturalismo fundacional", cuja ideia básica está em que "o poder de emenda constitucional não pode ser usado para destruir a constituição",[14] ou, mais especificamente, "os princípios básicos da constituição".[15] Neste tópico, aparece um dos elementos mais controversos de seu pensamento, que está na definição de quais são os "princípios político-filosóficos básicos"[16]que formam sua "identidade constitucional"[17] e lhe confere pleno sentido. Para Roznai, alterar a constituição, afetando seus princípios básicos, é, na verdade, o colapso de toda a constituição e tem o mesmo significado de uma substituição constitucional.[18] É também - e aqui aparece o terceiro elemento de seu "estruturalismo fundacional" - um direto ataque à pressuposição de que o governo age de boa fé.[19]

Naturalmente, o "estruturalismo fundacional" é sustentado pela tese de que, por via da delegação, o poder constituinte secundário somente poderia alterar os "princípios básicos" da constituição na medida em que houvesse uma ruptura com a ordem constitucional em vigor. Porém, Roznai avança na análise de que, na relação entre ambos os poderes constituintes - primário e secundário -, há um espectro do poder de

[9] ROZNAI, Yaniv. *Op. Cit.,* p. 134.

[10] ROZNAI, Yaniv. *Op. Cit.,* p. 137.

[11] ROZNAI, Yaniv. *Op. Cit.,* p. 145.

[12] ROZNAI, Yaniv. *Op. Cit*., p. 139.

[13] ROZNAI, Yaniv. *Op. Cit.,* p. 140.

[14] ROZNAI, Yaniv. *Op. Cit.,* p. 141.

[15] ROZNAI, Yaniv. *Op. Cit.,* p. 142.

[16] ROZNAI, Yaniv. *Op. Cit.,* p. 143.

[17] ROZNAI, Yaniv. *Op. Cit.,* p. 148.

[18] ROZNAI, Yaniv. *Op. Cit.,* p. 143.

[19] ROZNAI, Yaniv. *Op. Cit.,* p. 143.

emenda constitucional. Segundo ele, “quanto mais semelhantes são as características do poder constituinte secundário daquelas do poder constituinte primário democrático, seja inclusivo, participativo ou deliberativo, menos ele é atingido por limitações e vice-versa”.[20] Este é o objeto de seu sexto capítulo, em que ele avança a tese de que, em situações em que o povo exerce seu poder diretamente na mudança constitucional - e, portanto, mais próximo do exercício do poder constituinte primário - menos limitado ele se encontra. Não haveria aqui, portanto, uma relação binária, mas uma gradação dos limites na medida em que o poder constituinte secundário mais se aproxima ou se afasta daquilo que se entende por poder constituinte primário ou “poder de emenda popular”.[21] Alguns sistemas constitucionais adotam mecanismos cada vez mais rígidos quanto mais estrutural vem a ser a mudança constitucional - e isso, de certa forma, expõe, na prática, um pouco da tese avançada por Roznai. Estabelecer uma gradação para o poder de emenda, desse modo, além de ser interessante como desenho constitucional, representa não somente uma maior proteção aos princípios básicos da constituição como também acarreta maior legitimidade ao próprio poder de alterá-la.[22] Por outro lado, estabelecer o critério de mudança constitucional mais estrutural em uma maior conexão com o povo pode ser também visto como uma estratégia de agentes políticos para se fortalecer no poder ou para diminuir direitos de minorias, embora Roznai deixe muito claro que “não há resposta clara” se “mecanismos de direta democracia são um risco para os direitos das minorias”, especialmente em comparação com outros mecanismos.[23] Uma conclusão, todavia, parece ser central aqui: processos constitucionais com mais participação popular e inclusão tendem a gerar mais proteção aos direitos fundamentais, além de promover mais legitimidade e confiança.[24]

A terceira e última parte de seu livro é dedicada ao papel do judiciário no controle de emendas constitucionais, um fenômeno que já é prática em várias jurisdições.[25] Roznai inicia o sétimo capítulo indicando as principais argumentos teóricos que justificam essa forma de controle, como o princípio da delegação; o princípio da separação vertical de poderes entre poder constituinte primário e secundário;[26] o papel do judiciário de defesa da constituição;[27] a supremacia constitucional;[28] e a defesa da

[20] ROZNAI, Yaniv. *Op. Cit.,* p. 158.

[21] ROZNAI, Yaniv. *Op. Cit.,* p. 162.

[22] ROZNAI, Yaniv. *Op. Cit.,* p. 168.

[23] ROZNAI, Yaniv. *Op. Cit.,* p. 172.

[24] ROZNAI, Yaniv. *Op. Cit.,* p. 173-174.

[25] ROZNAI, Yaniv. *Op. Cit.,* p. 179.

[26] ROZNAI, Yaniv. *Op. Cit.,* p. 180.

[27] ROZNAI, Yaniv. *Op. Cit.,* p. 181.

[28] ROZNAI, Yaniv. *Op. Cit.,* p. 182

democracia contra falhas do próprio processo político, especialmente em democracias frágeis.[29] Roznai também rebate as críticas a esta forma de controle, como o que ele denomina de "enigma da subordinação", que traria uma impossibilidade lógica da Corte, constituída pela constituição, controlar as emendas à constituição;[30] a "mão morta" do passado, que defende ter as presentes e futuras gerações o direito de mudar também os princípios básicos da Constituição, caso assim o desejem;[31] e, mais diretamente, ofensa ao exercício ao autogoverno democrático, um direito o povo possui de, de forma direta ou indireta por meio de seus representantes, mudar o texto constitucional.[32] A tese do livro consegue rebater cada um desses argumentos e, tal como se desenha desde o início, há um elemento normativo que faz exigir uma concepção de democracia que carrega também algo substantivo e, não, meramente formal, mesmo que isso "exacerbe a dificuldade contramajoritária".[33] Essa premissa normativa está espelhada na tese de que o controle jurisdicional de emendas constitucionais é uma defesa da "vontade supratemporal do povo", expressa nos princípios básicos da constituição, contra eventuais "vontades temporais do povo".[34] Visivelmente, toda a defesa desse papel do judiciário lhe confere poderes que potencialmente desequilibram a relação com os demais poderes - e Roznai faz uma contemporização dessa controvérsia, defendendo, por isso, o argumento que esse poder deve ser exercido de modo bastante contido e de acordo com certas diretrizes, que ele examina em seu capítulo final.[35]

A tese de Roznai é por ele defendida como a "máxima expressão da democracia", na medida em que é uma garantia do poder constituinte primário do povo.[36] O capítulo oitavo acompanha esta premissa para apontar que, por ser algo excepcional, o poder de controle pela corte sobre emendas constitucionais deve ser feito segundo certos parâmetros. Primeiramente, se há explícita definição pelo poder constituinte primário de que a Corte Constitucional deve apenas fazer o exame formal de emendas, esta limitação deve ser obedecida: "a teoria da delegação necessita que esta explícita limitação, imposta pelo poder constituinte primário sob certos órgãos constituídos, seja levada a sério".[37] Por outro lado, se há cláusulas pétreas previstas na Constituição, é dedutível e desejável que a Corte Constitucional faça o controle de emendas caso violem cláusula pétrea, embora haja importantes exemplos no mundo de países com essa característica,

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[29] ROZNAI, Yaniv. *Op. Cit.,* p. 183-186.

[30] ROZNAI, Yaniv. *Op. Cit.,* p. 187

[31] ROZNAI, Yaniv. *Op. Cit.,* p. 188.

[32] ROZNAI, Yaniv. *Op. Cit.,* p. 190.

[33] ROZNAI, Yaniv. *Op. Cit.,* p. 191

[34] ROZNAI, Yaniv. *Op. Cit.,* p. 193.

[35] ROZNAI, Yaniv. *Op. Cit.,* p. 193.

[36] ROZNAI, Yaniv. *Op. Cit.,* p. 196.

[37] ROZNAI, Yaniv. *Op. Cit.,* p. 201.

tais como Noruega e França, cujas Cortes Constitucionais têm declinado dessa competência.[38] Quando não há cláusula pétrea, a tese das "normas constitucionais inconstitucionais" gera, como visto, polêmicas, mas também tem sido adotada de forma crescente.[39] Um dos grandes focos de polêmica encontra-se, primeiramente, na identificação dos princípios não-emendáveis e, na sequência, no "desenvolvimento de uma teoria dos princípios não-emendáveis",[40] que, naturalmente, varia em contextos diversos. Por isso, segundo Roznai, "uma teoria dos princípios não-emendáveis é, portanto, necessária para limitar a incerteza em relação à extensão do poder de emenda",[41] mesmo que essa tarefa se torne altamente complexa tanto na vagueza de certas cláusulas pétreas e mais ainda no caso de inexistência delas. Sua tese do "estruturalismo fundacional" serviria, assim, como uma premissa interpretativa de proteção a esses princípios[42] e o uso de referências - por exemplo, o preâmbulo[43] - poderia auxiliar nessa tarefa. Por fim, a interpretação das emendas pelas Cortes Constitucionais deve ser sempre feita de modo a lhe dar um sentido conforme a Constituição (lembrando aqui a teoria da "interpretação conforme a Constituição") e sua anulação somente deve ocorrer em última hipótese,[44] levando em consideração também o processo de emenda: quanto mais democrático e complexo o procedimento de emenda, menor deve ser a intensidade de intervenção do judiciário.[45] Afinal, para Roznai, "a invalidação de emendas constitucionais deve ser um remédio de última ordem".[46]

A pesquisa de Roznai surpreende pela abrangência e pela acuidade na análise dos dados, com exemplos que corroboram, de forma muito bem localizada, suas teses. Aliás, a esse respeito, vale registrar aqui a fala da professora Kim Lane Scheppele, da Universidade de Princeton, em um painel para discutir o livro de Roznai durante a ICON-S Conference 2017 em Copenhagen, sobre o quão impressionada ela ficou com o resultado da pesquisa. Disse ela que, em conversas anteriores com o próprio autor, havia alertado da dificuldade de escrever uma tese com a dimensão empírica desse porte e, ao mesmo tempo, contextualizar devidamente as conclusões, o que ele acabou conseguindo fazer com maestria. Seu livro, por outro lado, levanta várias questões, especialmente porque parte de uma premissa normativa que é polêmica por excelência. Embora ele explicite serem questões em aberto, é visível que sua tese esbarra nos

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[38] ROZNAI, Yaniv. *Op. Cit.,* p. 203-208.

[39] ROZNAI, Yaniv. *Op. Cit.,* p. 211

[40] ROZNAI, Yaniv. *Op. Cit.,* p. 212.

[41] ROZNAI, Yaniv. *Op. Cit.,* p. 212.

[42] ROZNAI, Yaniv. *Op. Cit.,* p. 215.

[43] ROZNAI, Yaniv. *Op. Cit.,* p. 217

[44] ROZNAI, Yaniv. *Op. Cit.,* p. 217-218.

[45] ROZNAI, Yaniv. *Op. Cit.,* p. 219-220.

[46] ROZNAI, Yaniv. *Op. Cit.,* p. 225

próprios limites do normativo - que, naturalmente, ele próprio reconhece. Do mesmo modo, defender o papel das Cortes Constitucionais para esse fim, embora pareça lógica, é também um tema que levanta importantes controvérsias. Afinal, tanto a manipulação dessa premissa normativa pode facilmente ocorrer como uma estratégia de agentes públicos,[47] como também é sempre importante perguntar se, na realidade, é mesmo o povo que tem exercido o poder constituinte primário. A história mostra que as barganhas políticas distantes de uma maior participação popular ainda predominam em vários movimentos de mudança constitucional estrutural. Essa dimensão menos normativa e mais estratégica, que poderia ter sido um pouco mais trabalhada no livro, todavia, não afasta nenhum pouco o brilho do livro de Roznai, pois, desde o início, ele deixa muito claro que seu argumento se baseia mais na distinção entre poder constituinte primário e secundário - logo, é normativo por excelência - e menos em questões de desenho constitucional. É certamente um marco do Direito Constitucional Comparado, fruto de uma pesquisa realmente impressionante e não é sem motivo que, recentemente, recebeu o ICON-S Book Prize de melhor livro publicado na área do Direito Constitucional em 2017. É uma leitura mais do que indispensável.

[47] DIXON, R.; LANDAU, D. Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment: r05387. **International Journal of Constitutional Law,** v. 13, n. 3, p. 606-638, 2015.

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5.5.4.5. Os quatro elementos anteriores deverão ser indicados um abaixo do outro em linhas distintas, com alinhamento à direita.

5.5.4.6. Em nota de rodapé com um asterisco (e não com número), situada à direita do nome do autor, deverá constar o seu mini-currículo, iniciando com a indicação da instituição onde figura como docente, seguida de cidade, sigla do Estado e país entre parênteses, indicação das titulações acadêmicas (começando pela mais elevada), outros vínculos com associações científicas, profissão, etc. Caso tenha sido utilizada a nota de rodapé ao lado do título com informações sobre o artigo, a nota com o mini-currículo do primeiro autor deverá ser indicada com dois asteriscos, a do segundo autor com três asteriscos, e assim sucessivamente.

5.5.5. Resumo no idioma do artigo (fonte Times New Roman 12, espaçamento entre linhas simples, sem parágrafo ou citações e referências, com até 200 palavras), antecedido da palavra "Resumo" escrita no idioma do artigo.

5.5.6. Indicação de 5 palavras chave no idioma do artigo (em letras minúsculas e separadas por ponto e vírgula), antecedidas da expressão "Palavras-chave" redigida no idioma do artigo.

5.5.7. Resumo em inglês (Fonte Times New Roman 12, espaçamento entre linhas simples, sem parágrafo ou citações e referências, com até 250 palavras), antecedido da palavra "Abstract". No caso de artigos redigidos em inglês, este elemento deverá ser substituído pelo resumo em português.

5.5.8. Indicação de cinco palavras chave em inglês (em letras minúsculas e separadas por ponto e vírgula), antecedidas da expressão "Keywords". No caso de artigos redigidos em inglês, este elemento deverá ser substituído pelas palavras-chave em português.

5.5.9. Sumário com a identificação dos títulos das seções e das subseções, com numeração progressiva em números arábicos.

5.5.10. Desenvolvimento do trabalho científico: a numeração progressiva, em número arábicos, deve ser utilizada para evidenciar a sistematização do conteúdo do trabalho.

5.5.11. Lista das referências bibliográficas efetivamente utilizadas no artigo, ao final do trabalho, separadas por um espaço simples, alinhadas à margem esquerda (sem recuo).

5.5.12. Aplicam-se, para os demais aspectos de formatação, as normas técnicas brasileiras (ABNT NBR 14724:2011).

5.6. Todo destaque que se queira dar ao texto deve ser feito com o uso de itálico, ficando vedada a utilização de negrito, sublinhado ou caixa alta para fins de dar destaque ao texto.

5.7. Figuras e tabelas devem estar inseridas no texto, e não no final do documento na forma de anexos.

6. METODOLOGIA CIENTÍFICA

6.1. As referências dos livros, capítulos de obras coletivas, artigos, teses, dissertações e monografias de conclusão de curso de autores citados ou utilizados como base para a redação do texto devem constar em nota de rodapé, com todas as informações do texto, em observância às normas técnicas brasileiras (ABNT NBR 6023:2002), e, especialmente, com a indicação da página da qual se tirou a informação apresentada no texto logo após a referência.

6.1.1. O destaque dado ao título dos livros (ou revistas) citados deverá constar em negrito, ficando vedada a utilização de itálico.

6.1.2. Os artigos redigidos no formato AUTOR:DATA não serão aceitos para publicação.

6.1.3. As referências deverão constar da seguinte forma:

6.1.3.1. Livros: SOBRENOME, Nome. **Título da obra em negrito**: subtítulo sem negrito. número da edição. Cidade: Editora, ano.

Exemplo: CLÈVE, Clèmerson Merlin. **Atividade legislativa do Poder Executivo**. 3. ed. São Paulo: Revista dos Tribunais, 2011.

6.1.3.2. Capítulos de livros coletivos: SOBRENOME, Nome. Título do capítulo sem negrito. In: SOBRENOME DO 1º ORGANIZADOR, Nome do organizador; SOBRENOME DO 2º ORGANIZADOR, Nome do 2º organizador e assim sucessivamente, separados por ponto e vírgula (Org. ou Coord.). **Título da obra ou coletânea em negrito**: subtítulo sem negrito. número da edição. Cidade: Editora, ano. página inicial-página final [antecedidas de "p."].

Exemplo: SALGADO, Eneida Desiree; COUTO, Mariele Pena de. Uma proposta para o controle social: um olhar prospectivo sobre a transparência e a probidade. In: BLANCHET, Luiz Alberto; HACHEM, Daniel Wunder; SANTANO, Ana Claudia (Coord.). **Estado, direito e políticas públicas**: homenagem ao professor Romeu Felipe Bacellar Filho. Curitiba: Íthala, 2014. p. 149-164.

6.1.3.3. Artigos em revistas: SOBRENOME, Nome. Título do artigo sem negrito. **Título da Revista em negrito**, cidade, volume, número, página inicial-página final [antecedidas de "p."], meses da publicação [abreviados com as três primeiras letras do mês seguidas de ponto e separados por barra]. ano.

Exemplo: PERLINGEIRO, Ricardo. Brazil's administrative justice system in a comparative context. **Revista de Investigações Constitucionais**, Curitiba, vol. 1, n. 3, p. 33-58, set./dez. 2014.

6.1.3.4. Teses de Titularidade, Livre-Docência, Doutorado, Dissertações de Mestrado, Monografias de Conclusão de Curso de Graduação e Pós-Graduação: SOBRENOME, Nome. **Título do trabalho em negrito**: subtítulo sem negrito. Cidade, ano. número de folhas seguido de "f". Modalidade do trabalho (Grau obtido com a defesa) – Órgão perante o qual o trabalho foi defendido, Nome da instituição.

Exemplo: HACHEM, Daniel Wunder. **Tutela administrativa efetiva dos direitos fundamentais sociais**: por uma implementação espontânea, integral e igualitária. Curitiba, 2014. 614 f. Tese (Doutorado) – Programa de Pós-Graduação em Direito, Universidade Federal do Paraná.

6.1.4. Os elementos das referências devem observar o seguinte padrão:

6.1.4.1. Autor: SOBRENOME em maiúsculas, vírgula, Nome com as iniciais em maiúsculas, seguido de ponto final.

6.1.4.2. Edição: deve ser incluída a informação somente a partir da segunda edição, sem ordinal, seguido de ponto e "ed.". Exemplo: 2. ed.

6.1.4.3. Ano: grafado com algarismos arábicos, sem ponto no milhar, antecedido de vírgula e seguido de ponto.

6.1.5. Nos casos em que for absolutamente impossível obter alguma das informações acima, a ausência deverá ser suprida da seguinte forma:

6.1.5.1. Ausência de cidade: substituir por [s.l.].

6.1.5.2. Ausência de editora: substituir por [s.n.].

6.1.5.3. Ausência de ano: indicar entre colchetes o ano aproximado, seguido de ponto de interrogação. Exemplo: [1998?].

6.2. As citações (palavras, expressões, períodos) deverão ser cuidadosamente conferidas pelos autores e/ou tradutores.

6.2.1. Citações diretas devem seguir o seguinte padrão de registro: transcrição com até quatro linhas devem constar do corpo do texto, com letra e espaçamento normais, e estar entre aspas.

6.2.2. Recomenda-se fortemente que citações textuais longas (mais de quatro linhas) não sejam utilizadas. Entretanto, se imprescindíveis, deverão constituir um parágrafo independente, com recuo de 1,5 cm em relação à margem esquerda (alinhamento justificado), utilizando-se espaçamento entre linhas simples e tamanho da fonte 10. Neste caso, aspas não devem ser utilizadas.

6.2.3. Fica vedado o uso do op. cit., ibidem e idem nas notas bibliográficas, que deverão ser substituídas pela referência completa, por extenso.

6.2.4. Para menção de autores no corpo do texto, fica vedada sua utilização em caixa alta (ex.: para Nome SOBRENOME...). Nestes casos todas as menções devem ser feitas apenas com a primeira letra maiúscula (ex.: para Nome Sobrenome...).

7. REDAÇÃO

7.1. Os textos devem ser revisados, além de terem sua linguagem adequada a uma publicação editorial científica.

7.2. No caso de artigos redigidos na língua portuguesa, a escrita deve obedecer às novas regras ortográficas em vigor desde a promulgação do ACORDO ORTOGRÁFICO DA LÍNGUA PORTUGUESA, a partir de 1º de janeiro de 2009.

7.3. As citações de textos anteriores ao ACORDO devem respeitar a ortografia original.

8. ARTIGOS RESULTANTES DE PESQUISAS FINANCIADAS

Os artigos resultantes de projetos de pesquisa financiados deveram indicar em nota de rodapé, situada ao final do título do artigo no idioma do texto, a informação relativa ao financiamento da pesquisa.

9. DECLARAÇÃO DE DIREITOS AUTORAIS

Autores que publicam nesta revista concordam com os seguintes termos:

9.1. Não serão devidos direitos autorais ou qualquer outra remuneração pela publicação dos trabalhos.

9.2. Autores mantém os direitos autorais e concedem à *Revista de Investigações Constitucionais* o direito de primeira publicação, com o trabalho simultaneamente licenciado sob a **Licença Creative Commons Attribution** que permite o compartilhamento do trabalho com reconhecimento da autoria e publicação inicial nesta revista. Ainda, em virtude de aparecerem nesta revista de acesso público, os artigos são de uso gratuito, com atribuições próprias, com aplicações educacionais e não comerciais.

9.3. Autores têm permissão e são estimulados a publicar e distribuir seu trabalho online (ex.: em repositórios institucionais ou na sua página pessoal) a qualquer

ponto antes ou durante o processo editorial, já que isso pode gerar alterações produtivas, bem como aumentar o impacto e a citação do trabalho publicado (ver **O Efeito do Acesso Livre**).

10. RESPONSABILIDADE DOS AUTORES

10.1. Autores são responsáveis pelo conteúdo publicado, comprometendo-se, assim, a participar ativamente da discussão dos resultados de sua pesquisa científica, bem como do processo de revisão e aprovação da versão final do trabalho.

10.2. Autores são responsáveis pela condução, resultados e validade de toda investigação científica.

10.3. No momento da submissão os autores deverão enviar, juntamente com a proposta de artigo, declaração de autoria assinada e digitalizada.

10.4. Autores devem noticiar a revista sobre qualquer conflito de interesse.

10.5. As opiniões emitidas pelos autores dos artigos são de sua exclusiva responsabilidade.

11. CONFLITO DE INTERESSES

A confiabilidade pública no processo de revisão por pares e a credibilidade de artigos publicados dependem em parte de como os conflitos de interesses são administrados durante a redação, revisão por pares e tomada de decisões pelos editores.

11.1. É obrigatório que o autor do manuscrito declare a existência ou não de conflitos de interesse. Mesmo julgando não haver conflitos de interesse, o autor deve declarar essa informação no ato de submissão do artigo, marcando esse campo específico.

11.2. Conflitos de interesses podem surgir quando autores, pareceristas ou editores possuem interesses que, aparentes ou não, podem influenciar a elaboração ou avaliação de manuscritos. O conflito de interesses pode ser de natureza pessoal, comercial, política, acadêmica ou financeira.

11.3. Quando os autores submetem um manuscrito, eles são responsáveis por reconhecer e revelar conflitos financeiros ou de outra natureza que possam ter influenciado seu trabalho.

11.4. Os autores devem reconhecer no manuscrito todo o apoio financeiro para o trabalho e outras conexões financeiras ou pessoais com relação à pesquisa. As contribuições de pessoas que são mencionadas nos agradecimentos por sua assistência na pesquisa devem ser descritas, e seu consentimento para publicação deve ser documentado.

11.5. Manuscritos não serão rejeitados simplesmente por haver um conflito de interesses, mas deverá ser feita uma declaração de que há ou não conflito de interesses.

11.6. Os pareceristas devem, igualmente, revelar aos editores quaisquer conflitos de interesse que poderiam influir em suas opiniões sobre o manuscrito, e devem declarar-se não-qualificados para revisar originais específicos se acreditarem que esse procedimento é apropriado. Assim como no caso dos autores, se houver silêncio por parte dos pareceristas sobre conflitos potenciais, isso significará que os conflitos não existem.

11.7. No caso da identificação de conflito de interesse da parte dos pareceristas, o Conselho Editorial encaminhará o manuscrito a outro parecerista ad hoc.

11.8. Se os autores não tiverem certos do que pode constituir um potencial conflito de interesses, devem contatar a secretaria editorial da Revista.

11.9. Para os casos em que editores ou algum outro membro publiquem com frequência na Revista, não serão atribuídos tratamentos especiais ou diferenciados. Todos os artigos submetidos serão avaliados através do procedimento *double blind peer review*.

12. OUTRAS INFORMAÇÕES

12.1. Os trabalhos serão selecionados pelo Coordenador Editorial e pelo Conselho Editorial da Revista, que entrarão em contato com os respectivos autores para confirmar o recebimento dos textos, e em seguida os remeterão para análise de dois pareceristas do Conselho de Pareceristas.

12.2. Os originais recebidos e não publicados não serão devolvidos.

12.3. Asseguram-se aos autores o direito de recurso das decisões editorais.

12.3.1. Serão concedidos 5 (cinco) dias, contados da data da decisão final do Conselho Editorial.

12.3.2. O arrazoado escrito deverá ser enviado para o e-mail: <revista@ninc.com.br>.

12.3.3. O recurso será analisado pelo Conselho Editorial no prazo de 30 (trinta) dias.