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Editorial

Editorial

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Concluimos este volume 7 do ano de 2020 com uma edição muito especial. Este número 3 da **Revista de Investigações Constitucionais** contém um dossiê intitulado “*Constitutional Amendments: Making, Breaking, and Changing Constitutions - a dialogue with Richard Albert*”. Nele foram reunidos sete artigos escritos por pesquisadores de universidades de sete países (Brasil, Colômbia, Japão, Itália, Israel, Reino Unido e Turquia), nos quais os autores exploraram diversos aspectos relacionados às emendas constitucionais, dialogando com o novo livro de Richard Albert – Professor de Direito Constitucional da University of Texas at Austin – e utilizando algumas das categorias jurídicas e sistematizações que formulou em sua obra.

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A escolha em promover um diálogo com a obra-prima de Richard Albert, recentemente publicada pela prestigiosa Oxford University Press,¹ reflete, para além do reconhecimento da alta relevância de sua doutrina sobre os processos formais e informais de reforma das Constituições, a gratidão da **Revista de Investigações Constitucionais** em relação à sua atuação inicialmente como membro do Conselho Editorial e atualmente como Editor Associado da revista. Sua participação desde a criação do periódico foi crucial para disseminá-lo no meio acadêmico internacional e para atrair excelentes submissões de autores de diversos países do mundo.

Agradecemos profundamente o Professor Oran Doyle, da Trinity College Dublin, membro do Conselho Editorial da **Revista de Investigações Constitucionais**, por ter atuado brilhantemente como Editor Convidado para este dossiê, auxiliando na seleção rigorosa de artigos para compor esta seção especial da presente edição. Agradecemos igualmente aos autores dos artigos selecionados para o dossiê e aos pareceristas pelo trabalho de avaliação das submissões.

Além dos artigos que compõem o dossiê, publicamos também neste número três artigos que fazem parte da seção aberta (não temática) da revista. Nesta edição, publicamos artigos em 2 idiomas (inglês e português), de autores vinculados a 10 instituições de ensino superior de 7 países diferentes: Colômbia, Japão, Itália, Israel, Reino Unido, Turquia e de 3 diferentes unidades federativas da República Federativa do Brasil, com representação das regiões Sul (Rio Grande do Sul), Sudeste (Rio de Janeiro) e Centro-Oeste (Distrito Federal). Dos trabalhos publicados, 100% são de Professores Doutores, 70% redigidos em língua estrangeira, 60% dos artigos possuem entre seus autores pesquisadores afiliados a instituições estrangeiras e 100% dos artigos são de autores exógenos ao Estado do Paraná. São eles:

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Assistant Professor of Comparative Public Law at Libera Università Internazionale degli Studi Sociali Guido Carli – LUISS (Rome, Italy)

¹ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. New York: Oxford University Press, 2019.

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- Os poderes hipertróficos do relator no STF, o desmembramento constitucional e o golpe de Estado jurídico

Fabício Castagna Lunardi

Professor do Instituto Brasiliense de Direito Público (Brasília-DF, Brasil)

Seguimos com o trabalho de divulgação de pesquisas de ponta no âmbito do Direito Constitucional, tentando sempre ampliar a representatividade do nosso corpo de autores e promover a disseminação de trabalhos de excelência, que aportam contribuições relevantes e provocativas para o constitucionalismo contemporâneo.

Introduction

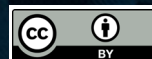
Introdução

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Constitutional amendments under the lenses of Richard Albert

Emendas constitucionais sob as lentes de Richard Albert

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Some legal scholars are dedicated to very different topics within their field of knowledge. Others, however, choose to specialize in a specific theme, delving very deeply into the study of that issue and becoming a reference in that matter. Richard Albert, William Stamps Farish Professor in Law at University of Texas at Austin, is an

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** Editor-in-chief of Revista de Investigações Constitucionais – Journal of Constitutional Research. Professor of Law at Universidade Federal do Paraná (Curitiba-PR, Brazil) and at Pontifícia Universidade Católica do Paraná (Curitiba-PR, Brazil). He holds a PhD and an LLM from Universidade Federal do Paraná. He has held visiting positions at Université Paris 1 Panthéon-Sorbonne (France), Universitat Rovira i Virgili (Spain), and Universidad Externado de Colombia. E-mail: danielhachem@gmail.com.

example of this second type of scholar: throughout his academic career, he dedicated himself more than any other scholar to the subject of constitutional change, researching the phenomenon of constitutional amendment in the democratic world, across many different countries and legal systems. The various controversial issues involving formal and informal constitutional change processes were explored in his studies, resulting in original and provocative articles published in several prestigious journals and edited volumes in different countries. This is why, in a short space of time, he has become a world reference on this topic.

To crown this successful trajectory in the field of constitutional changes and to definitively consolidate his position of absolute prominence and leadership in the scholarship of comparative constitutional law, Richard Albert has written *Constitutional Amendments: Making, Breaking, and Changing Constitutions*,¹ published in 2019 by the prestigious Oxford University Press. The book is a milestone in the study of the theme and represents, from the start, a seminal work and a must-read for all those who seek to deepen their knowledge of constitutional amendments and the various controversial issues raised by this subject in a comparative constitutional perspective.

It is with great pride that the **Revista de Investigações Constitucionais - Journal of Constitutional Research** has included Professor Richard Albert in its Editorial Team since its creation, first as a member of the Editorial Board in the first years and latterly as Associate Editor of the journal, always assisting the dissemination of the journal around the world and attracting excellent submissions and authors from the most diverse countries. As a sign of recognition for his valuable contributions to the journal and the singular quality of his scholarship in the field of constitutional amendments, we decided to organize this Special Dossier "*Constitutional Amendments: Making, Breaking, and Changing Constitutions* - a dialogue with Richard Albert". Seven articles were selected by scholars from universities from seven countries (Brazil, Colombia, Japan, Italy, Israel, Turkey, and United Kingdom), in which the authors explored different aspects related to constitutional changes, dialoguing with Richard Albert's new book and using some of the legal categories and systematizations he formulated in his work.

In a first block of articles, the authors used the systematizations created by Richard Albert on the phenomenon of the constitutional reform process as a tool to analyze related issues, such as the democratic system, supranational normative changes in the European Union and self-enforcing constitutional amendments rules. In the article "The inexorableness of constitutional amendments and its democratic potentiality", Antoni Abat Ninet, Visiting Professor at the Faculty of Law at the Hebrew University of Jerusalem, dealt with the tense relationship between constitutional amendments

¹ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. New York: Oxford University Press, 2019.

and democracy, based on the democratic input that Richard Albert proposes in his book. Cristina Fasone, Assistant Professor of Comparative Public Law at Libera Università Internazionale degli Studi Sociali Guido Carli - LUISS, in her article “Constitutional amendments’ theory and troubles at supranational level: Constitutional change in the EU from the perspective of Richard Albert’s analysis”, applies to the case of the European Union the systematizations proposed by Albert, using this analytical framework to understand the functioning of the EU “constitutional amendments”. In his contribution entitled “Self-enforcing constitutional amendments rules: a dialogue with Richard Albert’s Constitutional Amendments: Making, Breaking, and Changing Constitutions”, Juliano Zaiden Benvindo, Professor of Constitutional Law at Universidade de Brasília, highlights the importance of constitutional self-enforcing amendment rules for constitutional design from the categories formulated by Albert.

In the second block, the articles set out to dissect and explore in greater depth one of the main and most innovative contributions of Richard Albert’s work: the phenomenon of *constitutional dismemberment*. Luisa Fernanda García López, Principal Professor of Constitutional Law at the Universidad del Rosario, uses in her paper “Constitutional interpretation and Constitution substitution: oscillating between the juridical and the political” Albert’s lessons on the limits to the power of constitutional reform as a standard to examine what those limits are according to the Colombian Constitutional Court and to what extent that court has exceeded those restrictions by producing a constitutional dismemberment. In his work “Disaggregating dismemberment: nullity, natality, and the hollowing of constitutional renewal in designed written constitutionalism”, Ming-Sung Kuo, Associate Professor at the University of Warwick, proposes to rethink the notion of constitutional renewal from a critical and in-depth analysis of the concept of constitutional dismemberment elaborated by Richard Albert, in the light of Hannah Arendt’s idea of “natality” in political action. Valentina Rita Scotti, Post-doctoral fellow in Comparative Public Law at Koç University School of Law, explores the theme “Constitutional dismemberment via referendum: a comparative overview”, examining whether, in times of populism and democratic decay, the elaboration of constitutions should take into account the need to adopt mechanisms capable of protecting political opposition from alliances between the populist leader and the majority of the people. Finally, Yota Negishi, Associate Professor of the Department of Law at the Seinan Gakuin University, in his contribution entitled “The theory and phenomenology of constitutional dismemberment” questions whether an objectivist perspective of constitutional designers is adequate to assess the transformative potential of the idea of constitutional dismemberment.

We sincerely thank all authors who submitted valuable contributions to this Special Dossier, as well as the reviewers of the articles. We are sure that the contributions of this edition, promoting a dialogue with Richard Albert's already-seminal work, will contribute significantly to the evolution of studies on constitutional amendment in a comparative perspective, stimulating new research agendas in the field.



Dossiê

Dossier

**Constitutional Amendments: Making, Breaking, and
Changing Constitutions - a dialogue with Richard Albert**

***Constitutional Amendments: Making, Breaking, and
Changing Constitutions - um diálogo com Richard Albert***



The inexorableness of constitutional amendments and its democratic potentiality

A inexorabilidade das emendas constitucionais e sua potencialidade democrática

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Abstract

Constitutional law and Democracy are two domains that are inevitably in tension. Nevertheless, there have been theories and proposals to improve the necessary coexistence of both elements in modern constitutional democratic systems. Richard Albert's work distinguishes between constitutional changes (amendments and dismemberments) and introduces a non-merely symbolic role to the people in terms of legitimacy, can be qualified as one of these theories. This paper focuses on the democratic input that Albert proposes along with his book.

Keywords: constitutional amendments; constitutional dismemberments; democracy; constitutional moments; derivate constituent power.

Resumo

O direito constitucional e a democracia são dois domínios que estão inevitavelmente em tensão. No entanto, tem havido teorias e propostas para melhorar a necessária coexistência de ambos os elementos nos sistemas democráticos constitucionais modernos. O trabalho de Richard Albert distingue entre mudanças constitucionais (emendas e desmembramentos) e introduz um papel não meramente simbólico para o povo em termos de legitimidade, podendo ser qualificado como uma dessas teorias. Este artigo enfoca a contribuição democrática que Albert propõe junto com seu livro.

Palavras-chave: emendas constitucionais; desmembramentos constitucionais; democracia; momentos constitucionais; poder constituinte derivado.

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1. INEXORABLENESS OF CONSTITUTIONAL AMENDMENTS

One of the most ancient philosophical controversies that we are aware of is the one between Heraclitus and Parmenides on the being of nature (*physis*). Heraclitus contended that everything flows and therefore, it is in a constant change, everything is dynamic and temporary.¹ In constitutional terms, no constitution is permanent, and of course, no disposition is unamendable. Constitutions are continually flowing throughout a never-ending change. If we consider that constitutional amendments give form and path to this constant change, then we will support Richard's claim, constitutional amendments are an essential part of constitutions, not only procedurally but also materially.²

On the other hand, we can also conceive the opposite, constitutional amendments are mostly irrelevant,³ because constitutional change is inexorable, and it would happen no matter what the constitutional provisions on the amendment may stipulate. In this case, the role of the amendment is limited, in the best-case scenario, to juridify changes that already occurred. The change produces the amendment rather than the other way around.⁴

In front of Heraclitus, we find Parmenides who considered that nothing changes, and any change is always illusory. Change is impossible and irrational. Reason (*Logos*) dictates what is real and what is not, and according to the famous quotation of Parmenides: "whatever is, is, and what is not cannot be".⁵

It is remarkable that according to the monist interpretation of Parmenides, the only reason establishes the being. The same "reason" and rationalisation that involves law. Law, modern law, is exclusively rationality, reason, and its legitimacy lies solely in axioms of legal rationalism. In this sense, a possible interpretation of Parmenides words

¹ CONCHE, Marcel. **The Fragments of the Work of Heraclitus of Ephesus On Nature**. London: Creative Media Partners, 2018.

² ALBERT, Richard. **Constitutional Amendments: Making, Changing and Breaking Constitutions**. New York: Oxford Univ. Press, 2019.

³ See STRAUSS, David. A. The irrelevance of constitutional amendments. **Harvard Law Review**, vol. 114, p. 1457-1505, 2001.

⁴ STRAUSS, David. A. The irrelevance of constitutional amendments. **Harvard Law Review**, vol. 114, p. 1457-1505, 2001.

⁵ GALLOP, David. **Parmenides of Elea: Fragments, a Text and Translation**. Toronto: Toronto University Press, 1984.

in our domain would be that only law, as pure reason determines what is real, meaning, that only codified (rationalised norms) can be qualified as amendment rules.

It is not plausible to understand the process of amendment as aseptic and straightforward transplantation of social or political changes into the realm of law. The process of juridification considered as a defining element of the rule of law it is also an element to enforce rationalisation. Constitutional amendments (codified or not) implies a process of (legal) rationalisation, and even considering an amendment as simply ratifying of changes that have already take place in society, the process of juridification has not only normative effects but also material ones. Therefore, it may also affect the change that causes the amendment process.

As a matter of example of this ancient debate in constitutions, constitutionalism and amendments, we can questioning whether the Constitution of Egypt of 2014 has changed the previous Constitution of 30 November 2012? Both constitutions are results of revolutionary and counter-revolutionary **événements**.⁶ Then an obvious presumption is to think that both constitutional drafts involved significant changes in political and constitutional terms.

The Constitution of 2012 was passed by an Islamist party (Muslim Brotherhoods) that constitutionalised the main goals of the revolution (building up a democratic state, adherence to democratic principles, pluralism and multiparty system). However, the previous Constitution of 1971 in force under the Presidency of Hosni Mubarak already stated that Egypt was a democratic state (art.1), with a multiparty system (art.5). In addition, the current Constitution of 2014 recognises these principles, democratic Republic (art.1), with a political system based on political and partisan multiplicity (art.5). Perhaps due to a sort of constitutional “inertia” and despite the political measures that Mubarak, Morsi (potentially) and Sisi implemented, to eliminate these dispositions have a higher cost than to behave accordingly to them.

The reading of article 2 (as amended in 1980) of all these constitutional charters, the one related to the role of Islam and Sharia, a disposition exported by Egypt to the rest of the Arab world, can also enlighten the real change that these revolutions have caused in constitutional terms. Certainly, we can also define these dispositions as aspirational constitutionalism,⁷ or “programmatic” constitutional declarations because of its null incidence in the daily life of citizens, as Chapter 1 of the book analyses in the section “Text and Reality”.⁸

⁶ RICOEUR, Paul. Événement et sens. **Raisons pratiques**, vol. 2, p. 41-56, 1991.

⁷ SCHEPPELLE, Kim Lane. Aspirational and Aversive constitutionalism: The case for studying cross-constitutional influence through negative models. **International Journal of Constitutional Law**, vol. 1, n. 2, p. 296-324, 2003.

⁸ ALBERT, Richard. **Constitutional Amendments: Making, Changing and Breaking Constitutions**. New York: Oxford Univ. Press, 2019. p. 51.

The answer to these questions is related to a more essentialist analysis on constitutions. Additionally, no constitution can stop a revolution, a military coup and another kind of political events, neither a constitutional amendment can. Richard acknowledges this *Realpolitik* truism from a constitutional perspective by saying: “*if the political will exists to alter an obdurate constitutional text, a new constitution can be written with the unamendable rule removed or loosened*”.⁹ Not even a new constitutional text is essential, and: “*where constitutional replacement is impossible....the authoritative interpreter may find a way to interpret a constitutional amendment*”,¹⁰ or a constitutional disposition. This fact is even more flagrant because no constitutional system escapes of direct or indirect control of the executive branch and partyocracy.¹¹

However, from a pragmatic perspective, despite whether we may consider amendments as irrelevant or the most critical section of our constitutions, constitutional amendments are a normative and a material reality that cannot be detached of constitutional charters. From a Kantian pragmatic perspective or a strict positivistic standpoint, there cannot be a constitution without “rules for changing the rules”.¹² There is no constitution without amendment rules. An objective fact that *per se* justifies, Richard Albert’s insight in this magnificent book and reinforces the centrality that amendments have in comparative constitutional law.¹³

2. DEMOCRACY AND CONSTITUTIONAL AMENDMENTS

A reader influenced by the Critical Legal Studies approaches the relation of law and Democracy with scepticism or even nihilism. Law implies rationalisation and social domination and consequently is not easy to fuse with democracies. The use of the euphemism “constitutional democracies” instead of mixed governments to define our “democratic” political systems is not improving the relation between the two elements of the paraphrase.

However, the way that Albert links constitutional amendments and Democracy is compelling and opens paths to develop popular participation in the realm of

⁹ ALBERT, Richard. **Constitutional Amendments: Making, Changing and Breaking Constitutions**. New York: Oxford Univ. Press, 2019. p. 141.

¹⁰ ALBERT, Richard. **Constitutional Amendments: Making, Changing and Breaking Constitutions**. New York: Oxford Univ. Press, 2019. p. 141.

¹¹ COTA, Maurizio. Partitocracy: Parties and their Critics in Italian Political Life. In: PASQUINO, Jones, E., (eds.). **The Oxford Handbook of Italian Politics**. Oxford-New York: Oxford University Press, 2015. p. 41-52.

¹² ALBERT, Richard. **Constitutional Amendments: Making, Changing and Breaking Constitutions**. New York: Oxford Univ. Press, 2019. p. 3.

¹³ TUSHNET, Mark. Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power. **International Journal of Constitutional Law**, vol. 13, n. 3, p. 639-654, 2015.

constitutionalism. Whether this is a romantic form,¹⁴ does not change its potentiality, especially in a society where digital technologies are applicable. However, there is also a question related to the essential nature of the amendment and its legitimacy; an epistemological question, that Richard responds excellently: *"The right to amend a constitution is above all a right to democratic choice. Amendment rules, then, shall be designed and used for a related reason: to promote democracy"*.¹⁵ Albert continues quoting Rubinfeld to remark that written constitutionalism requires a process of popular writing and re-writing.

I would add that not only written constitutionalism, also non-written constitutionalism using non-codified means requires processes to enable the participation of the people in the amendment of the non-codified but constitutional norms. Nowadays only three state constitutional systems around the world are classified as "non-written" (United Kingdom, Israel and New Zealand) a disputed definition, because not codified in a single text, does not mean unwritten.¹⁶

Can a non-codified constitutional amendment serve formal, functional and symbolic uses in constitutionalism? In non-codified constitutionalism, amendments are also inexorable, and if the system is defined as democratic, it needs to involve the Demos in constitutional matters.

As Richard Albert has observed, the practice of unamendability plays a critical role in the relation between constitutional amendment and democracy (chapter 4 and p.271). As he notes, to limit the possibility of constitutional change is not a reasonable option in the modern world, and it would lack legitimacy of present popular consent.¹⁷ Even that these limits to amend affect matters such as the bill of rights, peace (Japanese Constitution), republican form (French Constitution) or human dignity (German Constitution).

Besides, I believe that the inclusion of these kinds of constitutional dispositions does not make sense because of the inexorability of the change (Heraclitus) and the fact that no constitutional disposition can prevent a revolution, some political changes or constitutional moments (Ackerman). Consider the political debate opened in Japan, where Prime Minister Shinzo Abe attempted to amend Article 9 of the Japanese Constitution. With this article, Japan renounces war as a sovereign right and the threat of use of force as a mean of settling international disputes and prohibits the maintenance of

¹⁴ STRAUSS, David. A. The irrelevance of constitutional amendments. *Harvard Law Review*, vol. 114, p. 1457-1505, 2001.

¹⁵ ALBERT, Richard. *Constitutional Amendments: Making, Changing and Breaking Constitutions*. New York: Oxford Univ. Press, 2019. p. 46.

¹⁶ GREY, Thomas. C. Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought. *Stanford Law Review*, vol. 30, n. 5, p. 843-893, 1978.

¹⁷ ALBERT, Richard. *Constitutional Amendments: Making, Changing and Breaking Constitutions*. New York: Oxford Univ. Press, 2019. p. 271.

land, sea and air forces. Some authors consider the Prime's Minister proposal and the use of a specific referendum on the topic, as a constitutional coup;¹⁸ others an unconstitutional constitutional amendment.¹⁹

On the other hand, some authors argue that article 9 contradicts Japan's place in the contemporary world and the factual reality. Despite the strong symbolic character of the article and its conceptualisation as a Japanese (imposed) constitutional value of peace, Japan has the fourth largest military in the world. Therefore, we find again here a question of text and reality and assertive and aspirational principles.

A second example on the inexorability of change and the relative transcendence of constitutional dispositions and amendments in front of some political events is the null constitutional changes that the independence of Algeria caused in the French Constitution of the Fifth Republic of 1958. The process of independence of the French *départements* in Algeria caused constitutional crises that ended with the Fourth Republic and the Constitution of 1946. A constitutional text that for the first time in French history consecrated the complete equality of rights between the citizens of metropolitan France and those of overseas.

However, the independence occurred in 1962, four years later, the enactment of the current constitution, and not constitutional amendment happened in the text. Alternatively, as Diemert explains, from the entry into force of the Constitution of 4 October 1958 until the mid-1970s, the overseas territories were progressively marginalised and normalised on the constitutional level, the secession of Algeria takes place in a legal context marked by the almost complete absence of constitutional review.²⁰

3. UNAMENDABILITY AND THE DEMOCRATIC PRINCIPLE

Richard Albert is bright on the democratic inconvenient that non-amendable provisions cause. The conclusion of the book is an example of the significance that this aspect has for the author. In the introduction of Chapter 4, after explaining the Zelaya's affair in Honduras, he concludes stating: *"But should Hondurans have been denied the right to speak their views on an issue so central to their political life? It is, after all, their constitution, and they are the ones who must live it with it"*.²¹ This thoughtful statement re-

¹⁸ ACKERMAN, Bruce; MATSUDAIRA, Tokujin. Dishonest Abe. **Foreign Policy**, 24 June 2014. Available at: <<http://foreignpolicy.com/2014/06/24/dishonest-abe/>>.

¹⁹ ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments: The Limits of Amendment Powers**. Oxford: Oxford University Press, 2017.

²⁰ DIEMERT, Stéphane. L'histoire constitutionnelle de l'outre-mer sous la V^e République. **Nouveaux Cahiers du Conseil Constitutionnel**, Paris, n. 35, Dossier: La Constitution et l'Outre-Mer, avr. 2012. Available at: <<https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/l-histoire-constitutionnelle-de-l-outre-mer-sous-la-ve-republique>>.

²¹ ALBERT, Richard. **Constitutional Amendments: Making, Changing and Breaking Constitutions**. New York: Oxford Univ. Press, 2019. p. 140.

flects the issues that unamendability also inflects to the fundamental rights of political participation and freedom of speech.

Besides the good reasons that Albert remarks, there are additional problems of unamendable constitutional dispositions from a democratic perspective. Such as *who* decides what is unamendable, when it does so, and what for. The answers to these questions, in constitutional democracies, must be democratically legitimate.

Following the three varieties of unamendability (codified, interpretative and constructive), the one who decides, who is acting as a sovereign (*Theorie des Dezisionismus*) in the first case, is an elected body with the exceptions of illiberal democracies and imposed governments. In the second category (interpretative unamendability), the decision is taken by an unelected body, the judiciary (with some exceptions of legislature possessing powers of binding constitutional interpretation). Within this category, mixed bodies exercising the control of constitutionality, such as the *Conseil Constitutionnel* (France, Lebanon, Cameroun) may be included. In the third case (constructive), the decision-makers are political actors also selected democratically.

All classification involves elements of subjectivity, this one presented by Richard Albert includes a hybrid category (constructive unamendability) that can also be defined as deconstructive in a Derridian sense, a codified procedure of amendment, the decision can be taken by both, elected and unelected bodies.

Even that the dominant view,²² considers that judicial invalidation of constitutional amendments rests on democratic foundations, the tensions with the principle of Democracy are obvious since the landmark case *Marbury v. Madison*, as Jefferson already pointed out and has given rise to much debate and caused rivers of ink to flow.

Richard Albert starts his account on this topic by summarising Yaniv Roznai's "contractual" theory, where the "people authorises" the constituted powers, to act in her name. It follows by remarking that according to another understanding of constitutional change, the doctrine of unconstitutional amendment denies democratic choice to reformers and the people.²³ Then, Albert takes a kind of Pontius Pilate's position: "*whether democracy demands the doctrine of unconstitutional amendment depends on one's view of what democracy requires*":²⁴ Certainly, "democracy" is a concept that has had multiple meanings throughout history. Today it is still a vague concept. Democracy can be understood as a principle, as a political orientation of those who favour government by the people. Democracy appears to mean popular, political self-government - the

²² ALBERT, Richard. **Constitutional Amendments: Making, Changing and Breaking Constitutions**. New York: Oxford Univ. Press, 2019. p. 217.

²³ ALBERT, Richard. **Constitutional Amendments: Making, Changing and Breaking Constitutions**. New York: Oxford Univ. Press, 2019. p. 221.

²⁴ ALBERT, Richard. **Constitutional Amendments: Making, Changing and Breaking Constitutions**. New York: Oxford Univ. Press, 2019. p. 271.

people of a country deciding for themselves the contents (especially, one would think, the most fateful and fundamental contents) of the laws that organise and regulate their political association.

There is a common observation that constitutionalism and Democracy are inevitably in tension. Democracy seems to require that the current policy judgements of today's majority be implemented, while constitutionalism seems to require that some such judgements be thwarted. Constitutionalism appears to mean the containment of popular political decision making by a basic law, the constitution.

If there is no a link between the people and the constitution the relations become antithetical because the elite deciding in the name of the people becomes a sort of modern oligarchy which consolidates an institutional structure mirroring the socioeconomic classes. Demos and Democracy will be the poor class and constitutionalism and the decider will be represent the economic and politic elites. The antithetical character of these concepts does not exclude the possibility of mediation between them, and this is where constitutional amendments as conceived by Richard Albert in the book shall play an important role.

4. RECONCILIATION

Chapter 4 includes "reconciliation" among the different uses of codified unamendability. This kind of non-amendable constitutional provisions aim to end a conflict between previously conflicting groups. Richard Albert follows by stating: "*unamendability as reconciliation makes peace possible between enemies conferring irrevocable amnesty for prior conduct. The new constitutions of Niger and Ghana granted eternal immunity to the architects, enablers, and executors of these destructive episodes in the life of each country*".²⁵

If this is a normative claim, we need to observe other transitions to Democracy from regimes of horror to have the complete picture. For example, the effects of the lack of transitional justice in Spain causes that after 40 years of the death of the dictator, more than 140.000 persons are disappeared in mass graves without exhumation, trial, reparation or justice. Despite Ghana struck an agreement to create an innovative ceasefire constitution, the constitutionalisation of this kind of amnesty laws and "reconciliation acts" is undemocratic and in some cases breaches international humanitarian law. The unamendable form of these dispositions deters any transitional justice or reparation from the superior legal norm of the country.

Legislators are well-aware that this amnesty dispositions breach the principle of universal jurisdiction, the enforcement of *jus cogens* and *erga omnes* obligations and

²⁵ ALBERT, Richard. **Constitutional Amendments: Making, Changing and Breaking Constitutions**. New York: Oxford Univ. Press, 2019. p. 143.

prevent the prosecution of crimes against humanity, war crimes, genocide, and torture. In this sense, the Rome statute (signed and ratified by Ghana) grants the international foundation that strengthens the domestic enactment of acts and the engagement of the judiciary to handle cases that offend humanity in general irrespective of their location or residence.

Therefore, there is not only a democratic requirement of unamendability; there are also human rights and human dignity requirements to be fulfilled.²⁶ In Ghana, the constitutional unamendability has caused a legal loophole making the country potential safe havens for fugitives suspected of war crime and crimes against humanity (Amnesty International). Ghana, as in Spain, can face a legal paradox, genocide can be prosecuted except if it was committed by a Ghanaian.

The book proposes alternatives to codified unamendability consisting in “*offer its expressive benefits without democratic burdens....codifying an escalating structure of restricted amendment pathways to make some constitutional rules harder to amend than others yet without insulating any of them from formal change*”.²⁷ This escalating structure may incorporate several degrees of amendment difficulty designating different thresholds (the highest threshold applied to the essential features of the constitution) and including the participation (in composed or federal states) of the subnational legislatures. As Richard Albert states, this escalate structure offers the benefits of unamendability while no extinguishing the power of amendment.²⁸

Albert’s proposal is coherent with the democratic principle because the organs in charge to decide on the amendability of a constitutional disposition are representatives elected by the people. However, if the constitutional control stills been attributed to the judiciary, a non-elected body will continue to have the power of decision on the formal and material elements of the norm (including its amendability).

The escalating structure erases the symbolism and political connotations that the status of unamendability involves. Legislators defining as “unamendable” a constitutional principle or disposition aim to determinate a concrete political and legal behaviour of citizens and public officers. In some of the cases, constitutional unamendability is the first stone of political culture and constitutional identity principle. Take the principle of human dignity in Germany as an example of this. The state needs the coercion that the declaration of unamendability implies to impose concrete social and political

²⁶ ALBERT, Richard. **Constitutional Amendments: Making, Changing and Breaking Constitutions**. New York: Oxford Univ. Press, 2019. p. 198-202.

²⁷ ALBERT, Richard. **Constitutional Amendments: Making, Changing and Breaking Constitutions**. New York: Oxford Univ. Press, 2019. p. 201.

²⁸ ALBERT, Richard. **Constitutional Amendments: Making, Changing and Breaking Constitutions**. New York: Oxford Univ. Press, 2019. p. 202.

behaviour. It is a crude act of sovereignty, dominion and legal rationalisation of the real constituent power and not the figurative one.

With his proposal I wonder whether Richard Albert accepts a sort of constructive unamendability for the essential features of the constitution, *“a constitutional norm is constructively unamendable when the codified threshold required to amend it are so one-rous that reformers cannot realistically satisfy the standard requiring reformers to perform impossible heroics to successful amend the constitution”*²⁹

Do democratic constitutional systems necessarily need *non-amendable dispositions* to protect their meta-constitutional values, principles and identity? If Albert believes so, no escalating structure is required. If the unamendability is to protect the essential requirements for a democratic state (as in the case of the Czech Republic), we are in front of a democratic paradox, if there is a democratic agreement on these essential requirements.

5. CONSTITUTIONAL MOMENTS, EXTRACONSTITUTIONAL AND POPULAR AMENDMENTS

The introduction of the book defines the theory of Constitutional Moments of Bruce Ackerman comparing it with the basic structure doctrine of the Indian Supreme Court. Richard Albert considers that these theories resemble, both have altered how the constitution is changed, and when we recognise a change as valid. He contends correctly that: *“a constitutional moment is not just any profound transformation in constitutional meaning... it is a precedential change to formal amendment rules without a formal amendment. At bottom, a constitutional moment is a successful reconfiguration of the process and political consensus required to legitimate a constitutional change”*. Albert then remarks the *powerful implication that the theory has retelling that codified rules of change can themselves be changed without a corresponding recodification*³⁰

The theory of constitutional moments deserves more attention when talking about constitutional amendments. Despite I believe that the name “constitutional moments” is not accurate, because Ackerman defines these “moments” as processes that happen progressively and not in a concrete instant.

As described by Ackerman, constitutional moments occur very rarely (only three times in the history of the U.S), at times when “We the People” speak using extraconstitutional means to make fundamental changes in the constitution. The fact that they are “extraconstitutional” and “popular” at origin is also remarkable and transcendent to the

²⁹ ALBERT, Richard. **Constitutional Amendments: Making, Changing and Breaking Constitutions**. New York: Oxford Univ. Press, 2019. p. 158-159.

³⁰ ALBERT, Richard. **Constitutional Amendments: Making, Changing and Breaking Constitutions**. New York: Oxford Univ. Press, 2019. p. 22.

relations of constitutional amendments and Democracy. The relevance is evident because the initiator of the constitutional change is the people themselves, and it shows, that there are extraconstitutional ways to amend the constitution; without the need to follow the legal processual formalities and even the material limitation.

Constitutional moments are characterised by the fact that an unusually high number of citizens are convinced of the seriousness of the matter under discussion (far greater than in the case of decisions to be taken in normal times), by the fact that all citizens have the opportunity to express their views on the question, and finally by the fact that a majority supports a specific way of solving the question.³¹

Richard Albert's explanation of these particular moments lacks an important element, the epistemological relation that the constitutional moments have with the normal politics. Ackerman defines both concepts in a dialogical way; we cannot conceive a constitutional moment without normal politics. As we cannot understand the definition of constitutional dismemberment deprived of constitutional amendments. The distinction between normal and constitutional moments turns out to be mapped onto each other.

In normal politics, we include the everyday decisions taken by the government; there is no debate or popular mobilisation. The electorate entrusts the management of legal matters to the government, and the government, legitimated by this mandate, takes the decisions that it believes most appropriate. In normal politics, a "united" population allows democratically. Normal moments are managed by elected representatives, while constitutional moments are managed by the people; normal politics are not particularly reflective, whereas constitutional politics are; normal politics involve the pluralist pursuit of group interests, while constitutional politics involve principles and the common good.³²

A constitutional moment also plays a role in altering the framework in which normal politics develop: That is, constitutional moments not only differ from the periods of normality that precede and follow them but must also ensure that the two phases of normal politics, before and afterwards, are different. Even that constitutional moments are infrequent, occurring only at key political moments; they have long-lasting constitutional effects (even though the constitutional moment is only temporary) and, most importantly for the present paper, the citizens who aim to effect a constitutional transformation act directly.

For Ackerman, we should treat normal moments—that is, the situation in which the people decide to withdraw from politics—with the greatest respect. The people delegate power to their representatives, who may be substituted through the appropriate

³¹ See ACKERMAN, Bruce. **We the people Foundations**. Cambridge: Harvard University Press, 1995.

³² HERZOG, Donald J. Democratic Credentials. **Ethics**, vol. 104, n. 3, p. 467-479, 1994.

democratic procedures. Therefore, normal politics is as important as constitutional politics for the stability and necessary continuity that every legal system needs. As noted above, the purpose of the constitutional moment is to affect a specific normal moment in a direct way and to produce a different new normal moment.

The theory and experience of constitutional and normal moments should be studied when proposing a constitutional amendment theory, which stimulates a democratic role in the process of constitutional change. Since in this theory, citizens have direct access to the promulgation of the fundamental laws of their state, without intermediaries.

However, the study of how “the people” act directly in constitutional amendments should be adapted within the types of amendments categorised in the book. This differentiation will help us to understand that the dialogue among citizens will vary according to the type of amendment, the political context, time and society.

6. THE PEOPLE AND THE LIMITS OF THE *POUVOIR CONSTITUANT DÉRIVÉ* IN RELATION TO CONSTITUTIONAL AMENDMENTS AND DISMEMBERMENTS

One of the most important contributions of Richard Albert’s book to constitutional doctrine is his distinction between constitutional amendments and constitutional dismemberments. The difference is structured in four techniques, procedural, narrow textual approach (positivist) and consent-based approach. The notion of dismemberment is a precious doctrinal response to a phenomenon that had not a theoretical autonomous accommodation, but it happened the *de facto*.

A constitutional change targeting the essential characteristics of the constitution, the constitutional identity principles, or to destroy the constitutional foundation cannot be considered as a simple amendment. The distinction provides a theoretical response to a phenomenon that differs from constitutional changes because it affects the fundamental ontology of the constitution, its Being.³³

The chapter grounds the distinction of amendment and dismemberment from Carl Schmitt’s theory of constitutional change, and the difference between *pouvoir constituant* (constituent power) and *pouvoir constitué* (constituted power) of Joseph Sieyès. Albert follows Sieyès’ hierarchical division of labour between the people, as principals, and their agent representatives in government. The superior group is the constituent power referring to the body of “people” (as constitutional fictional construction) in whom supreme power resides. The inferior group is the constituted power as the

³³ HEIDEGGER, Martin. **Sein und Zeit**. Berlin: De Gruyter, 2015.

institutions a constitution creates or regulates to carry out the duties and discretionary authority delegated by the people.³⁴

The distinction between amendments and dismemberments is democratically relevant due to its theoretical relation with the constituent power, which has been defined as the truth of modern Democracy³⁵ or the juristic expression of the democratic impetus.³⁶

Can we consider democratically legitimate a constitutional amendment? What about a constitutional dismemberment? Richard Albert answers these questions (not explicitly) *a contrario sensu* by stating: “no constitution can properly be formed by a constituted power; it must be created- and understood to have been created – by the exercise of constituent power, which is to say by the people themselves.”³⁷

Therefore, theoretically no constitution can be dismantled, destroyed (that is dismembered) by a constituted power, only the exercise of constituent power, by the people themselves, can do so. This interpretation follows the words of the Declaration of Independence of the U.S.: “*whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government*” but on the Federal Constitution. This is an excellent point that forces a democratic role in constitutional control. A role that can be exercised directly through referenda, popular consultations or constitutional crowdsourcing.

Richard’s theoretical explanation does not mention the classical distinction within the constituent power (*pouvoir constituant originaire* and *pouvoir constituant dérivé*) that it has been used in order to “democratically legitimise” the role of constitutional/supreme courts as exclusive guardians of the constitution. The “original constituent power” does not derive its legitimacy from a pre-existing legal norm; it is in terms of Kelsen, the power that creates the basic norm without legal constraints.³⁸ The “derived constituent power” is related to the amendment of the constitution, it must respect the procedure, and material constraints imposed by the constitution. Nevertheless, it stills been a constituent power, and therefore it can legitimately dismember the constitution.

These theories need to be updated to the new technological era, where e-democracy offers a new range of possibilities to implement and improve direct Democracy in the realm of the constituent power. We have observed (Iceland, Chile, Colombia,

³⁴ ALBERT, Richard. **Constitutional Amendments: Making, Changing and Breaking Constitutions**. New York: Oxford Univ. Press, 2019. p. 72.

³⁵ KALYVAS, Andreas. Constituent Power. In: BERSTEIN, Jay M.; OPHIR, Adi; STOLER, Ann Laura (eds.). **Political Concepts, a Critical Lexicon**. New York: Fordham University Press. Available at: <<https://www.politicalconcepts.org/constituentpower/>>.

³⁶ See LOUGHLIN, Martin. **The Idea of Public Law**. Oxford: Oxford University Press, 2004.

³⁷ ALBERT, Richard. **Constitutional Amendments: Making, Changing and Breaking Constitutions**. New York: Oxford Univ. Press, 2019. p. 72.

³⁸ KELSEN, Hans. **The Pure Theory of Law**. Clark: The Lawbook Exchange, 2015.

Catalonia, Ireland) the first experiences of people acting in the original constituent power directly. These experiences have overcome the limits and constraints of an imposed fiction supported by several theories that excluded the people as effective sovereign. From the “contractualism” (from Rousseau to Bell, Gaus), “consensual acceptance” (From Hume to Barnett), to the ‘rule of recognition’ (Hart, Green, Raz, Kutz). The truth modern democracy may now end with the invisibility of the people and fulfil the eternal promise of the modern constituent power, to make the people as-the-governed active participants in the shaping and ruling of political systems, and constitutional charters.³⁹

Whether the concept of constituent power is a sociological concept, neither moral nor legal it is contested. However, Loughlin locates the constituent power on the boundaries of legal knowledge, whose meaning is bound up with deeper disputes concerning the nature of legal, political and constitutional ordering.⁴⁰ Kalyvas and Nootens define the concept as political, due to its conceptual articulation with the concept of Democracy.⁴¹ Arato links the concept with other political notions (social contract, sovereignty, the people as a whole and the separation of powers).⁴²

The debate on the nature of the constituent power is not merely theoretical. The point to establish a normative and not sociological concept is to legitimate legal change that cannot be legitimated with reference to existing legal norms. If the concept of constituent power is normative and justificatory, a constitutional dismemberment will be legitimate if it follows the legal processes (positivist approach). On the other hand, if it is sociological, the legitimization can be *alegal*, in a constitutional democracy, democratically.

7. CONCLUSION

Solon, a founder of Athenian Democracy, was an statesman, poet and legislator that governed Athens in a period of enormous social conflicts. The Solonian Constitution (politeia) introduced several measures to growth popular sovereignty, such as the cancellation of mortgages and indebtedness of the landholders’ citizens; all debt-slaves

³⁹ NOOTENS, Geneviève. Constituent power and people-as-the-governed: About the ‘invisible’ people of political and legal theory. *Global Constitutionalism*, vol. 4, n. 2, p. 137-156, 2015.

⁴⁰ LOUGHLIN, Martin. *The Idea of Public Law*. Oxford: Oxford University Press, 2004.

⁴¹ See KALYVAS, Andreas. Constituent Power. In: BERSTEIN, Jay M.; OPHIR, Adi; STOLER, Ann Laura (eds.). *Political Concepts, a Critical Lexicon*. New York: Fordham University Press. Available at: <<https://www.politicalconcepts.org/constituentpower/>>; NOOTENS, Geneviève. Constituent power and people-as-the-governed: About the ‘invisible’ people of political and legal theory. *Global Constitutionalism*, vol. 4, n. 2, p. 137-156, 2015.

⁴² ARATO, Andrew. *The Adventures of the Constituent Power, beyond Revolutions?* Cambridge: Cambridge University Press, 2017.

were freed, he confirmed of the *Ekklesia* as source of all legislative, executive and judicial power, and opened the membership of the law courts to all.⁴³

After ruling and reforming Athens, Solon travelled abroad for ten years, in a self-imposed exile visiting Egypt, Cyprus and Lydia. When he returned to Athens, he found a very different political situation; he could not recognise his city because of the political changes and upheavals that occurred. Some of the democratic measures that Solon introduced in the constitution were amended by the Jurors, taking advantage of the constitutional flexibility and the vague language of Athenian statutes.⁴⁴ The Athenian Constitution was an unentrenched written constitution because the body of standing laws could be amended at any time.

Despite Richard Albert states that it is a modern practice, political and constitutional amendments are old as constitutions (codified and uncoded) and political systems. Amendments and changes are intrinsic and unavoidable features of law. Law and constitutions are living documents and codified rules of change and formal amendments are guarantees and safeguards of legal certainty and the rule of law. Albert with this book, as he aimed, brings formal amendment back to centre of the field of constitutional change.

Multiple elements of his work are going to condition the constitutional analysis on constitutional amendments. His distinction between amendments and dismemberment fills a doctrinal loophole, which exists because of the widespread use of a concept (constitutional amendment). As Richard Albert claims the phenomenon of dismemberment has a different essence and transcendence, it is not a “mere” constitutional mutation but a make or a break that deserves an autonomous concept. In this sense, the cases of Making and Breaking of the title of the book may be dismemberments.

Albert’s book is a comparative constitutional law tour de force, which deals mainly with constitutional change and control, but not only. Throughout this epistemological distinction, Richard convincingly opens the door to an approach of two domains (constitutionalism and Democracy) that are inevitably in tension. His proposal provides visibility to the people in the domain of constitutional change and helps to overcome an ancient scepticism on law, Democracy and a possible symbiotic coexistence.

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⁴³ ARISTOTLE. **The Politics and the Constitution of Athens**. Cambridge: Cambridge University Press, 1996.

⁴⁴ ABAT NINET, Antoni. **Constitutional Violence, Legitimacy, Democracy and Human Rights**. Edinburgh University Press, 2012.

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Constitutional amendments' theory and troubles at supranational level: Constitutional change in the EU from the perspective of Richard Albert's analysis

Teoria das emendas constitucionais e problemas a nível supranacional: alteração constitucional nos EUA a partir da perspectiva de análise de Richard Albert

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Abstract

Richard Albert's book offers a crucial systematization of constitutional amendments, their forms, procedures and scope. In doing so, it provides important insights on the theory and the practice of constitutional amendment design, the difficulty they face and the varieties of unamendability, amongst other things. This contribution seeks to apply Richard Albert's analysis to the case of the European Union, where the existence of a fully-fledged Constitution has long been contested. It claims that this analytical framework can help to better understand the functioning of EU "constitutional amendments", i.e. Treaty revisions, and their limits, in a context where they have remained substantially understudied.

Keywords: constitutional amendments; European Union; European Treaty revisions; unamendability; overcostitucionalization.

Resumo

O livro de Richard Albert oferece uma sistematização crucial das emendas constitucionais, suas formas, procedimentos e escopo. Ao fazer isso, são previstos importantes insights na teoria e na prática do desenho das emendas constitucionais, as dificuldades que encontram, as variações de inamendabilidade, entre outras coisas. Esta contribuição busca aplicar a análise de Richard Albert para o caso da União Europeia, onde a existência de uma Constituição integral tem sido contestada. Esta análise pode ajudar no melhor entendimento das emendas constitucionais da UE, ou seja, das revisões de Tratados de seus limites, num contexto em que essas não têm sido suficientemente estudadas.

Palavras-chave: emendas constitucionais; União Europeia; revisões de Tratados Europeus; inamendabilidade; superconstitucionalização.

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1. Introduction; **2.** The comparability of the EU “Constitution”; **3.** The fragmented constitutional constellation of the EU; **3.1.** The “overconstituzionalization” of EU law; **3.2.** Norms that are constitutional in nature but are not part of EU primary law; **4.** EU “constitutional” amendment procedures and “dismemberments”; **5.** Constitutional unamendability in EU law; **6.** References.

1. INTRODUCTION

If and to what extent can Richard Albert’s book on constitutional amendments provide the ground for assessing and critically review “constitutional amendments” procedures and practice at European Union (EU) level? This contribution argues that the analysis offered by this book, both from a theoretical-conceptual perspective and in terms of concrete choices of forms and design of constitutional amendments’ procedures, sheds lights on the weaknesses and pitfalls on how EU law has evolved so far and on the potential direction to take. The topic has recently triggered once again a lively academic debate, on the problem of the overconstituzionalization of EU rules and on the difficulty to revise the Treaties with a view to face the multiple crises the EU is experiencing.

By drawing on the extensive body of scholarship on the nature of the EU and on its comparability with other entities in the international community, this contribution first justifies why it is worth exploring the EU constellation through the lens of a study on constitutional amendments that primarily – though not exclusively¹ – refers to States. Second, the contribution explores how concepts devised or arguments elaborated in Richard Albert’s monograph – including constitutional dismemberment, amendment difficulty and its fallacy and variations of unamendability – apply to EU constitutional changes and help to better understand the legitimacy problems surrounding it.

2. THE COMPARABILITY OF THE EU “CONSTITUTION”

Perhaps there is no other academic debate in EU legal studies that has triggered, directly or indirectly, equal share of scholarly attention than the discussion on the constitutional nature of the EU. The reflections on its democratic nature, on sovereignty problems and powers conferred, on the autonomy of EU law, on the Peoples v. the People of Europe dichotomy can all ultimately traced back to “the” big question: does the EU have a Constitution?

As early as in 1986 the European Court of Justice answered positively to this question stating that “the European Economic Community is a Community based on

¹ ALBERT, Richard. **Constitutional Amendments**: Making, Breaking and Changing Constitutions. Oxford: Oxford University Press, 2019, p. 5, 96, 234, 319.

the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the *basic constitutional Charter, the Treaty* (emphasis added).² However, the issue is a little bit more complex as the EU has evolved.

Indeed, from a purely international law perspective and according to some recent legal philosophical analyses the EU is nothing more than an international organization.³ It does not possess original powers, inherent in its fundamental structures, unlike sovereign entities, but it lives with powers that are conferred through the Treaties (Art. 4 TEU) – the Treaty on the European Union, the Treaty on the functioning of the European Union and the Charter of fundamental rights – and that, thus, could be further expanded but also withdrawn. The today's 27 Member States still remain the “masters of the treaties”. Neither the EU is a State, the entity for which modern Constitutions were first devised. It does possess a territory with external borders and whose geographical reach is vaguely identified with “Europe” by Article 49 TEU.

More questionable is whether the EU finds its legitimacy in a People. Habermas has repeatedly claimed that there is no unified People in the Union, but that the People could be constructed through deliberation and discourse in the wide European public sphere.⁴ The recognition of the European citizenship to all nationals of the Member States since the Maastricht Treaty (1993) and the (ambivalent) case law of the Court of Justice have not supplemented sufficient substance to the construction of the European (cross-border) citizen.⁵ Just a few rights, mainly political rights, are genuinely attached to the European citizens, while most economic and social rights the EU grants are protected for European citizens as well as for third country nationals resident in one of the Member States. Surveys shown that there is little sense of belonging to a European People (though this might not be very different from what happens in some States with highly divided societies).⁶

The last decade in particular has seen the success of Nikolaidis' idea of “demoi-cracy” to describe the Union's system of government: a Union of peoples (plural, as many as the Member States), “understood as both states and citizens, who govern

² European Court of Justice. **Parti écologiste “Les Verts” v. European Parliament**. Case C-294/83, ECR 1986 -01339 (Judgment of the Court of 23 Apr. 1986), para. 23.

³ ELEFThERiADIS, Pavlos. **A Union of Peoples**. Oxford: Oxford University Press, 2020, p. 3 ff.

⁴ HABERMAS, Jürgen. Democracy in Europe: Why the development of the EU into a transnational democracy is necessary and how it is possible. **European Law Journal**, vol. 21, n. 4, p. 546–557, Jul. 2015.

⁵ AZOULAI, Loïc; BARBOU DES PLACES, Ségolène; PATAUT, Etienne (eds.). **Constructing the Person in EU Law: Rights, Roles, Identities**. Oxford: Hart Publishing, 2016.

⁶ O'FLYNN, Ian. **Deliberative Democracy and Divided Societies**. Edinburgh: Edinburgh University Press, 2006, p. 32 ff.

together but not as one”⁷ Controversial as it can be, the “demoicratic” idea reflects a compound constitutional structure where institutions representing the Member States through their governments, the Council and the European Council, coexist with a Parliament directly elected by the peoples(s), through an electoral process that is partly regulated by EU law and partly by domestic law.⁸ In addition to this, there are technical bodies, exercising mainly, though not only, executive powers, like the European Commission and the European Central Bank (ECB), who represent the supranational common interests and whose legitimacy is based on their technical expertise. In relation to them, democratic legitimation is either absent – in the case of the ECB strong forms of democratic accountability could be even dangerous for the fulfillment of its independent mandate – or weak, although the process of appointment of the Commission has been more evidently linked to the European Parliament elections since 2009 (Article 17 TEU). “The lack of the People’s argument”, however, does not appear as a very convincing objection to deny a constitutional status (modelled around the State conception) to the EU. Comparative federalism, at least, provide several examples of multinational and ethnically divided States, where it is impossible to identify a unified People or where the idea of a People is constructed over decades or centuries and certainly does not predate the specific legal system.⁹

When looking at the third and last constitutive element of a State, according to Jellinek,¹⁰ sovereignty, it appears at first that it is missing at the EU supranational level. The higher law of the European Union – the Treaties and all the provisions having a primary status – is made and changed through complex procedures that requires the unanimity of the Member States (Article 48 TEU). At present, both the ordinary and the simplified revision procedures set as a requirement the unanimity of the Member States to let a Treaty change enter into force (see further section 4). However, it has been pointed out that once the rules are set in the Treaties, EU law tends to develop autonomously from the Member States and this element would be a sign of a *de facto* sovereignty conquered by the EU.¹¹ The real engine of the European integration, the Court of Justice, from the very beginning has devised structural principles governing the relationship between national law and EU law, like the principles of primacy and

⁷ NIKOLAÏDIS, Kalypso. European Democracy and Its Crisis. *Journal of Common Market Studies*, vol. 51, n. 2, p. 351-369, mar. 2013.

⁸ See the European Electoral Act of 1976, as subsequently amended. For an analysis of national legislation on the European elections, see: VIOLA, Donatella Maria (ed.). *Routledge Handbook of European Elections*. Abingdon: Routledge, 2015.

⁹ Recent scholarly contributions have also tried to deconstruct the idea of the “sovereign People” and of “peoplehood” as the precondition of the exercise of sovereign powers. See: OKLOPCIC, Zoran. *Beyond the People: Social Imaginary and Constituent Imagination*. Oxford: Oxford University Press, 2018, p. 44 ff.

¹⁰ JELLINEK, George. *Allgemeine Staatslehre*. 3. ed. Berlin: Häring, 1914, p. 180-181.

¹¹ GRIMM, Dieter. *Sovereignty: The Origin and Future of a Political and Legal Concept*. New York: Columbia University Press, 2015, p. 99 ff.

direct effect and the decentralized enforcement of EU law,¹² making national judges and administrations responsible for that, and thereby ensuring an autonomy of action that could not be originally foreseen. Relatedly, although the discourse on sovereignty and constituent power is not perfectly overlapping,¹³ new narratives have been developed in relation to the constituent power in the EU that do not tend to reduce constitution-making in this context merely to the will of the “Masters of the Treaties”, the States¹⁴ but – mostly as an aspiration – emphasize bottom-up participation of citizens, as both national and EU citizens, in the exercise of a *pouvoir constituant mixte*.¹⁵

It is not by chance that the EU is the main point of observation when looking at the notion of post-sovereign constellation.¹⁶ And the Brexit saga, dominated by the mantra of “let’s take back control”, regardless of whether this is really technically possible as the difficulties in achieving first the withdrawal and now an agreement on the future UK-EU partnership show, confirms that the level of European integration reached fundamentally questions both the idea of (fully) sovereign Nation States and of a non-sovereign Union.

Many scholars have highlighted the similarities between the EU and other federal experiences or federalizing processes. Robert Schütze has emphasized the similarities between the today’s EU and the US Confederation before the adoption of the 1787 Constitution.¹⁷ Others have also reflected on the many point of contacts between the EU and Canada¹⁸ or the EU and Switzerland.¹⁹

The deepening of the European integration process, the adoption of a Charter of fundamental rights and a gradual clarification of the EU interinstitutional balance²⁰ have led most scholars to agree that the EU does have a Constitution, well beyond the

¹² European Court of Justice. **Van Gend en Loos v. Nederlandse Administratie der Belastingen**. Case 26/62 (Judgment of the Court of 5 Feb. 1963); European Court of Justice. **Costa v. Enel**. Case 6/64 (Judgment of the Court of 15 Jul. 1964); European Court of Justice. **Amministrazione delle Finanze dello Stato v Simmenthal SpA**. Case 106/77 (Judgment of the Court of 9 Mar. 1978).

¹³ See CÔLON-RÍOS, Joel. **Constituent Power and the Law**. Oxford: Oxford University Press, 2020, p. 263 ff. showing that constitution-making powers can be subject to the authority and the indications set by the “sovereign”.

¹⁴ PATBERG, Markus. Challenging the masters of the treaties: Emerging narratives of constituent power in the European Union. **Global Constitutionalism**, vol. 7, n. 2, p. 263-293, Jul. 2018.

¹⁵ PATBERG, Markus. A systematic justification for the EU’s *pouvoir constituant mixte*: Principles of constitutional politics in supranational polities. **European Law Journal**, vol. 23, n. 6, p. 451-463, Nov. 2017.

¹⁶ See: MENÉNDEZ, Agustín José; FOSSUM, John Erik (eds.). **Law and Democracy in Neil MacCormick’s Legal and Political Theory**. New York: Springer, 2011.

¹⁷ SCHÜTZE, Robert. **From Dual to Cooperative Federalism: The Changing Structure of European Law**. Oxford: Oxford University Press, 2009, chapter 1.

¹⁸ VERDUN, Amie. The Federal Features of the EU: Lessons from Canada. **Politics and Governance**, vol. 4, n. 3, p. 100-110, Aug. 2016, p. 100 ff..

¹⁹ FABBRINI, Sergio. **Which European Union?** Europe after the Euro Crisis. Cambridge: Cambridge University Press, 2015, p. 219-256.

²⁰ Since the Court of Justice’s decision in the *Meroni* case, C-9/56, of 13 June 1958.

State vs. non-State rhetoric, although it is a problematic one.²¹ The Constitution of the EU is fragmented. In addition to the Treaty provisions, it is also fed by the Constitutions of the Member States and anchored to international law as confirmed by the reference, respectively, to the common constitutional traditions and to the ECHR in Article 6.3 TEU makes clear. Moreover, the EU constitutional system heavily relies on domestic institutions for its implementation. It is a Constitution of “bits and pieces”²² and the level of fidelity, loyalty and identification that such a fundamental act is normally expected to trigger is rather low or, better, uneven amongst EU citizens, each projecting on that text national aspirations, interests, culture and history.²³ Nevertheless the Constitution of Europe contains the fundamental elements that according to Article 16 of the 1789 French Declaration of the right of a man and citizen every modern Constitution shall entail: separation of powers, both horizontally (amongst the EU institutions, though this is put in terms of interinstitutional balance) and vertically (in between the EU and the Member States), and the protection of fundamental rights.

While the idea of a Constitution for the EU goes back at least to the 1984 Altiero Spinelli's (failed) project of a Constitutional Treaty,²⁴ it is with the Convention who drafted the Treaty establishing a Constitution for Europe that the debate has been revitalized despite the adverse fate of that Treaty.²⁵

3. THE FRAGMENTED CONSTITUTIONAL CONSTELLATION OF THE EU

EU primary law - what can be equated to EU constitutional law at first sight - is highly fragmented across a variety of sources of law. First of all, the Treaties. The TEU codifies some of the fundamental principles of EU law (the principles of conferral and of loyal cooperation in Art. 4; the principles of subsidiarity and of proportionality in Art.

²¹ See: WEILER, Joseph H.H. **The Constitution of Europe**: “Do the new clothes have an emperor?” and other essays on European integration. Cambridge: Cambridge University Press, 1999.

²² CURTIN, Deirdre. The Constitutional Structure of the Union: A Europe of Bits and Pieces. **Common Market Law Review**, vol. 30, n. 1, p. 17-69, Feb. 1993.

²³ ACKERMAN, Bruce. Three Paths to Constitutionalism – and the Crisis of the European Union. **British Journal of Political Science**, vol. 45, n. 4, p. 705-714, May. 2015, highlights the importance of the cultural dimension when it comes to the problematic EU constitutional pathway. It is problematic especially because it is the result of a convergence and integration process among countries experiencing different pathways in their constitutional transition to democracy.

²⁴ PONZANO, Paolo. The “Spinelli” Treaty of February 1984. Centro di studi sul federalismo - **The Federalist Debate**, vol. XX, n. 3, Nov. 2007. Available at: <<http://www.federalist-debate.org/index.php/component/k2/item/282-the-spinelli-treaty-of-february-1984>>.

²⁵ WEILER, Joseph H.H. On the power of the Word: Europe's constitutional iconography. **International Journal of Constitutional Law**, n. 2 & 3, p. 173-190, May 2005; ELEFThERiADiS, Pavlos. The Idea of a European Constitution. **Oxford Journal of Legal Studies**, vol. 27, n. 1, p. 1-21, Spr. 2007; CRUM, Ben. **Learning from the EU Constitutional Treaty**: Democratic constitutionalization beyond the Nation-State. Abingdon: Routledge, 2011.

5), fixes the composition and the main tasks of the EU institutions, sets the procedures for amending the Treaties (Art. 48) and contains provisions on common foreign and security policy, on the defence policy as well as on social policy, the least integrated areas in EU law.

The TFEU regulates all (the other) EU internal and external policies in great detail and the procedures to be followed and the acts to be adopted in each field. The Charter of fundamental rights is the EU long "bill of rights" codified, first in 1999 in a Convention, proclaimed twice in 2000 and in 2007 (slightly amended), and eventually entered into force in 2009. To some extent the Charter has put into the higher law of the Union the long-standing case law of the Court of Justice, while other rights, especially the articulated catalogue of social rights, has been added; rights that should be given as much as possible an interpretation consistent with the constitutional traditions common to the Member States and with the ECHR and are nevertheless enforceable, in theory, only when they fall under the scope of application of EU law.

In addition to this, also the 37 Protocols annexed to the Treaties form part of EU primary law and their content ranges from the entrenchment of the Statutes of the Court of Justice (no. 3), of the European System of Central Banks and of the ECB (no. 4), to the privileges and the immunities of the EU (no. 7); from the excessive deficit procedure (no. 12) and the convergence criteria (no. 13) to the provisions on the Schengen acquis (no. 19) and the selective enforcement of specific Treaties' provisions to certain countries (nos. 21, 22 and 30); from the system of public broadcasting in the Member States (no. 29) to the imports of petroleum products refined in the Netherlands into the Union (no. 31).

General principles of EU law established by the Court of Justice, even when not codified in the Treaties, like the crucial principle of primacy,²⁶ are part of the primary law, too. That said, the area of law that is primary or, by contrast, that is not, in terms of the hierarchy of the sources of law, is a bit blurred. For example, the European Electoral Act and the Decision on the Union's own resources, like every act to be adopted by unanimity in the Council and approved by every Member State according to the domestic constitutional requirements, seem to have a primary status.²⁷ However, looking at the legal bases for their adoption in the Treaties (in the examples made, Arts. 223 and 311 TFEU), the relevant procedure is described as a special *legislative* procedure. Whether the legislative nature of the procedure affects the rank of the legal source in the hierarchy of EU norms, thereby lowering its status to secondary law, remains to be determined and the Court of Justice was never given an opportunity to reflect on that.

²⁶ At present, outlined just in Declaration n° 17 to the Treaties, which is a political and non-binding act.

²⁷ PICCIRILLI, Giovanni. La clausola di sbarramento per le elezioni europee tra Corte costituzionale e principi comuni a tutti gli Stati membri. *Studium Iuris*, vol. 12, p. 1430-1437, 2019.

Not everyone agrees on the usefulness of the categorization of the EU sources of law along a formal hierarchy of EU norms and for good reasons.²⁸ Indeed, when looking carefully at what is inside and what remains outside EU primary law, one clearly understands that, on the one hand, there are many EU primary law provisions that are not constitutional in substance. On the other hand, there are legal sources which certainly have a constitutional pedigree, but that are not included in the formal EU primary law. This asymmetry between formal constitutional hierarchy and the substantive part of a Constitution is rightly emphasized in Richard Albert's book and it certainly applies to the EU.²⁹ There is an important difference between having a constitutional amendment only in name or, rather, a constitutional amendment in its real meaning. Looking at the confusion present in the Union, Richard Albert's claims about the importance of reconciling procedure and form with substance of constitutional amendments could be fruitfully followed also in the EU, though with some caveats due to the nature of this legal system that will be explained shortly.

3.1. The “overconstituzionalization” of EU law

The legal construction of Europe was effectively channeled from a doctrinal perspective by the “integration through law” project. Conducted under the leadership of Mauro Cappelletti at the European University Institute in Florence in the 1970s and in the 1980s and supported by a wide range of legal academics, Community civil servants and European judges, this project has provided a constitutional vision to the process of European integration solidly grounded by law.³⁰ Law was understood as the main tool through which integration could be constructed, the dominant force giving shape to the common, then, internal market and to its social dimension.³¹ As such there was, and probably, there is still an imbalance in the influence of law as a discipline compared to other social sciences in the European integration. However, how much of this law is constitutional in nature?

²⁸ See the work carried out in the framework of the Convention on the future of Europe and, in particular, LENAERTS, Koen. *How to Simplify the Instruments of the Union*. **The European Convention - Working Group IX**, Working Document 07, 6 Nov. 2002.

²⁹ ALBERT, Richard. **Constitutional Amendments**: Making, Breaking and Changing Constitutions. Oxford: Oxford University Press, 2019, p. 268-271.

³⁰ See, notably, PESCATORE, Pierre. **Le droit de l'intégration. Emergence d'un phénomène nouveau dans les relations Internationales selon l'expérience des Communautés Européennes**. Genève: A.W. Sijthoff, Leiden/Institut Universitaire de Hautes Etudes Internationales, 1972. On the main tenets of that project see now BYBERG, Rebekka. *The History of the Integration Through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe*. **German Law Journal**, vol. 18, n. 6, p. 1531-1556, Nov. 2017.

³¹ VAUCHEZ, Antoine. **L'union par le droit**: L'invention d'un programme institutionnel pour l'Europe. Paris: Sciences Po Les Presses, 2013; AZOULAI, Loïc. “Integration through law” and us. **International Journal of Constitutional Law**, vol. 14, n. 2, p. 449-463, Apr. 2016.

EU policies are heavily regulated, not just by EU legislation (Art. 289 TFEU (Art. 290 TFEU) and by implementing acts (Art. 291 TFEU), the latter comprising by far the greatest part of the legal acts adopted every year in the EU context. This normative hypertrophy is also evident from the Treaties. Combined together the TEU, the TFEU and the Charter (and Protocols) contain more than 500 articles; an impressive number even compared to the Constitution of India, which is well-known for being the longest Constitution in the world. However, as Richard Albert rightly points out in his book, it is not just a matter of quantity.³² Also the quality of the constitutional drafting matters and EU primary law provisions, especially in the TFEU, are very detailed and include many norms – procedural and substantive, with their respective exceptions – that at national level would be contained in ordinary legislation at best. Dieter Grimm has defined this “capture” of ordinary provisions into the EU constitutional texts as the problem of “overconstitutionalization” of the EU.³³ EU Treaties, in other words, are exactly the opposite of how a constitutional text is expected to be drafted, i.e. as an “Incomplete Code”.³⁴ Filling the text of the treaties of provisions that in theory are all but constitutional in their content, on the one hand, is functional as a risk-sharing mechanism: the limited mutual trust amongst the Member States, amplified by multilingualism and by the progressive expansion and deepening of the EU integration process, finds in the “overconstitutionalisation” an effective reassurance tool. Those provisions, indeed, cannot be modified without the agreement of all the contracting parties in principle. To de-constitutionalize them, instead, would mean to open the door to legislation that can be adopted and amended with qualified majorities.³⁵

On the other hand, however, “overconstitutionalization” creates a legitimacy problem because in the case of the EU triggers a de-politicization of the decision-making. Once the discipline of a certain subject-matter is entrenched in the treaties it is almost impossible to modify it, given the Treaty amendment procedures. Due to the “overconstitutionalization”, this resistance to change applies also to issues that would be normally subject – outside the EU – to lower lawmaking but that in the Union are thus *de facto* “immunized” against public pressure and political correction.³⁶ Against this backdrop and the “original sin” of European treaties going beyond the core functions national

³² ALBERT, Richard. **Constitutional Amendments: Making, Breaking and Changing Constitutions**. Oxford: Oxford University Press, 2019, p. 261 ff.

³³ GRIMM, Dieter. The Democratic Costs of Constitutionalisation: The European Case. **European Law Journal**, vol. 21, n. 4, p. 460-473, May. 2015.

³⁴ ALBERT, Richard. **Constitutional Amendments: Making, Breaking and Changing Constitutions**. Oxford: Oxford University Press, 2019, p. 22-24

³⁵ At present qualified majority voting in the Council requests to meet two conditions at the same time: 55 % of EU countries vote in favour representing at least 65 % of the total EU population.

³⁶ GRIMM, Dieter. The Democratic Costs of Constitutionalisation: The European Case. **European Law Journal**, vol. 21, n. 4, p. 460-473, May. 2015, p. 460.

constitutions typically fulfil, it has been suggested that the “de-constitutionalization” of EU law would entail a strengthened role for EU political institutions, in particular the Council and the Parliament, and a different use of the majority rule: both to authorize the selective disapplication of EU norms by Member States in areas covered by simple or qualified majority voting and to stop such a selective disapplication – in case it turns into free riding – by special majorities in the Council and in the European Parliament.³⁷ By playing with the majority rule more flexibility would be ensured.

3.2. Norms that are constitutional in nature but are not part of EU primary law

While the EU treaties are full of provisions that are at odd with the usual contents of domestic Constitutions, there are many EU norms that appears as constitutional in nature – in that they affect the interinstitutional balance, the relationship between the Union and the Member States and well as fundamental rights – but are not entrenched into primary law.

These constitutional norms are, for example, those provided in the interinstitutional agreements between the European Parliament, the Commission and the Council: “common agreement[s]” through which they “make arrangement for their cooperation” and that “may be of a binding nature” (Art. 295 TFEU). The scope of these interinstitutional agreements ranges from joint programming activities, tools for better law-making, transparency and accountability to the citizens³⁸ to the exercise of budgetary powers in the Union.³⁹ While the status of these agreements has never been clarified by the Court of Justice, some have argued that, given their content and the way they are formed (by consolidating existing practices) they amount to “constitutional conventions” in the EU.⁴⁰

In addition to this, there are sources of law like inter se agreements concluded among some or all Member States which are not strictly speaking EU norms and that

³⁷ SCHARPF, Fritz W. De-constitutionalisation and majority rule: A democratic vision for Europe. *European Law Journal*, vol. 23, n. 5, p. 330-332, Nov. 2017.

³⁸ See the Interinstitutional Agreement on Better Law-Making of 13 April 2016, OJEU L123/1, 12.5.2016.

³⁹ See the Interinstitutional Agreement on budgetary discipline, on cooperation in budgetary matters and on sound financial management of 2 December 2013, OJEU C373/1, 20.12.2013 and the Interinstitutional Agreements adopting the Multiannual Financial Framework, the long term (7 year) budget of the EU.

⁴⁰ BEUKERS, Thomas. *Law, Practice and Convention in the Constitution of the European Union*. Amsterdam, 2011. 419 p. Thesis (PhD) - Faculty of Law, University of Amsterdam, p. 201-290; IBRIDO, Renato; LUPO, Nicola. Introduzione. “Forma di governo” e “indirizzo politico”: la discussa applicabilità all’Unione europea. In: IBRIDO, Renato; LUPO, Nicola (eds.). *Dinamiche della forma di governo tra Unione europea e Stati membri*. Bologna, Il Mulino, 2018. ft. 25.

nevertheless constitute a significant part of the European "Constitution".⁴¹ These "quasi-instruments of EU law", as they have been described, define constitutional aspects of the life of the Union. For example, the Schengen Agreement of 1985, subsequently incorporated into EU law in 1997 with the Treaty of Amsterdam, regulates the status of the EU citizens, their free movement across the Member States, and, relatedly it also protects third country nationals once they have entered the EU (in any of the Member States applying the Schengen *acquis*). In 2012 the Treaty on stability, economic coordination and governance in the Economic and Monetary Union (TSCG), signed by all Member States but the UK and the Czech Republic back then,⁴² sets important rules on fiscal discipline for the entire Union and especially for the countries adopting the euro as the single currency. To some extent it designs the "Economic Constitution"⁴³ of the EU without being formally part of it.⁴⁴

By the same token, also national constitutional clauses, more or less directly, shape European constitutional law. On the one hand, national participation in the EU integration process is grounded in the Member States' Constitutions through *ad hoc* clauses in many cases (see Art. 23 of the German Basic Law) or in general clauses authorizing the limitation of the country's sovereignty in favour of international organizations.⁴⁵ Moreover, as Richard Albert points out, drawing on the Spanish case and on new Art. 135 of the national Constitution,⁴⁶ the national fundamental laws are full of references to EU law and, by doing so, they provide a crucial vehicle for the enforcement of the EU Constitution.

On the other hand, the case law of the Court of Justice, first,⁴⁷ and then the Treaty themselves (see now Art. 6 TEU) refer to the constitutional traditions common to the Member States as constitutional standards for the interpretation of EU law. The relationship between EU law and national constitutional law is to a large extent osmotic or,

⁴¹ DE WITTE, Bruno; MARTINELLI, Thibaud. Treaties between EU Member States as Quasi-Instruments of EU Law. In: CREMONA, Marise and KILPATRICK, Claire (eds). **EU Legal Acts: Challenges and Transformations**. Oxford: Oxford University Press, 2018, p. 158-188.

⁴² The Czech Republic subsequently signed this Treaty in 2019, while the UK, as well-know, left the EU on 1 February 2020.

⁴³ See: GERAPETRITIS, George. **New Economic Constitutionalism in Europe**. Oxford: Hart Publishing, 2019.

⁴⁴ Its incorporation into EU law is foreseen by Art. 16 within five years since its entry into force. The deadline has expired already, but no measure has been taken.

⁴⁵ CLAES, Monica. Constitutionalizing Europe at its Source: The 'European Clauses' in the National Constitutions: Evolution and Typology. **Yearbook of European Law**, vol. 24, n. 1, p. 81-125, Nov. 2005.

⁴⁶ ALBERT, Richard. **Constitutional Amendments: Making, Breaking and Changing Constitutions**. Oxford: Oxford University Press, 2019, p. 5.

⁴⁷ Since the Court of Justice famous decision in: European Court of Justice. **Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel**. Case 11/70 (Judgment of the Court of 17 Dec. 1970).

as has been claimed, they shape together a composite constitutional system,⁴⁸ where it is difficult to keep separate the purely domestic and purely supranational elements. Especially when the EU (the Community) was devoid of its own catalogue of fundamental rights the reference to common constitutional traditions has been crucial to “translate” rights protected under domestic Constitution into the European realm.⁴⁹ The long-lasting influence of the “common constitutional traditions” discourse has been confirmed also recently despite the EU enlargement and the success, particularly in some Member States, of the “constitutional identity” narrative, which tends to highlight national specificities rather than transnational commonalities.⁵⁰

The richness of the EU constitutional constellation, also fed by EU sources of law that are not comprised into primary law or by sources that formally do not stem from the Union, helps to clarify why constitutional amendments and unamendability in this supranational context are difficult to be systematized, even from a conceptual level, and why Richard Albert’s book can be inspiring (also) from this perspective.

4. EU “CONSTITUTIONAL” AMENDMENT PROCEDURES AND “DIS-MEMBERMENTS”

To start with, amendments to EU primary law can be mainly catalogued through the “integrative model” articulated by Richard Albert: EU “constitutional amendments” are directly integrated “into the text of the original master text constitution”⁵¹ Once inserted into EU primary law, within the consolidated text of the Treaties, amendments are no longer detectable. There is no reference to when, how and how many times a particular provision has been changed. The only sign of a previous version of a certain treaty article is the indication of the old numbering of that article in brackets. That said the Reform Treaty that brought about the “constitutional amendments”, published on the EU Official Journal, remains there to signify and make available to the public the list of changes that once were adopted, even though it is the consolidated version of the treaties that is regularly consulted and used.

In some respect also the “disaggregative model” of constitutional amendments, which do not appear in a single codified constitutional document and referred by

⁴⁸ BESSELINK, Leonard F.M. **A Composite European Constitution**. Amsterdam: Europa Publishing, 2007.

⁴⁹ See, notably, the decision of the Court of Justice in: European Court of Justice. **Internationale Handelsgesellschaft mbH v. Einfuhr - und Vorratsstelle für Getreide und Futtermittel**. Case 36/02 (Judgment of the Court of 14 Oct. 2004), where the case was solved drawing on the German Basic Law and on the protection of human dignity, a right shared by all national constitutions of the Member States.

⁵⁰ FICHERA, Massimo; POLLICINO, Oreste. The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?. **German Law Journal**, vol. 20, n. 8, p. 1097-1118, Dec. 2019.

⁵¹ ALBERT, Richard. **Constitutional Amendments: Making, Breaking and Changing Constitutions**. Oxford: Oxford University Press, 2019, p. 236.

Richard Albert mainly to the Constitutions of Israel, New Zealand and UK,⁵² may come into play in the EU context. As described in section 3, within the varied constellation of EU “constitutional norms”, in addition to Treaty provisions, intergovernmental agreements, constitutional conventions, codes of conduct and legislative acts of constitutional significance (like the Electoral Act) can be included. Therefore, also the modification of one of these sources can be considered as a “disaggregative” constitutional change.

Since the entry into force of the Treaty of Lisbon, in 2009, two types of procedures are envisaged to reform the Treaties (Art. 48 TEU). The ordinary revision procedure, “enriched” compared to the pre-Lisbon version, foresees as the starting point a decision of the European Council, by simple majority and after having consulted the Parliament and the Commission. Within the ordinary revision procedure two options are available: the default option is the summoning by the President of the European Council of a Convention “composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission” while the ECB can be consulted if the proposed changes affect monetary policy (Art. 48, par. 3 TEU). In theory this Convention is only asked to examine the proposed amendments and to adopt *by consensus* a recommendation to a conference of representatives of national governments that determines “by common accord the amendments to be made to the Treaties” (Art. 48, par. 4 TEU). The subordinated option, instead, allows the European Council, by simple majority and with the consent of the European Parliament, to waive the requirement to establish a Convention whenever the scope of the change does not justify the setting up of this *ad hoc* body, which is costly and makes the process longer but is expected to grant a more solid democratic underpinning to the Treaty change. In these circumstances, it is the European Council that defines the mandate of the intergovernmental conference.

Interestingly, none of these ordinary procedures has been used since 2009. The procedure leading to the setting up of the Convention, although Art. 48 TEU does not clarify with which proportion the different institutions involved have to be represented, is a codification of the practice followed when the Charter of fundamental rights and the Constitutional Treaty were drafted. On those occasions, as to strengthen the democratic commitment of the constitution-making exercise, members of parliaments, especially from national parliaments, were in a majority.⁵³ Moreover, the Conventions worked for more than one year each, in public and in a transparent manner, “as if” they were to draft and agree on the Treaty amendments nor just to issue recommendations

⁵² ALBERT, Richard. **Constitutional Amendments: Making, Breaking and Changing Constitutions**. Oxford: Oxford University Press, 2019, p. 234

⁵³ MANZELLA, Andrea. The convention: a new model for constitution-making. In: Europeos (ed.). **Institutional reforms in the European Union**. Rome: Europeos, 2002. p. 159-182.

to the intergovernmental conferences, which found themselves with tied hands when deciding on the Conventions' proposals.⁵⁴

While the history of the European integration has known just two Conventions, both organized before they were codified as the ordinary method for Treaty changes, all treaty revisions have featured the crucial work and deliberation of an intergovernmental conference, working behind closed doors. The secrecy of the constitution-making process, particularly with the gradual increase of the Member States, was key to make the process smooth. Indeed, intergovernmental conferences have normally ensured a deal on Treaty amendments within a few months, in preparation of the much longer ratification stage.

In fact, what has proved to be very cumbersome in the process of adoption of EU "constitutional amendments" is the second stage, the national one, after the reform treaty has been signed: "The amendments shall enter into force after being ratified by *all the Member States* in accordance with their respective constitutional requirements (Art. 48, par 4 TEU)." As has been the case during the "season" of Treaty changes, from the Single European Act of 1987 until the Lisbon Treaty, the failure – with the Constitutional Treaty – or the delay in the entry into force of Treaty revisions was due to the national constitutional requirements set in combination with the unanimity rule.⁵⁵ Referendums – mandatory or optional – held in some Member States, namely Denmark, France, Ireland, the Netherlands have seriously challenged the possibility to achieve a successful ratification in these countries, with implications for the whole EU. By the same token, the judgments of some Constitutional and Supreme Courts on the *ex ante* review of the constitutionality of the Treaty revisions or of the domestic norms for their ratification and implementation have been awaited with some concerns.⁵⁶ In the event of a conflict, either the country cannot ratify the treaty change, thereby leading to an European impasse, or the national Constitution has to be changed (as it regularly occurs in Ireland).

⁵⁴ On the Convention method, see DELOCHE-GAUDEZ, Florence. La Convention européenne sur l'avenir de l'Europe: ruptures et continuités. In: AMATO, Giuliano; BRIBOSIA, Emmanuelle and DE WITTE, Bruno (eds.), **Genèse et destinée de la Constitution européenne**: commentaire du traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir. Bruxelles: Bruylant, 2007. p. 47-85 and PINELLI, Cesare. The Convention Method. In: LUPO, Nicola; FASONE, Cristina (eds.), **Interparliamentary Cooperation in the Composite European Constitution**. Oxford-Portland: Hart Publishing, 2016. p. 57-72. Changes were nevertheless introduced by the intergovernmental conferences both on the Charter and on the constitutional Treaty.

⁵⁵ Although Article 48, para 5 TEU leaves the door open to bypass the unanimity requirement under the ordinary revision procedure, potentially: "If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council". See: CLOSA, Carlos. **The Politics of Ratification of EU Treaties**. Abingdon: Routledge, 2013, p. 30-39.

⁵⁶ German Constitutional Tribunal, Second Senate. **Judgment on the Treaty of Lisbon and the related acts of approval and implementation**. 2 BvE 2/08 (Judgment of the Court of 30 Jun. 2009).

This problem can be bypassed, should one of the simplified revision procedures, introduced by the Lisbon Treaty, be followed. Under Art. 48, par. 6 TEU Part Three of the TFEU, on the EU internal policies and actions, can be modified in its entirety or just some clauses. Such a procedure, however, cannot entail an increase in the Union's competences (unlike the ordinary revision procedure). In this case, the Treaty amendment is agreed directly in the European Council by unanimity, after consulting the Parliament and the Council as well as the ECB, if the monetary policy is concerned. The European Council decision enters into force only if approved by the Member States according to national constitutional requirements. By not mentioning the ratification, but just the approval, Art. 48, par. 6 TEU was thought of making the entry into force smoother than with the ordinary revision procedure. However, the only case when this procedure was used to date, in 2011, to modify Art. 136 TFEU and create a permanent fund, the European Stability Mechanism (ESM) financed by national budgets to rescue Eurozone countries in need of financial assistance, has shown that this expectation was wrong. The approval of the European Council Decision 2011/199/EU has been challenged in front of domestic courts and has even reached the Court of Justice of the EU (see section 5).⁵⁷

The second simplified revision procedure, never applied so far, consists in activating the so-called “passerelle clauses”, only in limited circumstances (art. 48, par. 7 TEU). Notably to shift from unanimity rule to qualified majority rule in the Council, whenever the TFEU or Title V of the TEU provides for unanimity, and to shift from a special legislative procedure (which normally assigns to the Council a central stage) to the ordinary legislative procedure (where the Parliament and the Council act on an equal footing) when the TFEU prescribes the special legislative procedure. Thus “passerelle clauses” are meant, on the one hand, to ease the adoption of an act and, on the other, to make it more democratic by including the Parliament as a real decision-maker. For this to happen the European Council shall act by unanimity, after the Parliament has given its consent by a majority of its members. In addition to this, the initiative of the European Council is notified to the 27 national parliaments that within six months can notify their opposition. The European Council's Decision is eventually adopted only if no objection has been raised by any of the national parliaments.

It follows that also for the simplified revision procedures the unanimity requirement for Treaty amendments is confirmed and, in any event, any constitutional change in the EU has to go through a European and a national stage. Linked to this discourse is the problem of the constitutional amendment difficulty in the EU.

⁵⁷ GRANAT, Katarzyna. Approval of Article 136 TFEU Amendment in Poland: The Perspective of the Constitutional Court on Eurozone Crisis law. **European Public Law**, vol. 21, n. 1, p. 31-46, Feb. 2015; BARDUTZKY, Samo. Constitutional Courts, Preliminary Rulings and the “New Form of Law”: The Adjudication of the European Stability Mechanism. **German Law Journal**, vol. 16, n. 6, p. 1771-1790, Mar. 2015, who highlights that very often the constitutional challenges against the European Council Decision 2011/199/EU have been combined to those against the Treaty on the ESM.

As Richard Albert observes, despite the very high threshold for agreeing on Treaty changes, in the course of the European integration process amendments have been rather frequent. "One might think that building consensus among a multinational body of nearly thirty countries in the European Union would be more difficult than meeting the unanimity threshold among thirteen states under the Articles of Confederation. And yet the Treaties of the European Union have been amended many times,⁵⁸ more frequently than the Articles, which have fewer veto players and a lower denominator".⁵⁹ Indeed, in between 1987 and 2009 a "semi-permanent Treaty revision process"⁶⁰ has been witnessed: in about thirty years 6 reform treaties and a Charter of fundamental rights have been drafted, plus 4 accession Treaties, which also modify certain treaty provisions (for example on the composition of the institutions).⁶¹ What is remarkable is not just the number of subsequent treaties, but also the scope of the changes they brought about. The founding treaties were changed extensively, reform after reform, for what concerns the institutional architectures, the EU competences and policies and fundamental rights, adding a series of details that are unusual in the drafting of constitutional texts (see section 3). For some decades the continuous process of Treaty change was probably favoured by the spillover effects of the end of the Cold War and the German reunification and by a consensual mode of operation within and among the EU institutions and the Member States targeting the idea of "an ever closer Union". By 2005, however, when the people in two founding Member States, France and the Netherlands, rejected the Constitutional Treaty at the referendums, and following the accession of 12 new countries from the Eastern bloc, the "permissive consensus"⁶² had gone.

The present situation in the Union is that of an impasse with regard to Treaty revisions, while the Eurozone crisis, the refugee crisis, Brexit, the rule of law problems and now the pandemic have revealed that the EU is in desperate need for a reform. Deeply divided internally and with limited public support, the EU institutions have tried to

⁵⁸ PEERS, Steve. The Future of EU Treaty Amendments. *Yearbook of European Law*, vol. 31, n. 1, p. 19-22, Apr. 2012.

⁵⁹ ALBERT, Richard. **Constitutional Amendments: Making, Breaking and Changing Constitutions**. Oxford: Oxford University Press, 2019, p. 96.

⁶⁰ DE WITTE, Bruno. The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process. In: BEAUMONT, Paul, LYONS, Carole and WALKER, Neil (eds.). **Convergence and Divergence in European Public Law**. Oxford-Portland: Hart Publishing, 2002, p. 39.

⁶¹ Reform Treaties were, in order, the Single European Act, the Treaty of Maastricht, the Treaty of Amsterdam, the Treaty of Nice and the Charter of fundamental rights (the latter proclaimed but not entered into force until 2009), the Constitutional Treaty (failed), and the Treaty of Lisbon. The accession treaties, instead, were those concerning Norway, Austria, Finland and Sweden (1994), concerning Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia (2003), concerning Bulgaria and Romania (2005), and concerning Croatia (2011).

⁶² HOOGHE, Liesbet and MARKS, Gary. A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus. *British Journal of Political Science*, vol. 39, n. 1, p. 1-23, Jan. 2009.

launch a new process of reflection about Treaty changes, through a Conference on the Future of Europe expected to start to work in Fall 2020. The composition does not appear very different from a Convention under Art. 48 TEU, but it is devoid of any clear mandate in relation to the discussion of Treaty amendments and its structure has already led to allegations about the lack of people's involvement in the process, being thought as a top-down exercise.⁶³ It is the usual criticism emerging every time Treaties are changed due to the limited democratic credentials of the revision procedures, taking into account the detachment or disconnection between EU citizens and EU institutions.⁶⁴

However successful the experience of the Conference on the Future of Europe can be, it appears that the situation in the Union is now quite closed to that described by Richard Albert as "constructive unamendability". In the present political, social and economic circumstances "the codified thresholds required to amend (...) [the treaties] are so onerous that reformers cannot realistically (though they could theoretically) satisfy the standard. What results is the impossibility of amending the rule, even though formally it is amendable".⁶⁵

Over the last few years, this constitutional amendment difficulty in the EU has triggered the emergence of something close to a "constitutional dismemberment"⁶⁶ – a transformative change with consequences far greater than an amendment – according to some readings of these occurrences. For example, the impossibility to reach unanimity for a Treaty change that would have introduced the obligation for Member States to respect a structural balanced budget has led all EU countries but the Czech Republic and the UK to sign already evoked TSCG, so to formally resort to international law. This is not strictly prohibited under EU law and the Court of Justice in any event could have been involved in principle in reviewing its compatibility with the Treaties. Moreover, the problem the TSCG triggers is not about the content of what it prescribes. Rather, questionable is the precedent it creates, in allowing to bypass the ordinary or simplified Treaty revision procedures whenever their standards are too difficult to meet.⁶⁷ Indeed, the TSCG also sets its own rules for the entry into force, not just moving away from unanimity, but clearly identifying at least two clusters of countries, within and outside the Eurozone, for the sake of the ratification. Art. 15, par. 2 of the TSCG states that the Treaty,

⁶³ ALEMANN, Alberto. Europe's Democracy Challenge: Citizen Participation in and Beyond Elections. *German Law Journal*, vol. 21, Special Issue n. 1, p. 35–40, Jan. 2020.

⁶⁴ LINDSETH, Peter L. **Power and Legitimacy**: Reconciling Europe and the Nation State. Oxford: Oxford University Press, 2010, p. 234.

⁶⁵ ALBERT, Richard. **Constitutional Amendments**: Making, Breaking and Changing Constitutions. Oxford: Oxford University Press, 2019, p. 158.

⁶⁶ ALBERT, Richard. **Constitutional Amendments**: Making, Breaking and Changing Constitutions. Oxford: Oxford University Press, 2019, p. 78.

⁶⁷ In the European Court of Justice. **Defrenne v Sabena**. Case 43/75 (Judgment of the Court of 8 Apr. 1976), the Court of Justice had clarified that the EU Treaties can only be modified through the revision procedure provided for by the Treaties themselves.

agreed in 2012, enters into force on 1 January 2013 “provided that twelve Contracting Parties whose currency is the euro have deposited their instrument of ratification, or on the first day of the month following the deposit of the twelfth instrument of ratification by a Contracting Party whose currency is the euro, whichever is the earlier”. Considering that in 2012 the EU Member States were 27 and 17 where the Eurozone countries the 12-ratification threshold is considerably lower than the usual EU one. Moreover, the TSCG devalues the weight of the ratifications of the countries outside the Euro area – unlike Art. 48 TEU, which places everyone on an equal footing – and also creates a double standard between the 12 Eurozone countries that are the first to ratify and the others.⁶⁸

A second potential dismemberment is occurring, again, within the Economic and Monetary Union and, in contrast to the former, has gained much more public attention. It refers to the role taken up by the EBC since 2011 through its unconventional monetary operations to preserve the stability of the euro. Given the clear-cut division between the fully integrated monetary leg of the Economic and Monetary Union and the economic policies that are still managed at national level and just coordinated through the EU, the ECB could only protect the Eurozone against asymmetric shocks by interpreting its mandate extensively; a mandate that is conceived in very strict terms in the Treaties. It followed a strong clash between the ECB and the Court of Justice ruling in favour of the central bank (to have acted within its mandate), on the one hand, and the German Constitutional Court, on the other.⁶⁹ The saga is still open at the time of writing, but, again, the problem with the ECB’s mandate is that there is no unanimous consent to modify it in the Treaties to make borrowing possible as it probably should and therefore the financial support lend by this institution on the financial markets has gone too far according to its critics,⁷⁰ despite its genuine intention to “do whatever it takes to save the euro”.⁷¹

Besides these recent examples, the list of “candidates” to be treated as dismemberments in EU law can be longer, should the case law of the Court of Justice be considered as a source of dismemberment. Without any explicit legal basis in the Treaties

⁶⁸ CLOSA, Carlos. Moving Away from Unanimity: Ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. **RECON Online Working Paper**, n° 2011/38, 17 Feb. 2012.

⁶⁹ For the latest episode of the saga, see: German Constitutional Tribunal, Second Senate. 2 BvR 859/15 (Judgment of the Court of 5 May. 2020), which declared *ultra vires* the ECB’s Public Sector Purchase Programme and the decision of the Court of Justice confirming its validity, pending further clarifications by the ECB as to the proportionality of its action.

⁷⁰ BOBIĆ, Ana; DAWSON, Mark. COVID-19 and the European Central Bank: The Legal Foundations of EMU as the Next Victim? **Verfassungsblog**, 27 Mar. 2020. Available at: <<https://verfassungsblog.de/covid-19-and-the-european-central-bank-the-legal-foundations-of-emu-as-the-next-victim/>>.

⁷¹ See the famous speech by the President of the ECB, Mario Draghi, at the press conference of 6 August 2012 announcing the Outright Monetary Transaction Programme.

foundational principles of EU law, like primacy and direct effect,⁷² have been identified by the Court of Justice as the *grundnorm* of the Union. Despite their lack of codification in EU primary law, their acknowledgement by the Court has “transformed” the nature of the European integration process compared to what had been until the 1960s. As such the conceptualization of “dismemberment” by Richard Albert can find an interesting litmus test even in the context of a *sui generis* constitutional constellation like the EU.

5. CONSTITUTIONAL UNAMENDABILITY IN EU LAW

To conclude, some final remarks can be devoted to the contribution of Richard Albert's monograph to the question of constitutional unamendability in EU law. The limits to constitutional reforms and unconstitutional constitutional amendments have come under increasing academic scrutiny.⁷³ Perhaps democratic decay and the crisis of liberal constitutionalism have contributed to make these issues “hot topics” in comparative constitutional law. By the same token, the multiple crises the EU has experienced over the last few years and, in particular, the rule of law backsliding in Eastern Europe have made quite compelling the identification of the ultimate constitutional principles, the foundations of EU law. The debate is not new,⁷⁴ but it is resurging now.⁷⁵ Most Constitutions in the Member States sets explicit limits to constitutional amendments or have implicit limits, as interpreted by Courts. As such they also set the boundaries to further European integration.⁷⁶

In the 1990s some scholars claimed that substantive limits to the revision of the EU Treaties were in place, for example, the respect of human rights, of the rule of law and of democratic principles.⁷⁷ However, then and now the plain words of the Treaties do not offer examples of codified unamendable clauses.⁷⁸ Interestingly, it has been argued that the values enshrined in Art. 2 TEU – “respect for human dignity, freedom,

⁷² See ft 12 above.

⁷³ See, amongst many, ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments: The Limits of Amendment Powers**. Oxford: Oxford University Press, 2017.

⁷⁴ See, e.g., DE WITTE, B. Rules of Change in International Law: How Special is the European Community?. **Netherlands Yearbook of International Law**, vol. 25, p. 299 ff., Dec. 1994.

⁷⁵ See: PASSCHIER, Reijer; STREMLER, Maarten. Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision. **Cambridge Journal of International and Comparative Law**, vol. 5, p. 337-362, Jan. 2016.

⁷⁶ BESSELINK, Leonard F.M.; CLAES, Monica; IMAMOVIĆ, Šejla; REESTMAN, Jan Herman. **National constitutional avenues for further integration**, Study for the European Parliament. Brussels: Directorate General for Internal Policies, 2014.

⁷⁷ CURTIN, Deirdre. The Constitutional Structure of the Union: A Europe of Bits and Pieces. **Common Market Law Review**, vol. 30, n. 1, Feb. 1993, p. 17 ff. and WEILER, Joseph H.H.; HALTERN, Ulrich. The Autonomy of the Community Legal Order: Through the Looking Glass. **Harvard International Law Journal**, vol. 37, n. 2, 1996, p. 411 ff.

⁷⁸ ALBERT, Richard. **Constitutional Amendments: Making, Breaking and Changing Constitutions**. Oxford: Oxford University Press, 2019, p. 140.

democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”, “common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail” – amount to foundational principles of the Union,⁷⁹ but this has never been confirmed by the Court of Justice, which to date has always refused to deliver judgments grounded on this article only.

However, looking at the Court of Justice’s jurisprudence there are clear signs of “interpretative unamendability” in Richard Albert’s terms,⁸⁰ although this Court lacks a doctrine on unconstitutional constitutional amendments. As anticipated (in section 2), the Court of Justice is the fundamental engine of the “integration through law” in the Union and many developments, in particular advancements in the way EU law has been interpreted in its relationship with the Member States are due to the fundamental role played by this Court. Up to the point that scholars have talked of a “judicial construction of Europe”.⁸¹ Often accused of “judicial activism” and of monopolizing the Treaties,⁸² the Court of Justice, in cooperation with national courts through the preliminary reference procedure (Art. 267 TFEU),⁸³ has let EU law evolve in a direction that could hardly be foreseen in the 1950s when it was established.

In a few landmark judgments the Court of Justice has identified some foundational rules and principles. Although were not detected in relation to Treaty revisions, they have emerged in such contexts that allowed to consider them as the ultimate rules for the functioning of the EU. In the *Kadi* judgment, in the framework of a potential clash between an UN Security Council’s Resolution against suspect terrorists and EU law’s guarantees of due process, the Court affirmed that by no means the EU could violate its commitment to rule of law and to fundamental rights’ protection.⁸⁴

Other important statements of the Court with regard to EU law foundational principles/rules were rendered in the framework of opinions or judgments dealing with the prospective creation of alternative judicial mechanisms or new Courts that could

⁷⁹ PASSCHIER, Reijer; STREMLER, Maarten. Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision. **Cambridge Journal of International and Comparative Law**, vol. 5, Jan. 2016, p. 357. According to VON BOGDANDY, Armin; SPIEKER, Luke D. Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges. **European Constitutional Law Review**, vol. 15, p. 391-426, Sep. 2019 these values also represent clear constitutional limits to Member States’ actions.

⁸⁰ ALBERT, Richard. **Constitutional Amendments: Making, Breaking and Changing Constitutions**. Oxford: Oxford University Press, 2019, p. 149 ff.

⁸¹ STONE SWEET, Alec. **The Judicial Construction of Europe**. Oxford: Oxford University Press, 2004.

⁸² DAVIES, Gareth. Does the Court of Justice own the Treaties? Interpretative pluralism as a solution to over-constitutionalisation. **European Law Journal**, vol. 24, n. 6, p. 358-375, Nov. 2018.

⁸³ CLAES, Monica. **The National Courts’ Mandate in the European Constitution** Oxford-Portland: Hart Publishing, 2006.

⁸⁴ European Court of Justice. **Kadi and Al Barakaat v. Council**. Joined Cases C-402/05 P and C-415/05 P (Judgment of the Court of 3 Sep. 2008), paras 281, 284 and 316.

undermine the judicial enforcement of EU law as set in the Treaties.⁸⁵ Hence in the 1991 Opinion on the treaty establishing the European Economic Area the Court considered that the treaty would have created a system of courts incompatible with the EU judicial system defined in the EU Treaties and that not even a Treaty amendment could have remedied to this clash “with the very foundation of the Community”, i.e. inherent in the design and functioning of its courts.⁸⁶ A similar reasoning was developed later on, when the Court of Justice was asked to review the draft agreement setting up a European patent court.⁸⁷ Likewise, in the Opinion on the draft agreement on the EU accession to the ECHR and in the judgment in the *Achmea* case,⁸⁸ the Luxembourg Court affirmed that it is not possible to dismantle the crucial relationship between the courts in the Member States and the Court of Justice, thereby hinting to the fact that the preliminary reference procedure (Art. 267 TFEU) amounts to an unamendable mechanism of EU law in that it ensures the autonomy of the Union’s legal system and the consistency and uniformity of its interpretation.⁸⁹

Nevertheless, it is with the *Pringle* judgment in 2012⁹⁰ that the Court engages clearly with “interpretative unamendability”. Through a preliminary reference by the Irish Supreme Court, the European Court was given the opportunity to review the compatibility of a Treaty amendment adopted under the simplified revision procedure, the already mentioned Decision EU 2011/199, with EU primary law (as well as to deal with other legal issues the remains out of the scope of this contribution). This Decision was meant to provide a legal basis in the EU Treaties, Art. 136, par. 3 TFEU, to the rescue fund set up, on a permanent basis, though an intergovernmental agreement amongst Eurozone countries, the Treaty on the ESM. The Court of Justice considered itself entitled to review the validity of Treaty amendments; a move that could not be given for granted.⁹¹ Indeed, the Commission and the European Council as well as ten intervening States claimed that the Court did not have jurisdiction under Art. 267 TFEU to check the validity of Treaty provisions. The Court seemed first to concur with this view, but then it went

⁸⁵ PASSCHIER, Reijer; STREMLER, Maarten. Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision. **Cambridge Journal of International and Comparative Law**, vol. 5, Jan. 2016, p. 354 ff.

⁸⁶ European Court of Justice. **Opinion 1/91**. European Free Trade Association [1991] ECR I-6079, para 71.

⁸⁷ European Court of Justice. **Opinion 1/09**. European and Community Patents Court [2011] ECR I-1137.

⁸⁸ European Court of Justice, Full Court, **Opinion 2/13**, of 18 December 2014, and European Court of Justice, Grand Chamber. **Slovak Republic v. Achmea**. Case C-284/16 (Judgment of the Court of 6 Mar. 2018).

⁸⁹ MARTINICO, Giuseppe. Building Supranational Identity: Legal Reasoning and Outcome in Kadi I and Opinion 2/13 of the Court of Justice. **Italian Journal of Public Law**, vol. 8, n. 2, p. 260-261, 2016.

⁹⁰ European Court of Justice. **Thomas Pringle v. Government of Ireland**. Case C- 370/12 (Judgment of the Court of 27 Nov. 2012).

⁹¹ MURPHY, Ciara. Pringle – The Unconstitutional Constitutional Amendment Conundrum. **European Law Blog**, Dec. 6 2012. Available at: <<https://europeanlawblog.eu/2012/12/06/pringle-the-unconstitutional-constitutional-amendment-conundrum/>>.

on saying in the light of the conditions set by Art. 48, par. 6 TEU to follow a simplified revision procedure (that can only affect Part Three of the TFEU and cannot increase the EU competences), that the Court must ensure that “the law is observed in the interpretation and application of the Treaties”. The Court eluded the distinction between procedural and substantive “constitutional amendment” review, but it engaged also with the latter to assess whether the European Council’s Decision encroached upon monetary policy and (illegitimately) expanded the economic policy competence of the Union. In both cases the answer was negative also because the Court found that the contested Decision was not really needed for the sake of adopting the ESM Treaty.⁹² This case illustrates that there are also substantive limits to Treaty amendments under the simplified revision procedure, but only future developments can tell whether the Court is willing to check the compliance of these limits by Treaty amendments adopted under the ordinary revision procedure. From a legal perspective this appears possible, but it would be politically difficult given the present situation of “constructive unamendability”.

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⁹² For more details, see: PASSCHIER, Reijer; STREMLER, Maarten. Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision. **Cambridge Journal of International and Comparative Law**, vol. 5, Jan. 2016, p. 352-353.

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Self-enforcing constitutional amendments rules: a dialogue with Richard Albert's Constitutional Amendments: Making, Breaking, and Changing Constitutions

Regras auto-impositivas de emendas constitucionais: um diálogo com Constitutional Amendments: Making, Breaking, and Changing Constitutions de Richard Albert

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Abstract

Richard Albert's groundbreaking book *Constitutional Amendments: Making, Breaking, and Changing Constitutions* surely provides the most extensive analysis of constitutional amendments rules ever published. Particularly relevant is that, unlike part of the constitutional literature that overly stresses normative assumptions, Albert brings important insights about how constitutional amendment rules can influence certain outcomes and provide incentives for political players' behaviors. By drawing from rational choice theory, this Article aims to show the value of self-enforcing constitutional amendment rules for constitutional design. Although Richard Albert does not directly work with rational choice language, he certainly knows how to operate some of its premises when

Resumo

O livro inovador de Richard Albert, *Constitutional Amendments: Making, Breaking and Changing Constitutions* com certeza fornece a análise mais extensiva das regras de emendas constitucionais já publicada. É particularmente relevante que, diferente de parte da literatura constitucional que força suposições normativas, Albert traz importantes ideias sobre como as regras de emendas constitucionais podem influenciar certos resultados e fornecer incentivo para o comportamento de políticos. Partindo da teoria da escolha racional, este Artigo pretende mostrar o valor de regras auto-impositivas de emendas constitucionais para o desenho constitucional. Apesar de Richard Albert não trabalhar diretamente com linguagem de escolha racional, ele com certeza sabe operar algumas das suas premissas

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examining cases, raising hypotheses, creating models, and suggesting constitutional frameworks. His book is a relevant example of how constitutional design, when not excessively dominated by normative assumptions that are taken for granted, can be the much-needed response to challenges that a strong reliance on those normative assumptions may fail to overcome.

Keywords: constitutional amendments; constitutional theory; constitutional design; rational choice theory; Richard Albert.

quando examina casos, levanta hipóteses, cria modelos, e sugere armações constitucionais. Seu livro é um exemplo relevante de como o desenho constitucional, quando não é excessivamente dominado por suposições normativas que são tomadas como certas, pode ser uma resposta necessária para desafios que uma confiança forte naquelas suposições normativas pode falhar em superar..

Palavras-chave: emendas constitucionais; teoria constitucional; desenho constitucional; teoria da escolha racional; Richard Albert.

CONTENTS

1. Introduction; 2. The Potential Dialogue between Richard Albert's book and Rational Choice Theory; 3. Self-Enforcing Constitutional Amendment Rules; 4. And the Normative Claims? 5. Conclusion; 6. References.

1. INTRODUCTION

Constitutional law not rarely develops based on trendy topics. For example, for a long time, proportionality was the concept that appeared in almost every issue of the most distinguished journals in the field. Theoretical debates, from vehement defense of the rationality of balancing¹ to arguments pointing out the inconsistencies and potential arbitrariness of proportionality,² spread out following the rising activism of constitutional courts. Likewise, the longstanding debate over the limits of constitutional adjudication³ and the countermajoritarian difficulty,⁴ the potential dialogues⁵ or the

¹ See ALEXY, Robert. **A Theory of Constitutional Rights**. Oxford: Oxford University Press, USA, 2010; ALEXY, Robert. Justification and Application of Norms. **Ratio Juris**, v. 6, n. 2, p. 157-170, 1993; ALEXY, Robert. Constitutional Rights, Balancing, and Rationality. **Ratio Juris**, v. 16, n. 2, p. 131-140, 2003; PULIDO, Carlos Bernal. The Rationality of Balancing. **Archiv für Rechts-und Sozialphilosophie**, v. 92, n. 2, p. 195-208, 2006.

² See GÜNTHER, Klaus. **The Sinn Für Angemessenheit: Anwendungsdiskurse in Moral Und Recht**. Frankfurt a.M.: Suhrkamp, 1988: 268; HABERMAS, J. A Short Reply. **Ratio Juris**, v. 12, n. 4, p. 445-453, 1999 HABERMAS, Jürgen. Reply to Symposium Participants, Benjamin N. Cardozo School of Law. **Cardozo Law Review**, v. n. p. 1994: 428; BENVINDO, Juliano Zaiden. **On the Limits of Constitutional Adjudication: Deconstructing Balancing and Judicial Activism**. Heidelberg; New York: Springer, 2010.

³ TUSHNET, Mark. **Taking the Constitution Away From the Courts**. Princeton, NJ: Princeton University Press, 1999 HIRSCHL, Ran. **Towards Juristocracy : The Origins and Consequences of the New Constitutionalism**. Cambridge, Mass.: Harvard University Press, 2004; BENVINDO, Juliano Zaiden. **On the Limits of Constitutional Adjudication: Deconstructing Balancing and Judicial Activism**. Heidelberg; New York: Springer, 2010.

⁴ BICKEL, Alexander Mordecai. **The Least Dangerous Branch: The Supreme Court At the Bar of Politics**. Yale University Press, 1986; FRIEDMAN, B. The History of the Countermajoritarian Difficulty: Part One: The Road to Judicial Supremacy. **NYUL Rev.**, v. 73, p. 333, 1998.

⁵ MENDES, Conrado Hübner. **Constitutional Courts and Deliberative Democracy**. Oxford: Oxford University Press, 2013 SWEET, Alec Stone. Constitutional Dialogues: Protecting Human Rights in France, Germany, Italy and Spain. In: _____. **Constitutional Dialogues in Comparative Perspective**. Springer, 1999, '8-41 KENNEY, Sally; REISINGER, William et al. **Constitutional Dialogues in Comparative Perspective**. Springer, 1999.

conflictive relationship between parliament and courts,⁶ all of which have flourished in recent constitutional debates and forums, also following the trend of the rising role of constitutional courts.

A particular feature of such debates is the strong prevalence of normative discussions, which are naturally expected from a legal perspective. The questions normally revolve around whether, how, and to what extent such growing presence of constitutional courts in politically and morally disputed matters is democratically legitimate or not, whether such decisions are principled or politically motivated,⁷ or, more deeply, what is the very meaning of justice or of the people in a democratic reality. Yet it is remarkable how many such analyses differ from those by political scientists or economists, who usually stress a more empirical and behavioral dimension of the constitutional context. See, for example, the fascinating books *Courts in Latin America*, edited by Gretchen Helmke and Julio Rios-Figueroa,⁸ and Robert D. Cooter's *The Strategic Constitution*,⁹ the former providing a powerful, empirically based, but unusual discussion of constitutional courts, and the latter, more broadly, suggesting that "constitutional theory needs more models and less meaning."¹⁰

Comparative constitutional law appears, on the one hand, largely influenced by this tradition of typical normative debates that prevail among constitutional lawyers. Constitutional courts have been likewise the focal point. Yet, by comparing distinct realities, a remarkable positive side effect has also been a stronger connection with what had been until then largely overlooked in constitutional law: a deep concern with methodological issues,¹¹ a more consistent connection with empirical studies, and - which is largely beneficial to constitutional law - a closer look into constitutional design and parliaments. Zachary Elkins, Tom Ginsburg's, and James Melton's *The Endurance of National Constitution*¹² is a paramount example of such a new look into constitutional law, providing an extensive discussion of how environment and, mainly, constitutional design matter for constitutional endurance. More recently, Richard Albert's *Constitutional Amendments: Making, Breaking, and Changing Constitutions*¹³ provided the long sought-

⁶ WALDRON, Jeremy. **Law and Disagreement**. Oxford: Oxford University Press, 1999.

⁷ See DWORKIN, Ronald. **A Matter of Principle**. Cambridge, MA: Harvard university Press, 1985.

⁸ HELMKE, Gretchen; RIOS-FIGUEROA, Julio. **Courts in Latin America**. Cambridge: Cambridge University Press, 2011.

⁹ COOTER, Robert Dandridge. **The Strategic Constitution**. Princeton University Press, 2002

¹⁰ COOTER, Robert Dandridge. **The Strategic Constitution**. Princeton University Press, 2002. p. 22.

¹¹ See HIRSCHL, Ran. **Comparative Matters: The Renaissance of Comparative Constitutional Law**. Oxford: Oxford University Press, 2014.

¹² ELKINS, Zachary; GINSBURG, Tom et al. **The Endurance of National Constitutions**. Cambridge: Cambridge University Press, 2009.

¹³ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019.

-after analysis of a fundamental topic of constitutional law: constitutional amendments. It is at least intriguing that constitutional law took so much time to understand that constitutional design should be highly studied and explored in all its various nuances, and that formal constitutional change is at least as important as informal constitutional change. Naturally, there were previously other relevant and fascinating studies on such topics, but no one can deny the impact of these more recent works on the development of comparative constitutional law. They are breathtaking in their own right.

This paper will examine the particular feature of this new trend in comparative constitutional law: the refocus on parliaments and, more specifically, on constitutional amendments. Moreover, it will argue in favor of the need of bringing to constitutional studies tools such as rational choice, which is largely adopted especially by political scientists and economists. It will obviously not discuss particularities of such tools - they are, after all, more than well documented in the literature. The purpose here is to merely observe that, when constitutional design applied to constitutional amendments are at stake, it is imperative to observe how political agents behave, how their strategies are planned (or not!), and how their choices can impact future developments. When parliaments and their procedures become a focal point, the image of a chessboard should immediately come into sight.

Richard Albert's groundbreaking book *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, since it consistently and comprehensively examines the phenomenon of constitutional amendments, will be the example of a scholarship that manages this dialogue between the normative dimension of formal constitutional change and the crude strategic behavior of political agents and institutions. On the one hand, his concept of "constitutional dismemberment" is his most ambitious, though certainly controversial, bet in the normative value of constitutionalism. On the other hand, his book offers a rich and broad set of examples of how political actors' behaviors as well as the impacts of constitutional design on particular realities matter a great deal. The challenging relationship between the normative and the reality is the powerful conclusion that his book offers: if constitutional amendment rules are continuously bent and not able to be "self-enforcing" and thereby enhance cooperation among political players,¹⁴ the odds are that they will prove unstable and destabilizing, jeopardizing the whole constitutional project.

¹⁴ WEINGAST, Barry. Designing Constitutional Stability. In: CONGLETON, Robert; SWEDENBORG, Birgitta. **Democratic Constitutional Design and Public Policy Analysis and Evidence**. Cambridge: MIT Press, 2006, p. 343.

2. THE POTENTIAL DIALOGUE BETWEEN RICHARD ALBERT'S BOOK AND RATIONAL CHOICE THEORY

Richard Albert's *Constitutional Amendments: Making, Breaking, and Changing Constitutions* is structured in an introduction and three parts, divided into six chapters. All over its almost three hundred pages, constitutional design is by far the central focus, with some concessions to normative debates. In some parts, where it would, at first sight, seem that Albert would fall into arguing that constitutional amendments should have one or other value, he assumes a more careful and pragmatic attitude and examines the strategic options normally on the table for political agents. For example, the last topic of his book - *The Democratic Values of Constitutional Amendment*- is very telling. Where we could, at first, assume that he discusses "the democratic values of constitutional amendment", thereby leaning to normative arguments, his first sentence in this topic starts by curiously pointing out that "there are advantages to changing the constitution outside the rules of formal amendment."¹⁵

His analysis is followed by a very detailed discussion of costs and benefits of such a behavior. He stresses the words "instability", "dialogic interactions", "contestability", "transparency", "civic engagement", "educative function", "coordination", "publicity",¹⁶ among others. His normative defense largely revolves around a debate over the pros and cons of following the constitutional amendment rules. When he says that "circumventing the codified rules of change may achieve a politically favorable outcome but in the end it degrades the constitution and undermines the rule of law,"¹⁷ it is clear that he defends that this is the democratic attitude - and this is his normative call -, but it is largely based on observing political agents' behaviors as well as the consequences of any of those strategic moves. If those rules are not followed - he argues - it would "give the impression that it is proper to create law 'on an ad hoc basis'", it would also mean a 'failure to publicize' the laws, and it would lead to a disconnection between those rules and practices, enhancing thereby "the possibility of arbitrary conduct."¹⁸ In the end, he praises constitutional design by concluding that "the prime objective in amendment design, then, must be to create rules of change that keep the constitution stable and

¹⁵ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 268.

¹⁶ See ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 268-270.

¹⁷ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 270.

¹⁸ ALBERT, Richard. *Constitutional Amendments: Making, Breaking, and Changing Constitutions*. Oxford University Press, 2019.

true to popular values yet always changeable when necessary.”¹⁹ Constitutional design and political actors’ behaviors are intrinsically correlated in Albert’s main arguments.

This way of reasoning is replicated all over his book, sometimes in excessive details. His fifth chapter, for example, aimed at exploring the “architecture of constitutional amendments” is so detail-oriented, exploring all distinct constitutional variables for constitutional amendments that, in the end, the reader might find him or herself mentally challenged. Richard Albert provides plenty of interesting examples, which highly enrich the discussion, but it is undeniable he is so focused on providing an overarching categorization of the distinct types of amendments and amendment procedures - the so-called “formal amendment pathways”²⁰ - that we cannot but conclude that he works really hard in projecting models, categories, and concepts. It is impressive his capacity of linking examples with such well-planned reasoning to the point that it appears that he had effectively - if we could say so - exhausted the subject. It also shows that his look into the subject is largely anchored in the strength and value of constitutional design, or, in other words, his normative approach is largely design-oriented.

Whenever he suggests a more consistent avenue for constitutional amendments, it is design that matters for his prescriptions. In this fifth chapter, for example, when examining the U.S. Constitution and the gap between popular support for change and the highly rigid amendment framework, he says that “well-designed rules of change *should* offer more than one pathway for initiating an amendment and more than one for ratification, precisely to avoid the stasis that has for now paralyzed the United States.”²¹ He goes further, even appealing to the need of a more “creative” design, one that would “create multiple procedures for amendment and vary the degree of consent required for ratification according to the importance of change, restricting the use of each amendment rule to different parts of the constitution.”²² His normative approach does not restrict itself to the debate over the relevance of popular legitimacy for institutions to behave in one way or another. He already assumes that constitutional change ought to be democratic, the focus thereby leaning to understanding how, “designally” speaking, that democratic legitimacy could be better achieved. It is normative, sometimes based on hypothetical experiments, but better would be to say that it is prescriptive: his book provides a series valuable recommendations of how constitutions should design their amendment rules based on Albert’s vast experience of delving into - and

¹⁹ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 271.

²⁰ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 179.

²¹ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 178 (emphasis added).

²² ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019.

comparing - constitutional amendment rules and practices. Such an approach can only be so convincingly and comprehensively made by someone who has vast knowledge of all the stages of amendment production and their real and potential outcomes.

Richard Albert does not theoretically review the distinct nuances of behavioral analyses, rational choice and alike in his book. Yet, various interesting connections of Albert's conclusions can be made with some premises normally adopted by rational choice theorists. Constitutional design naturally demands analyses of how individuals - especially political agents - behave in the face of a certain institutional framework and constitutional procedures. There is, accordingly, a deep concern with strategic interaction, behavioral coordination, available information, and the way institutions and procedures can be best framed to provide expected outcomes. Constitutional designers should be rather aware that, if a certain condition applies, the consequence will be likely the one predicted in that model.²³ It is hypothetical in many respects, but it is also largely based on experience and cases, which gains strength with the advance of comparative constitutional studies. Typical concerns that are studied by rational choice, such as stability, equilibrium, and endurance, appear, in one way or another, in Albert's book.

In any case, a central concept normally adopted by rational choice theorists to explain the stability of institutions, and, more particularly, the stability of constitutions, should be more deeply examined, and then applied to the debate over constitutional amendments: self-enforcement.²⁴ Such a concept can help explain how this bridge between constitutional amendment rules and expected outcomes, both well explored in Albert's book, goes way beyond the typical normative debate by constitutional theorists. It is not that constitutional amendments need to fill certain premises to be called as such - even though he explores it somehow especially through his concept of "constitutional dismemberment".²⁵ They do not necessarily have to be anchored in a sort of "constitutional moment,"²⁶ demanding vast popular support and an institutional channeling of such support through a set of procedures that will enhance the exchange of opinions, for this would contradict the way many constitutional amendments in

²³ See WEINGAST, Barry. Political Institutions: Rational Choice Perspectives. In: GOODIN, Robert; KLINGEMANN, Hans-Dieter. A New Handbook of Political Science. Oxford University Press on Demand, 1998, '167-190: 174 (arguing that the hallmark of the rational choice approach to institutions is its ability to analyze how institutions influence outcomes).

²⁴ See MITTAL, S.; WEINGAST, B. R. Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century. *Journal of Law, Economics, and Organization*, v. 29, n. 2, p. 278-302, 2013. p. 282.

²⁵ See ALBERT, R. *Constitutional Amendments: Making, Breaking, and Changing Constitutions*. Oxford University Press, 2019. p. 84 (arguing that a constitutional dismemberment entails a fundamental transformation of one or more of the constitution's core commitments).

²⁶ See ACKERMAN, B. A. *We the People, Volume 1*. Harvard University Press, 1993. See also BENVINDO, J. Z. The Seeds of Change: Popular Protests as Constitutional Moments. *Marquette Law Review*, v. 99, n. 2, p. 364-426, 2015 (bringing a more prosaic perspective of constitutional moments).

the world come to life. Although Albert certainly defends democratic values all over his book, one could say that constitutional change does not even need to be in principle democratic or legitimate, because - as he says in a very pragmatic way - "what matters is the present constitutional settlement and how changes are made to it."²⁷ However, constitutional amendments should operate in a stable environment, which is the basis for all those normative commitments.²⁸ In other words, a constitutional system, in order to maintain stability and thereby its own existence, should operate as a "self-enforcing constitution."²⁹

3. SELF-ENFORCING CONSTITUTIONAL AMENDMENT RULES

The core concept of self-enforcement,³⁰ in particular, is central for understanding constitutional change. If individuals find themselves motivated to change the constitution but the amendment rules are overly rigid, the outcomes can be several, for example: a) a broader consensus is sought; b) an informal avenue functions as a workaround; c) the framework proves itself unstable and foster instability. On the other hand, if it is too flexible, the outcomes can also be multiple, such as: a) consensus are reached, but they can easily derive from bad and unreasonable judgments; b) the hierarchically superior position of the constitution in the legal framework fades away and can even compete with ordinary legislation, thereby creating instability; c) individuals may feel less motivated to follow the constitution as they see it less as the foundation of their legal system and more as just another legislation, albeit constitutionally qualified. A well-designed constitutional amendment framework would thus mean a self-enforcing constitutional amendment framework: it would allow changes if needed and also provide incentives for actors not to change the constitution unless that necessity is imperative and justified and, if so, according to the constitutional amendment rules. It should embrace both "the considered judgment of the community and the sociological

²⁷ See ALBERT, R. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 84.

²⁸ MITTAL, S.; WEINGAST, B. R. Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013. p. 282 (arguing that ...the ability of a constitution to hold citizens to normative commitments hinges crucially on its stability).

²⁹ *Idem*.

³⁰ See WEINGAST, Barry. Political Institutions: Rational Choice Perspectives. In: GOODIN, Robert; KLINGEMANN, Hans-Dieter. **A New Handbook of Political Science**. Oxford University Press on Demand, 1998. p.167-190. p. 175 (arguing that a model of institutional stability must meet two conditions: first, the model must allow institutions to be altered by particular actors, and second, it must show by these actors have no incentive to do so. When these conditions hold, we say that institutions are self-enforcing).

legitimacy that only deliberative procedures can confer.”³¹ In the end, there is an equilibrium between change and stability in order to stably change the constitution.

Self-enforcing amendment rules provide coordination both vertically and horizontally. Change is vertically coordinated when political agents can grasp the interests of society and properly use such knowledge for the constitutional amendment, and it is horizontally coordinated when political agents can build consensus despite conflicting interests. Coordination is a central concept in rational choice analyses, but in order for coordination to be reached, it is crucial that those amendment rules are designed to promote incentives so that political agents can both grasp those social interests and build consensus according to those rules. The concept of self-enforcement is largely structured in this perspective of incentives: if such incentives are strong and well-planned, there is a good chance that individuals will behave and make decisions through those rules and procedures. Constitutional change will be outcome of such deliberations, whose well-designed procedures and rules lead individuals to behave accordingly since they feel they are better-off by doing so. Even if some individuals do not see their proposals being approved in the end through such procedures, they accept the result as legitimate, since circumventing those rules can prove highly harmful for them - and also for the community - in another opportunity. Well-designed constitutional amendment rules are those that foster dialogue, promote consensus, but also are honored by the ones who saw their interests not prevailing in the end.³²

Moreover, well-designed constitutional amendments rules are those that are part of a constitutional system that provides mechanisms to defend the constitution against transgression. Here appears another crucial concept: the “rationality of fear.”³³ Such a concept derives from the perception that individuals will do whatever it takes to protect themselves against any harm, and, if necessary, they will resort to extra-constitutional means to do so. The idea of equilibrium pervades much of this understanding. If the constitution - and thus its amendment rules - is not prone to providing equilibrium among political agents and the society at large, there is a chance that it will not endure. If conflicts are not solved, and consensuses are not reached, the snow ball effect of harshly or gradually disrupting the constitutional system becomes a reality.

³¹ ALBERT, R. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 270.

³² See MITTAL, S.; WEINGAST, B. R. Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013. p. 279.

³³ See WEINGAST, Barry. Designing Constitutional Stability. In: CONGLETON, Robert; SWEDENBORG, Birgitta. **Democratic Constitutional Design and Public Policy Analysis and Evidence**. Cambridge: MIT Press, 2006, '343: 344 MITTAL, Sonia; WEINGAST, Barru. Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013. p. 283.

The premise is not that conflicts will be over, but they will be limited and channeled according to the rules of the game.³⁴

If such an equilibrium is just a distant promise, constitutions will be unable to, first, “short-circuit the rationality of fear mechanism”, and, second, “lower the stakes of politics.”³⁵ On the one hand, individuals will not abide by the constitutional rules because they fear that they may be worse off by doing it or the very constitutional framework is unable to provide incentives for making them honor its rules and principles. Naturally, there might be a moral imperative for following the constitutional rules, but there is also a more prosaic movement that is clearly based on cost-benefits analysis. As Stephen Holmes puts it, “whatever the merit of the normative approach to law’s binding character, it is also true that individuals often adapt their behavior to novel and complex rules because they anticipate gaining some advantage thereby.”³⁶ On the other hand, a well-designed constitutional framework will “lower the stakes of politics” because political agents see advantages in cooperation, and the constitution is a focal point that may help achieve such an end, while also being an important instrument for coordinating individual’s reaction against its transgression.³⁷

Richard Albert’s book explores various reasons why individuals may or may not abide by the constitutional rules, and he visibly stresses the need of engaging political elites in accepting the authority of any constitutional change as a condition for its very recognition. In his most normative call - when he introduces the concept of “constitutional dismemberment” - he acknowledges that “an amendment can survive a breach by reformers but when the relevant legal and political elites cease to accept the authority of the amendment it could cease to be recognized as valid.”³⁸ In this passage, he agrees with the premise that coordination is linked to the capacity of involving the legal and political elites for change. Here appears another important premise in behavioral analyses: such cooperations are strategically identified in some influential groups, since

³⁴ See PRZEWORSKI, Adam. Democracy as an Equilibrium. **Public Choice**, v. 123, n. p. 253-273, 2005. p. 270 (arguing that conflicts are regulated, processed according to rules, and thus limited).

³⁵ See WEINGAST, Barry. Designing Constitutional Stability. In: CONGLETON, Robert; SWEDENBORG, Birgitta. **Democratic Constitutional Design and Public Policy Analysis and Evidence**. Cambridge: MIT Press, 2006. ‘343: 344 MITTAL, Sonia; WEINGAST, Barry. Self-Enforcing Constitutions: With an Application to Democratic Stability in America’s First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013. p. 283.

³⁶ HOLMES, Stephen. Lineages of the Rule of Law. In: PRZEWORSKI, A.; MARAVALL, J. M. **Democracy and the Rule of Law**. Cambridge University Press, 2003, p. 19-61. p. 24.

³⁷ See WEINGAST, Barry. Designing Constitutional Stability. In: CONGLETON, Roger; SWEDENBORG, Birgitta. **Democratic Constitutional Design and Public Policy Analysis and Evidence**. Cambridge: MIT Press, 2006. p. 343.

³⁸ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 79.

"group power can never be fully equalized,"³⁹ and it is mainly by expanding competition among such groups that ordinary citizens may obtain some gains and be able to "defend their interests despite their relatively modest resources."⁴⁰ A central feature of such analyses is that they reduce the expectation that individuals will behave according to the rules based on a moral call, such as an imperative of justice, even though it also matters. To bet all the chips on such normative guidance would blur the potentials of constitutional design. For such a purpose, a more robust guidance, even because the worst-case scenario should always be on the table, would be to expect individuals to guide themselves through self-interest and not solidarity. There is an empirical argument which Stephen Holmes well portrays: "political and economic elites, who are all-too-human in this respect, often fail to behave justly even when it is in their manifest interest to do so."⁴¹

Constitutional amendment rules, for this reason, should be thought out as coordination devices that will promote constitutional change while keeping legal and political elites in equilibrium. They should provide procedures that will favor such an equilibrium, which, nonetheless, is not always just. In such chessboard, even though the normative call for greater inclusion and equality plays a role, in many cases what may prevail in the end are some powerful interests. It is such a crude dimension of social life that makes rational choice analyses so intriguing. They obviously see the value of those normative calls, but they also understand that, as Weingast says, "to succeed, a constitution must protect those with the power to disrupt democracy" and that "the theory of self-enforcing constitutions requires that these interests be protected."⁴² If constitutional designers fail to see that such a premise also applies to constitutional amendment rules, they will lose sight of the dangers and threats those groups can inflict on the constitutional project, and, more serious, overlook the capacity of the constitution itself to promote inclusion by fostering cooperation and serving as a focal solution for conflicting behaviors.⁴³ "Democracy waxes and wanes. The determining factor is the perceived need of the political elite for cooperation from larger or smaller number of ordinary

³⁹ HOLMES, Stephen. Lineages of the Rule of Law. In: PRZEWORSKI, A.; MARAVALL, J. M. **Democracy and the Rule of Law**. Cambridge University Press, 2003, p. 19-61. p. 22.

⁴⁰ HOLMES, Stephen. Lineages of the Rule of Law. In: PRZEWORSKI, A.; MARAVALL, J. M. **Democracy and the Rule of Law**. Cambridge University Press, 2003, p. 19-6. p. 22.

⁴¹ HOLMES, Stephen. Lineages of the Rule of Law. In: PRZEWORSKI, A.; MARAVALL, J. M. **Democracy and the Rule of Law**. Cambridge University Press, 2003, p. 19-6. p. 60.

⁴² WEINGAST, Barry. Designing Constitutional Stability. In: CONGLETON, Robert; SWEDENBORG, Birgitta. **Democratic Constitutional Design and Public Policy Analysis and Evidence**. Cambridge: MIT Press, 2006, p. 343. p. 35-36.

⁴³ MITTAL, Sonia; WEINGAST, Barry. Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013. p. 285 (saying that in the face of a wide range of ways to coordinate - particularly when citizens have different preferences over the ways to coordinate - a focal solution changes citizen incentives).

citizens"⁴⁴—said Stephen Holmes. Indeed, by fostering pluralism through coordination, constitutions can serve as a powerful tool for democratic consolidation,⁴⁵ as well as enhance the capacity of individuals to defend democracy against transgressions.⁴⁶ Constitutional amendment rules ought to follow this assumption: they should function as a focal solution for conflicting interests, define adequate procedures to foster cooperation, and create tools and boundaries to avert constitutional violation.

Finally, constitutional amendment rules should have what rational choice theorists call “adaptive efficiency.”⁴⁷ They should be able to keep incentives for cooperation and limit the “stakes of power” also in circumstances of change. “A constitution that is self-enforcing under some circumstances may fail to remain self-enforcing as circumstances change.”⁴⁸ This is a crucial element for understanding why some constitutions may endure and others not: the “adaptive efficiency” refers to a dynamic condition of constitutions. They are not only to be thought out as a framework for a given reality, but also for other potential realities. A well-designed constitution should embrace amendment rules that are capable enough for preserving the constitution’s “self-enforcement” while changes take place.

A constitution that is overly rigid may fail to efficiently adapt to new circumstances, and an equilibrium that existed in the past, if not disrupted, may need to be changed through other means. It is no wonder that some democratic countries whose rigid constitutional amendment rules make any formal constitutional change a severe challenge resort to informal means, such as judicial interpretation and conventions.⁴⁹ On the other hand, a very flexible constitution may also be efficient, but not adaptively efficient, since it may not foster cooperation and not really work as a coordination

⁴⁴ HOLMES, Stephen. *Lineages of the Rule of Law*. In: PRZEWORSKI, Adam; MARAVALL, Jose Maria. **Democracy and the Rule of Law**. Cambridge University Press, 2003, p. 19-61. p. 38.

⁴⁵ See DIAMOND, Larry; LINZ, Juan José et al. (eds.). **Democracy in Developing Countries: Latin America**. London: Adamantane Press, 1999: 326 (arguing that what does seem clear is that democratic consolidation is highly implausible without reduction in class disparities).

⁴⁶ See MITTAL, Sonia; WEINGAST, Barry. Self-Enforcing Constitutions: With an Application to Democratic Stability in America’s First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013: 285 (sustaining that ...constitutions create consensus by creating focal solutions that define transgressions and foster citizen coordination in the face of potential violations).

⁴⁷ See MITTAL, Sonia; WEINGAST, Barry. Self-Enforcing Constitutions: With an Application to Democratic Stability in America’s First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013. p. 286.

⁴⁸ MITTAL, Sonia; WEINGAST, Barry. Self-Enforcing Constitutions: With an Application to Democratic Stability in America’s First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013.

⁴⁹ See ALBERT, Richard. Constitutional Amendment By Constitutional Desuetude. **American Journal of Comparative Law**, v. 62, n. 3, p. 641-686, 2014 ALBERT, Richard. How Unwritten Constitutional Norms Change Written Constitutions. **Dublin ULJ**, v. 38, n. p. 387, 2015 AHMED, Farrah; ALBERT, Richard; PERRY, Adam. Enforcing Constitutional Conventions. **International Journal of Constitutional Law**, v. 17, n. 4, p. 1146-1165, 2019 AHMED, Farrah; ALBERT, Richard; PERRY, Adam. Judging Constitutional Conventions. **International Journal of Constitutional Law**, v. 17, n. 3, p. 787-806, 2019 JACONELLI, Joseph. Do Constitutional Conventions Bind?. **The Cambridge Law Journal**, v. 64, n. 1, p. 149-176, 2005.

device that will lead to robust consensuses among conflicting interests. In the end, that equilibrium may prove very fragile because it could be easily disrupted without much effort. More serious, a very flexible constitution can lower the need of greater knowledge of the changing circumstances amid a constitutional change, and the new environment can prove in the end thereby much more unstable than first expected. By increasing the need of more qualified consensuses, conflicting interests may offer more reasonable arguments for their positions, which can prove relevant for the constitution's adaptative efficiency.⁵⁰

4. AND THE NORMATIVE CLAIMS?

Such an approach is not a denial of the fundamental and necessary call for a normative approach when constitutional amendment rules are at stake. It is certainly not a good advice for constitutional designers to merely observe how individuals and institutions behave and project potential outcomes given a certain context. Rational choice, in any case, does not suggest an artificial separation between normative and behavioral analyses nor disregards the relevance of normative claims. By the same token, constitutional law would be severely handicapped in its concern with basic rights, fairness, greater inclusion and equality, among many other key values, if its focus were based uniquely on “[analysing] how institutions influence outcomes”⁵¹

Yet there is a wake-up call here. True, sometimes such analyses based on rational choice premises may sound way too critical of the excessively normative accent that is so common in constitutional law studies. It is well-known, for example, the words that José María Maravall and Adam Przeworski, in their introduction to their groundbreaking book *Democracy and the Rule of Law* bring in a very upfront way when examining the concept of rule of law: “The normative conception of the rule of law is a figment of the imagination of jurists.”⁵² It seems that they, as political scientists, want to differentiate themselves from typical jurists, who strongly praise normative arguments to explain legal concepts. Both authors argue that such normative calls are “implausible as a description” and “incomplete as an explanation” because they cannot give satisfactory

⁵⁰ See MITTAL, Sonia; WEINGAST, Barry. Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century. **Journal of Law, Economics, and Organization**, v. 29, n. 2, p. 278-302, 2013. p. 287 (arguing that competition forces law-making institutions to invest in skills and knowledge to survive and is the impetus behind institutional change. By increasing the stock and quality of institutional knowledge, competition in law-making processes creates adaptative efficiency.).

⁵¹ WEINGAST, Barry. Political Institutions: Rational Choice Perspectives. In: GOODIN, Robert; KLINGEMANN, Hans-Dieter. **A New Handbook of Political Science**. Oxford University Press on Demand, 1998, p. 167-190. p. 174.

⁵² PRZEWORSKI, Adam; MARAVALL, Jose Maria. Introduction. In: PRZEWORSKI, Adam; MARAVALL, Jose Maria. **Democracy and the Rule of Law**. Cambridge University Press, 2003, p. 1-18.

answers for people's behavior, for instance, why people obey laws.⁵³ It is harsh in many respects, for sure, and may even appear they are demeaning what lawyers have so brilliantly brought to this and other debates. Despite all that, they have a point: constitutional lawyers should be more aware of the relevance of those more prosaic elements of social life.⁵⁴ Perhaps individuals follow the constitutional rules not because they feel they have a duty to do so. It could be politically, economically, or personally a good strategy to follow the rules, as many of those rational choice theories sustain. Yet, individuals may follow the constitutional rules not for a duty and nor even strategy. Inertia⁵⁵ or even a passion-based impulses⁵⁶ may also matter a great deal. Constitutional designers cannot overlook that incentives need to operate in such multidimensional palette of social behavior.

It is fascinating to observe that comparative constitutional law, possibly more than any other areas of constitutional law, has more consistently embraced such a perception. Excessively normative calls are not enough for constitutional design. The crude perception that constitutions are pacts full of compromises - and compromises "[protecting] those with the power to disrupt"⁵⁷ the constitutional project - is not easily digestible for those who praise the values of democracy and social justice. Those normative values matter and should be pursued thereby. It does not follow, however, that such crude reality of individuals' and institutions' behaviors matter less. In fact, both spheres complement each other. The constitution as a coordination device, as previously seen, can be a strong resource for promoting equality, and a well-designed framework for constitutional change can be a fundamental mechanisms for enhancing this end throughout time.

Richard Albert plays well with this premise all over the chapters of his book: he observes real and potential outcomes given certain configurations of constitutional amendment rules, explores the stakes and nuances of a vast array of real and hypothetical procedures based on such rules, and - not to forget the value of normative

⁵³ PRZEWORSKI, Adam; MARAVALL Jose Maria. Introduction. In: PRZEWORSKI, Adam; MARAVALL, Jose Maria. **Democracy and the Rule of Law**. Cambridge University Press, 2003, p. 1-18.

⁵⁴ See BENVINDO, Juliano Zaiden. The Seeds of Change: Popular Protests as Constitutional Moments. **Marquette Law Review**, v. 99, n. 2, p. 364-426, 2015. p. 386 (examining the prosaic nature of precommitments and the paradoxical nature of constitutional democracy).

⁵⁵ See LEVINSON, Daryl. Parchment and Politics: The Positive Puzzle of Constitutional Commitment. **Harvard Law Review**, v. 124, n. p. 657, 2010. p. 691 (arguing that political arrangements will tend to display a significant measure of inertia for reasons running well beyond the interest-based calculations of rational and well-informed political actors).

⁵⁶ See ELSTER, Jon. **Ulysses Unbound : Studies in Rationality, Precommitment, and Constraints**. Cambridge, U.K.; New York: Cambridge University Press, 2000 ELSTER, Jon. Don't Burn Your Bridge Before You Come to it: Some Ambiguities and Complexities of Precommitment. **Texas Law Review**, v. 81, n. p. 1751, 2003.

⁵⁷ WEINGAST, Barry. Designing Constitutional Stability. In: CONGLETON, Robert; SWEDENBORG, Birgitta. **Democratic Constitutional Design and Public Policy Analysis and Evidence**. Cambridge: MIT Press, 2006, p. 343. p. 35-36.

values - ends his book by praising democracy and the rule of law. He emphasizes, for example, that "circumventing the codified rules of change may achieve a politically favorable outcome but in the end it degrades the constitution and undermines the rule of law,"⁵⁸ which clearly set boundaries for strategic behaviors, however short-sighted they might be. He also points out the normative ideal that amendment design should "create rules of change that keep the constitution stable and true to popular values yet always changeable when necessary"⁵⁹ in a straight reference to a dynamic conception of popular will. However, on the other hand, he sees that behaviors matter significantly for such amendment designs, for example, when he sustains that "there are advantages to changing the constitution outside the rules of formal amendment,"⁶⁰ even though "formal amendment has its own democracy-enhancing virtues."⁶¹ This is the narrative that traverses his robust arguments throughout his book: constitutional design has to examine how "institutions influence outcomes"⁶² but cannot overlook the normative call for democracy.

However, there is a central concept in his book that challenges this balance between institutions' and individuals' behaviors and those normative assumptions: "constitutional dismemberment." This concept is possibly his strongest bet in coining a parameter that may serve as tool and guidance for constitutional designers, and it is also one that seeks to qualify certain types of constitutional amendments based on their contents. According to him, "[constitutional dismemberments] are transformative changes with consequences far greater than amendments. They do violence to the existing constitution, whether by remaking the constitution's identify, repealing or reworking a fundamental right, or destroying and rebuilding a central structural pillar of the constitution."⁶³ It is clear, from this definition, that the concept of constitutional dismemberment is content-dependent, and thereby substantive in nature. It is also strongly normative for two reasons: it is structured on a *call for coherence* and a *call for validation*. It calls for coherence because it is linked to the preservationist argument that constitutions should be amended only to the point that they are not dismembered. "The

⁵⁸ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 270.

⁵⁹ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 271.

⁶⁰ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 268.

⁶¹ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 269.

⁶² WEINGAST, Barry. Political Institutions: Rational Choice Perspectives. In: GOODIN, Robert; KLINGEMANN, Hans-Dieter. **A New Handbook of Political Science**. Oxford University Press on Demand, 1998, p. 167-190. p.174.

⁶³ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 78.

amended constitution must remain coherent and consistent with the pre-amendment constitution.”⁶⁴ The qualifying gap between amendment and dismemberment leads to the *call for validation*: the assessment of constitutional core values. It is thus normative not only in the dimension of defining the “existing framework and fundamental pre-suppositions”⁶⁵ but also how those core values project themselves throughout time. They are validated as core constitutional values and coherently interpreted as such in time. These are the normative parameters separating constitutional amendments from constitutional dismemberments.

Interestingly enough, Albert suggests that his “theory of constitutional dismemberment is not rooted in a normative understanding of the constitution”⁶⁶ Instead, it should be interpreted more as an assessment of the quality and weight of the constitutional change than of what that change should embody. As he says, “a constitution, then, may be dismembered either to improve liberal democratic outcomes or to weaken them.”⁶⁷ As a constitutional lawyer, it should be expected that he would defend the typical normative approach that constitutions should strengthen democratic values, but Albert did not choose this avenue. For him, “what matters is the present constitutional settlement and how changes are made to it” and that “constitutional dismemberment takes not prior view of what a constitution should do, entrench, or protect.”⁶⁸ He is certainly concerned with providing a baseline from where constitutional designers can define whether and when a constitutional change oversteps the boundaries of a constitutional amendment, so they can better foresee potential outcomes. In this regard, it sounds pragmatic rather than normative despite being largely reliant on understanding what he calls “constitution’s right, structure, or identity.”⁶⁹ It is a smart move, in which he highlights his purpose of providing a “blueprint for building and improving the rules of constitutional change,”⁷⁰ but, even though seemingly “not rooted in a nor-

⁶⁴ ALBERT, Richard. *Constitutional Amendments: Making, Breaking, and Changing Constitutions*. Oxford University Press, 2019. p. 82.

⁶⁵ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019.

⁶⁶ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 85.

⁶⁷ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019.

⁶⁸ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 84.

⁶⁹ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 85.

⁷⁰ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 4.

mative understanding of the constitution,”⁷¹ it is still very much normative in his *call for coherence* and *call for validation* for this concept.

This is not a problem, and indeed it reveals that Albert is aware that constitutional design should operate in this dialogue with different perspectives. Coherence and preservation of core values matter notwithstanding the controversies that naturally arise when assessing such other contents, which are also very controversial. The criticisms the concept of constitutional dismemberment raises likely derive from this reliance on such controversial concepts: what is “constitutional identity”, “fundamental presuppositions”, “structural pillar of the constitution”, for example? Even if his concern is not to discuss such concepts and merely provide a tool that may help constitutional designers themselves interpret those contents and then assess whether an amendment is a dismemberment or not, it hinges on those normative assumptions - the call for coherence and the call for validation -, which can nonetheless be a relevant goal. However, from a rational choice perspective, this concept would likely be drafted according to some other parameters. Instead of connecting to core constitutional principles or being coherent with the pre-amendment constitution, rational choice would simply posit that a constitutional amendment should preserve the self-enforcement quality of the constitution and thereby be “adaptively efficient” to the new circumstances. Both perspectives complement each other, but, while Albert’s stresses the call for coherence and validation, rational choice would point out that what matters for the sake of the constitution’s stability is that it keeps being “self-enforcing” and able to vertically and horizontally coordinate people’s behavior.

5. CONCLUSION

Constitutional law has had a longstanding relationship with a vast array of normative assumptions.⁷² The natural and necessary call for democracy, rule of law, justice, just to cite some of the best-known concepts, has provided the richest debates in all legal fields. Constitutional law has been one of the main reasons why, as Jürgen Habermas puts it, “legal philosophy, in search of contact with social reality, has migrated into the law schools.”⁷³ For a long time, there has prevailed debates over the limits of constitutional adjudication, the countermajoritarian difficulty, conceptions of justice, among many other fascinating topics. Yet constitutional law has also failed to provide a stronger connection with debates that have flourished in other connected areas of

⁷¹ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford University Press, 2019. p. 82.

⁷² WEINGAST, Barry. Political Institutions: Rational Choice Perspectives. In: GOODIN, Robert; KLINGEMANN, Hans-Dieter. **A New Handbook of Political Science**. Oxford University Press on Demand, 1998, p. 167-190. p. 174.

⁷³ HABERMAS, Jürgen. **Between Facts and Norms**. Cambridge, MA: MIT Press, 1996. p. xxxiv.

knowledge, such as political science and economy. For example, it has had a difficult relationship with analyses that focus on people's and institutions' behaviors and their influence on potential outcomes. Rational choice theory, in its distinct configurations, has not rarely been seen as the black sheep in various constitutional debates, most of which overly dominated by normative assumptions.

When such normative conceptions are called a "figment of the imagination of jurists" that are "implausible as a description" and "incomplete as an explanation",⁷⁴ it is certainly a harsh - and unfair - criticism, but it is also a wake-up call. Constitutional law has provided one of most fascinating, challenging, and intriguing debates in legal theory, but it may have gone too far in its belief in the transformative capacity of such normative values. The empirical dimension of social life has increasingly demanded that distinct tools be brought to constitutional law, and an overlooked one in law - though largely employed in those other correlated fields - can provide relevant analyses for distinct constitutional phenomena and complement many of the conclusions that already take place in constitutional law: rational choice theory.

This Article focused on briefly discussing some key concepts that rational choice theory provides for constitutional law, such as "self-enforcement", "rationality of fear", "adaptive efficiency", in order to show their analytical potentialities for constitutional law. More particularly, they can be a resource for constitutional design, which, more than any other field of constitutional law, has made the much-needed bridge between behavioral analyses and normative assumptions.

For such an end, Richard Albert's groundbreaking book *Constitutional Amendment: Making, Breaking, and Changing Constitutions* was adopted as a compelling example of a book which, though not directly making use of those rational choice concepts, is largely concerned with connecting people's and institutions' behavior with potential outcomes when examining the distinct nuances of constitutional amendment rules. The success of Albert's book largely hinges on his impressive capacity of examining distinct constitutional frameworks, analyzing empirical cases, but also creating models, classifications, and concepts. His book is certainly the most comprehensive and best designed treaty of constitutional amendment rules ever produced. It has naturally its controversial parts, especially the concept of "constitutional dismemberment", in which the normative claim may have gone a bit further than the traditional balance between behavioral and normative approaches he could deliver throughout his book, but even there it is clear that he acknowledges the limits of a typical normative narrative.

The minimal ambition of this Article is to remind us that constitutional law - and, more particularly - constitutional design - should explore further the potentialities of

⁷⁴ PRZEWORSKI, Adam; MARAVALL Jose Maria. Introduction. In: PRZEWORSKI, Adam; MARAVALL, Jose Maria. **Democracy and the Rule of Law**. Cambridge University Press, 2003. p. 1-18.

various tools that other correlated areas of knowledge largely adopt, especially in times when constitutional law is under growing stress and the movements of political players becomes so central for constitutional analyses. Rational choice is one such tool and, even when not directly adopted - as in Richard Albert's book - it is clear that institutions and people's behavior, strategically or not, rationally or passionately, are to be taken seriously. Richard Albert's book brightly applied this understanding for constitutional amendment rules. A similar effort should take place in the other rich areas of constitutional law.

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Constitutional interpretation and Constitution substitution: oscillating between the juridical and the political

Interpretação constitucional e substituição constitucional: oscilando entre o jurídico e o político

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Abstract

The concept of constitution substitution is a notion that has not been developed by constituent power, and in that measure, the Colombian Constitutional Court has established a precedent for the amendment process of the Legislative Act, which is performed by congress in order to limit the power of constituted power. In spite the fact that the Court has stated that there are no clauses written in stone, it has forged some fundamental principles and consolidated the defining axes, is what resume the theory of substituting. However, constitutional amendments have some limits to what Richard Albert makes a reference and summarize in 4 fundamental characteristics, that should not exceed the constitutional scope. As was pointed out by Albert the power to amend is one above all that does not exceed the scope of what was intended in the constitution, but there may be an intermediate point which he calls dismemberment, which is more than an amendment but does not get to become a structural reform of the constitution. Let's see how Colombia's

Resumo

O conceito de substituição constitucional é uma noção que não foi desenvolvida pelo poder constituinte e, nessa medida, o Tribunal Constitucional colombiano estabeleceu um precedente para o processo de alteração do Ato Legislativo, que é realizado pelo Congresso para limitar o poder do poder constituído. Apesar de o Tribunal ter afirmado que não existem cláusulas escritas em pedra, forjou alguns princípios fundamentais e consolidou os eixos definidores, que é o que retoma a teoria da substituição. No entanto, as emendas constitucionais têm alguns limites a que Richard Albert faz referência, resumindo-os em 4 características fundamentais, que não devem ultrapassar o escopo constitucional. Como foi apontado por Albert, o poder de emendar é aquele que, acima de tudo, não excede o alcance do que foi pretendido na constituição, mas pode haver um ponto intermediário que ele chama de desmembramento, que é mais do que uma emenda, mas não para se tornar uma reforma estrutural da Constituição. Vamos ver como a Constituição da Colômbia e o Tribunal

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Constitution and the Constitutional Court have set limits to constitutional amendments and exceeded constitutional limits through dismemberment.

Keywords: constitution substitution; constitutional amendment; legislative act; Constitutional Court; original constituent.

Constitucional estabeleceram limites para emendas constitucionais e ultrapassaram os limites constitucionais por meio do desmembramento.

Palavras-chave: substituição constitucional; emenda constitucional; ato legislativo; Corte Constitucional; cons-tituínte originário.

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1. INTRODUCTION

Richard Albert's book "Constitutional amendments" is a reference on how constitutional amendments are transformed or preserved, to protect democracy. Its content and present nature show how such means of amending is a fundamental aspect of contemporary democracies and how constitutional law is an ineludible matter for constitutionalist, today and tomorrow.

Albert highlights an aspect that is highly debated in Colombia, that is to say, the Constitutional Court's ability to interpret it. The creation of the defining axes by the Colombian Constitutional Court, to apply the substitution test is a dogmatic construct that gives the Court the freedom to determine randomly the constitutional text, since the Constitution has no objective parameters on the definition of such defining axes¹. It is important to address the extent to which formal control of the Court has become a material control, when the thesis of the substitution of the Constitution (i.e. Constitution substitution) has been used primarily to declare the unconstitutionality of reforms to the Political Charter, pursued by the legislator. To what extent, does Colombia's Constitutional Court, through interpretation, create validity parameters to reform the Constitution? To what degree does this control become a political control?

The Court has jurisdiction to examine if Congress, when exercising the power to reform, incurred in procedural defects or not; besides using the grounds of article 241.1 of the Constitution, it is backed by the difference that there is between the power of the Original Constituent – whose political power is not subject to juridical limits – and that power derived from constituent power bestowed upon the Republic's Congress (art. 374 of Colombia's Political Constitution.), a role that enables the latter to reform

¹ ALBERT, Richard. **Constitutional Amendments Making, breaking, and changing constitutions**. New York, Oxford University Press, 2019. p. 153-154.

the constitutional text, but in that measure it is a limited power, subject to the conditions set forth in such aforementioned text. The court has stated that these conditions refer to, not only the reform procedure but also, to the jurisdiction of being a derived constituent. Here, there is relevance in terms of the power to review the reforms to the current constitution, but there is no power to substitute it, in total or partially, temporarily or definitively with another Constitution, which may only be done by the Original Constituent. In this manner, the Court has stated that the judgement to substitute the Constitution has the purpose of reviewing the constitutionality of a Legislative Act. It is not to perform a material control, but rather to know whether or not there was a replacement of the defining axis of the Constitution or of the Constitutional Set. The plaintiff in filing the lawsuit challenge has the burden of arguing to demonstrate the magnitude and the transcendental impact of said reform, which would lead to having the Constitution being substituted by another, case in which it would not be enough to argue that a preexisting constitutional clause was breached, or to show that the reform created an exception to a higher norm or to show that it established a limitation or a restriction in respect of the prior constitutional order.

The amendment system to the Constitution in Colombia has three means² consecrated in:

A bill that is initiated by Government, 5% of citizens eligible to vote, the territorial government or its representative institutions. The amendment process of this Legislative Act is performed by congress who must have 8 debates, in two 2 legislative periods, with the caveat that in the second legislative period the 4 debates must have an absolute majority in both chambers. Such legislative act may be challenged for its unconstitutionality by the people (i.e. 'acción pública de inconstitucionalidad') within the year following its passing into law. The initiative to file legislative bills may come from 10 members of congress, from 30% of city council members or provincial legislatures, or from a number of citizens that amount to 5 % of those eligible to vote. Article 156 authorizes the Council of State only in its condition as officials to file bills pertaining to matters of its jurisdiction,³ and article 155 of the Political Constitution (CP)⁴ foresees the possibility for the people i.e. citizens as well as for 30% the provincial legislatures and city councilmen to file constitutional reforms.

² Articles 373, 374, 375, 376 of Colombia's Political Constitution.

³ Ruling C-222 dated 1997, having as presenting Magistrate José Gregorio Hernández Galindo states precisely that only the Magistrates of the Council of State may present bills of legislative acts as per what is stipulated in article 237 numeral 4 of the Political Constitution.

⁴ Article 155. A number of citizens that is equal to or greater than 5% of those eligible to vote on the respective date or thirty percent of city councilman or of members of the provincial legislature of the country may lodge bills to be turned into law or bills for constitutional reforms. The people's initiative will process by Congress, in accordance with what is stipulated in Article 163, for those bills that have been declared urgent. The proposing citizens in representation of the people shall have a right to designate a spokesperson that will be heard by both Chambers in all of its stages of the amendment process.

A constitutional referendum must have a prior law that summons it, whose initiative must have the people or Government as actors, law which must be approved by an absolute majority in both chambers of congress. Such must have 4 debates and it has an automatic constitutional control for procedural defects. After such formalities have been performed the people are asked to vote, where there is a threshold of participation of one fourth of those eligible to vote and the majority of the voters must support the reform, case in which there must be a constitutional control if there is a challenge⁵.

A national constitutional assembly requires, likewise, a prior law, with citizens' initiative or an initiative from the institutions. Once the law is approved by an absolute majority in both chambers, the people are asked to vote if they want to summon such an assembly, the period and the composition that it determines. The law must be subject to an automatic constitutional control for procedural defects. Then, there is the consultation, where there must be a participation of at least one third of those eligible to vote. Once the amendment process has ended there will come the election of the delegates.

The control procedure of the legislative acts will be addressed in this document, as well as, the jurisprudence that has risen around the capacity of Congress to reform the Constitution and of the Court to control the procedural defects. That is why, the concept of defining axes will be reviewed, as well as, the concept of constitution substitution as notions that have not been developed by the original constituent, and in that measure, the Court has established a precedent. The concept of being unable to substitute will be reviewed in spite the fact that the Court has stated that there are no clauses written in stone, which are aimed at forging some fundamental principles, consolidating the defining axes and forging the theory of substituting that in the case of the Legislative Act 1 dated 2016 and of Ruling C 379 dated 2016, oscillated between the political and the juridical.⁶

The limits to constitutional amendments to which Albert makes a reference are summarized in 4 fundamental characteristics, the subject, the authority, the scope and the purpose, giving prevalence to the scope that should not exceed the Constitutional Scope⁷. Let's see how Colombia's Constitution and the Constitutional Court have set limits to constitutional amendments.

⁵ Articles 241, 242 and 378 of Colombia's Political Constitution.

⁶ Ruling C 699 dated 2016.

⁷ ALBERT, Richard. **Constitutional Amendments Making, breaking, and changing constitutions**. New York: Oxford University Press, 2019. p. 31-31, 78-79.

2. THE DEMOCRATIC PRINCIPLE OF HAVING JURISDICTION AND THE LIMITS TO THE CAPABILITY OF AMENDING THE CONSTITUTION

The power to reform the Constitution⁸ is a constituted power that must be circumscribed to the jurisdiction of reforming the Constitution. If the constituted power lacks this jurisdiction then there shall be a procedural defect, making the reform invalid, as per, the postulates of article 241 of Colombia's Political Constitution. Likewise, the constitutional reform substitutes the constitution; when it changes totally its fundamental constitutional content or when it changes essential components that identify the Constitution. Title XIII of the Constitution stipulated the reform faculty in the three acts, that is to say, the Legislative Act, the Approving act (i.e. 'Acto Refrendatario') and the Reforming Act which must come from a Constitutional Assembly. Yepes Arcila states that the Legislative Act headed by government and by congress is an act of minor intensity, in the measure that Congress is the representative of the original constituent. Electing people through a referendum is a means that enables citizens to participate in the constitutional reform proposals and here, there is a mayor capability to reform, and the people have — once again thru a National Constituent Assembly — full capacity to reform the constitution without restrictions since the constituent assembly is the sovereign power.⁹

The jurisdiction, therefore, is the materialization of the democratic principle given that it is the one which enables reviewing the validity of the amendment and doing so in accordance with the degree of jurisdiction with which they are bestowed to do so. The reform, thus, generates new constitutional norms. Also, the general clause on jurisdiction enables Congress only to have the capacity to develop the constitution, thus making a reference to the faculties that have being bestowed to it. Congress in virtue of Article 113 of Colombia's Political Constitution, has the faculty to develop the Constitution, and all other faculties that have not been attributed to other bodies of government are bestowed upon Congress, in accordance with enforcing Article 136 of Colombia's Political Constitution¹⁰.

⁸ Hernando Yepes Arcila, Ex-delegate to the "Asamblea Nacional Constituyente", in Ruling C 551 dated 2003, gave a lecture presentation around the power to reform and its limits.

⁹ Hernando Yepes Arcila, Ex-delegate to the "Asamblea Nacional Constituyente", in Ruling C 551 dated 2003, gave a lecture presentation around the power to reform and its limits.

¹⁰ Ruling C 543 dated 1998.

2.1. The democratic principle as a requisite to reform when amending the constitution

A transcendental aspect of the Legislative Act is to preserve the unity of matter, as an established requisite by the Constitution. Therefore, it is a requisite that the subject matter must have coherence with the essential nucleus of the legislative act and it must be tied to the content of the reform.

Also, the Democratic principal is also a procedural requisite that the Court must keep in mind when performing its procedural review. As a matter fact, the debates that guarantee the procedural formalities of legislative acts refer to voting the reform bill after having a debate on the subject matter.¹¹ In reality it is the possibility of debating the bills that are geared to reforming the constitution,¹² given that it is through debates that conclude which becomes the means how Congress expresses its will.

Debates are a guarantee of the democratic principle in the measure that if one of the debates were to be missing — four are needed for laws (art. 107 Colombia's Political Constitution) and eight are needed for Legislative Acts (art. 375 Colombia's Political Constitution)—, there would be a procedural defect of unconstitutionality in the amendment process and The Court must state it so, when exercising its control review duties.¹³

Debates and consensus may allude to party agreements prior to voting as a result of coalitions among groups that are in Congress. These coalitions, inevitably favor the adoption of measures that encourage governance, given that the dialogue between government and parliament is consolidated through open dialogue among party spokes people.¹⁴ Therefore, the Democratic principle is oriented fundamentally towards promoting debate, in spite of the prior agreements that generate commitments among those who favor or oppose the reform, generating a consensus. Undoubtedly, the liberty of legislative configuration and the democratic principal are the grounds for the legislative function.

A challenge of unconstitutionality by the people (i.e. “acción pública de inconstitucionalidad”) is a guarantee of the Democratic principle given that, as the Court has stated in its jurisprudence, it must have clear, true, specific and sufficient reasons, as stipulated in the decree 2067 dated 1991. Those plaintiffs challenging must have the argumentative burden of exposing the structural axes that are being altered with the

¹¹ As stipulated in articles 157 of the Constitution & 176 of Law 5 dated 1992 as well as Article 227 of Law 5 dated 1992, that orders that the stipulations contained in the Norms of Congress referred in the ordinary legislative process which are compulsory when passing a legislative act.

¹² Ruling C-222 dated 1997.

¹³ The Court stated in ruling C-222 dated 1997.

¹⁴ Abstain from voting Ruling C- 668 dated 2004 Magistrates Álvaro Tafur Galvis & Marco Gerardo Monroy Cabra, published in the official Gazette of Congress number 378 of Thursday 31st of July dated 2003.

reform, the explanation of how the reform alters the structural axes and to what degree do they generate a substitution of the constitution.

In turn, the constitutional review control on legislative acts is a control on the nature, which is only exercised as per request and the ruling must only be on the challenges formulated by the plaintiffs who challenged the legislative act. In accordance with article 241-1 and 374 of the constitution, this was the thesis that was sustained for some time by the Court. As a matter of fact, that is what was stated by The Court in ruling C-487 dated 2002¹⁵, when it ruled that the procedural defects in legislative acts were limited to the study of the challenges filed in the lawsuit.¹⁶

In time, the Court extended the theory of an integral review that applied for laws and for decrees turned into law, to that of legislative acts. In this sense the Court shall perform a review on all the procedural defects, although they may not have been invoked by the plaintiff. Therefore, the procedure of integral¹⁷ review of the legislative acts is a faculty of the Constitutional Court when ruling on procedural defects not only in its formation but also in its essence, in respect of the reformatory acts on the constitution.¹⁸ The Court clarifies that the adverb “only” of article 241-1 of Colombia’s Political constitution cannot be taken literally, that is to say that the study by the Court cannot be reduced to only studying the formality but also studying the essence. And also, studying other dispositions.¹⁹

The Court²⁰ when it performs its procedural analysis in the forming of legislative acts and it identifies procedural defects of jurisdiction, such may incur in a substitution of the constitution. In this sense, when the Democratic principal is not followed thoroughly, the Court performs a study on the essence, to identify if there was a configuration of a scenario of constitution substitution.

¹⁵ In this opportunity, having as presenting Magistrate Álvaro Tafur Galvis, the constitutionality of Legislative Act 01 dated 2001 was reviewed.

¹⁶ Having as presenting Magistrate Rodrigo Escobar Gil, in reviewing the lawsuit for partial unconstitutionality, challenging articles 1°, 2° & 3° Legislative Act 01 dated 2001. The same has been said in ruling C- 543 dated 1998 & C- 614 dated 2002.

¹⁷ This topic is amply treated in Ruling C 668 dated 2004.

¹⁸ That was the constitutional control of Law 796 dated 2003, with which a referendum was convened and was placed to the people through a project of constitutional reform ruling C-551 dated 2003.

¹⁹ In this sense, the constitutional review study of the legislative act must be subject to the requirements stipulated in Article 157, 158, 160, 169 & 375 of Colombia’s Political Constitution. Also, of Law 5 dated 1992. Cfr, Ruling C-543 dated 1990.

²⁰ There is ample jurisprudence around the scope of constitutional reforms by Congress and other questions around procedural defects, where the court assures that in such a case there must be an even greater argumentative burden considering that the Democratic principal must prevail. See Rulings C-1124 dated 2004, C-472 dated 2006, C-740 dated 2006, C-986 dated 2006, C-153 dated 2007, C-1058 dated 2008, A-274 dated 2012 y C-968 dated 2012.

2.2. The breach of the Democratic principal carries along a Constitution substitution

The Court has developed several guidelines to identify when a substitution of the constitution has occurred, following the defining axes. Without referencing to those clauses which are written in stone, that do not exist in Colombia's juridical framework, the defining axes are those principles that orient the constitutional framework and in that measure are unbreakable to the contrary, because they would be incurring in a constitution substitution. The jurisprudence²¹ has built an entire tradition around the main aspects that have been recognized to date to be inherent to the identity of the constitutional text. Therefore, there may not be any alterations through a simple reform. The main defining axes have been built around the democratic principle and around that of separation of powers. There is the administrative civil servant career and there is merit as being the main criteria to have access to a public post; there is the principle of equality, a two chamber configuration of the legislative body, the principle of alternating the exercise of power, and a system of checks and balances, all of these latter ones, expressing concretely the democratic principle per se.

Please review one of the many examples where the Court, in performing a judgement on substitution,²² concluded that the Legislative Act 1 dated 2011, affected the democratic principle and thus, made a substitution of the constitution. The Legislative Act 1 dated 2011, reformed Article 183 of Colombia's Political Constitution, in as far as losing a congressional seat, as a sanction to those Congress members who breached certain limits in exercising their role, as set forth by the Political Constitution. This legislative act excluded, from the consequences of losing the congressional seat, the actions of members of parliament who would have gone against the regimen of conflict of interest. As a matter of fact, the Legislative Act clarifies that their participation in the debate and their voting on legislative acts or constitutional reform, where the members of parliament can obtain a direct or indirect benefit, shall not be sanctioned with losing their congressional seat, given the high degree of generality of the characteristic of constitutional norms. The Court considered that a clause of this nature breached not only the democratic principle, public morals, the prevalence of the general interest, the duty of members of parliament to act in pursuit of justice and the common good, the possibility for their constituents to control the actions of their representatives, and along that same line, the institutional means of stripping away their congressional seat, as a means of debugging political customs. That is why it is so important to defend "the identity" and "the unity" of the constitution as a whole. Given that both are configured thru the institutions, the principles and the values of the Constitution. That is why the

²¹ Ruling C 249 dated 2012.

²² Ruling C- 1056 dated 2012.

power to reform must preserve those values that have been consecrated in the Constitution, otherwise there would be a substitution.

The concept of substitution is a complex notion, that has not been defined by the Court, given that to a certain degree, it is a concept that has not been quite culminated and it is not exempt from political decisions. In the construct that is being made by the Court on the concept of substitution, it has awarded an unbreakable value to the concept of the constituent having the power that halts the reach of the constituted powers (or representative powers), granting a rigidity to the constitution that does not permit being denaturalized. These limits to substitution have been developed through Ruling C-971 dated 2004, and the Court has tried to draw a conceptual and a formal difference between "Reform" and "substitution". Thus, the substitution power ends up being very restricted and the power to reform is far more ample, although ambiguity still persists in the realm of reforms considering that it has less limits and it is turning into a means of more abusive power.²³

3. JUDGMENTS ON SUBSTITUTIONS: OSCILLATING BETWEEN AN AMENDMENT AND A DISMEMBERMENT

As was pointed out by Albert the power to amend is one above all that does not exceed the scope of what was intended in the constitution, but there may be an intermediate point which he calls dismemberment²⁴, which is more than an amendment but does not get to become a structural reform of the constitution.

Though, the court has made an effort to construct a theory on substitution, it still continues to be a random concept in the making. Identifying the limit between the amendment and the substitution is a task that requires care, where it is not always easy to delimit. A substitution is produced when there is a procedural defect in the jurisdiction to modify the Political Charter. The limits to the faculties in modifying the Political Charter were annunciated for the first time,²⁵ indicating that the government bodies that had the power to modify the Political Charter were not bestowed with the power to repeal it, destroy it or subvert it. Transforming the content of the constitution is a different matter:²⁶ "which implies that the changes are of such magnitude and transcendence that the original constitution was replaced by another, under the pretext of reforming it". The substitution refers to material changes that alter the identity of the

²³ YEPES ARCILA Abstain from voting.

²⁴ ALBERT, Richard. **Constitutional Amendments Making, breaking, and changing constitutions**. New York: Oxford University Press, 2019. p. 84-92.

²⁵ Ruling C-551 dated 2003.

²⁶ Ruling C-1200 dated 2003.

constitution, and therefore, there is a rupture,²⁷ “in such a way that the new constitution cannot be held as a continuation of the prior one, but rather as a different one, as a result of a new constituting act(...)”²⁸.

In order to perform the judgment review in respect of constitution substitution, firstly, one must perform a study as to whether the defining axes has been definitively affected. In order to do so one must delineating what is a defining axis. Then one must establish if such an axis is projected throughout the constitution and the reasons why the axis is deemed defining, which together is considered to be a principal premise. The second stage deals with the manner in which the Reforming Act of the constitution impacts that defining axis and this analysis is a secondary premise.²⁹ Once such a study has been performed and there is evidence of replacement or elimination, the Court proceeds to evaluate whether the new defining axis contravenes directly the Constitution in such a manner that it is incompatible with what was initially set forth in the constitution: this is what is the denominated as the premise of synthesis.

3.1. Judgment on constitution substitution

The court makes some conceptual precisions around the intangible and non-substitutable nature of the Constitution. Although the concept of ‘clauses written in stone’ does not exist in the Political Charter of Colombia the Court speaks of a judgment of untouchability, that refers to the criteria that the constituent had set forth, originally. It is a means to establish which are the intangible or untouchable norms and the possibility to perform an expensive interpretation or a restrictive one by constitutional judges. However, this criteria of being intangible is not present in Colombia’s constitution and there is no clarity as to which norms are untouchable. The constituent did not exclude any norm from the power to be reformed, thus any of its content may be subject to reform.³⁰

In as far as being non-substitutable, the court states that the existence in all constitutional frameworks of essential axes and definitory ones that if they were to be reformulated they would affect the identity of the constitution to such a degree that they would engender a different text. The Court assures that these premises are not present anywhere, in any article of the Constitution (because they are not intangible clauses) but they may be identified as of an analysis of the constitutional dispositions that constitute the different axes. Therefore, if such axes were to be modified or eliminated by the constituted powers (i.e. representatives) it would not be a legitimate

²⁷ Ruling C-970 dated 2004.

²⁸ Ruling C-970 dated 2004.

²⁹ Ruling C -053 dated 2016.

³⁰ Ruling C 288 dated 2012.

exercise of the power to reform, but rather it would configure the act of constitution substitution. Thus, the untouchable nature responds to a greater rigidity of the constitution, while the non-substitution responds to the limit on the power to reform the constitution. From there, the non-substitution premise is grounded on the fundamental premise that substitution is not predicated among the competencies of the derived constituent and the reforms, in such a degree, are the reforms that a text would be different in comparison with the one drafted by the original constituent.³¹

With this, the Court affirms that the judgment on substitution does not want to raise principles, norms or rules to untouchable level, thus, jurisprudence has been constructing precedence on the matter.³² Juridical self restriction or self restraint permits fulfilling three objectives: protect the identity of the constitution, protecting it from arbitrary exercises of the power to reform, permitting the constitution to adapt to social and political changes, avoiding that under the exercise of performing a substitution test they could be incurring in a material control of constitutional reforms. That is how the court has expressed itself reiteratively. The Court has the jurisdictional duty of controlling legislative acts, but only in procedural defects, due to breaches in the amendment process as stipulated in the Constitution and in the norms that govern Congress. Therefore, the same court manifests that control does not fall on the material content of the Reforming Act.³³ Self restriction seeks to avoid the subjectiveness in which the constitutional court Judge may incur.

Also, the Court affirms that there must be conceptual precision in respect of the substitution judgement when compared to other controls that the Court performs. Also, the Court is implementing a technique that in a manner of syllogism is made in three stages. The main premise is that there are aspects that define the identity of the constitution, then, the minor premise is that they perform the constitutional substitution test on the act. Such study is performed in respect of the defining axes that are being substituted or replaced. Then comes the third stage or third premise, or synthesis premise that contrasts between the main premise and the minor premise, to evidence whether there has been or not a procedural defect of jurisdiction, and confirming if in reality one is facing a substitution of the constitution. The Court's interpretation as of the analytical exercise of the Constitution, the Constitutionality Set (or 'Constitutional Block'), and other history criteria and jurisprudence has concluded that there are constitutional axes which have higher constitutional ranking, and which the State has the obligation to respect: guaranteeing and protecting human rights, the existence of a participative democratic framework, a Social State under the rule of law, the separation

³¹ Ruling C 288 dated 2012.

³² Ruling C- 1200 dated 2003.

³³ Ruling C-543 dated 1998.

of powers, and the autonomy and judicial independence, as well as, the checks and balances' system, an administrative career of public servants, the separation of powers and the reservation of the law. The Court adds that the constitution substitution is not a completed concept but rather "its test implies having to go back time after time to test the basic elements".³⁴

The judgment on substitutions must be differentiated from a material control on constitutionality of a reform act of the constitution, in the measure that the court must not perform this type of control, given that it ends up being illogical that the Court controls something that per se is reforming the content of the constitution. In addition to that, Article 241 of the Constitution excludes the possibility of a material control limiting the control to procedural defects. Therefore, any lawsuit presented on grounds of material control must result in an inhibiting ruling or in rejecting the acceptance of the lawsuit challenge. However, other types of analysis are possible, like resolving the challenges of the substitution and performing an abstract analysis on the content of the reform to study the implications of said reform, and whether eventually they generate a constitutional substitution, such as lack of jurisdiction or a procedural defect.

If the new norm does not encompass the general sense then there may be a constitution substitution. And, in this sense because there is no precept in the constitution that must be considered as essential, constitutional judges are the ones who are called to develop such guidelines through jurisprudence.

As a matter of fact, Albert alludes to constitutional changes that are more than amendments. These are changes that transform the Constitution and orient it towards new directions. This new orientation does not create a new constitution, but it is a change that deliberately modifies its content, profoundly (in something). In Colombia the constitutional theory of dismemberment³⁵ does not anchor itself on a formalist understanding of the constitution. Albert describes it as a middle ground between an amendment and a substitution, as if it were more than an amendment but less than a new constitution. The specificity of this dismemberment is that the constitution remains but an essential aspect of it is changed, such as a right is changed, or a structure or a procedure is changed that gave identity to the constitution. The political agreement with the FARC is a scenario that best describes the dismemberment, in terms of enforcing the Colombian constitutional structure. When the Court backed the procedure to Fast track and to Incorporate such as a constitutional amendment, it transformed the procedure originally stipulated in the Constitution. This unequivocally obeyed the political overtone of the agreement and bowed to pressures from the executive, who inevitably wanted to implement the agreement quickly.

³⁴ Ruling C 332 dated 2017.

³⁵ ALBERT, Richard. **Constitutional Amendments Making, breaking, and changing constitutions**. New York: Oxford University Press, 2019. p. 84-92.

3.2. Dismemberment and Fast track

Legislative Act Number 1 dated 2016,³⁶ added one transitory article to the constitution where it is foreseen to have a legislative exceptional procedure for a period of six months. In this Legislative Act it is stipulated that all projects associated with peace shall be of government initiative, because the purpose is to facilitate and to ensure the implementation of the Final Accord.³⁷ Likewise, procedural changes in the acts of reform to the Constitution stipulate that the first debate of the bill would be held in a respectively joint chambers' session of permanent constitutional commissions, and the second debate shall be held in plenary sessions of both chambers. The bills shall be approved by absolute majority in one round, since there will only be four debates, where there shall be only 8 days in the middle between one and the other chamber. These modifications to each bill shall be done with the backing of the national government. There shall be an automatic control on constitutionality for procedural defects in the drafting. This legislative act has four more articles, where they grant presidential faculties to issue decrees that will be turned into law (Article 2), and it creates additional multiyear investment plans for the next 20 years.³⁸

In addition to that, on behalf of the right to peace, they will include a special legislative procedure to approve the Final Accord and it must be incorporated into the juridical framework. The special legislative procedure or Fast Track will have some special procedural formalities in processing the bill and in approving the law. The Legislative Act foresees initially sending to Congress a bill that will be processed as an ordinary law, lodging the bill at the secretary of the senate and publishing it and debating it in the joint constitutional commissions of the Senate and the House, voting and debating it in plenary sessions of the Senate; and debating it in the plenary session of the House. This processing of the bill among commissions and plenary sessions will be an 8 day process. Votes can only be for approval or denial of the entire text; constitutional control of the law approving the Special Agreement will be performed; there will be presidential sanctioning and publication in the Official Gazette; this will be during a six month period. The Constitution review control will be automatic and it will be unique. The expiration term of the Legislative Act shall be as of its popular approval by a plebiscite.

The challenging lawsuit of unconstitutionality requests declaring a constitution substitution. In effect, reducing to 4 debates a constitutional reform, as well as reducing the number of rounds from 2 to 1 is going against the Constitution. That is why raising this to the level of a Legislative Act with an ordinary law substitutes the constitution in

³⁶ The development of the norms of the Final Accord.

³⁷ In addition to that, the plaintiffs suing other articles of the legislative act, given that in that very legislative act, the final cord is assimilated to being an international peace treaty.

³⁸ This fund foresees that there will be an investment plan within the national development plan, with the intent of giving priority to the zones that were affected by the conflict. (art. 3).

article 375, given that it modifies the structural elements of constitution reform and of the primary constituent. This modality that is so called fast track overlooks the principle of separation of powers given that it extra limits the executive powers in matters of legislative powers, and it limits the constitutionality review control power of the Court in as far as under the principle of double Jeopardy it can no longer review again the legislative act, and it impedes the court from reviewing aspects of the legislative act that were not subjected to the effect of double Jeopardy tried matters.³⁹

The Court declared unconstitutional what was stipulated in Paragraph h) and j) of article 1° of Legislative Act 1 dated 2016 because they substituted the principle of separation of powers. They stated that there was a suppression of the capability to deliberate and to decide by Congress, both in the creation of the law and in amending the constitution, where the Act challenged in the lawsuit had been transferred to the executive.

Additionally, the Court in ruling C-699 dated 2016 also analyzed Legislative Act 1 dated 2016 and stated specifically that constitutional amendments that develop transitional justice means are not *in genere* substitutions of the constitution. In effect, they affirmed that although transitional measures may be adopted and some that reform the constitution that in certain aspects substitute the Charter as long as it is transitional, situation that may arise when through such means one replaces a definitive axis of identity of the constitution, as could be the case in terms of separation and of balance of powers.⁴⁰

However, the court sustained the abbreviated procedure or *fast track*, reducing the number of debates for approval of the legislative acts. The Final Accord, being a political act, requires the work of implementing norms, and that is bestowed upon Congress, given that they have the democratic mandate of being representatives. In that degree the debate grants full legitimacy to its deliberating and decision-making activities, which are materialized in the general clause of legislative jurisdiction.

This decision, the Court clarified, is to be enforced in the future, with which the legislative acts that were approved under the procedure of fast track, like amnesty or the creation of the Special Justice for Peace (JEP for its initials in Spanish), shall remain and not be modified, although they went through the review via automatic control of constitutionality. This situation is a clear example of dismemberment, an abbreviated procedure to introduce constitutional reforms with the intent of reducing the number of debates and weakening the scenario of participation as well as of democratic representation. Things as they are, the Special Legislative Procedure for Peace consecrated in

³⁹ The plaintiffs consider that Article 1° of Legislative Act N. 01 dated 2016 breach article 113, 241, 243, 374, 375 & 379 of the constitution.

⁴⁰ Ruling C-699 dated 2016.

the Legislative Act 01 dated 2016 was sustained as a rapid pathway, special, exceptional and transitory. The court sustained:

that it fulfills the principles of celerity, legislative efficacy and efficiency as well as having the purpose of being agile and of guaranteeing a timely implementation of the Final Accord, whose constitutional thelos is to turn effective the right to peace via the reduction of the terms in passing a law and in passing legislative acts, that may only be used to developed what was agreed in the Final Accord.⁴¹

In the aforementioned ruling that had already analyzed the Legislative Act number 1 dated 2016, the court affirmed that the abbreviated procedure of formalities for legislative acts was not a substitution of the constitution given that such procedure of fast track was not going alone, because there were 3 stages intervening. One of people approval, a parliamentary stage and one instance of automatic constitutional control. That justified the special and abbreviated procedure in Congress.⁴² At the end of the aforementioned ruling they added that Legislative Act number 1 dated 2016,

did introduce a change in the reform procedures by Congress, when contemplating the special mechanism to produce legislative acts with a parliamentary stage constituted by four debates, an absolute majority and an 8 day transition between the two chambers. Notwithstanding, this change does comply with the jurisdictional limits of the power to reform the constitution.⁴³

However, the concept of popular approval to which the court alludes in this ruling shows a series of argumentative maneuvers that do not correspond to the means foreseen in Article 103 of the Political Charter, or to the concepts developed before by the Court in respect of the means of participation.

The abstaining from voting by Magistrate Luis Guillermo Guerrero, who distanced himself from the decision, describes in a forceful manner this situation. The magistrate distanced himself from the majority decision that altered the principle of separation of powers, thus altering the venues of collective construction and of generating a permanent and a continuous venue for consensus. Effectively, this ruling came after having a plebiscite that was held on October 2nd of 2016, when the people in their majority voted NO to the Peace Accord. The Court in Ruling C 379 dated 2016 had said that if this were to happen there would have to be a new summoning of the people. But, the Government decided that there would not be such summoning and that it would

⁴¹ Ruling C 630 2017.

⁴² Ruling C 699 dated 2016.

⁴³ Ruling C 699 dated 2016.

award such faculty to Congress on behalf of the people, to vote the approval of the Peace Accord.

The abstention from voting by Magistrate Guerrero alluded precisely to this, in stating that they were replacing the direct participation of the people with an interpretative role of Congress that is subject to the play of majorities.⁴⁴

*I estimate that by doing without a true people approval, one is permitting that the signed accord between government and an armed outlaw group acquires quasi constituent connotations, and as far as, by disposition of the very "Acto Legislativo 01 de 2016," it ends up being binding in the implementation phase and its development imposed via Fast track, which stripped away venues for deliberation. In this manner, central aspects, backed by constitutional rigidity, are performed by Government in accordance with what was previously stipulated in the Final Accord, which presents practically immutable connotations.*⁴⁵

Additionally, what the Legislative Act 01 dated 2016 foresees are structural reforms that include topics of much controversy like the Special Jurisdiction for Peace, the agrarian structure, the political participation of former combatants. Limiting the venues for deliberation and the participation of Congress would only be legitimate if the accord would have been approved by the people in a direct manner and through the means that the constitution foresees for such cases.⁴⁶ The one who abstained from voting added that any means that would permit establishing in a true and unequivocal manner that there is actually a consensus of the people around the peace accord⁴⁷ would be valid, but, not being at the unilateral decision taken by Government or by Congress. What this is doing is "to be unaware of the decision of the majority in the plebiscite dated October 2, and that permits accentuating the social price tags that result from pushing through a process without having had around it the indispensable consensus, as grounds for a true peace that would be stable and long lasting".⁴⁸

4. CONCLUSION

Albert describes the power of the courts as one to safe guard the content of the constitution and to validate constitutional changes that are made by the constituted powers, which may go over and beyond the limits of the constitution. It is the doctrine

⁴⁴ Abstain from voting Luis Guillermo Guerrero Ruling C 699 dated 2016.

⁴⁵ Abstain from voting Luis Guillermo Guerrero Ruling C 699 dated 2016.

⁴⁶ Article 103 of Colombia's Political Constitution.

⁴⁷ Abstain from voting Luis Guillermo Guerrero Ruling C 699 dated 2016.

⁴⁸ Abstain from voting Luis Guillermo Guerrero Ruling C 699 dated 2016.

of unconstitutionality of constitutional reforms as the triumph of democracy.⁴⁹ Likewise, citing Ran Hirschl⁵⁰, this scenario that grants Constitutional Courts the capacity to intervene in the political realm is a clear example of judicializing politics. This scenario shows how Colombia's Constitutional Court handle the incorporation of the political agreement with the FARC, to the constitutional framework and Colombia's juridical framework. Rulings C-699 dated 2016 & C-332 dated 2017, have an enormous political component in the measure that they incorporate the political agreement to the legal framework, which required strategies that unequivocally gave rise to these decisions. The Court in ruling C-332 dated 2017 declared unconstitutional part of the Legislative Act N. 1 dated 2016 that eliminated some of congress' duties, but in order to incorporate the peace agreements, sustained the *fast track*. With such, it not only alters the content of the article 375 with the will to reduce the number of debates of legislative acts and to diminish the participation as foreseen in the Constitution for constitutional amendments, something that is very risky considering the climate of a majority in Congress and a strong opposition to the peace agreement, but yes to its content. Additionally, the non-retroactive nature of *fast track* makes legislative acts that were voted before Ruling C 332 dated 2017, to remain current and in force. Several elements that more than amending, substitute the constitution, which cannot be understood from the juridical perspective but they can be understood from the political perspective.

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⁴⁹ ALBERT, Richard. **Constitutional Amendments Making, breaking, and changing constitutions**. New York: Oxford University Press, 2019. p. 217.

⁵⁰ ALBERT, Richard. **Constitutional Amendments Making, breaking, and changing constitutions**. New York: Oxford University Press, 2019. p. 218.



Disaggregating dismemberment: nullity, natality, and the hollowing of constitutional renewal in designed written constitutionalism

Desagregando desmembramento: nulidade, natalidade e o esvaziamento da renovação constitucional no constitucionalismo escrito

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Abstract

This paper aims to rethink the idea of constitutional renewal through a dissection of Richard Albert's ground-breaking concept of constitutional dismemberment. It is contended that under the rubric of constitutional dismemberment are two exceptional constitutional phenomena: the ought-to-be declared nullity of unconstitutional constitutional amendments and the legal unity-defying, extraconstitutional expression of what Hannah Arendt called "natality" in political action. The thesis is that attempts to tame revolutionary constitutional alteration with designed rules as to formal constitutional change as Albert's illustrates are missing the meaning of constitution-making for a natality-driven constitutional renewal characteristically defines designed constitutional form. The concept of constitutional dismemberment is first dissected in light of Arendt's idea of natality. With constitutional dismemberment unpacked,

Resumo

O objetivo deste trabalho é repensar a ideia de renovação constitucional através de uma análise do inovador conceito de desmembramento constitucional de Richard Albert. Alega-se que, sob a rubrica do desmembramento constitucional, há dois fenômenos constitucionais excepcionais: a necessária declaração de nulidade de emendas constitucionais inconstitucionais e a extraconstitucional expressão do que Hannah Arendt chamou de "natalidade" em ação política. A tese é que tentativas de domar as alterações constitucionais revolucionárias através de regras desenhadas como mudanças formais à Constituição, como mostrado por Albert, carecem do significado de constitution-making para uma renovação constitucional guiada pela natalidade, desafiando a forma do constitucionalismo desenhado. O conceito de desmembramento constitucional é primeiro analisado sob a luz da ideia de natalidade de Arendt. Após isso, na sequência observa-se que o constitution-making

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it is further observed that the constitution-making transmutes into the formal pronouncement of a new codified constitution in Albert's rigid tripartite classification of constitutional changes into amendment, dismemberment, and enactment. Albert therefore inadvertently reduces constitution-making to the formal enactment of a new codified constitution with constitutional natality dismembered and constitutional renewal hollowed out. It is concluded that Albert's formalistic conceptual framework of constitutional change reflects the centrality of comparative written constitutions in the place of comparative constitutional phenomena in current comparative constitutional studies.

Keywords: *constitutional renewal; constitutional dismemberment; constitutional amendment; Richard Albert; natality.*

se transmuta em pronunciamentos formais de uma nova Constituição codificada na rígida classificação tripartida de Albert em emenda, desmembramento e promulgação. Albert, assim, inadvertidamente reduz o constitution-making à promulgação formal de uma nova Constituição codificada com natalidade constitucional desmembrada e renovação constitucional esvaziada. Conclui-se que o conceito formalista de Albert sobre mudança constitucional reflete a centralidade da comparação de constituições escritas no lugar da comparação de fenômenos constitucionais nos atuais estudos de direito comparado.

Palavras-chave: *renovação constitucional; desmembramento constitucional; emenda constitucional; Richard Albert; natalidade.*

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1. Introduction; 2. Dismemberment disaggregated: constitutional amendment on trial; 3. When constitution-making becomes constitution-writing: constitutional natality dismembered; 4. In lieu of conclusion: constitution-making is more than constitutional design; 5. References.

1. INTRODUCTION

Richard Albert takes studies of constitutional change to another level with his erudite work *Constitutional Amendments*.¹ As he sets out in the beginning, the objective of *Constitutional Amendments* is "to bring formal amendment back to the center of the field of constitutional change."² This reveals Albert's ambitious project "to guide those seeking to understand how constitutions change" with the hopes for "inspir[ing] interest in constitutional amendment."³ Notably, Albert's target audience is not li-

¹ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019. In line with Albert's usage, I use constitutional change and constitutional alteration interchangeably, which include what Albert calls constitutional amendment (proper) and constitutional dismemberment unless otherwise specified. Notably, as suggested throughout *Constitutional Amendments*, constitutional change may take place formally and informally. Formal constitutional change refers to the direct alteration of the text of the codified constitution or other constitutional laws sitting on the top order of the hierarchical legal system; informal constitutional change refers to such alterations taking place through judicial interpretation, legislative enactment, or political practice. Both formal and informal constitutional change/ alteration include amendment and dismemberment. Unless otherwise specified, my discussion centers on formal constitutional change. As regards another form of constitutional change – the making of a new constitution, it is referred to as constitutional replacement. All forms of constitutional change are considered the means of constitutional renewal.

² ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 2.

³ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 36.

mitted to those living in the ivory tower. “[L]eaders involved in making or remaking their constitution” are also whom *Constitutional Amendments* is pitching.⁴ Guided by the foregoing goals, Albert presents us – yes, those living in the ivory tower – with a 360-degree study of formal constitutional amendment. Standing out from the already crowded field of constitutional change,⁵ *Constitutional Amendments* rests on Albert’s ground-breaking discovery of “constitutional dismemberment” amidst manifold formal constitutional alterations aimed at constitutional renewal.⁶

Notably, applying his theory to constitutional practice with the leaders involved in constitution-(re)making in mind, Albert suggests that constitutional identity-changing dismemberment⁷ be constitutionalized alongside amendment in the design of the constitutional rules governing formal changes so that transformative and revolutionary constitutional alterations can take place without disrupting “legal continuity,” while the rule of law can therefore be upheld.⁸ As will be revealed, Albert moves between roles in three dimensions in *Constitutional Amendments*: constitutional designer vs constitutional comparatist; substantivist vs formalist; general constitutional theorist vs written constitutionalism defender. Reflecting its author’s multiple identities, *Constitutional Amendments* is not only erudite but also intricate. Thus, in answering Albert’s call for further inquiry into constitutional change,⁹ my contribution surely falls far short of engaging with his encyclopaedic work on constitutional change comprehensively. Rather, I aim to rethink the idea of constitutional renewal through an engaged dissection of Albert’s newly discovered, yet-to-be-explored constitutional dismemberment in the world of formal (or codified) constitutional change.

⁴ ALBERT, Richard. *Constitutional Amendments: Making, Breaking, and Changing Constitutions*. Oxford and New York: Oxford University Press, 2019, p. 36.

⁵ See, e.g., ACKERMAN, Bruce. **We the People**. vols. 1-3. Cambridge: Belknap, 1991-2014; ACKERMAN, Bruce. **Revolutionary Constitutions: Charismatic Leadership and the Rule of Law**. Cambridge: Belknap, 2019; ARATO, Andrew. **Civil Society, Constitution, and Legitimacy**. Lanham, MD: Rowman & Littlefield, 2000; ARATO, Andrew. **Post Sovereign Constitution Making: Learning and Legitimacy**. Oxford: Oxford University Press, 2016; ARATO, Andrew. **The Adventures of the Constituent Power: Beyond Revolutions?** Cambridge: Cambridge University Press, 2017; GINSBURG, Tom. **Comparative Constitutional Design**. Cambridge: Cambridge University Press, 2012; BEUKERS, Thomas; de WITTE, Bruno; KILPATRICK, Claire. **Constitutional Change through Euro-Crisis Law**. Cambridge: Cambridge University Press, 2017; ALBERT, Richard; BERNAL, Carlos; BENVINDO, Juliano Zaiden. **Constitutional Change and Transformation in Latin America**. Oxford: Hart, 2019; CONTIADES, Xenophon. **Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA**. Abingdon: Routledge, 2013.

⁶ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 61-92.

⁷ Albert distinguishes between three types of constitutional dismemberment in terms of fundamental rights, basic structure, and constitutional identity. See ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 85-86.

⁸ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 263-64.

⁹ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 36.

As Albert's loyal interlocutor, I argue that under the rubric of constitutional dismemberment are two exceptional constitutional phenomena in the real-world constitutional practice: the ought-to-be declared nullity of unconstitutional (formal) constitutional amendments and the legal unity-defying, extraconstitutional (or unconventional) expression of what Hannah Arendt called one of "the most general condition[s] of human existence" – the "natality" in (political) "action."¹⁰ Despite Arendt's observation that "startling unexpectedness" inherent in natality underlies political action,¹¹ Albert insists that there be no space for an identity-altering constitutional renewal – which results from natality-driven political action – within an existing constitution that makes no distinction between amendment and dismemberment in its provisions governing formal changes.¹² In such constitutional arrangements, an identity-altering constitutional amendment boils down to a disguised constitutional dismemberment that ought to be nullified, regardless of its political underpinnings. Based on the legalistic stance on what counts as constitutional identity off limits to constitutional amendment,¹³ Albert's foregoing insistence may suck the air out of fundamental constitutional renewal engendered by a rule-challenging, form-resisting political action. As a result, Albert inadvertently reduces constitution-making to the formal enactment of a new codified constitution.

My thesis is that a natality-driven constitutional renewal characteristically defies designed "constitutional form,"¹⁴ suggesting that attempts to tame revolutionary constitutional alteration with designed differentiated rules as to formal constitutional change as Albert's theory illustrates are missing the meaning of constitution-making. Even in Albert's designed world of ideal written constitutions wherein processes for identity-altering constitutional change are incorporated,¹⁵ revolutionary change may result from an unconventional use of such codified processes at the expense of the relevant constitutional rules. Also, the relationship between the real-world constitutions and political action looks even more refracted through Albert's conceptual prism, suggesting the hollowing out of constitutional renewal and the underlying idea of natality. Looked at through the lens of Albert's tripartite classification of constitutional change

¹⁰ ARENDT, Hannah. **The Human Condition**. 2. ed. Chicago: University of Chicago Press, 1998, p. 8-9.

¹¹ ARENDT, Hannah. **The Human Condition**. 2. ed. Chicago: University of Chicago Press, 1998, p. 176-78.

¹² ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 85, 189-90.

¹³ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 84-85.

¹⁴ See LOUGHLIN Martin; WALKER, Neil. Introduction. In: LOUGHLIN, Martin; WALKER, Neil. **The Paradox of Constitutionalism: Constituent Power and Constitutional Form**. Oxford: Oxford University Press, 2007, p. 1-2.

¹⁵ As regards the provision for constitutional dismemberment in current national constitutions, Albert mentions Austria, Costa Rica, Spain, and Switzerland. ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 191-92, 309 n 62.

– amendment, dismemberment, and enactment, some real-world instances of genuine fundamental constitutional renewal are doomed to be condemned for dismembering or otherwise unlawfully altering the existing constitution, while other real-world constitutions that are anything but a function of Arendtian political action are praised for their role in constitutional renewal. My argument unfolds as follows. First, I situate Albert’s concept of constitutional dismemberment in the global constitutional landscape and provide a dissection of constitutional dismemberment in light of Arendt’s idea of natality, suggesting that not all instances of constitutional dismemberment should be treated as *ultra vires* amendments that ought to be nullified *ex ante* or *ex post*. After unpacking constitutional dismemberment, I then show why Albert’s rigid tripartite classification of constitutional change suggests a formalistic approach to constitution-making under which constitutional natality is dismembered. I conclude with remarks on the formalistic turn in comparative constitutional law scholarship as reflected in *Constitutional Amendments*.

2. DISMEMBERMENT DISAGGREGATED: CONSTITUTIONAL AMENDMENT ON TRIAL

As the Indian Supreme Court’s German jurisprudence-inspired “basic structure doctrine” continues to migrate to various constitutional realms, scholarship on constitutional amendment has been embedded in a binary aptitude as connoted by the concept of “unconstitutional constitutional amendment”.¹⁶ From the “internal” perspective of the existing constitution, an amendment is either constitutional or unconstitutional, depending on its coherence with the identity of the existing one.¹⁷ Yet, the question of the identity of a transformative formal constitutional change reveals another binary attitude taking hold in current constitutional scholarship when looked at from outside the existing constitution: it must either continue with the existing constitution or mark a constitutional new beginning. Challenging the prevalent binary propensity in current studies of constitutional change, Albert puts forward the midway concept of constitutional dismemberment with an eye to providing a better and discriminating analytic framework of constitutional change.¹⁸ Summarily, an identity-altering formal constitutional change does not properly *amend* a constitution as it deviates from the

¹⁶ ROZNAL, Yaniv. **Unconstitutional Constitutional Amendments: The Limits of Amendment Powers**. Oxford: Oxford University Press, 2017, p. 42-69.

¹⁷ HARRIS, II, William F. **The Interpretable Constitution**. Baltimore, MD: Johns Hopkins University Press, 199, p. 176; KUO, Ming-Sung. Reconciling constitutionalism with power: towards a constitutional nomos of political ordering. **Ratio Juris**, vol. 23, n. 3, Sep./ Nov. 2010, p. 397-98. See also KAHN, Paul W. **The Reign of Law: Marbury v. Madison and the Construction of Law**. New Haven: Yale University Press, 1997, p. 63-64.

¹⁸ Albert considers constitutional dismemberment “the middle ground” that “serves as a bridge between [amendment and a new constitution].” ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 85.

latter's existing fundamentals. Nor does it mark a constitutional new beginning in that the continuation of the existing constitution it effectively breaks with is still exhibited in a very visible form. Such identity-altering formal constitutional change dismembers the existing constitution by giving an alternative identity to its remaining form.¹⁹

It comes as no surprise that Albert's concept of constitutional dismemberment is not the first theoretical endeavour to transcend the binary stance pervading analyses of constitutional change. Prompted by the constantly changing constitutional order in Weimar Germany, scholars such as Georg Jellinek and Carl Schmitt meticulously distinguished between varieties of constitutional change on the conceptual level with an eye to delineating the limits of constitutional amendment.²⁰ Unlike the Weimar crisis-prompted theories, Albert's midway concept benefits from decades, if not centuries, of constitutional practices across the globe. Nevertheless, as with Germanophone constitutional theories that were in response to the particular constitutional environment in Weimar, Albert's constitutional dismemberment is situated in the current condition of constitutional change. As noted above, the recognition of unconstitutional constitutional amendments is one of the most important developments in the landscape of comparative constitutional law.²¹ More importantly, the continuing migration of the doctrine of unconstitutional constitutional amendment indicates the increase of transformative and revolutionary constitutional changes in the guise of formal amendments in various constitutional realm and the concomitant judicial response.²² The ultimate goal of distinguishing constitutional dismemberment from constitutional amendment is the taming of that increasing constitutional phenomenon.

Albert carves out constitutional dismemberment from constitutional amendment in terms of subject, authority, scope, and purpose.²³ Among them, scope is the "overriding feature."²⁴ Aimed at correction, elaboration, reformation, or restoration,²⁵

¹⁹ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 68-82.

²⁰ JELLINEK, Georg. Constitutional amendment and constitutional transformation (1906). In: JACOBSON, Arthur J.; SCHLINK, Bernard. **Weimar: A Jurisprudence of Crisis**. Berkeley: University of California Press, 2000, p. 54-56; SCHMITT, Carl. **Constitutional Theory**. Translated and edited by Jeffrey Seitzer. Durham: Duke University Press, 2007, p. 147-48.

²¹ See ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments: The Limits of Amendment Powers**. Oxford: Oxford University Press, 2017, p. 6.

²² For the migration of the doctrine of unconstitutional constitutional amendment, see ROZNAI, Yaniv. Unconstitutional constitutional amendments—the migration and success of a constitutional idea. **American Journal of Comparative Law**, vol. 61, n. 3, summer, 2013, p. 657-720

²³ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 79-80.

²⁴ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 82.

²⁵ Ibid ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 80.

an amendment is delimited by “constitutional identity.”²⁶ In other words, “[a] constitutional amendment entails unbroken unity with the constitution being amended” while “continu[ing] the constitution-making project initiated at the founding or in intervening moments of refounding of the constitution.”²⁷ In sum, “[a]n amendment is an authoritative change to higher law that corrects, elaborates, reforms, or restores the meaning of the constitution consistent with its existing *framework and fundamental presuppositions*.”²⁸

The way that Albert defines amendment indicates the “formal” character of the distinction he draws between amendment and dismemberment. What distinguishes dismemberment from amendment is that the former breaks “unity” with the existing constitution or alters its “framework” or “fundamental presuppositions” and thereby disrupts the constitution-making project initiated at constitutional (re)founding. Thus, Albert contends that “[t]he theory of constitutional dismemberment is not rooted in a normative understanding of the constitution.”²⁹ The identity of the existing constitution itself decides whether a formal constitutional change is a unity-entailed amendment or an identity-altering dismemberment. This reveals the formalistic element of Albert’s theory of constitutional amendment. So does Albert’s identification of a new constitution. A new constitution must take the form of a new constitution with the status of higher law enacted outside the replaced constitution.³⁰

Yet, a closer look at Albert’s “content-based approach” to the distinction between amendment and dismemberment³¹ suggests that Albert is not as formalistic as the foregoing suggests. Constitutional identity that decides whether a formal alteration breaks or preserves the unity of the constitution being altered is not the only object of constitutional dismemberment. “[T]he repeal or replacement of a fundamental right protected by the constitution...that is central to the political community” and a fundamental alteration of the allocation of constitutional powers and other core elements of the central structure of the constitution are also instances of constitutional

²⁶ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 79.

²⁷ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 79.

²⁸ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 82 (emphasis added).

²⁹ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 84.

³⁰ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 76.

³¹ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 78.

dismemberment.³² Whether the last two varieties are merely instances of altering constitutional identity is debatable.³³ Of particular pertinence to my present discussion, however, is the way that a formal change to fundamental rights enshrined in the constitution is considered dismemberment under Albert's theory and what it tells of his theoretical position. Notably, it is repeal or replacement that would render such an alternation constitution-dismembering.³⁴ As a corollary, neither enhancement of an existing fundamental right nor addition of a new right to the constitutional bill of rights will dismember the constitution. It is true that they may still be considered constitutional dismemberment for altering constitutional identity in the event. Nevertheless, the asymmetrical stance Albert takes towards the alteration of fundamental rights in identifying instances of constitutional dismemberment reveals the indelible normative characteristic of Albert's theory.

The normative element implicit in the theory of constitutional dismemberment is further evidenced in Albert's attitude towards the doctrine of unconstitutional constitutional amendment. To Albert, those ostensible amendments that have been declared unconstitutional are attempts to "do more than correct, elaborate, reform, or restore the [relevant] constitution[s] within [their] boundaries and presuppositions."³⁵ It is true that such amendments may be declared unconstitutional for reasons other than substantive constitutional norms. Yet, the most interesting cases involving this doctrine exist where an ostensible amendment is declared unconstitutional even if the relevant constitution does not include "the eternity clause" that would render some constitutional provisions unamendable.³⁶ In such cases, judicial renderings of unconstitutional constitutional amendment have relied on implicit substantive normative requirements "discovered" and pronounced by the court.³⁷ Taken together, unless they are otherwise constitutionalized, formal constitutional alterations that dismember the constitution

³² ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 85.

³³ See POLZIN, Monika. Constitutional identity, unconstitutional amendments and the idea of constituent power: the development of the doctrine of constitutional identity in German constitutional law. **International Journal of Constitutional Law**, vol. 14, n. 2, Apr./Jun. 2016, p. 411-38.

³⁴ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 85.

³⁵ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 218.

³⁶ See, e.g., BARANGER, Denis. The language of eternity: judicial review of the amending power in France (or the absence thereof). **Israel Law Review**, vol. 44, n. 3, Nov./Feb. 2011-12, p. 389-428; PREUSS, Ulrich K. The implications of "eternity clauses": the German experience. **Israel Law Review**, vol. 44, n. 3, Nov./Feb. 2011-12, p. 429-88.

³⁷ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 149-58. Yaniv Roznai further identifies what he calls "supra-constitutional" limits derived from natural law and international law. Notably, natural law-based supra-constitutional limits are also discovered and pronounced by the court. ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments: The Limits of Amendment Powers**. Oxford: Oxford University Press, 2017, p. 71-102.

fall in the category of unconstitutional constitutional amendments to be nullified by the court *ex ante* or *ex post* either for their breaking the unity of the constitution or infringing fundamental substantive normative principles, suggesting a legalistic view of transformative and revolutionary constitutional change.³⁸

Through the lens of Albert's theory of constitutional dismemberment, the transformative and revolutionary character of formal constitutional changes lies in their high impact on the existing constitution, regardless of the politico-sociological forces underpinning such changes.³⁹ Yet, Albert's advocacy for the constitutionalization of constitutional dismemberment by differentiating amendment rules in constitutional design seems to suggest otherwise. Notably, both Albert's theory of constitutional dismemberment and his proposal for its codification in constitutional design are intended to tame transformative and revolutionary constitutional change by means of legal continuity.⁴⁰ Nevertheless, legal continuity, or rather, legal framing, is not sufficient for the constitutionalization of dismemberment. Rather, Albert suggests that a higher degree of "popular consent" is required of constitutional dismemberment than of constitutional amendment. Thus, in his designed world of ideal written constitutions, the rules for formal constitutional change must be differentiated, requiring a higher threshold of agreement for transformative and revolutionary changes, i.e., constitutional dismemberments.⁴¹

Linking formal constitutional change to democracy, Albert blends his formalistic suggestions with substantive value.⁴² Seen in this light, he is not indifferent to the politico-sociological foundation of transformative and revolutionary constitutional change. Even so, conformity with the rules as codified in the written constitution takes precedence over political legitimacy. The constitution making no distinction between constitutional dismemberment and constitutional amendment in its current design, a transformative or revolutionary formal constitutional alteration thereof amounts to constitutional nullity as it is in essence an unconstitutional constitutional amendment.⁴³

³⁸ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 218.

³⁹ This echoes Gary Jacobsohn's view on constitutional revolution. See JACOBSON, Gary Jeffrey. Theorizing the constitutional revolution. **Journal of Law and Courts**, vol. 2, n.1, Spring 2014, p. 1-32..

⁴⁰ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 189-94.

⁴¹ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 190, 263-64.

⁴² ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 268-70. For democracy in and of itself as a substantive value, see BRETTSCHEIDER, Corey. The value theory of democracy. **Politics, Philosophy & Economics**, vol. 5, n. 3, Oct./Jan. 2006-07, p. 259-78. Cf. TRIBE, Laurence H. The puzzling persistence of process-based constitutional theories. **Yale Law Journal**, vol. 89, n. 6, 1980, p. 1067-72.

⁴³ While Albert does not take issue with the boundary of constitutional amendment as delimited in the comparative jurisprudence on unconstitutional constitutional amendments, he falls short of endorsing the judicial

The question is whether such a legalistic understanding of revolutionary constitutional change adequately captures the meaning of revolution in the political project of constitutional governance. To answer this question, we need to ask what constitution-making is really about.

With the idea of “new beginning” brought to the fore in her *On Revolution*, Arendt shed illuminating light on the question of constitution-making at the core of constitutional theory.⁴⁴ Constitution-making marks a new beginning by concluding the revolution with the foundation of freedom. It is such a new beginning characteristic of the foundation of freedom, not the new constitution in writing, that gives meaning to the act of constitution-making.⁴⁵ Thus, constitution-making that sets a constitutional project in motion is inseparable from the quest for political freedom. According to Arendt, *political freedom* lies at the core of one of the “three fundamental human activities:... action.”⁴⁶ Notably, among “the most general condition[s] of human existence” with which “action has the closest connection” is “natality.”⁴⁷ Elucidating how natality bears on the freedom-oriented political action, Arendt remarked,

*“[T]he new beginning inherent in birth can make itself felt in the world only because the newcomer possesses the capacity of beginning something anew, that is, of acting. In this sense of initiative, an element of action, and therefore natality is inherent in all human activities.”*⁴⁸

Being the fountainhead of actions of political freedom, natality thus underlies the meaning of revolution in the political project of constitutional governance. Sowing the seeds of a new beginning with its inherent “startling unexpectedness,” natality

invalidation of unconstitutional constitutional amendments for reasons of democracy. See ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions.** Oxford and New York: Oxford University Press, 2019, p. 217-23. Seen in this light, he does not quite treat an unconstitutional constitutional amendment as an act of constitutional nullity. Yet, his suggestions for an *ex ante* judicial guardianship of the boundary of constitutional amendment in the pre-ratification stage envisage judicial prevention of constitutional nullity in respect of formal constitutional alterations. ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions.** Oxford and New York: Oxford University Press, 2019, p. 223-27.

⁴⁴ ARENDT, Hannah. **On Revolution.** Rep. ed. New York: Penguin, 1990, p. 20-47.

⁴⁵ ARENDT, Hannah. **On Revolution.** Rep. ed. New York: Penguin, 1990, p. 144-45. See also PREUSS, Ulrich K. **Constitutional Revolution: The Link between Constitutionalism and Progress.** Translated by Deborah Lucas Schneider. Atlantic Highlands, NJ: Humanities Press, 1995, p. 25-37, 110.

⁴⁶ See ARENDT, Hannah. **On Revolution.** Rep. ed. New York: Penguin, 1990, p. 30-31, 233-36; ARENDT, Hannah. **On Revolution.** Rep. ed. New York: Penguin, 1990, p. 149-76.

⁴⁷ ARENDT, Hannah. **On Revolution.** Rep. ed. New York: Penguin, 1990, p. 8-9.

⁴⁸ ARENDT, Hannah. **On Revolution.** Rep. ed. New York: Penguin, 1990, p. 9.

further clothed political action in an aura of “miracle.”⁴⁹ Natality puts political action pursuing freedom in tension with rules and forms.⁵⁰

Through the lens of natality, a revolutionary constitutional change looks very different from what Albert has said of constitutional dismemberment. Imagine the following two scenarios under a constitution that provides for an undifferentiated amendment rule. In the first is a formal constitutional change that alters constitutional identity in full conformity with the unitary amendment rule but does not really result from deliberation and reflection among members of the political community. From the perspective of Albert’s theory, such a change is a straightforward instance of constitutional dismemberment. Through the lens of natality, it is far from the result of revolutionary action of political freedom. Obviously it cannot claim democratic legitimacy required of such a grand-scale constitutional alteration. Nor can it be deemed as the culmination of a natality-driven political action. Thus, subjecting the imaginary formal constitutional change to judicial nullification *ex ante* or *ex post* as an *ultra vires* constitutional amendment does not contradict the meaning of revolution in the political project of constitutional governance.

Alternatively, the same grand-scale constitutional alteration does command genuine popular support as a result of a robust democratic process and cross the same supermajority threshold required of an amendment unquestionably as in the first scenario. In stark contrast to the ought-to-be-nullified amendment in the first scenario, the second imaginary constitutional alteration is undoubtedly a function of natality. Yet, through the lens of Albert, these two imaginary formal constitutional alterations are no different. As in the first scenario, the natality-bred constitutional alteration here is subject to *ex ante* or *ex post* judicial nullification, too. After all, it breaks the unity of the imaginary constitution. Taken together, Albert’s theory of constitutional dismemberment not only captures those unfounded attempts to dismember the existing constitution under the pretence of a constitutional new beginning but also extends to cases of constitutional natality. With revolution recast in legalistic terms, Albert seems to embank the underlying human condition of revolutionary politics – natality. Inside the embankment of a unitary amendment rule is no place for the stream of constitutional natality. Can natality really be tamed by such constitutional embankment?

Notably, natality-driven political action materializes in the process of constitution-making before it translates into the enacting of a codified constitution.⁵¹ Thus,

⁴⁹ ARENDT, Hannah. *On Revolution*. Rep. ed. New York: Penguin, 1990, p. 177, 246-47.

⁵⁰ See KAHN, Paul W. *The Reign of Law: Marbury v. Madison and the Construction of Law*. New Haven: Yale University Press, 1997, p. 54-59, 64-69. This translates into the modern concept of constituent power in constitutional theory. See LOUGHLIN, Martin. The concept of constituent power. *European Journal of Political Theory*, vol. 13, n. 2, Apr./Jun. 2014, p. 231-34.

⁵¹ ARENDT, Hannah. *On Revolution*. Rep. ed. New York: Penguin, 1990, p. 141-45.

in the foregoing second scenario, constitutional natality has already burst before the existing constitution is actually altered. To be precise, it is the lead-up political action, not the constitution-dismembering formal change, that breaks the unity of the existing constitution. In other words, the old constitutional identity has already been altered in the process of political action and counteraction. The eventual change to the constitutional document coming out of the existing amendment rule is merely the end result of constitutional identity-altering political action, not the cause of the breakdown of constitutional identity. In such a scenario, denying the resulting constitutional change the character of constitutional new beginning is far from the preservation of constitutional identity. Rather, condemning it as an unlawful constitutional dismemberment (or rather, an unconstitutional constitutional amendment) shows an intransigent attempt to restore the ousted identity, despite the new one to which natality has given rise.

3. WHEN CONSTITUTION-MAKING BECOMES CONSTITUTION-WRITING: CONSTITUTIONAL NATALITY DISMEMBERED

Despite no place for identity-altering formal change to the constitution that does not provide for rules governing such changes, Albert does allow for constitutional new beginning in his theory of constitutional change. Addressing reformers who are acting to “make a *lawful* change of the larger magnitude” that exceeds the boundary of constitutional amendment in the majority of the real-world constitutions in which only a unitary undifferentiated rule is provided for constitutional amendment, Albert points them in the direction of “mak[ing] a new constitution.”⁵² Notably, the constitution whose creation constitutional reformers would “invest time and resources [in with] nontrivial risks of failure [incurred]” has to be new not only in substance but also in form: it is a constitution with new authorship, new name, and new substance, breaking “legal continuity” with that which it is intended to reform.⁵³ Thus, what sets such constitution-making apart from the imaginary natality-driven constitutional alteration as discussed in Section II is not whether the latter requires time and resources or not. Nor does the foregoing imaginary natality-driven constitutional alteration necessarily incur less risks of failure. On the contrary, as will be further discussed, the underlying political action may well face more cumbersome challenges in the imaginary scenario, especially when the undifferentiated amendment rule requires an exceedingly high threshold of

⁵² ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 189 (emphasis added).

⁵³ For the role of authorship in constitutional theory, see KUO, Ming-Sung. Cutting the Gordian knot of legitimacy theory? an anatomy of Frank Michelman’s presentist critique of constitutional authorship. **International Journal of Constitutional Law**, vol. 7, n. 4, Oct./Dec. 2009, p 683-714.

popular consent,⁵⁴ than the making of a new constitution as envisaged in Albert's theory. As a whole, the creation of a new constitutional text is characteristic of Albert's version of constitutional new beginning.

In line with the formalistic view on constitutional new beginning, Albert proposes that reformers differentiate constitutional rules in terms of three types of formal constitutional change in their constitutional design: "rules changeable by amendment, rules changeable by dismemberment, and unamendable rules changeable only by creating a new constitution."⁵⁵ The first two are to be explicitly stipulated in the design of constitutional rules on formal constitutional alteration, while the last – the repeal or replacement of the unamendable rules by constitutional enactment – is a requirement by necessary implication. From Albert's calibration of the threshold of popular consent required of formal constitutional changes to their degree of impact on the existing constitution, it must be inferred that the threshold for dismemberment needs to reflect its transformative and revolutionary character and is thus set higher than that for amendment. And, this exposes the limitation of the formalistic conceptualization of constitutional new beginning as reflected in Albert's tripartite classification of constitutional changes: amendment, dismemberment, and enactment.

Suppose that an ideal codified constitution differentiates amendment and dismemberment with a provision defining state territory enshrined as the unamendable rule as observes Albert's advice.⁵⁶ For an amendment, it provides that an amendment require the agreement of at least two thirds of the total members of the unicameral parliament followed by popular consent with more than one-half of the valid ballots cast in favour in a popular referendum. For such a referendum to be valid, the voting rate must exceed one-half of the eligible electors. Given the transformative and revolutionary impact of altering suffrage on the constitutional order, the imaginary constitution treats any change on suffrage as dismemberment, requiring the agreement of at least three quarters of the total members of the unicameral parliament followed by a referendum. It requires the number of valid votes in favour exceeding one-half of the total number of eligible electors to sanction a dismemberment bill passed by the parliament.⁵⁷

⁵⁴ Apparently this may result in an instance of what Albert calls "constructive unamendability." ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 158-59.

⁵⁵ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 264.

⁵⁶ The following thought experiment is designed in light of actual constitutional politics in Taiwan.

⁵⁷ This imaginary constitutional design is an adaptation of the amendment rule of the ROC Constitution, which is the working constitution of Taiwan. Additional Article 12 provides: "Amendment of the Constitution shall be initiated upon the proposal of one-fourth of the total members of the Legislative Yuan, passed by at least three-fourths of the members present at a meeting attended by at least three-fourths of the total members of the Legislative Yuan, and sanctioned by electors in the free area of the Republic of China at a referendum held upon expiration of a six-month period of public announcement of the proposal, wherein the

At first glance, the three-tiered design of constitutional change seems to be ideal. Upon close examination, however, this model design cannot escape the startling unexpectedness posed by constitutional natality. To see why it is so, let us imagine the following two scenarios under this imaginary designed constitution.

In the first scenario is a reform proposal to extend suffrage to citizens over the age of eighteen but under the age of twenty. Enthusiastically pushed by grassroots organizations, this proposal easily passes the high threshold at the parliamentary stage, with an overwhelming cross-party support.⁵⁸ Yet, despite the passionate campaign and the general support as indicated in serial polls, it eventually falls short in the referendum stage. With 70% of eligible voters casting their ballots and 70% of the ballots cast in favour, this reform only gains the support of 49% of eligible voters short of the required one-half threshold, ending up as a failed attempt at constitutional dismemberment. Through Albert's lens, this reform is defeated. Let us suppose that following the referendum, the parliament further adopts a unanimous resolution instructing the president to promulgate the reform proposal as a valid formal change to the constitution on grounds that the reform bill is essentially a constitutional amendment without regard to dismemberment. Through Albert's lens again, this would amount to an unlawful constitutional coup. Yet, when looked at through Arendt's lens of natality, this would evoke a constitutional new beginning. Specifically, the constitutional order changes with its democratic foundation reimaged in a genuinely democratic fashion by virtue of an exercise of what Bruce Ackerman and Neal Katyal calls "unconventionality."⁵⁹ Condemning it as an unlawful constitutional coup or an unconstitutional constitutional alteration would mean a betrayal of the meaning of constitutional renewal – to mark a new beginning of constitutional life.

To be sure, it may be countered that reformers should opt for constitutional enactment instead of going down the foregoing route of unconventional application, if not intentional manipulation, of the enshrined rules on constitutional change. Embarking on the time-consuming and resources-demanding route of constitutional enactment is the right way forward as it would keep the proposed reform on the track of lawfulness without contravening the rules set out in the imaginary constitution.⁶⁰

number of valid votes in favor exceeds one-half of the total number of electors. The provisions of Article 174 of the Constitution shall not apply." For a helpful introduction to the Taiwan constitution, see YEH, Jiunn-rong. **The Constitution of Taiwan: A Contextual Analysis**. Oxford: Hart, 2016.

⁵⁸ This is an adaptation of an ongoing development in Taiwan. See TAIWAN likely to pass constitutional amendment lowering voting age to 18. Taiwan News, 19 Feb 2020. Available in: <<https://www.taiwannews.com.tw/en/news/3878403>>. Last visited: 04/04/2020.

⁵⁹ Unconventionality in formal constitutional change results from deviation from the constitution rules on amendment but without totally disregarding them. See ACKERMAN Bruce; KATYAL, Neal. Our unconventional founding. **University of Chicago Law Review**, vol. 62, n. 2, Spring 1995, p. 558-59.

⁶⁰ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 189.

This rejoinder raises two fundamental issues here. First, it is unclear what it means to be lawful to step out of the existing constitutional framework followed by the enactment of a new constitution. After all, a new constitution is a creation *ex nihilo* from the legal perspective⁶¹ unless some sort of natural law is invoked as the higher law delimiting the boundary of constitutional enactment.⁶² Thus, lawfulness in the rejoinder does not so much concern the legality of the proposed reform itself as focuses on assuring that the rules on formal constitutional change in the imaginary constitution be complied with to the letter. The rule of law project Albert persuasively links to written constitutions is manifested in the impeccable adherence to the rules on formal constitutional change.⁶³ This brings up the second issue.

The main reason underlying Albert's proposal to codify identity-altering dismemberment alongside amendment in constitutional design is to contain, or rather co-opt, transformative and revolutionary changes by means of constitutional incorporation. In this way, Albert argues, constitutions can change, piecemeal or on a grand scale, within a given institutional framework without breaking legal continuity.⁶⁴ Viewed thus, enabling ordered constitutional transformation or revolution within a continuing constitutional framework is the end, while conformity with the rules set out in the constitutional order is the means. Yet, with legal continuity in the context of constitutional change conditioned on the impeccable adherence to the rules governing formal constitutional changes, the unconventional reform change in the first scenario would be banished from the imaginary constitutional framework to the uncharted legal territory of constitutional creation *ex nihilo*. To put it differently, even if an ordered but unconventional constitutional transformation as illustrated in the foregoing reform proposal has taken place, its constitutional status remains contingent on the legalistic decision as to whether it has been in conformity with the codified rules on constitutional amendment and dismemberment in the imaginary constitution. Breaking the "law" of constitutional change in the imaginary constitution, it comes down to constitutional nullity. In sum,

⁶¹ FRIED, Charles. The Supreme Court, 1994 Term – foreword: revolutions?. *Harvard Law Review*, vol. 109, n. 1, Nov. 1995, p. 18.

⁶² The German Federal Constitutional Court alluded to the possibility of the original constitutional provisions being unlawful in the *Southwest Case* ((1951) I BverfGE 225). See ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments: The Limits of Amendment Powers**. Oxford: Oxford University Press, 2017, p. 76. Notably, a constitutional creation *ex nihilo* does not mean constitutional chaos. LOUGHLIN, Martin. The concept of constituent power. *European Journal of Political Theory*, vol. 13, n. 2, Apr./Jun. 2014, p. 229. See also MICHELMAN, Frank I. Always Under Law. *Constitutional Commentary*, vol. 12, n. 2, Summer 1995, p. 227-47. Yet, it is one thing to say that it is orderly; it is another to say that it is lawful in the same sense as a lawful constitutional amendment or dismemberment. Lawfulness in the latter presupposes some pre-existing legal criteria, which is not contemptible with the idea of creation *ex nihilo*.

⁶³ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 269-71.

⁶⁴ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 188-94, 263-64, 268-69.

Albert's emphasis on the importance of legal continuity in constitutional renewal is not so much about institutional continuity that channels constitutional transformation in an orderly way as about compliance with the rules on formal constitutional change. The means becomes the end.

The foregoing scenario indicates that the functioning of legal continuity in taming transformative and revolutionary constitutional alteration relies not only on conformity with the rules but also on the continuation of the institutional framework. What is missing from the tripartite classification of constitutional change is the recognition that the constitutional form of legal continuity will have to face the rule-challenging popular quest for constitutional renewal.⁶⁵ Failing to appreciate this real-world constitutional phenomenon, insistence on conformity with the codified dismemberment rule may unexpectedly pit legal continuity against the taming of transformative and revolutionary constitutional change as illustrated in the first scenario. Nevertheless, Albert's proposed design on the rules governing formal constitutional change may be otherwise defended in the following line: a transformative or revolutionary constitutional change must show its seriousness by going through the arduous process of creating a constitution *ex nihilo* as alluded to in the differentiation of amendment, dismemberment, and enactment. How far this line of argument can go will transpire in light of the second scenario of constitutional reform.

Suppose that the government has exercised effective control only over a frontier island province of the entire state territory defined in the imaginary constitution over the past seven decades. Numerous polls also constantly indicate that over three-quarters of the people support the idea to redefine state territory in the constitution to close the gap between political reality and constitutional definition. As indicated above, the provision for state territory is codified as an unamendable rule in the imaginary constitution. Looked at through Albert's lens, the only "lawful" way to redefine state territory in constitutional terms is down the failure-prone, time-consuming, and resources-demanding route of constitutional creation *ex nihilo*. But is the route of enactment really more arduous than that of amendment, not to mention dismemberment?

Imagine that, in order to adopt a new constitution with state territory redefined in line with the islands under the government effective control, the reformers follow Albert's advice and convene a constituent assembly with all societal sectors fully represented. Yet, although the change on state territory commands robust popular support

⁶⁵ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 268-69. Emmanuel Joseph Sieyès made this point of revolutionary constitution-making in the context of the French Revolution. SIEYÈS, Emmanuel Joseph. **What Is the Third Estate?** Translated by M. Blondel. London: Pall Mall Press, 1963, p. 127-28. See also KAHN, Paul W. **The Reign of Law: Marbury v. Madison and the Construction of Law**. New Haven: Yale University Press, 1997, p. 69-74; LOUGHLIN, Martin. The concept of constituent power. **European Journal of Political Theory**, vol. 13, n. 2, Apr./Jun. 2014, p. 227, 231-32.

and has been the impetus for this imaginary effort of constitutional renewal, public opinion is divided over other issues that need to be stipulated in a constitution such as whether the office of presidency should be ceremonial or executive. Even so, the constituent assembly adopts a new constitution with the support of two-thirds of the total delegates and subjects it to a referendum for popular approval. With 75% of eligible voters taking part in the referendum, the proposed new constitution is approved with 55% of total ballots cast in favour of its adoption. From the perspective of democracy, this imaginary new constitution has fairly popular support, marking a legitimate constitutional new beginning. Nevertheless, compared to the reform proposal to extend suffrage in the first scenario, this constitutional enactment is less cumbersome than dismemberment as well as amendment. With the benefit of institutional continuity deprived, this exercise of constitutional creation *ex nihilo* is prone to more risks. Under the differentiated rules on formal constitutional change modelled after Albert's proposed constitutional design, the most transformative and revolutionary constitutional alteration can be less time-consuming and resources-demanding than its lesser variety but remains equally risky.

Taken together, the foregoing two scenarios of constitutional reform suggest that compartmentalization of constitutional changes in constitutional design with constitutional new beginning consigned to the extraconstitutional route of enactment can stand in the way of genuine constitutional renewal. It may even contradict the goal of taming transformative and revolutionary constitutional changes with the institutional constraints of legal continuity. To make things more complicated, if a new constitution is simply promulgated with the ostensible democratic support expressed in a plebiscite-like popular vote, it would be fair to assume that this creation *ex nihilo* would still qualify as a constitutional new beginning under Albert's tripartite classification of constitutional changes. In this way, the writing of a new constitution marks the most revolutionary and radical form of constitutional change and the beginning of a novel constitutional order, thereby hollowing out the meaning of constitution-making.

As Arendt perceptively observed nearly sixty years ago, constitution-making is not only about the making of law. It is also a political act that "constitutes" the political order and the people.⁶⁶ Constitution-making is constitutive because it is engendered by political action that is powered by one of the general conditions of human existence – natality. As the foregoing imaginary constitutional order shows, Albert's designed world of ideal written constitutions assumes an orderly expression of desires for constitutional reform. They are expected to find their place in the respective designated

⁶⁶ See ARENDT, Hannah. **On Revolution**. Rep. ed. New York: Penguin, 1990, p. 145; PREUSS, Ulrich K. **Constitutional Revolution: The Link between Constitutionalism and Progress**. Translated by Deborah Lucas Schneider. Atlantic Highlands, NJ: Humanities Press, 1995, p. 109-10. Cf. ROSENFELD, Michel. **The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community**. Abingdon: Routledge, 2009.

constitutional channels. Yet, this is not the way that the world of politics operates. Rather, politics always plays out in a way startling its observers, defying existing frameworks, and continuing to bother institutional designers.⁶⁷ Against this backdrop and through the lens of Albert's constitutional design, an Arendtian constitution-making may well be either condemned as unlawful within an Albertine constitution or banished to an exercise of constitution-writing from without. While an Albertine constitution only envisages a dismembered constitutional natality that is tameable by constitutional design, the meaning of constitutional renewal is hollowed out with constitution-writing taking the place of constitution-making in *Constitutional Amendments*.⁶⁸

4. IN LIEU OF CONCLUSION: CONSTITUTION-MAKING IS MORE THAN CONSTITUTIONAL DESIGN

Once left on the margin of the landscape of comparative law, constitutions have recently generated great interest from comparatists.⁶⁹ To be more precise, not only constitutions themselves but also constitutional phenomena become objects of comparative constitutional studies. How they are interpreted by judges, how they are applied by politicians, how robust their protection of fundamental right is, how state powers are organized and allocated in constitutional terms, and so on all appear in various venues, including monograph series and specialized journals. Constitutional change and constitutional design are no exception. With his encyclopaedic knowledge of comparative constitutional amendments, Albert has helped us to see the nuances of formal constitutional alterations more clearly with his tremendous "*Constitutional Amendments*" and theoretical discovery – the concept of constitutional dismemberment.

I have shown that drawing upon comparative constitutions, Albert not only provides us constitutional scholars with a more sophisticated analytic framework of constitutional change but also pitches constitutional practitioners in the design of rules on constitutional change with his concept of constitutional dismemberment among other

⁶⁷ KAHN, Paul W. **The Reign of Law: Marbury v. Madison and the Construction of Law**. New Haven: Yale University Press, 1997, p. 64-74; LOUGHLIN, Martin. The concept of constituent power. **European Journal of Political Theory**, vol. 13, n. 2, Apr./Jun. 2014, p. 231-34. Conscious of the political character of the constitutional project, Albert nonetheless envisages a tamed political world. See ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 269.

⁶⁸ Albert notes constitution as an action through which consent is renewed and the constitutional order is continually re-legitimated. Nevertheless, he only allows for such action within the limits of the designed rules on constitutional change. ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 195-96.

⁶⁹ Compare, TWINING, William. **Globalisation and Legal Scholarship**. Nijmegen: Wolf Legal Publishers, 2011, p. 21, with HIRSCHL, Ran. **Comparative Matters: The Renaissance of Comparative Constitutional Law**. Oxford and New York: Oxford University Press, 2014, p. 77-78.

comparative insights.⁷⁰ This is an exemplar of joining theory and practice. Yet, with Albert's role moving from constitutional comparatist to constitutional practice and design adviser, constitutional dismemberment raises more questions than answers. Applying constitutional dismemberment to real-world constitutions that provide for only a set of unitary undifferentiated rules on formal constitutional changes, it may still fall under the spell of the doctrine of unconstitutional constitutional amendment. With all identity-altering constitutional changes under such constitutions condemned as unlawful constitutional dismemberments (or rather unconstitutional constitutional amendments), constitutional changes that would give rise to new meaning and identity resulting from natality-powered political action are turned into constitutional nullity. Moreover, when translated into constitutional design, the concept of constitutional dismemberment and the concomitant tripartite classification of constitutional changes – amendment, dismemberment, and enactment – will likely fall short of taming transformative and revolutionary constitutional alternations. Politics that gives meaning to the constitution characteristically defies predetermined rules and challenges designed forms.⁷¹ Failing to appreciate the free flow of natality Arendt perceptively identified in the condition of human existence, a scientific, theory-based design on constitutional change of Albert's sophisticated kind mistakes constitution-writing and constitutional design for constitution-making, hollowing out the meaning of constitutional renewal.

The foregoing observation does not mean that constitutional design is not important to constitution-making. Nor does it suggest that constitutional design needs no theoretical guidance or comparative insight. Yet, to do justice to the constitutional project, we must take the phenomenon of constitution-making and its concomitant real-world politics seriously. As with many fellow travellers in comparative constitutional studies, Albert focuses on comparative written constitutions rather than comparative constitutional phenomena.⁷² The writing of constitutional codes stands front and center, eclipsing the big picture of intricate constitutional phenomena relating to the making of a constitutional order. As a result, "written constitutionalism" steers the theory, which is further applied to defend the former.⁷³ By transcending the fascination

⁷⁰ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. Oxford and New York: Oxford University Press, 2019, p. 229-60.

⁷¹ KAHN, Paul W. **The Reign of Law: Marbury v. Madison and the Construction of Law**. New Haven: Yale University Press, 1997, p. 69-74; LOUGHLIN, Martin. The concept of constituent power. **European Journal of Political Theory**, vol. 13, n. 2, Apr./Jun. 2014, p. 231-32. See also KAHN, Paul W. **Political Theology: Four New Chapters on the Concept of Sovereignty**. New York: Columbia University Press, 2012.

⁷² KUO, Ming-Sung. A dubious Montesquieuian moment in constitutional scholarship: reading the empirical turn in comparative constitutional law in the light of William Twining and his hero. **Transnational Legal Theory**, vol. 4, n. 4, 2013, p. 491-93.

⁷³ KUO, Ming-Sung. A dubious Montesquieuian moment in constitutional scholarship: reading the empirical turn in comparative constitutional law in the light of William Twining and his hero. **Transnational Legal Theory**, vol. 4, n. 4, 2013, p. 493-501.

with well-styled constitutions and bringing unwieldy, flowing constitutional natality to the attention of comparatists,⁷⁴ Albert will enrich general theory of constitutional change even more with his landmark contribution of *Constitutional Amendments*.

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⁷⁴ Ackerman's recent comparative study of "constitutional pathways" is a good example. See ACKERMAN, Bruce. **Revolutionary Constitutions: Charismatic Leadership and the Rule of Law**. Cambridge, MA: Belknap, 2019.

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Constitutional dismemberment via referenda: a comparative overview

Desmembramento constitucional através de referendos: uma visão comparativa

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Abstract

Constitutional dismemberment is one of the main consequences attached to constitutional amendments that Albert's book analyses. After having analyzed Albert's definition, the present essay focuses on the practice of constitutional dismemberment via referendum and discusses whether, in times of populism and democratic decay, the constitutional design should provide for specific measures in order to protect the political opposition from the allegiance between the populist leadership and the majority of the population. Building on the existing literature and on a comparative analysis, the essay concludes by highlighting the pros and cons of introducing special protections for political minorities during constitutional referenda to protect democracy against populist deviations, suggesting the need to provide further studies in this field.

Keywords: constitutional amendments; referendum; Rule of Law; constitutional dismemberment; populism.

Resumo

O desmembramento constitucional é uma das principais consequências associadas às emendas constitucionais que o livro de Albert analisa. Depois de analisar a definição de Albert, o presente ensaio focaliza a prática do desmembramento constitucional por referendo e discute se, em tempos de populismo e decadência democrática, o desenho constitucional deve prever medidas específicas para proteger a oposição política da aliança entre a liderança populista e a maioria da população. Com base na literatura existente e em uma análise comparativa, o ensaio conclui destacando os prós e contras da introdução de proteções especiais para as minorias políticas durante os referendos constitucionais para proteger a democracia contra os desvios populistas, sugerindo a necessidade de fornecer mais estudos nesse campo.

Palavras-chave: emendas constitucionais; referendo; Estado de Direito, desmembramento constitucional; populismo.

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1. Constitutional dismemberment and populist referenda: is there a risk of democratic decay?; 2. Populism and Constitutional Change; 2.1 The Role of Political Opposition in Constitutional Dismemberment; 3. Concluding remarks; 4. References.

1. CONSTITUTIONAL DISMEMBERMENT AND POPULIST REFERENDA: IS THERE A RISK OF DEMOCRATIC DECAY?

Albert's notion of constitutional dismemberment¹ introduces in the scholarship on constitutional change a category in between constitution-making and constitutional amendment, the former entailing the exercise of the constituent power while the latter encompassing a wide range of interventions on the fundamental Charter, from mere adjustments to revolutionary changes. With the constitutional dismemberment, therefore, Albert provides a denomination for those amendments implying a significant transformative behavior, notwithstanding how many articles are formally 'transformed', which constitutional aspects they discipline (i.e. constitution's identity, catalog of fundamental rights, constitution's central structural pillar), and whether the amendments aim at disrupting or restoring the core of the Constitution. This transformation can occur suddenly or gradually, but it never breaks legal continuity and it is realized with all the relevant actors' awareness about the impact it is going to have on one or more Constitution's elemental parts. In brief, for Albert, a 'simple' amendment "must cohere with the existing constitution and must keep the constitution consistent with its pre-change form";² while a constitutional dismemberment, either enhancing or weakening democracy,³ does not.

In times of populism, however, the impact of constitutional amendments on democracy should be carefully taken into account. Indeed, populism, magnifying the role of the will of the people, can jeopardize the Courts' power to protect the essential elements of a constitution, and, enhancing the link between the leader and the population while weakening the one between the latter and its representatives in the Assemblies, can marginalize the political opposition, moreover when the procedure for constitutional dismemberment entails a referendum.

¹ ALBERT, Richard. Constitutional Amendment and Dismemberment. *Yale Journal of International Law*, vol. 43, n. 1, 2018; ALBERT, Richard. **Constitutional amendments: making, breaking, and changing constitutions**. Oxford: Oxford University Press, 2019. *passim*.

² ALBERT, Richard. **Constitutional amendments: making, breaking, and changing constitutions**. Oxford: Oxford University Press, 2019. p. 82.

³ ALBERT, Richard. **Constitutional amendments: making, breaking, and changing constitutions**. Oxford: Oxford University Press, 2019. p. 78.

Entrenched in contemporary constitutionalism as a device for calling people to decide,⁴ the referendum has often been the tool for instating plebiscitarian democracies.⁵ Indeed, referenda foster a majoritarian governance⁶ and populist leaders recur to them aware that individuals mostly prize charisma more than accurate explanations about the referendum's real content⁷ because they lack technical competences for taking relevant political decisions⁸. Hence, although representative democracy is not immune from majoritarianism,⁹ referenda are exploited for achieving majoritarian decision-making,¹⁰ moreover in a political environment with strong societal divides.

In this regard, Albert states that the reason for establishing formal rules for constitutional amendments is to reinforce the democratic debate,¹¹ and that, because of its content, "the execution and legitimation of a constitutional dismemberment should require a greater degree of consent than a constitutional amendment".¹² To ensure such a greater degree, however, he relies on the existing features constitutional designers have proposed. At the state of the art, a 'selective rigidity' of the Constitution and/or the Courts' power to strike down unconstitutional constitutional amendments have been entrenched in the Charters.¹³ However, the legal doctrine has already underscored the

⁴ SUKSI, Marku. **Bringing in the people: a comparison of constitutional forms and practices of the referendum**. Leida: Martinus Nijhoff Publishers, 1993. p. 2.

⁵ See DICEY, Albert Venn. Ought the referendum to be introduced into England. **Contemporary Review**, 1890; DE BENOIST, Alain. **Démocratie: le problème**. Paris : Le Labyrinthe, 1985; MUELLER, Dennis C. **Constitutional Democracy**. Oxford: Oxford University Press, 1996; MAYORGA, Rene Antonio. Outsider and Neopopulism: the road to plebiscitary democracy. In: MAINWARING, Scott (Coord.). **The Crisis of Democratic Representation in the Andes**. Redwood: Stanford University Press, 2006; QVORTRUP, Mads. Are Referendums Controlled and Pro-hegemonic? **Political Studies**, vol. 48, pp. 821-826, 2000.

⁶ See LIJPHART, Arend. **Democracies. Patterns of Majoritarian and Consensus Government in Twenty-One Countries**. New Haven: Yale University Press, 1984. p. 204.

⁷ OAKESHOTT, Michael. **Rationalism in Politics and other Essays**. Indianapolis: Liberty Fund, 1991. p. 380. See also TIERNEY, Stephen. **Constitutional Referendums: The Theory and Practice of Republican Deliberation**. Oxford: Oxford University Press, 2012. p. 28.

⁸ This is because whether the answer is relatively easy (YES or NO), the question may be complex, and therefore people's perception of it can be maneuvered using the ideological bond between the people and political parties. See SARTORI, Giovanni. **The Theory of Democracy Revisited**. New York: Chatham House, 1987. p. 120, SETALA, Maija. On the problems of responsibility and accountability in referendums. **European Journal of Political Research**, n. 45, 2006. p. 699; SEMETKO, Holli A.; DE VREESE, Claes E. (Coord.). **Political Campaigning in Referendums: Framing the Referendum Issue**. London: Routledge, 2004.

⁹ TIERNEY, Stephen. **Constitutional Referendums: The Theory and Practice of Republican Deliberation**. Oxford: Oxford University Press, 2012. p. 39-40.

¹⁰ The risks for minorities deriving from referenda were already debated in MILL, John Stuart. **Considerations on Representative Government** [1862]. New York: Prometheus Books, 1991 and in MADISON, James. **Federalist Paper No 10**.

¹¹ ALBERT, Richard. **Constitutional amendments: making, breaking, and changing constitutions**. Oxford: Oxford University Press, 2019. p. 46.

¹² ALBERT, Richard. **Constitutional amendments: making, breaking, and changing constitutions**. Oxford: Oxford University Press, 2019. p. 92.

¹³ LANDAU, David; DIXON, Rosalind. Constraining Constitutional Change. **Wake Forest Law Review**, vol. 50, n. 4, p. 859-890, 2015.

potential weakness of these design mechanisms – as well as of the ‘militant democracy’ against current authoritarian threats – and has called for greater scholarly attention in analyzing the links between constitutionalism and democracy.¹⁴

Against this background, forms for protecting political minorities in times of democratic decay should not be underestimated among the tools for disciplining constitutional change. Populism may indeed nullify the usually required parliamentary super-majorities or the other devices at the parliamentary level thought for increasing the negotiation, given also the fact that most of the Constitutions require a smaller qualified majority if a referendum will follow. In this vein, Landau proposes to introduce the requirement of multiple votes and intervening elections between votes for the constitutional dismemberment believing that a bigger time span can reduce the risks of abusive constitutional practices. This paper discusses the feasibility of another tool. Building on the comparative study of cases in which populist forces abridged political opposition and achieved to weaken the Constitution’s democratic identity by calling for a popular referendum, here the introduction of an explicitly reserved quota for political opposition in the requested super-majority for the approval of the dismemberment is examined.

2. POPULISM AND CONSTITUTIONAL CHANGE

Political scientists consistently struggle to find a definition of populism. For the scope of this contribution, populism can be defined as an ideology opposing the pure people against corrupted elite,¹⁵ with a specific communication style¹⁶ and a strategy for gaining and then keeping the power.¹⁷ In this strategy, populist parties exploit the promise, both right-wing and left-wing populism present with messianic tones and with a salvific attitude, to ensure the respect of the people’s real will for obtaining huge parliamentary majorities, then allowing them to monopolize the agenda-setting and the law-making process without needing to bargain with opposition parties. At this aim, constitutional change, either via constitution-making or constitutional dismemberment, is the most used tool.¹⁸

When amendment procedures set for a referendum after a parliamentary approval with a minimum qualified majority, thanks to the super-majority they own,

¹⁴ LANDAU, David. Abusive Constitutionalism. **UC Davis Law Review**, n. 47, p. 189-260, 2013.

¹⁵ MUDDE, Cas. The Populist Zeitgeist. **Government and Opposition**, n. 39, p. 541-543, 2004.

¹⁶ JAGERS, Jan; WALGRAVE, Stefaan. Populism as Political Communication Style: An Empirical Study of Political Parties’ Discourse in Belgium. **European Journal of Political Research**, vol. 46, n. 3, p. 319-345, 2007.

¹⁷ WEYLAND, Kurt. Clarifying a Contested Concept – Populism in the Study of Latin American Politics. **Journal of Comparative Politics**, vol. 34, n. 1, p. 1-22, 2001.

¹⁸ LANDAU, David. Populist Constitutions. **The University of Chicago Law Review**, Chicago, vol. 85, n. 2, p. 521-544, 2018.

populist parties have thus a chance for proceeding to a constitutional dismemberment without consulting/negotiating with other actors. Should this happen, the judicial review of constitutional amendments is the only remaining device for safeguarding the constitutional identity from unconstitutional amendments. Nevertheless, the doctrine has already underscored that only a few legal systems allow for this review, that some limit it to formal aspects and that a general critique can raise about the democracy of this procedure exactly because it safeguards constitutionalism at the expense of the respect of people's will.¹⁹ Populists' defiance toward Courts and notably toward constitutional judges stems from this paradox.

Furthermore, in a populist political environment, the main teleological aim of reinforced provisions for amending rigid constitutions – which is to preserve the fundamental Charter from volatile majorities and to include the opposition in such high-level decision-making – is generally disregarded as long as the focus is to fulfill the will of the present majority. Besides the risk of the tyranny of the (representative) majority, there is also the fact that the (popular) majority can be not so huge and, when a specific requirement for the turnout is not provided, the outcome of the referendum can then be determined by the sole will of an active political minority.

Finally, it should be noted that when the people's will concerns elections, the implementation of the political program presented and the 'evaluation' people will provide in the subsequent elections represent an incentive for politicians for being realistic and accountable. A referendum, instead, is a one-time event with no-specific consequences deriving from the way political forces campaigned, therefore they may have no incentives for being accountable and clearly represent/campaign on the content of the referendum.

Notwithstanding whether people's final decision has been in favor of or against populists' expectations, several examples of opposition's abridgment during attempts of constitutional dismemberment via referendum exist. Believing that the instability of constitution-making is the cost that must be paid when (re-)writing the Charter and that "the greater role granted to popular referenda and extra-parliamentary authorities, the less constitutionalism matters as a political force",²⁰ the cases discussed below showcase the risks for the political opposition during constitutional dismemberments when devoted protection lacks.

¹⁹ ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments**. Oxford: Oxford University Press, 2017.

²⁰ HOLMES, Stephen T.; SUNSTEIN, Cass R. The Politics of Constitutional Revision in Eastern Europe. In: SANFORD, Levinson (Coord.). **Responding to imperfection: the theory and practice of Constitutional Amendment**. Princeton: Princeton University Press, 1995. p. 275-290.

2.1. The role of political opposition in constitutional dismemberment

Albert hints at the use of referenda for circumventing the role of the opposition when examining the 1962 French referendum for amending the rules for presidential elections originally provided in the 1958 Constitution. On that occasion, De Gaulle convened a referendum (art. 11 Const.) and exploited his political influence on the population for having the direct election approved, aware that he could not gather the required majority in Parliament.

Several other cases in which the relationship between the leader and the population has been exploited for constitutional changes, often entailing a clear constitutional dismemberment, can be listed. As Albert briefly mentions, Turkey is among the countries where constitutional dismemberment can be observed;²¹ also, it is a country where the abridgment of the political opposition via referendum proved successful due to a solid pro-hegemonic dynamic of popular consultations.²² Indeed, Albert reports the case of the 2017 constitutional amendment, having entailed the rewriting or repealing of around 40 percent of the 1982 Charter. The reform, which builds on the 2007 constitutional amendment introducing the direct election of the President of the Republic, has changed the form of government from parliamentarism to a presidentialism turning the country into a majoritarian democracy and extensively increasing the power of the President of the Republic.²³ In both the 2007 and 2017 amendments, the modifications of the form of government needed the popular confirmation via referendum and impinged on the constitution's identity to an extent that let include them among constitutional dismemberments. In both the 2007 and 2017 amendments, incumbents proved aware of this.

Nevertheless, in 2007, the referendum was convened in a residual attempt of avoiding dismemberment, while in 2017 it was a means for ensuring people's support to the change of the constitutional identity while abridging the parliamentary opposition. Indeed, in 2007, President Sezer convened the referendum in order to hamper the entry into force of the constitutional amendment for the direct election of the President of the Republic the AKP majority in the Grand National Assembly of Turkey (GNAT) approved – although not with the required majority for avoiding the referendum – when the CHP opposition proved able to obstruct the election of Abdullah Gül as the President of the Republic. In the letter explaining the reasons for sending back to

²¹ ALBERT, Richard. **Constitutional amendments: making, breaking, and changing constitutions**. Oxford: Oxford University Press, 2019. p. 85.

²² In this regard, it is worthy to underscore that Turks have always confirmed, though with different majorities, constitutional amendments proposed by the AKP government.

²³ SCOTTI, Valentina Rita. On the pro-hegemonic nature of referenda for constitutional reforms in Turkey. A focus on 16 April 2017 referendum introducing presidentialism. **Osservatorio Costituzionale**, n. 2, 2017.

the GNAT the amendment bill for reconsideration, President Sezer stated that the direct election would have altered the pillars of parliamentarism, and namely the impartiality of the office, on which the Republic was built since its establishment.²⁴ Although envisaging the risks, Sezer could only rely on the people, who however confirmed the pro-hegemonic nature of referenda and approved the dismemberment. In 2017, instead, the President of the Republic Erdoğan convened the referendum because the amendment bill obtained only 330 votes, lacking the 367 votes on 550 needed for direct entry into force (article 175 of the Constitution). The populist antagonism between the people and the elite, as well as the lack of a political culture based on pluralism, clearly appeared in this circumstance. Indeed, Erdoğan stated that “These people (the opposition) don’t have respect for the people or popular sovereignty. Remember the slogan: one people, one flag, one homeland, one state”²⁵ The opposition surrendered to the leader/people relationship and the leader of the opposition party CHP, Kemal Kılıçdaroğlu, while explaining the decision of not appealing the Constitutional Court,²⁶ stated that “A sovereignty that cannot be protected by the people’s will is not possible to be protected by any other power. [...] If the issue is the nation’s sovereignty, the real Supreme Court in that case is the people’s, nation’s court”²⁷ The peculiar political atmosphere of the post-July-2016 state of emergency – still into force at the time of the referendum – contributes to explaining this submissive approach.

Finally, it is important to underscore that the demotion of the political opposition during constitutional amendments’ negotiations, though increased during the AKP era, was in the intent of the framers of an amendment passed at the end of the ’80s. Indeed, in the original 1982 Constitution, a two-thirds majority of the MPs in the GNAT should approve amendment proposals, the President of the Republic is entitled to return the amendment bill for reconsideration, and, in case it is re-adopted without change, he can submit it to a popular referendum (article 175).²⁸ However, in 1987, believing this procedure too rigid and unable to overcome parliamentary deadlocks, the Prime Minister Turgut Özal supported the approval of a constitutional amendment on

²⁴ For further details on the introduction of the direct election, see ÖRÜCÜ, Esin. Whither the Presidency of the Republic of Turkey? *European Public Law*, n. 14, p. 35-53, 2008. p. 48.

²⁵ ERDOĞAN, Recep Tayyip. Yenikapı’da tarihi buluş, mada tarihi mesajlar. *Sabah*, April 8, 2017.

²⁶ It is noteworthy that, whether appealed, the Constitutional Court could have declared the amendment unconstitutional. However, it should be also noted that the Court has progressively reduced its activism in this regard since the 2010 constitutional amendment having overloaded the Constitutional Court with the introduction of individual applications for rights violation and increased the number of judges elected thanks to the allegiance with the AKP environment.

²⁷ Main opposition CHP won’t appeal the presidential system reform before Turkey’s top court, in *Daily Sabah*, 14 February 2017.

²⁸ Özbudun states that “This was in line with the Constitution’s general philosophy of strengthening the Presidency as an ‘impartial arbiter’”, in ÖZBUDUN, Ergun. *The Constitutional System of Turkey: 1876 to the Present*. New York: Palgrave-Macmillan, 2011.

constitutional revisions according to which, should the amendment bill be adopted by at least three-fifths but less than two-thirds majority of MPs and if it is not returned by the President for reconsideration, the amendment shall be submitted to a mandatory popular referendum. If it is returned for reconsideration but is re-approved by a two-thirds majority, then the President may discretionally decide whether to submit the bill to a referendum.

Özal's will was to avoid that opposition's obstructionism could hamper the approval of an amendment. The reform of the form of government perfectly fitted the matter. Initially, the Constitutional Commission for Reconciliation was established for having the reform of the 1982 Constitution negotiated in a pluralistic way. Nevertheless, when presidentialism emerged as an AKP's priority and the opposition highly contested its introduction, negotiations were put aside and the parliamentary majority plus referendum was considered a valid and viable procedure as well.

It is finally noteworthy that opposition's abridgment has occurred, though more subtly, also when unamendable provisions were questioned.²⁹ Indeed, when the Constitutional Court declared the unconstitutionality of the amendment bill reforming articles 10 and 42 of the Constitution for allowing female students to wear the veil because it infringed Turkish secularism,³⁰ the Executive apparently respected the judicial decision, but then de facto overruled it through legislative or administrative measures it could approve without having to follow the procedure and the rules for a formal amendment.

The use of referendum for constitutional dismemberment to circumvent the opposition is evident also in the 2009 amendment to the 1999 Constitution of Venezuela the then populist President Hugo Chavez promoted for abolishing the term limit for all elected offices.³¹ This amendment strongly altered an element of the Venezuelan constitutional identity established since the 1830 Constitution³² and confirmed in the 1999 Charter. To appreciate the democratic backsliding connected to this amendment, it should be introduced a premise on the procedures 1999 Constitution provided.

²⁹ According to art. 4 of 1982 Turkish Constitution, the republican nature of the state (article 1), the main characteristics of the Republic listed in article 2 (democracy, secularism, social State governed by the rule of law, public peace, national solidarity, and justice; human rights' respect; Atatürk's nationalism), the integrity of the State, its official Language, flag, national anthem and Capital (article 3) cannot be amended.

³⁰ Constitutional Court, E2008/16 K2008/116, 5 June 2008. On the importance of this decision for the adjudication of unconstitutional constitutional amendments in the Turkish legal system, see ROZNAI Yaniv; YOLCU, Serkan. An unconstitutional constitutional amendment-The Turkish perspective: A comment on the Turkish Constitutional Court's headscarf decision. *International Journal of Constitutional Law*, vol. 10, n. 1, p. 175-202, 2012.

³¹ The referendum was proposed after the rejection of another referendum on a constitutional amendment aimed at removing the term limit only for the presidential office, held in December 2007.

³² The only exceptions in this regard were the 1857 Constitution, the authoritarian Constitutions approved under Juan Vicente Gómez (1914-1933), and the 1953 Constitution of Marcos Pérez Jiménez.

Indeed, the Charter distinguished between changes safeguarding its fundamental principles or structure – to be realized through a constitutional amendment procedure (article 340) or a constitutional reform procedure (article 342), both entailing a referendum – and the alterations of the fundamental structure, to be realized through a National Constituent Assembly (article 347); finally, should a constitutional reform be rejected, a similar proposal cannot be filed again before the National Assembly in the remainder of the constitutional term (article 345). However, there is no provision on the rejection of constitutional amendments or on the possibility to file the same rejected constitutional reform proposal through the procedure of a constitutional amendment.

Thus, when Chavez proposed the amendment, which extended to all the elective offices the term limit removal he already attempted only for the Presidency in 2007, the political opposition strongly claimed that this would have meant a final consecration of authoritarianism in the country and underscored the risks of unconstitutionality connected to procedures. Nevertheless, confirming the potential subservience courts may suffer in populist divided political societies, despite the massive opposition of non-governing political forces, the Constitutional Court declared both that the proposal had to be conceived as a constitutional amendment and that the limits provided for the constitutional reform could not apply.³³ In this case, the allegiance between the Executive and the Court deprived of relevance the Assembly and the role the opposition should have therein moreover when discussing constitutional dismemberments.

Among Latin America delegative democracies,³⁴ several other examples of referenda used for circumventing the opposition in a constitutional dismemberment can be found. Ecuador is a relevant case. There, President Correa exploited the populist discourse for defeating the opposition – including the one arising from his own party – and bound the Parliament to his will. Then, in 2011, after the 2010 failed coup that narrows the psychological environment in which the Ecuadorian referendum was approved to the 2017 Turkish one, Correa asked people to approve several measures, among the others, for packing the Supreme Court and reducing freedom of the press. The 2008 Constitution of Ecuador establishes two procedures for constitutional amendments not entailing structural changes or alterations in the protection of rights and it is the Constitutional Court that indicated the procedure to be followed; the Charter also entitles the President with the power of initiative and of convening referenda for constitutional amendments (articles 441-442).³⁵ Finally, a procedure exists for installing, via referendum, a Constituent Assembly for replacing the Charter (article 443). In the lack of a provision for a constitutional dismemberment and thanks to the subservience of

³³ See Constitutional Chamber of the Supreme Tribunal of Justice, decision no. 53, 3 February 2009.

³⁴ O'DONNELL, Guillermo. Delegative Democracy. *Journal of Democracy*, vol. 5, p. 55-69, 1994.

³⁵ See Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional.

the Constitutional Court,³⁶ Correa could use the majority in Parliament and the popular support for strongly empowering the Executive against the other state powers and for reducing fundamental freedoms' protection.

The modification of the presidential term, namely its extension as a step toward illiberal governments, has been the main reason for convening constitutional referenda in Sub-Saharan Africa. Hence, in light of the risks for the endurance of democracy, the experience of Guinea seems relevant. Indeed, in 2001, a referendum was held for extending the presidential term from 5 to 7 years, allowing the incumbent President to serve for a third term, and extending the central government's power on local authorities. The case is noteworthy because, although it proved quite fragmented, the opposition unitedly supported the claim of the Speaker of the National Assembly, El Hadj Bubacarri Biro Diallo, for a stronger involvement of the Assembly in drafting constitutional changes. The conflict among state powers can be considered as the main reason for the Executive's failure in obtaining the required parliamentary majority of two-thirds of MPs, which then made necessary the referendum. Although the opposition called for a boycott, the population confirmed the allegiance with the leader and approved the amendment, which entailed a dismemberment for its consequences on the potential alternation in the highest office. President Conte's death in 2008 opened a period of turmoil terminated with the approval via referendum of the 2010 Constitution, again establishing presidential term in 5 years. However, with March 2020 referendum, once again the population sided the leader and approved the extension of the presidential term (from 5 to 6 years), together with several amendments reinforcing the prohibition of gender-based discrimination and violence. In this case, the democratic decay can be a more than evident menace, the incumbent 80-years-old President Alpha Condé having clarified well before the referendum that the terms he already served under the previous constitutional limit in his opinion do not count. In brief, having approved the referendum, Guineans have almost ensured him 12 further years in office.

Looking at Europe, the 2016 Italian referendum is a noteworthy case of constitutional dismemberment that challenged the role of the opposition. It certainly represented an attempt of dismemberment for the modifications to the perfect bicameralism framers entrenched in the Charter to ensure meditated decisions. Italy is among the countries providing for a single procedure for all the possible constitutional changes, though multiple votes are required. Notably, each House of the Parliament must approve the constitutional amendment in two successive debates, held with intervals of not less than three months. On the second vote, both Houses must approve by an absolute majority and, if it is with less than a two-thirds majority in each of the Houses

³⁶ In the case under examination, the Court established that the bill had to undergo the procedure for the *consulta popular* (see Constitutional Court of Ecuador, Rulings no. 001-11-DRC-CC and 001-DCP-CC-2011, 15 February 2011).

on the second vote, the amendment may be subject to a referendum if either one-fifth of the MPs in each House or 500,000 voters or five regional councils so requests (article 138). In brief, the Italian Constitution seems to provide a means for the opposition to contrast an Executive-initiated constitutional amendment, as indeed occurred with the 2006 wide reform of Title V of the Constitution devolving some powers to local entities. In the case of the 2016 referendum, however, both the right-wing opposition and a part of the ruling center-left party disliked the constitutional amendment bill the Executive proposed, up to the point that it was necessary to put the question of confidence to have it approved on the second vote. Putting the question of confidence on a constitutional amendment is a clear sign of the Executive's attempt to reduce the margins of negotiation on the reform of a core constitutional element. The decision of some MPs of the majority-coalition who voted in favor of the reform to request a referendum does not seem a viable tool for restoring the democratic breach and can also denounce an attempt to pass with the popular support a reform scarcely appreciated by people's representative. In the end, the referendum was not approved, probably also because of the personalization of the campaign the then Prime Minister Matteo Renzi made.³⁷

3. CONCLUDING REMARKS

Albert has developed the theory of dismemberment to answer the following questions: How should constitutional designers structure the rules of constitutional change? How may political actors legally and legitimately formalize transformative changes to the constitution? How should scholars evaluate constitutional changes believed to violate the constitution's rights, structure, or identity? Should courts review the constitutionality of constitutional alterations?

Dealing with these questions, the present contribution attributed a specific role to referenda held in populist regimes, willing to study whether the constitutional design currently available can avoid the abridgment of the opposition, and the democracy backsliding it entails, moreover when the constitutional amendment in reality is a dismemberment. In this vein, the risks for democracy during constitution-making processes have not been explored, although it is questioned whether also in this case the lack of safeguard clauses can endanger democracy, as proved in the recent Hungarian experience.³⁸ Similarly, the strength of constitutional rigidity, even in those constitutions having provided procedures nuanced according to the relevance of the amendment for the general coherence of the Charter itself, has not been examined.

³⁷ For details on this, see BULL, Martin J. Renzi Removed. The 2016 Italian Constitutional Referendum and Its Outcome. *Italian Politics*, n. 1, pp. 131-153, 2017.

³⁸ BÁNKUTI, Miklós; HALMAI, Gábor; SCHEPPELE, Kim Lane. Hungary's Illiberal Turn: Disabling the Constitution. *Journal of Democracy*, vol. 23, n. 3, p. 138-46, 2012.

Here, the focus is on the risks the absence of clauses explicitly protecting the political opposition can entail for the general endurance of democracy. Indeed, once clarified that the constitution-making process matters as well as the final content of the Charter and that this process must be inclusive, participatory, and open,³⁹ then the same shall be valid for constitutional amendments, moreover when they touch the core of the constitution's identity.

According to Albert, a constitutional change should not be barred by the Constitution, but it also cannot go beyond the power of lawmakers and the people. Therefore, even though a transformative constitutional amendment should be allowed without taking the risk of the instability connected with a new constitution-making process, dismemberments should not occur by using the simple procedures for constitutional amendment. As Albert states, dismemberments "demand a higher level of direct or mediated popular consent since their effect is to unmake the constitution. [...] All changes should be possible without breaking legal continuity but not without gathering a higher-than-ordinary quantum of agreement from the peoples and institutions needed to legitimate transformative changes". In brief, "What validates a formal amendment is not its content alone but also the process by which it comes into existence". Though this clarifies that the procedure matters and that a special procedure should be introduced for constitutional dismemberments, yet it relies upon the current constitutional design believing that super-majorities and referendum can safeguard the respect of the democratic game.

Nevertheless, when populism enters in such a game, the issue complicates. Indeed, because "a two-thirds supermajority requirement, which may seem very demanding in the context of a competitive two-party or multiparty democracy, may not be demanding at all in a dominant party system or even after one party (as in Hungary) happens to win a high percentage of seats with a bare majority of votes",⁴⁰ the possibility of providing clauses for protecting the opinion of the minorities should be discussed. In other words, what is at stake here is the risk that populist forces, having already obtained a supermajority in the Parliament, exploit the popular favor they enjoy for a constitutional dismemberment toward a less democratic constitutional identity, able to secure their power and hampering the turnover. Attributing solely to the judicial review of constitutional amendments the power of protecting the system from the violation of the democratic rules seems neither viable nor realistic, given the cases – some of them also mentioned here – in which Courts, willing or not, have sided populist Executives.

³⁹ See HART, Vivien. Democratic Constitution-Making. **US Institute of Peace-Special Report** n. 107, 2003. And CHAMBERS, Simone. Democracy, Popular Sovereignty, and Constitutional Legitimacy. **Constellations – An International Journal of Critical and Democratic Theory**, vol. 11, issue 2, p. 153-173, 2004.

⁴⁰ LANDAU, David; DIXON, Rosalind. Constraining Constitutional Change. **Wake Forest Law Review**, vol. 50, n. 4, p. 859-890, 2015. p. 872.

In times of populism, also the referendum fails to represent a solid device for protecting democracy because it seems to glorify – instead of containing – its main feature, that is majoritarianism, ignoring that the protection of political minorities is quintessential to democracy. Indeed, involving people's participation in the procedures for constitutional amendment has been deemed as obvious⁴¹ because it seems to add a taste of constituent power, in line with Seyes' conception that the nation's will is always legal.⁴² Nevertheless, the nation's will can be volatile and, moreover when facing an economic or social crisis, people may incline to sacrifice freedom and democracy in favor of political stability. Furthermore, considering the aforementioned characteristics of the referendum, asking about people's will can be tricky during populisms both in case of constitution-making – when a mandate from people is necessary⁴³ – and of constitutional dismemberment, *a fortiori* whether the latter *de facto* means drafting a new Charter but following preordered procedures, as occurs in several Latin American countries including those mentioned here.

The examined cases instantiate the risks for political oppositions, showing that different constitutional designs could not safeguard them against populist forces. Indeed, in Turkey, where the Constitution provides a single procedure for every kind of constitutional amendment, lists a series of unamendable principles and assigns the Court an overlooking power, the procedure itself suggests the pathways for circumventing the opposition. In Venezuela and Ecuador, instead, the existence of different procedures according to the relevance of the constitutional change was not sufficient for protecting the opposition, because of the alliance between the leader and the judiciary. Guinea instantiates that constitutional provisions can always be hostages of a strong leader/people relationship. In Italy, finally, the procedure conforms to Landau's request of multiple votes for a meditated decision, but the absence of an explicit provision prohibiting the vote of confidence on constitutional matters – and possibly the lack of a political sensibility for understanding that such decisions should be inclusive and open – constrained the debate and coerced the parliamentary vote.

Under a propositional perspective, these cases lead to a reflection and a request. The reflection is that democracy is for sure a constantly on-going process and that, though framers have tried their best, not always the tools provided in the constituent moment can foresee the challenges a legal system will have to face. Furthermore, the impact of populism on democracy should be analyzed both with reference to the

⁴¹ See, i.e., EISENSTADT, Todd A.; LEVAN, Carl A.; MABOUDI, Tofigh. When Talk Trumps Text: The Democratizing Effects of Deliberation during Constitution-making, 1974-2011. **American Political Science Review**, vol. 109, n. 4, p. 592-612, 2015.

⁴² SIEYÈS, Emmanuel-Joseph. **What is the Third Estate? (Qu'est-ce que le Tiers Etat ?)**. London: Praeger, 1963.

⁴³ ACKERMAN, Bruce. **The future of liberal revolution**. New Haven: Yale University Press, 1991. p. 53-54.

exploitation of the democratic procedure it may realize, and having regard to its impact on aspects such as the freedom of the press and the fairness of the political campaign, which can further reduce people's ability to stand for democracy. Indeed, scholars have already demonstrated the impact of a lively and free civil society on the outcomes of referenda as well as the disruptive effects the governmental control on the public sphere may have in this regard.⁴⁴ Nevertheless, experience has also proved that the main characteristic of populism is to limit the public confrontation by assuming the will of the majority supporting it as the will of the whole population, or at least of the only part of the population worthy to be considered.

These premises led to the request to deepen the studies on the role of the political opposition during constitutional dismemberment and to examine whether introducing new devices, such as the protection of political minorities, can harbor the democratic principle. Notably, about the potential constitutional design whose importance Albert underlines moreover with regard to constitutional dismemberment, it should be questioned whether it can be significant to keep the already provided majorities and super-majorities, joint with referenda, but introducing a reserved quota of opposition's approval for those amendments entailing a dismemberment. It can be anticipated that, although such a quota can be easily introduced in bipolar systems, it could be more difficult to ensure in proportional political realities. Furthermore, besides constitutional provisions, the official role a legal system assigns to political minorities calls into question the parliamentary rules of procedures; therefore, in the light of ensuring special protection to these groups during constitutional change, amendments and dismemberments, the statute of the opposition should be further studied and intertwined with the theory on constitutional change. At this stage of the research, however, the reserved quota seems to be a viable device for protecting democracy against the populist authoritarian drift, as long as it will compulsorily entail the duty of canvassing different opinions.

The aim of avoiding opposition's obstructionism, which had justified the amendment of article 165 of the Turkish Constitution, can be accepted with regard to the enactment of the political program the people awarded with their vote during elections. Yet, when fundamental constitutional tenets are endangered by a constitutional dismemberment the deliberation should be as inclusive as possible. Thence, even assuming that in some legal system the introduction of a quota would not be feasible, a guarantee for the deliberation – meant as a moment in which all the involved parties are heard and conflicting arguments are smooth out – should stem, avoiding coercion as in the aforementioned Italian question of confidence.

⁴⁴ CHAMBERS, Simone. Democracy and constitutional reform: Deliberative versus populist constitutionalism. *Philosophy and Social Criticism*, vol. 45, n. 9-10, p. 1116-1131, 2019.

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The theory and phenomenology of constitutional dismemberment

A teoria e a fenomenologia de desmembramento constitucional

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Abstract

One of the most spectacle features anchored in Richard Albert's Constitutional Amendments: Making, Breaking, and Changing Constitutions is the theory of constitutional dismemberment. In his masterpiece, Albert proposes constitutional designers who are interested in preserving legal continuity to codify procedures for not only amendment but also dismemberment, namely, a fundamental break with the core commitments or presuppositions of the constitution. This contribution questions whether the objectivist, third-person perspective of constitutional designers can be a vantage viewpoint to assesses the socially transformative irruption of constitutional dismemberment. Should the phenomenon of constitutional dismemberment be analyzed without the relative-subjective perspective of peoples who are apart from constitutional designs but actually live under the practical interest of daily life? In tackling this question, the first section reveals that the objectively observable quantum of popular support in terms of the mutuality and symmetry between original ratification and constitutional dismemberment does not necessarily corresponds to the phenomenon that is perceived from the first-person plural person perspective of population. The

Resumo

Uma das características mais espetaculares ancoradas no livro de Richard Albert (*Constitutional Amendments: Making, Breaking, and Changing Constitutions*) é a teoria do desmembramento constitucional. Em sua obra-prima, Albert propõe aos projetistas constitucionais interessados em preservar a continuidade jurídica que codifiquem os procedimentos não só de emenda, mas também de desmembramento, ou seja, uma ruptura fundamental com os compromissos ou pressupostos fundamentais da constituição. Esta contribuição questiona se a perspectiva objetivista dos designers constitucionais pode ser um ponto de vista vantajoso para avaliar a irrupção socialmente transformadora do desmembramento constitucional. O fenômeno do desmembramento constitucional deve ser analisado sem a perspectiva subjetiva-relativa de povos afastados dos designios constitucionais, mas que vivem sob o interesse prático do cotidiano? Ao lidar com esta questão, a primeira seção revela que o quantum objetivamente observável de apoio popular em termos de mutualidade e simetria entre a ratificação original e o desmembramento constitucional não corresponde necessariamente ao fenômeno que é percebido da perspectiva da população de primeira pessoa no plural. A segunda seção, então, instala o princípio relacional

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second section then installs the relational principle of intentionality, which is synthesized at the static, genetic and generative levels, so that the practice of constitutional dismemberment can be grasped not only from the objectively theoretical viewpoint but also from the inter-subjective phenomenological perspective.

Keywords: constitutional design; constitutional dismemberment; phenomenology; legal intentionality; life-world.

da intencionalidade, que é sintetizado nos níveis estático, genético e generativo, de modo que a prática do desmembramento constitucional possa ser apreendida não apenas do ponto de vista teórico objetivo, mas também da perspectiva fenomenológica intersubjetiva.

Palavras-chave: desenho constitucional; desmembramento constitucional; fenomenologia; intencionalidade jurídica; mundo da vida.

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1. Introduction; 2. The Theory of Constitutional Dismemberment; 2.1. The Distinction between Constitutional Amendment and Dismemberment; 2.2. Legality and Legitimacy of Constitutional Dismemberment; 3. The Phenomenology of Constitutional Dismemberment; 3.1. From Static, through Genetic, to Generative Phenomenology; 3.2. The Static, Genetic and Generative Intentionality of Constitutional Dismemberment; 4. Conclusion; 5. References.

1. INTRODUCTION

Richard Albert's *Constitutional Amendments: Making, Breaking, and Changing Constitutions* beautifully shows us "how amendment works and why it often fails, what we can learn from its various designs around the world, and why amendment matters in constitutionalism."¹ One of the most spectacle features anchored therein is the theory of *constitutional dismemberment*. In sketching a blueprint for amendment design, Albert emphasizes the foundational distinction between constitutional amendment and dismemberment: while the former keeps the constitution coherent with itself, the latter marks a fundamental break with the core commitments or presuppositions of the constitution.² In his masterpiece, Albert proposes constitutional designers who are interested in preserving legal continuity to codify procedures for not only amendment but also dismemberment. The reviewer fully agrees with Albert's diagnosis: "We cannot deny that constitutional dismemberment exists as a *phenomenon* today: around the world, we continue to see efforts to make transformative constitutional changes without breaking legal continuity."³

However, should the phenomenon of constitutional dismemberment be analyzed without the relative-subjective perspective of peoples who are apart from constitutional designs but actually live under the practical interest of daily life? While

¹ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. New York: Oxford University Press, 2019. p. 2.

² ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. New York: Oxford University Press, 2019. p.263.

³ ALBERT, Richard. Constitutional amendment and dismemberment. **Yale Journal of International Law**. New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 82 [emphasis added].

acknowledging that Albert's design-based theory contributes to balancing constitutional transformation with legal certainty, the reviewer shares the caveat Tom Ginsburg made a caveat that "design implies a technocratic architectural paradigm that does not easily fit the messy realities of social institutions, especially not the messy process of constitution making."⁴ Paul Blokker opines in a similar way: "Constitutions concern then not mere legal-technical questions of the limitations of arbitrary power, but equally concerns questions of self-identity and democratic self-understanding."⁵ These opinions pose a question of whether the objectivist, third-person perspective of constitutional designers can be a vantage viewpoint to assesses the socially transformative irruption of constitutional dismemberment.

To tackle this question, the reviewer borrows ideas from phenomenological philosophy to complement the objectivist theory of constitutional dismemberment with the relational concepts of phenomenology. After this introduction, the first section preliminarily reaffirms the central features of the theory of constitutional dismemberment, particularly its way of ensuring legality and legitimacy of fundamental constitutional change. (2) The second section then tries to bring the relative-subjective phenomenological perspective into the objectivist, quantum-based theory of constitutional dismemberment. (3)

2. THE THEORY OF CONSTITUTIONAL DISMEMBERMENT

2.1. The Distinction between Constitutional Amendment and Dismemberment

The theory of constitutional dismemberment identifies a phenomenon in which the constitution itself might not be replaced in the formal sense but its identity, rights, or structure does not escape the change without substantial modification.⁶ Before elaborating this new theory, Albert points out that the conventional theory of constituent power is unhelpful for its lack of operational specificity and does not gives us an applicable practice to translate it into action.⁷ To give observable specificity to the theory of constituent power, Albert introduces *the rule of mutuality* that "a constitution may be

⁴ GINSBURG, Tom. Introduction. In: GINSBURG, Tom (Coord.). **Comparative Constitutional Design**. New York: Cambridge University Press, 2014. p. 1–14, p. 1.

⁵ BLOKKER, Paul. The imaginary constitution of constitutions. **Social Imaginaries**, Bucharest, vol. 3, n. 1, p. 167-193, Oct. 2017.

⁶ ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. New York: Oxford University Press, 2019. p. 84–92.

⁷ ALBERT, Richard. Constitutional amendment and dismemberment. **Yale Journal of International Law**, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 56.

dismembered using the same procedure that was used to ratify it.”⁸ One of the essential factors of the rule of mutuality is *symmetry* in that “the original constitutional ratification threshold as creating a default ceiling on the threshold required for constitutional dismemberment.”⁹ By focusing on the procedural symmetry that can be objectively observable, what matters in the theory is not whether a given major constitutional change is consistent with liberal constitutionalism but rather the quantum of popular support for the change.¹⁰

The theory of constitutional dismemberment can propose sound answers to the contemporary problems surrounding the invisible college of constitutional lawyers. The first problem is the so-called *liberal democratic degeneration* with which the new wave of scholarship in constitutional change is concerned principally. According to their claim, political actors around the world are increasingly exploiting the mechanisms of constitutional change to undermine the liberal values of constitutionalism, as is dramatically illustrated by the populist nationalist movement in Hungary.¹¹ To put a brake on such degeneration, the new wave constitutionalists argue, the tasks of constitutional scholars, judges, and designers are, respectively, to develop theories, apply doctrines, and engineer constitutions to prevent these attacks on constitutionalism. However, given the variety of principles beyond the traditional liberal idea of constitutionalism around the world,¹² Albert criticizes such a strict liberal understanding as “quite another more serious intrusion into a nation’s sphere of sovereignty and the self-determination of its peoples to impose on a national constitution a requirement of conformity with the values of others.”¹³ In contrast to the liberalist doctrines, Albert’s theory of constitutional dismemberment “offers a way to quantify the democratic majorities needed to validate a major constitutional change, even where the change runs counter to the existing constitutional framework.”¹⁴

The second contemporary problem behind the theory of constitutional dismemberment is the *juristocracy* or *judicialization of mega-politics*. According to the doctrine

⁸ ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 57.

⁹ ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 58.

¹⁰ ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 66.

¹¹ ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 60.

¹² For traditions other than liberalism, see DOWDLE, Michael W.; WILKINSON, Michael A. (Coord.). *Constitutionalism Beyond Liberalism*. Cambridge: Cambridge University Press, 2017.

¹³ ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 64.

¹⁴ ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 65.

of unconstitutional constitutional amendment, the increasing number of supreme or constitutional courts exert their judicial control to procedurally-perfect constitutional amendments.¹⁵ The more extreme doctrine of unconstitutional constitution was allegedly applied in the Honduran Supreme Court's judgment in 2015, in which it held an unamendable one-term limit on presidential term found in the 1982 constitution to be unconstitutional.¹⁶ Albert's theory of constitutional dismemberment is advocated to resist against such minoritarian controls on constitutional change. In the theory of constitutional dismemberment, a court is rather expected to "issue advisory judgments on the nature of the transformative change that amending actors are pursuing, and on the quantum of agreement that the court believes is necessary to legitimate that change."¹⁷

The third problem concerns imposed, colonial and resilient constitutions, all of which embrace legal discontinuity creating a period of legal vacuity and instability in the absence of the rule of law.¹⁸ In the history of Japanese constitutionalism, there has been a single constitutional dismemberment in the formal sense: the transformation after the World War II from the Meiji Constitution to Showa Constitution according the rules of constitutional alteration prescribed in Article 73 of the old Constitution. A prominent constitutional scholar Toshiyoshi Miyazawa at the time, facing the end of the seemingly ever-lasting Emperor system based on the Devine Revelation, put forward the *August Revolution* theory. According to this theory, the invocation of *pouvoir constituant* as the *kratos* (power) of the *demos* (people) in terms of *popular sovereignty* as the new *Grundnorm* (*Konpon Tatemaie*) is justified.¹⁹ As demonstrated such a revolutionary scene, the theory of constitutional dismemberment recognizes that "a constitution's purpose may change [...] when confronted by a cataclysmic event that cannot help but change the constitution itself and the people whose objectives it is intended to serve."²⁰

¹⁵ LANDAU, David E.; DIXON, Rosalind; ROZNAL, Yaniv. From an unconstitutional constitutional Amendment to an unconstitutional constitution? Lessons from Honduras. *Global Constitutionalism*, vol. 8, n. 1, p. 40–70, Mar. 2019.

¹⁶ ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 72.

¹⁷ ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 72.

¹⁸ NEGISHI, Yota. The constituent power of the "imposed" constitution of Japan: an amalgam of internationalised revolutionary power and nationalist devolutionary power. In ALBERT, Richard; CONTIADES, Xenophon; FOTIADOU, Alkmene (Coord.). *The Law and Legitimacy of Imposed Constitutions*. London: Routledge, 2018. p. 189–207.

¹⁹ MIYAZAWA, Toshiyoshi. Hachigatsu Kakumei to Kokumin Shuken Shugi [The August Revolution and the Principle of Popular Sovereignty]. *Sekai Bunka*, vol. 1, n. 4, p. 64–71, May. 1946.

²⁰ ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 81.

2.2. Legality and Legitimacy of Constitutional Dismemberment

Since the theory of constitutional dismemberment invites political actors and the people to take active ownership of their constitution, the post-war Showa Constitution of Japan that has survived for 70 years without any formal changes seems a conundrum thereto. Admittedly, the second formal dismemberment in the history of Japanese constitutionalism has been sought by *Kaiken-ha* (pro-revisionist groups) represented by the right-wing, conservative Liberal Democratic Party (LDP). Nonetheless, such an attempt has been blocked by *Goken-ha* (anti-revisionist groups) including progressive parties, many constitutional scholars and lawyers and major media. *Goken-ha* argues that *Kaiken-ha*'s ambition pursuant to the amendment rule under Article 96 of the current Showa Constitution would change one of the constitutional pillars, the pacifist clause of Article 9.

Despite the fact that a formal dismemberment pursued by *Kaiken-ha* has not been realized yet, the LDP-led Government has ventured two alleged quasi-constitutional dismemberments of the pacifist clause Article 9. First, in parallel to the diplomatic efforts to reengage in the international community under the San Francisco Peace Treaty and to establish the defence framework under the Japan-US Security Treaty, the Government created the Self-Defence Force (SDF) in 1954 and officially stated that Article 9 does not prevent Japan from defending itself.²¹ Following the Cabinet Legislation Bureau (CLB)'s interpretive assistance, the Government also introduced the conditions to exercise of the right of individual self-defence under the Constitution in 1972.²² At that time, *Goken-ha* opposed the first quasi-constitutional dismemberment concerning the SDF and individual self-defence as a politically-manipulated heterodox interpretation of Article 9.²³ Second, the Shinzo Abe Cabinet forcefully modified the traditional narrow-scope interpretation of self-defence under Article 9 in 2014 in order to incorporate collective self-defence due to 'the change of the security environment surrounding Japan' in the 21st century.²⁴ The contemporary *Goken-ha* against the second quasi-constitutional dismemberment on collective self-defence argues that the Abe Cabinet's drastic departure from the interpretation established by the successive governments

²¹ Diet Records, the House of Representatives, 21st Session, the Committee on Budget, 22 December 1954, No 2, 1.

²² Document submitted to the Committee on Audit of the House of Councilors on 14 October 1972. See Bouei Handbook [Handbook of Defence] (Asagumoshinbunsha, 2012), p. 574.

²³ For example, KIYOMIYA, Siro. *Kokka Sayo no Ronri [The Logic of State Operation]*. Tokyo: Yuhikaku, 1968.

²⁴ Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People July 1, 2014.

and the CLB, albeit the their political nature, cannot be permitted without the procedure of constitutional amendment stipulated in Article 96.²⁵

To apply Albert's theory of constitutional dismemberment that stipulates the principle of symmetry and the rule of mutuality to this Japanese constitutional context, "it would be sufficient for amending actors to alter Article 9 [of the Showa Constitution] using the original procedure in Article 73 [of the Meiji Constitution], which calls for only two-thirds approval in the national legislature in order to alter the Constitution."²⁶ However, Albert does not take such a strictly symmetrical proposition by distinguishing the issue of *legality* from that of *legitimacy*.²⁷ Given the intent of the Showa Constitution's designers to make any future constitutional alteration more difficult than the Meiji Constitution had previously been, Albert claims that "in order to meet the test of both legality and legitimacy, an effort to alter Article 9 should satisfy the procedure in Article 96, which requires the additional hurdle of a national referendum."²⁸ In other words, the alteration of Article 9 would not be legitimized by the default line set by Article 73 of the Meiji Constitution in accordance with the principle of symmetry in favor of legal certainty; it would rather asymmetrically gain its legitimacy through the higher criterion of a national referendum prescribed in Article 96 of the Showa Constitution. If the reviewer's understanding is correct, this asymmetrical criteria between legality and legitimacy corresponds to what Albert would call one of "rare cases [in which] the threshold ever [should] rise above the quantum required to ratify the constitution to begin with."²⁹ Such a rare case may arise "where it is clear that the change is supported by a substantial democratic majority that reflects the considered judgment of the political community."³⁰

The "rare" experience of Japanese constitutionalism tells us a lesson that the objective quantum of democratic agreement for legitimizing the validity of constitutional dismemberment is difficult to be measured by the legality of architectural designs. As Jamie Cameron discerns, constitutional legitimacy may be critically diverged from constitutional legality because the former is perceptive in nature and operates at the level

²⁵ For example, Japan Federation of Bar Associations, 65th General Meeting, Resolution Repeatedly Opposing the Approval of Exercising the Right to Collective Self-Defense, and Confirming the Meaning of Constitutionalism, Reasons for Suggestion, para. 3.2.

²⁶ ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 76.

²⁷ STERING, Adam N. Implicit limits on amending the Japanese Constitution. *Washington International Law Journal*, vol. 28, n. 1, p. 243–309, Jan. 2019. p. 298, fn 354.

²⁸ ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 76.

²⁹ ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 59.

³⁰ ALBERT, Richard. Constitutional amendment and dismemberment. *Yale Journal of International Law*, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 66.

of belief: legitimacy is an organic part of constitutional culture that is fluid, lacking in concreteness and at least difficult, if not impossible, to measure.³¹ Albert is of course conscious of this point that constitutional dismemberment defers to the considered judgment of the people and their representatives to trace and retrace their own path “as long as it satisfies the twin tests of legality and legitimacy, where legitimacy is a sociological measure, not a legal or moral one.”³² This limit is inherent in the theory of constitutional dismemberment because its core principle of symmetry itself “is intended to neutralize claims about the illegitimacy of the change.”³³

3. THE PHENOMENOLOGY OF CONSTITUTIONAL DISMEMBERMENT

3.1. From Static, through Genetic, to Generative Phenomenology

While elaborating from a third-person perspective the institutional design blueprint for constitutional amendment based on the fundamental distinction with constitutional dismemberment, Albert also apprehends them from the subjective-relative perspective: “[c]onstitutionalism [...] is a culturally-specific sociological principle that concerns *how a constitution is lived*, how its rules are practiced, and how the governed and the governors perceive themselves in relation to it and each other.”³⁴ Albert’s emphasis on the constitutional life that is correlational between the constitution and the people’s lives resonates with the phenomenological core concept of *intentionality*. This section amplifies the critical point indicated above in terms of phenomenological philosophy whose emphasis is put on the first-person plural, subjective-relative perspective in order to supplement the theory of constitutional dismemberment.

In terms of phenomenology, the universal *a priori* of correlation is to be exhibited by suspending the judgments (*epoché*) on the objective validity of truth. In his early masterpiece *Ideas toward a Pure Phenomenology*, Edmund Husserl, the father of phenomenology, once adopted the so-called Cartesian way that leads to the

³¹ CAMERON, Jamie. Legality, legitimacy and constitutional amendment in Canada. In: ALBERT, Richard; CAMERON, David R. (Coord.). **Canada in the World: Comparative Perspectives on the Canadian Constitution**. Cambridge: Cambridge University Press, 2017. p. 98–122, p. 104.

³² ALBERT, Richard. Constitutional amendment and dismemberment. **Yale Journal of International Law**, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 81.

³³ ALBERT, Richard. Constitutional amendment and dismemberment. **Yale Journal of International Law**, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 59.

³⁴ ALBERT, Richard. Constitutional amendment and dismemberment. **Yale Journal of International Law**, New Haven, Conn. vol. 43, n. 1, p. 1–84, Feb. 2018, p. 63. (emphasis added).

“transcendental ego” in one leap, which has been severely criticised as solipsism.³⁵ In his last work *The Crisis of European Sciences and Transcendental Phenomenology*, Husserl revealed that the gap between the everyday human experience and the world of objectivist science had significantly grown. Against this gap as a backdrop, Husserl attempts a withholding of natural, naïve validities already in effect: i.e. “an *epoché* of all participation in the cognitions of the objective sciences, and *epoché* of any critical position-taking which is interested in their truth or falsity, even any position on their guiding idea of an objective knowledge of the world.”³⁶

In this context, the purpose of *epoché* is no longer to directly leap to the transcendental ego (Cartesian way); it rather aims to return from the objective world to the so-called “subjective-relative” *life-world* (*Lebenswelt*), i.e. the world as the ground where we live under the practical interest of daily life.³⁷ Ulrich Claesges sharply discerns the ambiguous aspects of life-world: the return to life-world through phenomenological reduction contributes to both to *diagnosing* the dangerous situation of academics and to treating *therapeutically* such an academic crisis. To put it in a different terminology, the diagnostic function reveals the *ground* that objective sciences have sweep in oblivion (*Boden-Funktion*), whereas the therapeutics function remedies the crisis of academics by *giving guidance* to transcendental phenomenology (*Leitfaden-Funktion*).³⁸

While we are dealing with the multiplicity of manners in the given or situated life-world, the subjectivity in question is not that of the isolated subject (Descartes’ *ego cogito*). It is rather, as Husserl explicates, the entire *intersubjectivity* which is brought together in the accomplishment. Husserl’s contrast with the Cartesian way is now crystal-clear: “[a]ll the levels and strata through which the syntheses, *intentionally* overlapping as they are from subject to subject, are interwoven form a universal unity of synthesis; through it the objective universe comes to be – the world which is and as it is concretely and vividly given (and pre-given for all possible praxis).”³⁹

In this regard, Husserl was originally concerned with the level of *static* phenomenology and the most general, *a priori* background presuppositions of an intentional experience: the sense-giving side of intentionality (*noesis*) animates the sensory component of a perception (*hyle*) as a phenomenon of the objective-sense (*noema*) relating

³⁵ HUSSERL, Edmund; WALTER, Biemel. (Coord.). **Husserliana VI: Die Krisis der europäischen Wissenschaften und die transzendente Phänomenologie**. Den Haag: Martinus Nijhoff, 1954. p. 156–158.

³⁶ HUSSERL, Edmund; WALTER, Biemel. (Coord.). **Husserliana VI: Die Krisis der europäischen Wissenschaften und die transzendente Phänomenologie**. Den Haag: Martinus Nijhoff, 1954. p. 138–140.

³⁷ HUSSERL, Edmund; WALTER, Biemel. (Coord.). **Husserliana VI: Die Krisis der europäischen Wissenschaften und die transzendente Phänomenologie**. Den Haag: Martinus Nijhoff, 1954. p. 140–145.

³⁸ CLAESGES, Ulrich. Zweideutigkeiten in Husserls Lebenswelt-Begriff. In: CLAESGES, Ulrich; HELD, Klaus (Coord.). **Phaenomenologica Perspektiven transzendental-phänomenologischer Forschung, für Ludwig Landgrebe zum 70. Geburtstag von seiner Kölner Schülern**. Den Haag: Martinus Nijhoff, 1972. p. 85–101.

³⁹ HUSSERL, Edmund; WALTER, Biemel. (Coord.). **Husserliana VI: Die Krisis der europäischen Wissenschaften und die transzendente Phänomenologie**. Den Haag: Martinus Nijhoff, 1954. p. 170–173.

to an object.⁴⁰ Without intentionalities, Husserl argues, the objects and the world would not be there for us; they rather ‘exist for us only with the meaning and the mode of being that they receive in constantly arising or having arisen out of those subjective accomplishments.’⁴¹

The second level of intentional synthesis is called *genetic* in that it uncovers the temporal becoming and the temporal relationship of one experience to the next, thereby revealing a ‘temporal depth’ of any experience, which cannot be achieved through static analysis.⁴² In developing the ontology of life-world in *Crisis*, Husserl emphasizes that every perception has a *horizon* belonging to its object: “[i]n seeing I always ‘mean’ it with all the sides which are in no way given to me, *not even in the form of intuitive, anticipatory presentifications (Vergegenwärtigung)*”: In other words, “a whole horizon of *nonactive and yet confunctioning* manners of appearance and syntheses of validity is implied in a particular perception.”⁴³ Although perception is related only to the present, this present is always meant as having an endless past behind it (a continuity of *retention*), and an open future before it (a continuity of *protention*).⁴⁴

Third, Husserl’s late reflections in *Generativität* is inherited and sophisticated as *generative* phenomenology by Anthony Steinbock. As is explicated in Steinbock’s *Home and Beyond*, compared to the foregoing static and genetic methods, the generative analysis captures the constitutive duet between home-/alien-worlds: the “co-constitution of the alien through appropriative experience of the home,” on the one hand, and the “co-constitution of the home through the transgressive experience of the alien,” on the other hand. In characterizing the synergy between home and alien as *co-generative*, Steinbock notes that “neither home-world nor alien-world can be regarded as the ‘original sphere’ since they are in a continual historical becoming as delimited from one another.”⁴⁵

⁴⁰ For the concept of intentionality, see MCINTYRE, Ronald; SMITH, David Woodruff. Theory of intentionality. In MOHANTY, J. N.; MCKENNA, William R. (Coord.). **Husserl’s Phenomenology: A Textbook**. Washington, D. C.: Center for Advanced Research in Phenomenology and University Press of America, 1989. p. 147–170.

⁴¹ HUSSERL, Edmund; WALTER, Biemel. (Coord.). **Husserliana VI: Die Krisis der europäischen Wissenschaften und die transzendente Phänomenologie**. Den Haag: Martinus Nijhoff, 1954. p. 163.

⁴² DONOHOE, Janet. **Husserl on Ethics and Intersubjectivity: From Static and Genetic Phenomenology**. Toronto: University of Toronto Press, 2016. p. 30–37.

⁴³ HUSSERL, Edmund; WALTER, Biemel. (Coord.). **Husserliana VI: Die Krisis der europäischen Wissenschaften und die transzendente Phänomenologie**. Den Haag: Martinus Nijhoff, 1954. p. 159–163.

⁴⁴ HUSSERL, Edmund; WALTER, Biemel. (Coord.). **Husserliana VI: Die Krisis der europäischen Wissenschaften und die transzendente Phänomenologie**. Den Haag: Martinus Nijhoff, 1954. p. 159–163.

⁴⁵ STEINBOCK, Anthony. **Home and Beyond: Generative Phenomenology after Husserl**. Evanston, Ill: Northwestern University Press Evanston 1995, p. 179 [emphasis in the original text].

3.2. The Static, Genetic and Generative Intentionality of Constitutional Dismemberment

In the field of legal philosophy, Hans Lindahl borrows phenomenological insights from Husserl and invents the concept of *legal intentionality*. In the static sense, this correlative notion is invoked to elucidate the (constitutive) legal *ordering*, rather than the (descriptive) legal order, from a first-person plural perspective: to act legally is to disclose something as *something*, and to disclose something as *something* is to order, in terms of the subjective (as *someone*), material (as *somewhat*), spatial (as *somewhere*) and temporal (as *somewhen*) dimensions.⁴⁶ Lindahl also introduces the genetic concept of *horizon* to legal intentionality whence the members of a legal collective anticipate in a general ways who ought to do what, where and when.⁴⁷ This horizon has the *background* of collective action, meaning by such that all collective action is conditioned by a variable range of everyday practices, capacities, and assumptions into which its participants are socialized, yet which are not themselves thematized in the course of joint action.⁴⁸ For Lindahl the articulation of the background and horizon of collective action constructs its *Umwelt* as the circumambient world, or *Lebenswelt* in the framework of Husserl's *Crisis*, in which joint action takes place.⁴⁹ In the generative analysis, Lindahl grasps the momentum of *a-legality* when the circumambient life-world of collective action becomes conspicuous as a familiar home-world (*Heimwelt*) to its participants in the form of strange behaviors and situations that irrupt from the domain of the unordered as an alien-world (*Fremdwelt*) by challenging the boundaries of (il)legality.⁵⁰

The foregoing phenomenological legal approach is quite useful for reshaping the discourses of constitutional law including the theory of constitutional dismemberment. According to Kim Lane Scheppele, while the existing literature has taken the view of a constitution as a text or as a set of visible and functioning institutions from the third-person perspective, the phenomenological approach focuses our attention on the way that people experience constitutional life from the first-person plural

⁴⁶ LINDAHL, Hans. **Fault Lines of Globalization: Legal Order and the Politics of A-Legality**. Oxford: Oxford University Press, 2013. p. 125–129.

⁴⁷ LINDAHL, Hans. **Fault Lines of Globalization: Legal Order and the Politics of A-Legality**. Oxford: Oxford University Press, 2013. p. 129–133.

⁴⁸ LINDAHL, Hans. Intentionality, Representation, Recognition: Phenomenology and the Politics of A-Legality. In: BEDORF, Thomas; HERRMANN, Steffen (Coord.). **Political Phenomenology: Experience, Ontology, Episteme**. Abingdon: Routledge, 2019.

⁴⁹ LINDAHL, Hans. Intentionality, Representation, Recognition: Phenomenology and the Politics of A-Legality. In: BEDORF, Thomas; HERRMANN, Steffen (Coord.). **Political Phenomenology: Experience, Ontology, Episteme**. Abingdon: Routledge, 2019.

⁵⁰ LINDAHL, Hans. **Fault Lines of Globalization: Legal Order and the Politics of A-Legality**. Oxford: Oxford University Press, 2013. p. 156–163.

perspective.⁵¹ Put differently, it examines the way that constitutional knowledge comes to be developed, shared and passed on as the result of social interaction, through institutions, across history and as sedimented fact that becomes part of the taken-for-granted world.⁵²

Seen from the first-person plural perspective of phenomenology, for example, the legitimacy of the 2012 Hungarian Constitution as constitutional dismemberment can be narrated in a way of complementing the third-person perspective of Albert's architectural theory.⁵³ After the fall of communism in Hungary, the legal order of liberal constitutionalism based on the 1989 Constitution emerged as an elite project by the strong resolve across the political spectrum to join the European Union and by the celebration of human rights. The project was intersubjectively agreed by the masses as long as it delivered hope and the promise of prosperity and as long as it was associated with the restoration of national sovereignty. Through nearly two decades, the liberal constitutional order quickly became a taken-for-granted life-world, or more concretely, *home-world* for them. However, as an unthematized *background*, the 1989 Constitution that was supposed to create democracy, end corruption, bring economic prosperity and create better lives had already appeared unable to achieve those goals in the eyes of the population. In terms of *horizon*, as was evinced by social survey reflecting a lived experience of getting worse, the evaporation of the support for liberal constitutionalism's premises had already started for years before the 1989 Constitution itself finally failed in 2010, which became affiliated with the rise of counter-constitutional ideas. In that situation, counter-constitutionalists interrupted from an another collective of *alien-world* embracing alternative visions of constitutional ordering, grounded in different understandings that reject the liberal constitutional vision already in effect.

The phenomenological approach also proposes another scenario to narrate the ever-unamended post-war Japanese Constitution which Albert's symmetrical account categorizes as an asymmetrical, rare exception. As noted above, although *Goken-ha* once criticized the first quasi-constitutional dismemberment concerning the SDF and individual self-defense as a politically-manipulated heterodox interpretation of Article 9, it has come to recognize the orthodoxy of that interpretation established by the successive governments and the CLB when opposing against the second

⁵¹ SCHEPPELE, Kim Lane. The Social Lives of Constitutions. In: BLOKKER, Paul; THORNHILL, Chris (Coord.). **Sociological Constitutionalism**. Cambridge: Cambridge University Press, 2017. p. 35–63, p. 55

⁵² SCHEPPELE, Kim Lane. The Social Lives of Constitutions. In: BLOKKER, Paul; THORNHILL, Chris (Coord.). **Sociological Constitutionalism**. Cambridge: Cambridge University Press, 2017. p. 35–63, p. 51.

⁵³ For this paragraph, see in general SCHEPPELE, Kim Lane. The Social Lives of Constitutions. In: BLOKKER, Paul; THORNHILL, Chris (Coord.). **Sociological Constitutionalism**. Cambridge: Cambridge University Press, 2017. p. 35–63, p. 59–63.

quasi-constitutional dismemberment on collective self-defence.⁵⁴ In other words, the legal intentionality of Article 9 within the familiar constitutional order (*Heimwelt*) has been over generations modified co-generatively through the transgressive irruption from the unordered sphere (*Fremdwelt*) as another way of constitutionalizing pacifism. As the unthematized background of such a modification, Satoshi Yokodaido diagnoses that a pathological phenomenon flourishes among ordinary people due to the elitist controversy between *Kaiken-ha* and *Goken-ha*: “the Japanese people have gradually lost trust in the normative forces of the Constitution’s text and have regarded it as so flexible that it can fit almost any changing environment.”⁵⁵ This prevailing pathology, reasonably inferred from the result of recent opinion polls, indicates that majority of ordinary people of respondents think Abe’s attempt to change the interpretation of the Constitution is unconstitutional but at the same time do not seem to think the state of unconstitutionality should be solved as soon as possible.⁵⁶ This phenomenological focus on the first-person plural perspective of ordinary citizens offers a different reason from the explanations of either the *Kaiken-ha* or *Goken-ha* on the stability of the Constitution: the former bases its reasoning on the asymmetrical strictness of its constitutional amendment procedure under Article 96, and the latter puts an emphasis on the Japanese people’s profound endorsement of the Constitution and its philosophy.⁵⁷ The normativity of Article 9 has been gradually dismembered without following procedural requirements of Article 96 but due to the relational irruption to the people’s intentionality.

4. CONCLUSION

The theory of constitutional dismemberment unpacked by Richard Albert in his masterpieces has a great potential to redeem the mysterious concept of constituent power as a technically controllable notion for contemporary constitutional transformations. However, its focus on the objectively observable quantum of popular support in terms of the mutuality and symmetry between original ratification and constitutional dismemberment does not necessarily corresponds to the phenomenon that is perceived from the first-person plural perspective of population. It should be reminded here that the Husserlian concept of *Lebenswelt* does not negate the achievements

⁵⁴ YAMAMOTO, Hajime; NEGISHI, Yota. Japan. In: PALOMBINO, Fulvio M. (Coord.). **Duelling for Supremacy: International vs. National Fundamental Principles**. Cambridge: Cambridge University Press, 2019. p. 210–233, p. 224–228.

⁵⁵ YOKODAIIDO, Satoshi. Constitutional stability in Japan not due to popular approval. **German Law Journal**, vol. 20, n. 2, p. 263–283, Apr. 2019. p. 282.

⁵⁶ YOKODAIIDO, Satoshi. Constitutional stability in Japan not due to popular approval. **German Law Journal**, vol. 20, n. 2, p. 263–283, Apr. 2019. p. 273.

⁵⁷ YOKODAIIDO, Satoshi. Constitutional stability in Japan not due to popular approval. **German Law Journal**, vol. 20, n. 2, p. 263–283, Apr. 2019. p. 265–267.

of objective science but rather purports to restore the practical interest of daily life as the essential ground that objective sciences have swept in oblivion. Inheriting this purpose, this contribution installed the relational principle of intentionality, which is synthesized at the static, genetic and generative levels, so that the practice of constitutional dismemberment can be grasped not only from the objectively theoretical viewpoint but also from the inter-subjective phenomenological perspective.

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Artigos

Articles



Consequencialismo no Supremo Tribunal Federal: uma solução pela não surpresa

Consequentialism in Brazilian Federal Supreme Court: a solution through not surprise

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Resumo

O artigo pretende apresentar soluções para a forma com que o Supremo Tribunal Federal pratica o consequencialismo, constituindo-se de uma pesquisa do tipo qualitativa, com objetivos descritivo-explicativos e propositivos, utilizando para tal o procedimento de pesquisa bibliográfico. Partindo de uma exposição sobre o pragmatismo, destacam-se o consequencialismo e o empirismo. Para confrontação e crítica, explica-se o significado de consequencialismo. Após isso, estudam-se casos julgados pelo Supremo Tribunal Federal com a finalidade de construir-se uma linha argumentativa a favor de um valor fundamental de não surpresa. Para tanto, alicerça-se o texto na segurança jurídica e no contraditório. Assim,

Abstract

The paper intends to show some solutions for the style that the Federal Supreme Court practices the consequentialism, being consisted of a qualitative type research, with descriptive, explanatory and purposeful aims, using the bibliographic search procedure for such. Starting by an exposition about the pragmatism, it highlighted the consequentialism and the empirism. For confrontation and criticize, the meaning about consequentthinkness is explained. After analyzing cases ruled by Federal Supreme Court we intend to build an argument in favor of fundamental value of not surprise. For this, the paper is grounded in legal certainty and contradictory. With this, it started the purposeful part, in which the not surprise aims to try the consequentialism

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entra-se na parte propositiva, na qual a não surpresa visa testar o consequencialismo e impedir o consequencialismo. Com essa intenção, a explicação das propostas divide-se em processo subjetivo e processo objetivo.

Palavras-chave: consequencialismo; Supremo Tribunal Federal; não surpresa; pragmatismo; empirismo.

and to prevent the consequentthinkness. And for that, the explanation of the proposals is divided in subjective and objective processes.

Keywords: consequencialism; Federal Supreme Court; not surprise; pragmatism; empirism.

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1. INTRODUÇÃO

Em *Müller vs Oregon*¹, julgado em 1908, pela Suprema Corte norte americana, Louis D. Brandeis apresentou memorial que possuía apenas duas páginas com conteúdo jurídico e cento e dez outras páginas voltadas para as consequências da longa duração do trabalho em relação à mulher². No caso *Webster vs Reproductive Health Services*³, julgado pela Suprema Corte norte americana em 1989, vinte e cinco senadores, cento e quinze deputados, duzentos e oitenta e um historiadores, oitocentos e oitenta e cinco professores de direito e outros tantos grupos e interessados apresentaram considerações⁴. Esses casos, em comum, significam a grande importância do debate em relação a questões fáticas, ainda que uma questão constitucional esteja sob análise.

Porém, imagine, em um caso concreto, junto ao Supremo Tribunal Federal (STF), que no momento de julgar, seja em decisão monocrática, seja apresentando voto no colegiado, um ministro puxe uma carta, um dado não presente nos autos. Dizendo-se um consequencialista, ou tomando uma conduta como tal, o magistrado afirma ter tido acesso ao referido estudo e o utiliza na decisão ou voto que profere, para lhe dar lastro. Como fica a parte ou a parcela da sociedade afetada por esse dado novo na tutela do

¹ EUA. Suprema Corte, *Muller v. Oregon*, 208 U.S. 412 (1908).

² MENDES, Gilmar Ferreira. **Jurisdição constitucional: o controle abstrato de normas no Brasil e na Alemanha**. 4 ed. São Paulo: Saraiva, 2004, p. 221.

³ EUA. Suprema Corte, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

⁴ DWORKIN, Ronald. **O direito da liberdade: a leitura moral da Constituição norte-americana**. Tradução Marcelo Brandão Cipolla; revisão técnica Alberto Alonso Muñoz. São Paulo: Martins Fontes, 2006, p. 68-69.

seu direito? Ela não tem meios para impugnar esse argumento lastreado no referido estudo? Como fica a controlabilidade do consequencialismo? Caso se trate de consequenciachismo, este não viola um sentido constitucional fundamental?

Os ministros do STF, em diversos casos, nos seus votos e decisões, têm feito uso de investigações empíricas, que antes não se encontravam nos respectivos processos. Algumas vezes citando as fontes, outras vezes sem declinar a origem, os julgadores têm apresentado as mesmas no último momento processual, o decisório, sem que os envolvidos antes pudessem debater sobre as informações desses estudos. Ocorre que, como mais à frente ficará consignado, sobre um mesmo assunto, pesquisas podem apontar evidências diversas e os ministros estão, então, dando soluções antagônicas entre si.

Com o intuito de refinar o consequencialismo e diminuir as possibilidades de consequenciachismo, este trabalho buscou formatar uma ideia de não surpresa. O objetivo geral, assim, foi tratar do consequencialismo e do consequenciachismo à luz de um valor constitucional de não surpresa. Para isso, como objetivos específicos os seguintes passos foram trilhados. O pragmatismo, o consequencialismo e o empirismo, o problema do consequenciachismo, além de uma análise de casos do STF foram estudados. Também um valor fundamental de não surpresa, a partir da extração constitucional da segurança jurídica e do contraditório, foi desenvolvido. Com isso, chegou-se à parte propositiva do trabalho, na qual se separou a análise para processos subjetivo e objetivo. O estudo constituiu-se de uma pesquisa do tipo qualitativa, com objetivos descritivo-explicativos e propositivos, utilizando para tal o procedimento de pesquisa bibliográfico. A hipótese foi que o valor constitucional da não surpresa não recomenda o uso pelos ministros do STF, no momento decisório, de dados empíricos antes desconhecidos no processo, o que gera um refinamento do consequencialismo e um rebaixamento da conduta consequenciachista.

2. O PRAGMATISMO

O pragmatismo é um método de solução de questões e, no caso do direito, de questões jurídicas. Ele pode ser concebido como uma teoria de como decidir ou uma teoria de como decidir qual teoria deve ser usada para decidir, ou seja, uma meta teoria. Pela primeira figura, seria uma teoria de primeira ordem, em que suas características se apresentam como solucionadoras do caso em análise. Já pela segunda figura, como teoria de segunda ordem, seus predicados são utilizados para resolver qual a teoria de primeira ordem deve ser posta em prática para determinada situação.

Imbuída na ideia de pragmatismo está a de antifundacionalismo. O fundacionalista almeja o encontro da fundação. Significa uma busca para trás na procura de um começo, de um início. O antifundacionalismo, no entanto, significa a ausência desse ponto de parada e a constante produção de novas investigações. Nega uma fundação

estática, perpétua e imutável de um pensamento⁵. A realidade, nessa lógica, seria independente das opiniões das pessoas individualmente consideradas, havendo uma nota de falibilidade no ar⁶, o que propulsionaria o esforço pela descoberta.

Também o contextualismo é característica do pragmatismo. Seria isso a importância do papel do contexto no desenvolvimento das investigações⁷, sem se ignorar, porém, que a realidade é mutante. As mudanças geram uma nova versão da verdade, que exige uma adequação contínua⁸. Paralelo a isso, diz-se que um olhar para o futuro, sem uma necessária consistência com o passado é uma marca do pragmatismo⁹. Para Posner, o pragmatismo faz uso crítico da história e observa que casos genuinamente novos não são adequadamente resolvidos através de precedentes e das leis¹⁰.

É possível igualmente apontar para outro aspecto do pragmatismo. Na tomada de decisão, o pragmatismo pede que o juiz não olhe tão somente seu caso concreto. Reclama uma visão mais ampla, que leve em consideração o mundo fora da situação em análise. A atenção volta-se para os efeitos sistêmicos da decisão¹¹. Logo, as consequências não são avaliadas apenas para dentro de um processo. Tem uma conotação maior e exige que se busque aquilatar tais efeitos para fora do caso em exame¹².

O consequencialismo, que pode ser visto como um juízo de “prováveis efeitos concretos de diferentes normas”¹³, para aferição de compatibilidade ou não de uma solução com a ordem constitucional, será destacado e estudado no próximo subitem. Junto com ele, o empirismo, até mesmo como rejeição a certa filosofia¹⁴, será compreendido.

⁵ POGREBINSCHI, Thamy. **Pragmatismo: teoria social e política**. Rio de Janeiro: Relume Dumará, 2005, p. 26.

⁶ POGREBINSCHI, Thamy. **Pragmatismo: teoria social e política**. Rio de Janeiro: Relume Dumará, 2005, p. 29.

⁷ POGREBINSCHI, Thamy. **Pragmatismo: teoria social e política**. Rio de Janeiro: Relume Dumará, 2005, p. 49.

⁸ POGREBINSCHI, Thamy. **Pragmatismo: teoria social e política**. Rio de Janeiro: Relume Dumará, 2005, p. 56-57.

⁹ ARGUELHES, Diego Werneck; LEAL, Fernando. Pragmatismo como [Meta] Teoria da Decisão Judicial: Caracterização, Estratégias e Implicações. In: SARMENTO, Daniel (coord.). **Filosofia e Teoria Constitucional Contemporânea**. Rio de Janeiro: Lumen Juris, 2009, p. 187.

¹⁰ POSNER, Richard A. **Law, pragmatism, and democracy**. Cambridge, Massachusetts; London, England: Harvard University Press, 2003, p. 71-72.

¹¹ ARGUELHES, Diego Werneck; LEAL, Fernando. Pragmatismo como [Meta] Teoria da Decisão Judicial: Caracterização, Estratégias e Implicações. In: SARMENTO, Daniel (coord.). **Filosofia e Teoria Constitucional Contemporânea**. Rio de Janeiro: Lumen Juris, 2009, p. 186.

¹² POSNER, Richard A. **Law, pragmatism, and democracy**. Cambridge, Massachusetts; London, England: Harvard University Press, 2003, p. 59.

¹³ PARGENDLER, Mariana; SALAMA, Bruno Meyerhof. Direito e consequência no Brasil: em busca de um discurso sobre o método. **Revista de Direito Administrativo**, Rio de Janeiro, v. 262, p. 95-144, jan./abr. 2013, p. 126.

¹⁴ ARGUELHES, Diego Werneck; LEAL, Fernando. Pragmatismo como [Meta] Teoria da Decisão Judicial: Caracterização, Estratégias e Implicações. In: SARMENTO, Daniel (coord.). **Filosofia e Teoria Constitucional Contemporânea**. Rio de Janeiro: Lumen Juris, 2009, p. 187.

Dentre suas características, portanto, o pragmatismo busca olhar para frente, tendo uma visão crítica da história; preza pelo empirismo e foca em algum tipo de análise do que pode acontecer se tomada a decisão em um certo sentido (relação causa e efeito).

2.1. O consequencialismo e o empirismo

Com o passar do tempo e até como resultado de uma lapidação da inteligência, a pesquisa acadêmica se tornou mais e mais científica. Para Pargendler e Salama, tal se deu, dentre algumas razões, por causa da colocação do Poder Judiciário no centro do arranjo político e devido à aplicação de princípios e a consequente necessidade de utilização da proporcionalidade. Por esta, os resultados da operacionalização dos seus subprincípios devem ser aferidos por dados empíricos ou juízos probabilísticos¹⁵. Assim, não é errado dizer que o consequencialismo jurídico é um programa teórico que condiciona a adequação jurídica de uma decisão à valoração das consequências relacionadas à mesma e às suas alternativas. Pode, nesta explicação, haver um consequencialismo forte e um consequencialismo fraco. No primeiro existiria uma prioridade ou exclusividade na valoração das consequências, no juízo de adequação de uma determinada decisão. O segundo, no entanto, traria a marca de igualdade de peso quando comparados argumentos com valoração das consequências e os não consequencialistas¹⁶.

Assim, o consequencialismo jurídico é uma “postura, interpretativa ou cognitiva, tendente a considerar as consequências de ato, teoria ou conceito”, pelo qual a decisão que o acolher deverá fundamentadamente apresentar as respectivas consequências jurídicas. Estas, por sua vez, são estados imediatos ou imediatamente futuros e devem ser identificadas na respectiva decisão¹⁷.

A consequência inerente à ideia de consequencialismo, como parece evidente, traz em si um sentido de empirismo. Se o que se almeja é ter algum olhar para frente e, de algum modo, alcançar um resultado a partir de determinada decisão, não é concedido fazer esta operação sem um suporte com algum grau de segurança. É por isso que aqui se junta a compreensão de empirismo. Para se evitar que se confundam

¹⁵ PARGENDLER, Mariana; SALAMA, Bruno Meyerhof. Direito e consequência no Brasil: em busca de um discurso sobre o método. **Revista de Direito Administrativo**, Rio de Janeiro, v. 262, p. 95-144, jan./abr. 2013, p. 109-119.

¹⁶ SCHUARTZ, Luis Fernando. Consequencialismo jurídico, racionalidade decisória e malandragem. **Revista de Direito Administrativo**, Atlas, p. 130-158, 2008, p. 130-131.

¹⁷ DE MENDONÇA, José Vicente Santos. Art. 21 da LINDB - Indicando consequências e regularizando atos e negócios. **Revista de Direito Administrativo**, Rio de Janeiro, Edição especial: Direito Público na Lei de Introdução às Normas de Direito Brasileiro – LINDB (Lei nº 13.655/2018), p. 43-61, nov. 2018, p. 47-49.

consequência e palpite, a decisão consequencialista deve pautar-se em uma “base, lógica ou empírica, de evidenciação”¹⁸.

O problema é que o mau emprego do consequencialismo pode transformar-se em consequenciachismo. O uso pouco metódico de investigações empíricas, não raro, leva a soluções mais subjetivas do que objetivas. É sobre consequenciachismo que a próxima subseção trata.

2.2. O problema do consequenciachismo

Como visto acima, duas das marcas do pragmatismo são o consequencialismo e o empirismo. Olhando para frente e levando em consideração não apenas o caso que existe em concreto nas mãos, é preciso que, a partir das decisões a serem tomadas, observem-se os prováveis efeitos que advirão.

Para que esse exercício não fique sem uma base na qual se fundamente, a decisão mencionada deve estar lastreada em dados. Tais dados parecem ter dois focos muito semelhantes: referem-se a algo passado ou presente para ajudar na tomada de decisão e possibilitam olhar para frente, a fim de indicar que uma decisão em certo sentido deve ocorrer, porque há um dado indicativo para tanto.

É decorrência lógica do consequencialismo o empirismo. Todo esse desenho exige uma ancoragem em dados empíricos, em pesquisas que tornem viável entender qual caminho percorrer na questão em análise. Não se vislumbra como corretamente exercitar um raciocínio de consequências sem a presença de um estudo concreto sobre determinada situação. Se uma decisão precisa de um móvel, para um lugar, este móvel e a indicação desse lugar precisam estar, de alguma forma, abrangidos por uma investigação.

O problema é a dificuldade em fazer isso, no sentido de se evitarem subjetivismos e de empregar corretamente os dados na tentativa de construir uma decisão adequada. Não à toa, Conrado Hübner Mendes, chamando a atenção para isso, critica o atuar judicial. Conrado considera que o consequencialismo “busca detectar relações empíricas de causa e efeito, pratica a dúvida metódica, vai atrás de pesquisas e dialoga com as ciências sociais”, o que é diferente do consequenciachismo, “um estado de espírito, um pensamento desejoso (‘wishful thinking’), a confusão entre o que é e o que se queria que fosse”. O consequenciachista, então, profere mais palpites, intuições e argumentos com baixo teor empírico¹⁹.

¹⁸ DE MENDONÇA, José Vicente Santos. Art. 21 da LINDB - Indicando consequências e regularizando atos e negócios. **Revista de Direito Administrativo**, Rio de Janeiro, Edição especial: Direito Público na Lei de Introdução às Normas de Direito Brasileiro – LINDB (Lei nº 13.655/2018), p. 43-61, nov. 2018, p. 50.

¹⁹ MENDES, Conrado Hübner. **Jurisprudência impressionista**. Época, 14 set. 2018. Disponível em: <<https://epoca.globo.com/conrado-hubner-mendes/jurisprudencia-impressionista-23066592>>. Acesso em: 21 jul. 2019.

Esse é um assunto relevante e alvo de mais críticas, justamente porque perceptível o exercício de um consequencialismo sem método ou rigor, um consequencialismo inconsequente, a reclamar uma virada com a prática da dúvida sistemática com rigor inclemente²⁰. Nesse ponto, Daniel Wang diz que o consequenciachismo tenta aquilatar “o impacto do Direito na realidade por meio do uso pouco cuidadoso de dados empíricos (sem avaliar fontes, métodos, escopos, incertezas e objeções)”, caracterizando-se “por apresentar como fato meras especulações e intuições sobre a realidade social, política e econômica”. O consequenciachista, por causa das falhas citadas, acaba que explicita sua preferência pessoal, sem uma preocupação maior com o mundo real²¹.

Se as críticas são pertinentes, não se ignoram as dificuldades argumentativas do consequencialismo. No plano normativo, a valoração de consequências deve ser conhecida, operacionalizável, em um sentido estável no tempo, e possuir uma metodologia a justificar a prioridade de um critério sobre o outro. Já no plano positivo, o olhar para frente pode enfrentar uma distinção entre o “futuro imaginado agora” e o “futuro que realmente chegará”. Mas, é por todas essas dificuldades que se faz necessário um rigor de diagnóstico confiável²².

Chega-se, portanto, a uma conclusão provisória. Na prática, talvez exercitar o consequencialismo seja realmente difícil, o que acaba permitindo que se escorregue para o consequenciachismo. Este, entretanto, é falseável, já que permite a demonstração de que o tomador de decisão errou. É este o ponto importante para o presente trabalho, como será desenvolvido mais à frente.

2.3. Uma análise de casos do Supremo Tribunal Federal

Na presente subseção, serão analisados alguns casos em que o STF vestiu uma roupagem consequencialista. Não será dito se o mérito foi corretamente julgado. O que se pretende é verificar como a Corte faz uso dos dados em seus julgamentos. No final, deseja-se checar se o Tribunal esclarece quais são os estudos, a metodologia, os autores, as conclusões e onde estão disponíveis para acesso, assim como se as partes têm oportunidade de estudar previamente os dados e apresentar argumentos e outros dados em sentido contrário.

²⁰ DE MENDONÇA, José Vicente Santos. Em defesa do consequenciachismo. **Direito do Estado**, ano 2018, 16 set. 2018, nº 413. Disponível em: <<http://www.direitodoestado.com.br/colunistas/jose-vice-santos-mendonca/em-defesa-do-consequenciachismo>>. Acesso em: 21 jul. 2019.

²¹ WANG, Daniel Wei Liang. **Entre o consequenciachismo e o principiachismo, fico com a deferência**. Jota, 20 set. 2018. Disponível em: <https://www.jota.info/paywall?redirect_to=//www.jota.info/opiniao-e-analise/artigos/entre-o-consequenciachismo-e-o-principiachismo-fico-com-a-deferencia-20092018>. Acesso em: 21 jul. 2019.

²² LEAL, Fernando. **Consequenciachismo, principialismo e deferência: limpando o terreno**. Jota, 01 out. 2018. Disponível em: <https://www.jota.info/paywall?redirect_to=//www.jota.info/stf/supra/consequenciachismo-principialismo-e-deferencia-limpando-o-terreno-01102018>. Acesso em: 21 jul. 2019.

2.3.1. *O caso do início da execução da pena a partir de decisão condenatória de segundo grau de jurisdição*

O debate a respeito da execução da pena em segundo grau de jurisdição foi, dentre outros momentos, realizado no *Habeas Corpus* (HC) nº 126.292/SP²³ quando foi denegada a ordem, por maioria. É interessante notar que o ministro Luís Roberto Barroso abriu uma parte, a terceira de seu voto, para expor fundamentos pragmáticos. Elencou duas características: o contextualismo e o consequencialismo. Após passar por diversos tipos de argumentação, expressou, com base em pesquisas da época, que menos de 1,5% foi o quantitativo de recursos extraordinários providos em favor do réu; que, de 2009 a 19 de abril de 2016, menos 0,1% das decisões foram absolutórias, no tocante a recursos criminais no STF; e que era massiva a quantidade de casos com prescrição da pretensão punitiva, gerando sensação de descrédito na justiça penal. O julgador aduziu ser regra, nos diversos países, que o início da execução da pena ou é a decisão de primeiro grau ou a de segundo. Disse ainda que a postura anterior da Corte estimulou a interposição de recursos protelatórios e reforçou a seletividade do sistema penal, ante a impossibilidade de o pobre arcar com tais recursos.

O ministro Celso de Mello, utilizando-se de dados estatísticos do portal da Corte, seguiu direção oposta, em favor da concessão da ordem. Quanto aos números, apontou que de 2006 a 2008, 25,2% e 3,3% dos recursos extraordinários criminais foram providos, no todo e em parte, respectivamente, pelo STF. No mesmo sentido e para defender a impossibilidade da execução da pena em segunda instância, o ministro Ricardo Lewandowski disse que o Brasil, à época, tinha a quarta população carcerária, ficando atrás de Estados Unidos, China e Rússia. Disse, ainda, que existiam 600 mil presos e que 40% desses eram provisórios.

Pela utilização de dados levada a efeito pelos ministros supra, verificou-se que o ministro Barroso teve grande preocupação em apontar os respectivos estudos e seus autores. Já o ministro Celso de Mello teve preocupação ainda mais intensa, enquanto ministro Ricardo Lewandowski não apontou os estudos nos quais se baseara. A metodologia e eventuais conclusões, porém, não foram abordadas pelos julgadores. Também, ao que tudo indica, as partes não tiveram oportunidade de estudar previamente os citados dados, passando despercebida esta preocupação.

2.3.2. *O caso do indulto presidencial (governo Michel Temer)*

A Ação Direta de Inconstitucionalidade (ADI) nº 5.874/DF debateu os limites constitucionais à concessão de indulto em caráter geral pelo Presidente da República.

²³ BRASIL. STF, HC 126.292/SP – São Paulo; Habeas Corpus; Relator: Min. Teori Zavascki; Julgamento: 17/02/2016; Órgão julgador: Tribunal Pleno; Publicação Processo Eletrônico DJe-100 Divulg 16-05-2016 Public 17-05-2016.

Em seu pedido, a Procuradoria-Geral da República (PGR) argumentou que o Decreto nº 9.246/2017 concedeu indulto natalino e comutação de penas a condenados que cumpriram frações ínfimas da pena, ou que já foram beneficiados pela legislação e não estavam encarcerados, à pena de multa e a casos ainda não julgados definitivamente. Isso violaria a proibição do Poder Executivo legislar sobre matéria penal, a separação dos Poderes, a individualização da pena e a proibição à proteção insuficiente. Na decisão que concedeu a medida cautelar²⁴, o ministro Luís Roberto Barroso destacou que o poder presidencial de perdoar penas não pode ser ilimitado e deve se pautar pelo desenho feito pelo legislador, dizendo que “uma compreensão sistêmica da realidade jurídica e dos efeitos concretos gerados pela aplicação das normas possibilitará um debate público qualificado sobre o tema”. Após analisar institutos legais de direito penal, o ministro afirmou a existência de centenas de milhares de mandados de prisão à espera de cumprimento, para assegurar que o sistema de execução penal brasileiro é menos severo do que o de outros países.

A partir daí, números foram inseridos na decisão de concessão da medida cautelar. Foi dito que o Brasil é a terceira maior população carcerária do mundo, com mais de 720 mil presos, em condições degradantes. Adicionou que mais da metade dos encarcerados são acusados ou condenados por crimes não violentos e que 0,25% são de detentos por prática de delitos contra a administração pública. Além disso, a decisão expôs que 40% dos presos são provisórios, maioria derivada de flagrante por tráfico de drogas, e 60% são analfabetos ou não completaram o ensino fundamental.

Após esses números, a decisão partiu para uma análise rápida da leniência com o delito de “colarinho branco” e uma explicação sobre o indulto. Aqui, apontou que informações de Tribunais de Justiça de cinco estados da federação constataram que, entre 2013 e 2017, foram concedidos 27.681 indultos. Tudo isso e mais inúmeros outros argumentos, sobretudo de conotação constitucional, serviram, para ao final, o ministro Barroso deferir a medida cautelar na extensão que entendeu adequada para suspender do âmbito de incidência do decreto sob análise, os crimes de peculato, concussão, corrupção passiva, corrupção ativa, tráfico de influência, os praticados contra o sistema financeiro nacional, os previstos na Lei de Licitações, os crimes de lavagem de dinheiro e ocultação de bens, os previstos na Lei de Organizações Criminosas e a associação criminosa.

A decisão monocrática analisou de maneira criteriosa e densa a questão, porém, no que se refere aos dados empíricos citados, não explicitou o local de publicação dos respectivos estudos, a sua metodologia, autores e conclusões e onde estão disponíveis para acesso. Ademais, tudo aponta no sentido de que as partes não tiveram

²⁴ BRASIL. STF, ADI 5.874 MC/DF - Distrito Federal; Medida Cautelar na Ação Direta de Inconstitucionalidade; Relator: Min. Roberto Barroso; Julgamento: 12/03/2018; Publicação Processo Eletrônico DJE-049 Divul 13/03/2018 Public 14/03/2018.

oportunidade de estudar previamente – já que se tratava de deferimento de cautelar – os dados e apresentar argumentos e outros dados em sentido contrário, antes mesmo da apontada decisão. Todavia, frise-se, alguns *amici curiae* foram admitidos.

2.3.3. O caso do ensino domiciliar

No Recurso Extraordinário (RE) nº 888.815/RS²⁵, o STF enfrentou a questão da juridicidade do ensino domiciliar. Na origem, tratava-se de mandado de segurança impetrado contra ato da Secretaria Municipal de Educação de Canela/RS que impediu a educação domiciliar a um menor e recomendou a imediata matrícula na rede regular de ensino. Ao ascender à Corte, esta, por enxergar o dever de solidariedade entre a família e o Estado na formação educacional das crianças, jovens e adolescentes, por maioria, julgou inconstitucionais as espécies de *unschooling* radical – desescolarização radical –, *unschooling* moderado – desescolarização moderada –, e *homeschooling* puro. Entendeu que o ensino domiciliar não é um direito público subjetivo e que sua criação dependia de lei federal editada pelo Congresso Nacional.

O ministro Luís Roberto Barroso, relator e vencido, partiu de três pré-compreensões para dar sua solução. Uma, o Estado brasileiro é grande, ineficiente e pratica políticas públicas inadequadas e sem monitoramento. Dois, os resultados de 2017 da Prova Brasil, integrante do Sistema Nacional de Avaliação da Educação Básica, que teriam sido divulgados na semana em que se proferiu o presente julgamento, apontaram que 5% e 1,7% dos alunos se situaram na faixa adequada nos testes de matemática e português, respectivamente. E três, sua preferência, em regra, à autonomia e à emancipação das pessoas do que ao paternalismo estatal.

Dentre os sete motivos para pais e responsáveis optarem pela escolarização domiciliar, o relator apontou a proteção da integridade física e mental dos educandos, retirando-os de ambientes escolares agressivos, incapacitantes ou limitadores; o descontentamento com a real eficácia do sistema escolar ofertado pela rede pública ou privada; e a dificuldade de acesso às instituições de ensino tradicionais em virtude de restrições financeiras ou geográficas. Além disso, afirmou o ministro Barroso que fez um levantamento e constatou o crescimento, sobretudo em países desenvolvidos, da população praticante da educação doméstica familiar. Assim, apontou que no Reino Unido o número seria de 100 mil educandos; no Canadá, 95 mil; na Austrália, 55 mil famílias; na Nova Zelândia, 6 mil; na França e Taiwan, 500; nos Estados Unidos, segundo o Departamento de Educação, em 2012, o número era de 1,8 milhão de crianças e adolescentes. Frisou que no Brasil inexistia estatística oficial.

²⁵ BRASIL. STF, RE 888.815/RS – Rio Grande do Sul; Recurso Extraordinário; Relator: Min. Roberto Barroso; Relator p/ Acórdão: Min. Alexandre de Moraes; Julgamento: 12/09/2018; Órgão julgador: Tribunal Pleno; Publicação Processo Eletrônico DJE-055 Divulg 20-03-2019 Public 21-03-2019.

Disse ainda, ao debater o tema da socialização das crianças e adolescentes em ensino domiciliar, que “(...) conforme pesquisas empíricas relevantes - e as quais eu tive acesso -, elas não apenas têm melhor desempenho acadêmico, o que é indisputado, como também apresentam um nível elevado de socialização, acima da média”. O julgador acrescentou que “por circunstâncias diversas, (...) a verdade é que pesquisas empíricas realizadas predominantemente nos Estados Unidos documentam que não há problemas de socialização com as crianças que se encontram no ensino domiciliar”.

Assim, por argumentos constitucionais, aliados aos acima aludidos e ainda outros, o ministro Barroso entendeu pela legitimidade do ensino domiciliar, em conformidade com os parâmetros por ele fixados no voto, ainda que tenha admitido uma regulamentação estatal. É de se frisar que muitos dos dados empíricos citados vieram com referências aos respectivos estudos.

No mesmo julgamento, o redator para o acórdão, o ministro Alexandre de Moraes, para dar lastro à sua posição, em determinado momento, fez uso de argumento empírico, ao afirmar que “o Brasil tem a terceira maior taxa de evasão escolar entre cem países”, explicando que “o PNUD [Programa das Nações Unidas para o Desenvolvimento] trouxe esse problema”. Esclareceu que em vinte anos, o Brasil reduziu a taxa de analfabetismo de 65% para 16%. E falou que nos Estados Unidos a questão do *homeschooling* tem ligação com a liberdade religiosa, já que 75% são mórmons. Isso aliado a outros argumentos, inclusive de ordem constitucional, levou o julgador a entender pela inexistência de um direito público subjetivo de ensino domiciliar e pela necessidade, para viabilizar esta espécie de ensino, de lei proveniente do Congresso Nacional.

Igualmente, para dar lastro aos seus argumentos e afirmar a inconstitucionalidade do ensino domiciliar, o ministro Luiz Fux pautou-se em “[d]ados oficiais sobre abuso sexual infantil”, dizendo que “24,1% dos agressores das crianças são os próprios pais ou padrastos, e 32,2% são amigos ou conhecidos da vítima”. Isso apontaria para o profissional da educação como o mais capacitado a realizar a respectiva função.

O ministro Gilmar Mendes votou pelo desprovimento do recurso. Apontando sua fonte, o *Programme for International Student Assessment* (PISA), afirmou que, compulsando a edição de 2015, foi possível concluir que o *homeschooling* não resultou em qualquer ganho para o desempenho da educação no ranking entre os países. Os Estados Unidos e Portugal, permissivos a tal prática, ocuparam a 25ª e a 23ª colocações. A Suécia que admite apenas por exceção ficou na 28ª posição, enquanto a Alemanha, que a proíbe, ficou na 16ª posição.

Também o ministro Marco Aurélio, para fundamentar seu pensamento, usou de argumentos constitucionais e de dados. Indicando sua fonte, o Instituto Brasileiro de Geografia e Estatística (IBGE), especificamente a Pesquisa Nacional por Amostragem de Domicílios (PNAD) datada de 2015, alertou que 97,7% dos que possuem 6 e 14 anos estavam matriculados no ensino fundamental. Enfatizou que apenas 76% dos estudantes

encerraram o ensino fundamental no momento adequado, que cerca de 2,5 milhões de jovens entre 4 e 17 anos estavam fora da escola e que, destes, cerca de 1,5 milhão eram para estar no ensino médio. Ao final, votou pelo desprovemento do recurso.

Em relação a muitos dos dados acima utilizados, sobretudo os citados pelos ministros Barroso, Gilmar Mendes e Marco Aurélio, foram assinalados os respectivos estudos e os autores, mas não a metodologia e as conclusões. Ademais, não há notícia de que as partes não tiveram oportunidade de estudá-los previamente, apesar de alguns *amici curiae* terem sido admitidos. Apesar disso, o que chama bastante atenção é o fato de sobre a mesma questão, poderem, em tese, como o STF comprovou neste caso, ser utilizados dados empíricos que direcionaram a soluções antagônicas.

Frente ao espaço possível que este trabalho abriu, para analisar como o empirismo é concretizado pelo STF, ao menos nos apontados casos, algumas conclusões provisórias são autorizadas. Em primeiro, há ministros mais abertos do que outros ao emprego de elementos empíricos para fundamentar as suas decisões. Dos que o fazem, não há um padrão sobre como fundamentar uma decisão ou voto com o uso de dados empíricos. Os estudos e seus autores podem até, mas não sempre, ser citados, porém, a metodologia, as conclusões e como acessá-los não o são frequentemente. Além disso, é rara a preocupação em conferir às partes, a oportunidade de se pronunciar sobre dados e estudos empíricos reputados relevantes anteriormente à prolação da decisão, inclusive em hipóteses de reversão de jurisprudência.

Expressadas as características do pragmatismo, entregando especial atenção ao consequencialismo e ao empirismo, este trabalho demonstrou preocupação em se evitar o consequencialismo. Após defini-lo, analisou três casos importantes que o STF julgou. Em relação a estes, ficou constatada uma variação grande em como os integrantes da Corte fazem uso de investigações empíricas. Isso revela um estágio embrionário no emprego de dados empíricos como razões de decidir, devendo haver maior cuidado em oportunizar às partes do processo a possibilidade de manifestação sobre o seu teor antes da prolação da decisão. Em defesa da necessidade de não se autorizar o uso surpresa desses estudos pelo STF, é que na próxima seção sustentaremos a necessidade de se evitar o “uso surpresa” desses estudos, em proteção ao princípio constitucional da segurança jurídica e seus corolários.

3. UM VALOR FUNDAMENTAL DE NÃO SURPRESA

A seção anterior deste trabalho trouxe uma constatação problemática. O pragmatismo e suas características de cunho consequencialista e empírica não são de fácil execução na prática. Apesar disso, o STF vem decidindo alguns casos com argumentos pragmáticos. Uma grande dificuldade ficou atestada ao final da subseção anterior. Os ministros, cada um ao seu modo, às vezes sem mesmo dizer de onde extraíram

determinado dado empírico, dão cor aos seus fundamentos constitucionais. Demonstram, no entanto, baixa preocupação com a parte do processo ou parcela da sociedade afetada com o uso da pesquisa que, muitas vezes, podem nem ter conhecimento prévio sobre a existência.

A partir desse olhar, a presente seção buscará formatar a configuração de um valor fundamental de não surpresa. O tema parece mais complexo do que simplesmente repetir o brocardo *da mihi factum, dabo tibi ius*. Dizer o direito fundado na narrativa de um fato talvez não signifique afirmar que o julgador pode, por si, promover a busca de dados empíricos, para defender sua visão decisória. E, ainda que se pense que pode, permitir que um ministro do STF assim aja, sem franquear, de algum modo, aos afetados pela decisão estudar a pesquisa e eventualmente apresentar outra, em sentido diverso, antes da definição do caso, soa contrário a uma ideia de não surpresa.

3.1. A extração constitucional da segurança jurídica

A segurança é fator de relevância ímpar em qualquer área das relações humanas²⁶. Não é possível pensar até mesmo na concepção de coletividade se não houver, em um grau mínimo, segurança nas referidas relações. A economia e suas transações reclamam segurança. A política deve acontecer em um ambiente de segurança. E o direito não pode fugir da ideia de segurança.

O princípio da segurança jurídica é uma decorrência do Estado de Direito²⁷. Seja enxergando-o como fundamento²⁸, como elemento²⁹, como razão de ser³⁰ ou mesmo como subprincípio³¹ do Estado de Direito, a lógica para o presente trabalho é que o Estado limitado pela ordem jurídica³² deve agir em respeito a uma segurança dirigida para o administrado, o cidadão, o jurisdicionado. E com isso, a segurança é voltada

²⁶ MELO, Lígia Maria Silva de. Segurança jurídica: fundamento do Estado de Direito. **Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 6, n. 25, p. 133-144, jul./set. 2006, p. 133.

²⁷ MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet. **Curso de direito constitucional**, 14 ed. rev. e atual. São Paulo: Saraiva Educação, 2019, p. 410.

²⁸ MELO, Lígia Maria Silva de. Segurança jurídica: fundamento do Estado de Direito. **Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 6, n. 25, p. 133-144, jul./set. 2006, p. 133.

²⁹ BARBOZA, Estefânia Maria de Queiroz. Escrevendo um romance por meio dos precedentes judiciais – uma possibilidade de segurança jurídica para a jurisdição constitucional brasileira. **A&C - Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 14, n. 56, p. 177-207, abr./jun. 2014, p. 178.

³⁰ CLÈVE, Clèmerson Merlin; LORENZETTO, Bruno Meneses. Mutação constitucional e segurança jurídica: entre mudança e permanência. **Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito**, v. 7, n. 2, p. 136-146, maio-ago. 2015, p. 141.

³¹ BRASIL. STF, MS 24.268/MG – Minas Gerais, Mandado de Segurança, Relator(a): Min. Ellen Gracie, Relator(a) p/ acórdão: Min. Gilmar Mendes, Julgamento: 05/02/2004, Órgão julgador: Tribunal pleno, Publicação DJ 17-09-2004 PP-00053 Ement Vol-02164-01 PP-00154, RDDP n. 23, 2005, p. 133-151, RTJ Vol-00191-03 PP-00922.

³² MARTINS, Eliezer Pereira. Segurança jurídica e certeza do direito em matéria disciplinar - aspectos atuais. **Revista de Direito Administrativo**, Rio de Janeiro, v. 230, p. 141-152, out./dez. 2002, p. 142.

contra o próprio Estado³³. Nesse sentido, o Estado deve, não somente tutelar a referida segurança, mas implementar suas funções de forma a promovê-la e não realizar condutas que a neguem.

O Estado de Direito, dentre vários objetivos, visa à estabilidade social e à segurança jurídica e o faz por dois momentos: o legislativo e o decisório, o primeiro com a produção legislativa e o segundo com a produção de decisões. Nesse segundo momento, estuda-se o papel dos julgadores e espera-se que se resolvam os problemas jurídicos de acordo com o direito e não em conformidade com convicções íntimas. Aqui a exigência de justificação é cara sob dois aspectos. O primeiro direciona-se a que as partes tenham seus argumentos e provas produzidas considerados e ponderados. O segundo é voltado à criação e fomento da confiança de todos nas decisões judiciais. No ponto, credibilidade tem estreita ligação com previsibilidade do atuar judicial³⁴.

Daí que se mostra importante dizer que a segurança jurídica tem norte apontado tanto para condutas a serem praticadas pelo Estado, sobretudo aqui para atos judiciais, quanto para situações ocorridas. Assim, deve-se ampliar o estudo do instituto e evitar apenas exemplos ligados ao ato praticado, esquecendo-se a exigência de segurança ao procedimento para a prática do ato. Segue nesses dois caminhos a compreensão de que “nos vínculos entre o Estado e os indivíduos, se assegura uma certa previsibilidade da ação estatal, do mesmo modo que se garante o respeito pelas situações constituídas em consonância com as normas impostas ou reconhecidas pelo poder público”, tudo com o fim de “assegurar a estabilidade das relações jurídicas e uma certa coerência na conduta do Estado”³⁵. Apesar de não construído com o problema deste trabalho, Humberto Ávila afirma que a jurisdição tem causado problemas de cognoscibilidade, de confiabilidade e de calculabilidade³⁶. Para o presente escrito, importantes são as concepções de confiabilidade e calculabilidade. Aquela pode ser entendida como “a exigência de um ordenamento jurídico protetor de expectativas e garantidor de mudanças estáveis” e esta, como a exigência inerente à segurança jurídica de as pessoas terem a capacidade de prever as consequências jurídicas de atos ou fatos³⁷. Nessa ordem de ideias, a conduta do ministro do STF que se louva em dados empíricos cuja

³³ BARCELLOS, Ana Paula de. **Curso de direito constitucional**. Rio de Janeiro: Forense, 2018, p. 164.

³⁴ MOREIRA, Egon Bockmann; PEREIRA, Paula Pessoa. Art. 30 da LINDB - O dever público de incrementar a segurança jurídica. **Revista de Direito Administrativo**, Rio de Janeiro, Edição especial: Direito Público na Lei de Introdução às Normas de Direito Brasileiro – LINDB (Lei nº 13.655/2018), p. 243-274, nov. 2018, p. 258-260.

³⁵ SILVA, Almiro do Couto e. O princípio da segurança jurídica (proteção à confiança) no direito público brasileiro e o direito da administração pública de anular seus próprios atos administrativos: o prazo decadencial do art. 54 da lei do processo administrativo da União (Lei nº 9.784/99). **Revista de Direito Administrativo**, Rio de Janeiro, v. 237, p. 271-315, jul./set. 2004, p. 273.

³⁶ ÁVILA, Humberto. **Teoria da Segurança Jurídica**. 3 ed., revista, atualizada e ampliada. São Paulo: Malheiros Editores, 2016, p. 174.

³⁷ ÁVILA, Humberto. **Teoria da Segurança Jurídica**. 3 ed., revista, atualizada e ampliada. São Paulo: Malheiros Editores, 2016, p. 138-140.

origem é mencionada, mas dos quais o conhecimento não é franqueado previamente aos demais atores processuais, ou que se apoia em pesquisa da qual não se sabe nem mesmo a fonte, esbarra na configuração acima de segurança jurídica. Isso porque não se espera do julgador que, no momento de julgar, adicione elementos empíricos não estudados anteriormente nos autos do processo, assim como a falta dessa informação prévia às partes sobre a existência de tais dados subtrai das mesmas a capacidade de previsão das consequências jurídicas desse ato judicial.

Também na busca de sedimentar um pensamento que una, de um lado, a previsibilidade e, de outro, a não surpresa, é possível apresentar as dimensões da segurança jurídica. Floriano de Azevedo Marques Neto aborda o tema sob três aspectos: a estabilidade – perenidade aos atos e seus efeitos, ainda quando mudanças ocorrerem; a ponderabilidade – exigindo-se racionalidade e proporcionalidade na aplicação do direito; e previsibilidade – retardando-se grandes alternâncias, armadilhas e surpresas³⁸. Outros autores preferem formatar a segurança jurídica em duas dimensões: objetiva e subjetiva. A dimensão objetiva liga-se aos limites da retroatividade dos atos do Estado. A dimensão subjetiva refere-se à proteção e à confiança das pessoas no tocante a atos, procedimentos e condutas estatais³⁹. Interessante é o aprofundamento desta última face. A segurança jurídica significa uma tutela contra atos inesperados e prejudiciais do Estado⁴⁰, ou seja, uma nota de bloqueio a mudanças surpreendentes de condutas estatais⁴¹. Assim, a falta de previsibilidade dificulta a confiança das pessoas no Estado juiz, gerando desincentivos e frustração de expectativas⁴², tudo o que não se deseja para o STF.

Não foi com esse foco que Egon Bockmann Moreira e Paula Pessoa Pereira teceram comentários ao art. 30, da Lei de Introdução às normas do Direito Brasileiro (LINDB). Mas o raciocínio de forma ampla deve ser aqui aplicado. Eles tratam do dever de instauração e autovinculação administrativa a regulamentos, súmulas administrativas

³⁸ NETO, Floriano de Azevedo Marques. Art. 23 da LINDB - O equilíbrio entre mudança e previsibilidade na hermenêutica jurídica. **Revista de Direito Administrativo**, Rio de Janeiro, Edição especial: Direito Público na Lei de Introdução às Normas de Direito Brasileiro – LINDB (Lei nº 13.655/2018), p. 93-112, nov. 2018, p. 99.

³⁹ MOREIRA, Egon Bockmann; PEREIRA, Paula Pessoa. Art. 30 da LINDB - O dever público de incrementar a segurança jurídica. **Revista de Direito Administrativo**, Rio de Janeiro, Edição especial: Direito Público na Lei de Introdução às Normas de Direito Brasileiro – LINDB (Lei nº 13.655/2018), p. 243-274, nov. 2018, p. 255.

⁴⁰ CLÈVE, Clèmerson Merlin; LORENZETTO, Bruno Meneses. Mutação constitucional e segurança jurídica: entre mudança e permanência. **Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito**, v. 7, n. 2, p. 136-146, maio-ago. 2015, p. 142-144.

⁴¹ SILVA, Almiro do Couto e. O princípio da segurança jurídica (proteção à confiança) no direito público brasileiro e o direito da administração pública de anular seus próprios atos administrativos: o prazo decadencial do art. 54 da lei do processo administrativo da União (Lei nº 9.784/99). **Revista de Direito Administrativo**, Rio de Janeiro, v. 237, p. 271-315, jul./set. 2004, p. 275.

⁴² MOREIRA, Egon Bockmann; PEREIRA, Paula Pessoa. Art. 30 da LINDB - O dever público de incrementar a segurança jurídica. **Revista de Direito Administrativo**, Rio de Janeiro, Edição especial: Direito Público na Lei de Introdução às Normas de Direito Brasileiro – LINDB (Lei nº 13.655/2018), p. 243-274, nov. 2018, p. 254.

e respostas a consultas e trazem dois desdobramentos: a institucionalização do efetivo respeito e a estabilização institucional das decisões. Trabalhando este segundo aspecto, vinculam tal ideia à aceitabilidade e o efetivo cumprimento das decisões à reputação institucional, para este escrito, do STF. E daí, afirmam que “a estabilidade da legitimidade institucional e decisória é que garante esta reputação e, por conseguinte, a aceitabilidade das decisões” e, por isso, “[a] percepção de alguma atuação ilegítima, fora dos argumentos jurídicos estabilizados, traz grande insegurança e déficit de confiança por parte dos atores políticos, sociais e cidadãos”⁴³. A introdução de dado empírico, sem prévia ciência dos atores processuais, por parte de ministro do STF, que o utiliza de imediato em sua decisão ou voto, traz elemento novo, não necessariamente indene de crítica. Ele não é um argumento jurídico estabilizado. Pelo contrário, é um fundamento que surpreende a todos, inclusive os demais ministros da Corte.

Em um jogo de sentidos que se misturam, segurança ocasiona previsibilidade que importa em confiança. Porém, o contrário também é verdadeiro. A insegurança dá espaço à imprevisibilidade e esta leva à desconfiança. O interessante é que segurança e previsibilidade – o que inclui seus antônimos – podem ser causa e efeito uma da outra. E o resultado dessa conta é a confiança.

Uma conduta judicial que aporta para dentro da decisão a ser proferida elementos não presentes nos autos pode ser qualificada como imprevisível pela parte. Se esta trabalha com o que conhece existente no processo. Se isso traz certo resguardo igualmente à outra parte. Parece correto dizer que o magistrado que introduz elemento novo e, portanto, desconhecido dos demais atores processuais, age de forma imprevisível. Se, além disso, magistrados de órgão colegiado, como ficou demonstrado acima, utilizam-se de dados empíricos e chegam a soluções opostas, a segurança jurídica resta ainda mais comprometida. A desconfiança, não por responsabilidade das partes ou da própria sociedade, será o tom presente. É realmente difícil justificar fundamentadamente como dados empíricos podem direcionar votos em sentidos diversos.

Isso leva à necessidade de antes de autorizar-se o uso de investigações empíricas pelo julgador, as mesmas serem estudadas pelos envolvidos no processo. Tal passo prévio espantará a surpresa e tornará mais previsível o norte do julgamento. Caso os estudos tenham sentidos contrários, é o momento inclusive de falsear um ou outro. De todo modo, de insegurança jurídica não se poderá mais falar. Assim, para a sociedade como um todo e para as partes e envolvidos, em particular, pairará um sentimento de confiança no sentido de que, caso elementos empíricos surjam no conhecimento do magistrado, este antes levará os mesmos à ciência dos demais.

⁴³ MOREIRA, Egon Bockmann; PEREIRA, Paula Pessoa. Art. 30 da LINDB - O dever público de incrementar a segurança jurídica. *Revista de Direito Administrativo*, Rio de Janeiro, Edição especial: Direito Público na Lei de Introdução às Normas de Direito Brasileiro – LINDB (Lei nº 13.655/2018), p. 243-274, nov. 2018, p. 247.

A presente subseção, assim, buscou extrair da segurança jurídica o valor fundamental de não surpresa. O mesmo empreendimento será realizado abaixo, entretanto com relação ao contraditório.

3.2. A extração constitucional do contraditório

Para efeito de concretizar um valor constitucional da não surpresa é possível utilizar um modelo constitucional de processo, pelo qual se faz uma releitura dos institutos do processo com olhos voltados para o Estado Democrático de Direito. Através de uma crítica à escassez de diálogo processual, às decisões tomadas solitariamente pelo juiz e ao esquecimento da efetividade normativa e sua garantia de eficiência e legitimidade, com respectiva possibilidade de influência de todos os sujeitos processuais, foca-se o processo como estrutura dialógica de formação de provimentos e garantia de direitos fundamentais. Para tanto, deve-se ter uma percepção dinâmica dos princípios constitucionais e, ao mesmo tempo, promover a superação de dois modelos de processo, que hoje já não se encaixam. O processo como instituição estatal de bem estar social, pelo qual o juiz, formalmente, é o diretor do processo; e, materialmente, tem controle e iniciativa oficiosa na colheita da prova, deposita uma esperança acrítica e desmedida no magistrado. E, por sua vez, o processo como relação jurídica, categoriza o juiz como ator superior, subordinando, indevidamente, as partes ao magistrado. Daí que um juiz solucionista, caracterizado como sabedor do que é o bem comum, e solipsista, qualificado como tomador isolado de decisões, afasta a teoria da realidade constitucional exigível e permite o alijamento das partes do discurso processual⁴⁴. Por conta da democratização processual, é visível um dissenso do que é o bem comum e imperfeita a imagem de um juiz solitário com ideias privilegiadas de justiça⁴⁵.

Nesse sentido, a doutrina processualista vem reclamando um espaço discursivo aberto pelo processo, para problematização e formação de decisão. Uma forma para se alcançar esse desiderato é trabalhar a concepção de contraditório. Essencial para a ideia de processo, o contraditório durante longo tempo foi visto como um princípio que obedecia ao comando de informação e reação. Assim, à parte deveria ser entregue determinada informação e facultada a respectiva reação⁴⁶. Com o tempo, essa formação vem sofrendo uma releitura e hoje fala-se em o contraditório guardar em si uma

⁴⁴ THEODORO JÚNIOR, Humberto; NUNES, Dierle José Coelho. Uma dimensão que urge reconhecer ao contraditório no direito brasileiro: sua aplicação como garantia de influência, de não surpresa e de aproveitamento da atividade processual. *Revista de Processo*, vol. 168, p. 107-141, fev. 2009, DTR\2009\156.

⁴⁵ NUNES, Dierle José Coelho. Teoria do processo contemporâneo: por um processualismo constitucional democrático. *Revista da Faculdade de Direito do Sul de Minas*, p. 13-29, Edição Especial – 2018, p. 13-25.

⁴⁶ LUCON, Paulo Henrique dos Santos. Tutela do contraditório no novo código de processo civil: vedação à decisão-surpresa; requisito para extensão dos limites objetivos da coisa julgada; identificação das decisões imotivadas. *Revista Eletrônica de Direito Processual*, Rio de Janeiro, Ano 10, v. 17, n. 1, p. 164-192, jan. a jun. 2016, p. 166.

tríplice lógica. Funcionaria o referido princípio a noção de informação, reação e consideração. Abandonando-se a mera bilateralidade da audiência, passa-se à necessária consideração, na qual a decisão judicial deve enfrentar os argumentos apresentados pelas partes nas respectivas reações⁴⁷.

Tal pensamento traz à tona a distinção entre contraditório estático e contraditório dinâmico. O contraditório estático seria, pois, a simples oitiva das partes, na sequência evolutiva dos atos processuais, sendo o juiz um mero espectador do litígio⁴⁸. Entretanto, o contraditório dinâmico admite outra estruturação. Por ele, há a possibilidade de influência sobre o progresso do processo e em relação à configuração da decisão⁴⁹. No ponto, deseja-se a efetivação de um contraditório material ou substancial, em que as considerações sejam realmente levadas em conta, com potencialidade de influenciar no resultado final, não se atribuindo peso ao simples ato anterior, mas sim à sua utilidade⁵⁰. Há aí uma comparticipação pela qual os atores do processo podem influenciar na formação das decisões, com real discussão aprofundada pelo fomento ao debate e sem o protagonismo isolado de um ou outro sujeito processual. Partes e magistrado atuam efetivamente em uma comunidade de trabalho⁵¹.

Toda essa exposição leva à possibilidade de serem fixados, através do princípio do contraditório, duas garantias e alguns deveres. Em primeiro lugar, pode ser dito que o contraditório assegura uma oportunidade de participação⁵², mas com real chance de contribuição da parte⁵³. Exige ele um efetivo diálogo⁵⁴. Funciona, então, como uma garantia de influência⁵⁵ especialmente em relação ao magistrado. Dessa forma, passa-

⁴⁷ DE OLIVEIRA JUNIOR, Zulmar Duarte. Devido processo legal: contraditório (trinômio informação, reação e consideração) e o novo CPC. **Revista Eletrônica de Direito Processual**, Rio de Janeiro, Ano 5, v. 7, n. 7, p. 205-220, jan. a jun. 2011, p. 213-214.

⁴⁸ THEODORO JÚNIOR, Humberto. Processo justo e contraditório dinâmico. **Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito**, v. 2, n. 1, p. 64-71, jan. a jun. 2010, p. 69.

⁴⁹ THEODORO JÚNIOR, Humberto; NUNES, Dierle José Coelho. Uma dimensão que urge reconhecer ao contraditório no direito brasileiro: sua aplicação como garantia de influência, de não surpresa e de aproveitamento da atividade processual. **Revista de Processo**, vol. 168, p. 107-141, fev. 2009, DTR\2009\156.

⁵⁰ DE OLIVEIRA JUNIOR, Zulmar Duarte. Devido processo legal: contraditório (trinômio informação, reação e consideração) e o novo CPC. **Revista Eletrônica de Direito Processual**, Rio de Janeiro, Ano 5, v. 7, n. 7, p. 205-220, jan. a jun. 2011, p. 214.

⁵¹ DOS SANTOS, Welder Queiroz. A vedação à prolação de “decisão surpresa” na Alemanha. **Revista de Processo**, vol. 240, p. 425-435, fev. 2015, DTR\2015\817.

⁵² LUCON, Paulo Henrique dos Santos. Tutela do contraditório no novo código de processo civil: vedação à decisão-surpresa; requisito para extensão dos limites objetivos da coisa julgada; identificação das decisões imotivadas. **Revista Eletrônica de Direito Processual**, Rio de Janeiro, Ano 10, v. 17, n. 1, p. 164-192, jan. a jun. 2016, p. 167.

⁵³ MOREIRA, José Carlos Barbosa. Breve notícia sobre a reforma do processo civil alemão. In: **Temas de Direito Processual, Oitava Série**, Rio de Janeiro: Saraiva, p. 199-210, 2004, p. 201.

⁵⁴ THEODORO JÚNIOR, Humberto. Processo justo e contraditório dinâmico. **Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito**, v. 2, n. 1, p. 64-71, jan. a jun. 2010, p. 69.

⁵⁵ NUNES, Dierle José Coelho. Teoria do processo contemporâneo: por um processualismo constitucional democrático. **Revista da Faculdade de Direito do Sul de Minas**, p. 13-29, Edição Especial – 2018, p. 13-25.

-se a impedir a existência da figura do juiz isolado que toma decisões sozinho, um juiz solipsista⁵⁶.

Para o presente trabalho, essa face do contraditório é relevante, porque, como visto, os ministros do STF têm se utilizado de dados para proferir votos ou decisões monocráticas seguindo uma lógica pragmática. Observa-se, por um lado, que as pesquisas, levadas a efeito pelo próprio julgador, muitas vezes não são entranhadas aos autos, apesar de referenciadas. Em outras oportunidades, os ministros tão somente mencionam o acesso às mesmas, sem ser possível mesmo saber quais são e se concretamente são investigações empíricas. A visão acima de contraditório garantia, portanto, exige no ponto uma participação efetiva e dialógica sobre tais dados.

Surge, entretanto, a questão sobre o maior poder instrutório do juiz, com o abandono da passividade judicial na busca da tutela do direito material, quando enxergada uma desigualdade no curso do processo, e da vulnerabilidade processual da parte, que faz dela vítima de suas dificuldades e importa em descumprimento do seu ônus probatório⁵⁷. Porém, a atuação de ofício do juiz ainda assim não torna prescindível o respeito ao contraditório⁵⁸. Daí se coloca a segunda garantia. O magistrado, ao aplicar essa formatação do contraditório, deverá ser mais aberto a uma construção plural da decisão e as partes serão sempre ouvidas sobre os temas que ele tem em vista, impedindo-se que os sujeitos processuais sejam surpreendidos. Esta é a garantia contra decisões surpresa.

Como já disse Barbosa Moreira, em estudo voltado para o direito alemão, “em princípio é vedado ao tribunal colocar-se, para fundamentar sua decisão, em ponto de vista estranho ao das partes”, exceto se “lhes faça a respectiva indicação e lhes dê ensejo de manifestar-se”⁵⁹. Assim, como pronunciamento judicial apoiado em fundamentos não previamente debatido pelas partes⁶⁰, a decisão surpresa é vetada pelo contraditório. E então é bastante pertinente a exigência de o magistrado “ainda que possa e deva agir de ofício na produção de provas, facultando-se-lhe, portanto, extrair da rede mundial de computadores alguma informação para subsidiar o julgamento, convidar

⁵⁶ CÂMARA, Alexandre Antônio Franco Freitas. Dimensão processual do princípio do devido processo constitucional. **Revista de Estudos e Debates – CEDES**, v. 2, n. 2, p. 55-68, jan.-jun. 2017, p. 64.

⁵⁷ DE CARVALHO, Sabrina Nasser. Premissas para a melhor compreensão da dinamização do ônus da prova no novo CPC. **Revista Eletrônica de Direito Processual**, Rio de Janeiro, Ano 11, v. 18, n. 1, p. 346-376, jan. a abr. 2017, p. 356-358 e 361-362.

⁵⁸ MALLET, Estêvão. Notas sobre o problema da chamada “decisão-surpresa”. **Revista da Faculdade de Direito, Universidade de São Paulo**, v. 109, p. 389-414, jan./dez. 2014, p. 396-397.

⁵⁹ MOREIRA, José Carlos Barbosa. Breve notícia sobre a reforma do processo civil alemão. In: **Temas de Direito Processual, Oitava Série**, Rio de Janeiro: Saraiva, p. 199-210, 2004, p. 202.

⁶⁰ CÂMARA, Alexandre Antônio Franco Freitas. Dimensão processual do princípio do devido processo constitucional. **Revista de Estudos e Debates – CEDES**, v. 2, n. 2, p. 55-68, jan.-jun. 2017, p. 65.

as partes a falar sobre o material produzido, antes de utilizá-lo ao sentenciar”⁶¹. Deste modo, os ministros do STF não estão proibidos de fazerem uso do pragmatismo. Porém, os dados e pesquisas empíricas precisam, antes de compor um voto ou uma decisão monocrática, ser estudadas pelas partes processuais ou pela parcela da sociedade cujos interesses serão afetados pela decisão da Corte.

Se sob um ângulo, trata-se o tema pelo aspecto da garantia, sob outro, ele é abordado através da concepção de dever. Então, o contraditório importa em garantia de influência e em garantia de não surpresa, sobretudo com uma conotação protetiva às partes e aos envolvidos do processo. Mas também significa, como que em um outro lado da moeda, um dever ao magistrado. Nessa lógica, o julgador deve sempre consultar as partes sobre assuntos não discutidos. Com isso, provoca-se o debate e fomenta-se o diálogo. Dessa forma, impõe-se ao juiz o dever de informar o que pretende fazer e o rumo que deseja tomar⁶². É um verdadeiro dever de advertência, pelo qual o magistrado comunica aos sujeitos do processo sobre temas não debatidos e que podem ser objeto de decisão⁶³. E mais, se a arquitetura do princípio do contraditório é essa, o mesmo deve ser concretizado em todos os momentos processuais⁶⁴ e, em paralelo, a garantia de não surpresa, igualmente, deve ser observada em todos os graus de jurisdição⁶⁵. Com essa lógica, percebe-se haver um dever sobre os ministros do STF de, caso desejem utilizar-se de investigações empíricas, fomentar uma discussão prévia sobre as mesmas pelas partes e envolvidos no respectivo processo.

Assim, é possível se chegar a mais uma conclusão provisória. Pelo que foi exposto nesta subseção, do contraditório se extrai o valor fundamental de não surpresa. Do mesmo modo, da subseção anterior é possível compreender da segurança jurídica o valor de não surpresa. Com isso tudo, portanto, demonstrou-se porque os ministros do STF não devem usar de dados empíricos sem o prévio conhecimento dos afetados pela futura decisão. Ultrapassado esse momento, o trabalho passará a apresentar proposições de como o Tribunal pode executar tal tarefa.

⁶¹ MALLETT, Estêvão. Notas sobre o problema da chamada “decisão-surpresa”. **Revista da Faculdade de Direito, Universidade de São Paulo**, v. 109, p. 389-414, jan./dez. 2014, p. 404.

⁶² THEODORO JÚNIOR, Humberto. Processo justo e contraditório dinâmico. **Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito**, v. 2, n. 1, p. 64-71, jan. a jun. 2010, p. 70.

⁶³ DOS SANTOS, Welder Queiroz. A vedação à prolação de “decisão surpresa” na Alemanha. **Revista de Processo**, vol. 240, p. 425-435, fev. 2015, DTR\2015\817.

⁶⁴ DE OLIVEIRA JÚNIOR, Zulmar Duarte. Devido processo legal: contraditório (trinômio informação, reação e consideração) e o novo CPC. **Revista Eletrônica de Direito Processual**, Rio de Janeiro, Ano 5, v. 7, n. 7, p. 205-220, jan. a jun. 2011, p. 215.

⁶⁵ LUCON, Paulo Henrique dos Santos. Tutela do contraditório no novo código de processo civil: vedação à decisão-surpresa; requisito para extensão dos limites objetivos da coisa julgada; identificação das decisões imotivadas. **Revista Eletrônica de Direito Processual**, Rio de Janeiro, Ano 10, v. 17, n. 1, p. 164-192, jan. a jun. 2016, p. 172.

4. PROPOSIÇÕES

Na seção que se inaugura o trabalho apresentará algumas proposições para a questão detectada. Foi visto que o STF tem proferido decisões utilizando-se do pragmatismo, dizendo-se ou deixando que o qualifiquem como uma Corte consequencialista. Todavia, críticas vêm sendo direcionadas ao Tribunal devido à sua pouca preocupação em como realizar essa tarefa, aproximando-se seu atuar muito mais de um consequenciachismo.

4.1. A não surpresa como testagem do consequencialismo e contra o consequenciachismo

Ficou demonstrado que a não surpresa tem um valor fundamental. A formatação da segurança jurídica e o esquema do contraditório evidenciam isso. E com base no desenho acima feito desses princípios que, na preocupação do presente trabalho, desaguam na não surpresa, é possível testar se o Tribunal, em um caso concreto, está sendo consequencialista ou consequenciachista. Explica-se. Com a impossibilidade de o magistrado simplesmente inserir em seus votos ou decisões monocráticas investigações empíricas, com as características já ressaltadas linhas acima, para imediatamente implementar o julgamento, sem que os atores processuais se debrucem sobre tais dados, prestigia-se a não surpresa.

Essa estrutura, além de homenagear a segurança jurídica e o contraditório, ainda permite separar qual o magistrado, em determinado caso, fez adequado uso do consequencialismo. Ademais, impede que os próprios pares sigam o raciocínio levado a efeito no voto de forma acrítica, já que terão mais tempo para checar se as pesquisas usadas qualificam-se como adequadas ao caso em análise.

Com isso tudo em mente, chegou o momento de abaixo traçar alguns parâmetros para o uso de estudos, dados e pesquisas por parte do STF. Essa configuração deve ser pensada de forma a não importar em antecipação de voto, por parte do magistrado que faz uso do caráter empírico, e também de modo a não auxiliar a parte inerte ou omissa que não se desincumbiu em bem executar seu ônus probatório.

4.2. O processo subjetivo

São inúmeros os processos subjetivos submetidos às competências originárias e recursais do STF. Qualifica-se como processo subjetivo aquele que tem partes, lide e resistência à pretensão⁶⁶. Nele os princípios constitucionais processuais, como, por exemplo, o contraditório, o devido processo legal e a ampla defesa têm plena aplicação.

⁶⁶ ABBoud, Georges. **Processo constitucional brasileiro**. 2 ed. rev., atual. e ampl. São Paulo: Thomson Reuters Brasil, Revista dos Tribunais, 2018, p. 877-880.

Na hipótese as partes afetadas pela introdução, por ministro da Corte, no momento do julgamento, de dado empírico novo, podem ser identificadas. Por exemplo, no caso do recurso extraordinário, podem ser apontados o recorrente e o recorrido. No caso de *habeas corpus*, o impetrante e o paciente podem ser afetados, se o estudo empírico lhes for prejudicial. Em sendo favorável, porque atua na condição de *custos iuris*⁶⁷, é possível indicar a Procuradoria-Geral da República como ator processual interessado a manifestar-se quanto à nova investigação.

Não obstante, uma distinção precisa ser feita. Diferente do *habeas corpus* e de outras demandas guiadas pela ideia de competência originária, o recurso extraordinário ascende tema já debatido em outras instâncias julgadoras. Nasce aí um problema de os ministros do STF inserirem pesquisas novas em seus votos e decisões monocráticas: o fenômeno da preclusão e a questão do ônus da prova. Tal dificuldade possui um grau menor nas demandas de competência originária, em que pese a existência de algumas exigirem prova pré constituída. Por causa desse contorno, em processo subjetivo, o ministro do STF deve agir com mais parcimônia e cautela, para que sua inserção de estudo empírico não signifique a violação da formatação própria de alguns tipos de demanda constitucional. Nesse sentido, o dado empírico pode servir de auxílio à decisão ou voto, mas não pode, em regra, importar em elemento probatório dos fatos constitutivos do direito alegado.

Importante para tanto é o fenômeno da preclusão. A preclusão tem raiz na segurança jurídica, trazendo ordem ao processo, por afiançar neste um caráter evolutivo e dinâmico. Neste sentido, Marinoni e Mitidiero explicam que “ao precluir a prática de determinado ato ou ao se encerrar o debate a respeito de determinada questão, torna-se certa e estável dentro do processo a situação jurídica consolidada”, o que gera “expectativa legítima às partes no não retrocesso do procedimento e direito à observância do resultado da preclusão”. Ainda sobre isso, os autores afirmam que processo seguro é aquele “em que as regras de preclusão são devidamente (...) observadas pelo juiz na condução do processo”⁶⁸.

Com olhos nessa preocupação e considerando que o dado, aqui discutido, não está nos autos e vendo o ministro que eventualmente poderá fazer uso do mesmo, um parâmetro importante seria abrir espaço às partes para que se expressem sobre o conteúdo do mesmo, podendo, inclusive, apresentar estudo científico em sentido diverso. Sob pena de violação da cognição levada a efeito nas instâncias passadas e por causa da preclusão que atingiu as partes, não seria possível efetivamente produzir provas

⁶⁷ BRASIL. STF, RHC 84.404/SP – São Paulo; Recurso em Habeas Corpus; Relator: Min. Carlos Britto; Julgamento: 29/03/2005; Órgão julgador: Primeira Turma; Publicação DJ 16-12-2005 PP-00084 Ement Vol-02218-03 PP-00507 LexSTF v. 28, n. 326, 2006, p. 391-413.

⁶⁸ SARLET, Ingo; MARINONI, Luiz Guilherme; MITIDIERO, Daniel. **Curso de direito constitucional**. 4 ed. ampl., incluindo novo capítulo sobre princípios fundamentais. São Paulo: Saraiva, 2015, p. 784-785.

sobre os fatos constitutivos do direito nesse momento. O caso seria apenas de contraditar um estudo do qual o ministro, sem sinalizar sua intenção de voto, achou pertinente ao caso. A atenção se voltaria a não inovar no arcabouço probatório já produzido.

Além disso, parece relevante pontuar, ainda que de forma inicial, as características do estudo cuja utilização é autorizada ao ministro do STF. Deve o mesmo ser de acesso, ao menos, a uma comunidade científica ou estar facilmente disponível a quem interesse (por exemplo, na Internet). Com a preocupação de acesso ao dado busca-se, por um lado, a maior facilidade de contato com o conhecimento e, por outro, a maior possibilidade de debate desse conhecimento.

Com esses traços deseja-se, ao máximo, promover o uso adequado do consequencialismo. As considerações desta subseção, somadas às da próxima são relevantes para se evitar a surpresa em processos subjetivos. Assim, quando admitida a inserção de estudo empírico nos moldes aqui expostos, deve o magistrado abrir às partes a possibilidade de manifestação, em prestígio aos princípios constitucionais da segurança jurídica e do contraditório.

4.3. O processo objetivo

O processo objetivo caracteriza-se por solucionar uma questão constitucional, sem o objetivo de dirimir uma lide, não existindo pretensão resistida. Já foi dito que os legitimados ativos não buscam a tutela de um direito subjetivo, mas a defesa da ordem constitucional objetiva, não havendo que se falar, propriamente, em partes. Por isso, tem-se uma fiscalização abstrata da constitucionalidade de normas infraconstitucionais.

A legislação positivada em relação ao assunto, sobretudo a Lei nº 9.868, de 10 de novembro de 1999, e a Lei nº 9.882, de 03 de dezembro de 1999, sinalizam situação não muito próxima a que está sendo aqui analisada. É a hipótese de o relator entender pela necessidade de novos esclarecimentos sobre alguma circunstância e determinar nos autos a produção desse novo elemento que, portanto, estará no processo, com acesso, no mínimo, aos que nele podem atuar⁶⁹. O reconhecimento da relevância da aferição de elementos fáticos, notadamente para a definição do sopesamento entre princípios constitucionais em colisão, consiste em relevante inovação legislativa. Tais informações, somadas à manifestação de *experts*, terão enorme valia para a solução de questões constitucionais complexas.

Nada obstante isso, o ponto central desse escrito é diverso. Como demonstrado em subseção anterior, o que se busca alterar é um padrão de atuação judicial consistente em inserir dados empíricos em decisões judiciais sem prévia oitiva das partes

⁶⁹ Em ADI, rege a matéria o art. 9º, da Lei nº 9.868/99. Na ação declaratória de constitucionalidade, o assunto está no art. 20, da mesma lei, que possui igual redação. E na arguição de descumprimento de preceito fundamental, os arts. 6º e 7º, da Lei nº 9.882/99 tratam de modo semelhante o tema.

interessadas, principalmente quando tais informações eram até então estranhas aos autos do processo. E mais, em algumas vezes não é o relator que lança mão dessas investigações, sendo ainda mais ofensivo à segurança jurídica e ao contraditório que os últimos magistrados a votarem em órgão colegiado se utilizem desse método decisório, surpreendendo até mesmo seus colegas.

Embora os processos objetivos de competência originária do STF não apresentem as mencionadas dificuldades relativas aos processos subjetivos de competência recursal do STF (sobretudo quanto ao momento adequado de produção de provas dos fatos constitutivos do direito alegado), existem duas ordens de preocupação – que como dito também se aplicam à subseção anterior. Como a inserção do dado empírico afeta, de alguma forma, os interesses concretamente em jogo no julgamento – ainda que se insista em dizer haver apenas o interesse de tutela da ordem jurídica constitucional –, deve ser aberta oportunidade aos legitimados ativos e passivos, aos *amici curiae* e aos demais atores do processo (por exemplo, Procurador-Geral da República e Advogado-Geral da União) de se manifestarem especificamente sobre tal estudo, possibilitando-se inclusive o ingresso de novos *amici curiae*. Portanto, propõe-se que o julgador, mesmo sem adiantar seu entendimento, aponte antecipadamente a existência de dado empírico relevante. Dessa forma, a indicação antecipada da existência da investigação aliada ao oferecimento de espaço para que se entregue eventual pesquisa científica oposta à que o julgador tem em mãos visa adequar o uso do consequencialismo aos princípios constitucionais da segurança jurídica e do contraditório⁷⁰.

Uma segunda preocupação sinalizada linhas acima se dá quando o julgamento já está avançado entre os ministros e um utiliza-se em sua fundamentação de dados empíricos antes inexistentes nos autos. Como deixado claro nesse trabalho, esse atuar surpreende os envolvidos no processo e inclusive os seus pares. Assim, sugere-se que os mesmos passos descritos no parágrafo anterior sejam percorridos, porém com um detalhe. Deve o magistrado, caso já tenha em mãos a pesquisa antes do início da exposição dos votos, indicar a existência dessa investigação, para então percorrer o caminho logo acima descrito. Caso a pesquisa, entretanto, tenha chegado ao mesmo no transcorrer das declarações de voto, para que não haja surpresa, o julgamento terá que retornar ao ponto de dar publicidade da mesma nos autos e chamar eventuais interessados a se manifestarem.

⁷⁰ A possibilidade de admissão de *amicus curiae* fora do prazo das informações não parece ser um problema. Ademais, mesmo não tendo em mente o assunto trabalho aqui, há doutrina crítica a decisões intuitivas do STF. E, referindo-se à análise de fatos, defensiva do “desenvolvimento de técnicas que possibilitem decisões racionalmente fundadas por parte do órgão judicial de controle”. MARTINS, Ives Gandra da Silva; MENDES, Gilmar Ferreira. **Controle concentrado de constitucionalidade: comentários à Lei n. 9.868, de 10-11-1999**. 2 ed. São Paulo: Saraiva, 2005, p. 252 e 283.

5. CONSIDERAÇÕES FINAIS

O presente trabalho buscou demonstrar que o padrão de emprego de dados empíricos pelo STF pode ser aprimorado com vistas a mais efetiva proteção dos princípios constitucionais da segurança jurídica e do contraditório. Esta proposta se torna, a nosso ver, mais relevante a partir do momento em que se constata crescente uso de dados empíricos pelos ministros do STF como fundamentos das suas decisões e votos. Essa postura tende a gerar surpresa aos atores do processo e aos demais ministros, tornando a deliberação mais pobre e não resguardando de maneira eficaz a segurança jurídica e o contraditório. Frente a esse cenário, debruçou-se a primeira seção em organizar as ideias sobre consequencialismo e consequenciachismo, com a finalidade de definir parâmetros para esclarecer o adequado uso do primeiro. Assim, foram estudados o pragmatismo e, especialmente, o consequencialismo e o empirismo, assim como se delimitou o entendimento do que significa o consequenciachismo. Daí, foram apresentados três julgamentos importantes do STF, nos quais demonstrou-se a necessidade de aprimoramento do uso de dados empíricos pela Corte.

Depois disso, ante o problema acima constatado, foi identificado um valor fundamental da não surpresa. Para chegar ao mesmo, desenvolveram-se as ideias de segurança jurídica e de contraditório. Assentada que a não surpresa tem raiz constitucional, partiu-se para a construção de parâmetros de como testar o consequencialismo e de como impedir o consequenciachismo.

Nesse sentido, a terceira seção procurou entregar argumentos que visam aferir se o consequencialismo está sendo realizado com algum método pelo STF. Dividindo em subseções para tratar separadamente dos processos objetivos e subjetivos, a cautela foi propor parâmetros nos quais não haja surpresa às partes ou envolvidos no processo e nem aos demais ministros do Tribunal. Somou-se a isso o cuidado com o fenômeno da preclusão e com o instituto do ônus da prova.

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Federação, municípios e políticas públicas: o impacto da PEC do pacto federativo (nº 188/2019) no Rio Grande do Sul

Federation, municipalities, and public policies: the impact of the constitutional amendment bill of the federative pact (nº 188/2019) in Rio Grande do Sul

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Resumo

O presente artigo busca avaliar o impacto da Proposta de Emenda Constitucional 188/2019 no estado do Rio Grande do Sul. Parte-se da construção de o que é um estado federado, discorrendo, após, sobre a situação do município como membro da federação brasileira e, ainda, da importância desses para o desenvolvimento de políticas públicas e para a democracia. Apresentado o teor da Proposta de Emenda Constitucional, com base em

Abstract

This article aims to evaluate the impact of the Constitutional Amendment Proposal 188/2019 in the state of Rio Grande do Sul. Beginning from the construction of what is a federated state, passing through the situation of the municipality as a member of the Brazilian federation and, also, the importance of these for the development of public policies and for democracy. After presenting the content of the Constitutional Amendment Proposal, based on information

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informações extraídas do sítio Dados Abertos do Tribunal de Contas do Estado do Rio Grande do Sul, será avaliada o impacto que a PEC terá no número de municípios gaúchos. Tal análise será realizada a partir da revisão bibliográfica e documental, utilizando o método indutivo.

Palavras-chave: Federalismo; município; democracia; Constituição Federal; Proposta de Emenda Constitucional.

extracted from the Open Data website of the Rio Grande do Sul State Court of Accounts, will be evaluated the impact of the CAP upon the the number of counties in the state. Such analysis will be carried out from the bibliographical and documentary review, using the inductive method.

Keywords: Federalism; counties; democracy; Federal Constitution; Constitutional Amendment Proposal.

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1. Introdução; **2.** Federação, federalismo e os municípios no contexto brasileiro; **3.** Os municípios como fomentadores de políticas públicas e da democracia; **4.** A PEC do Pacto Federativo (nº 188/2019) e o impacto no Rio Grande do Sul; **5.** Conclusão; **6.** Referências.

1. INTRODUÇÃO

Os municípios sempre foram o ente político que mais representou a comunidade. Eles espelham mais a comunidade do que o Estado, dada, obviamente, a dimensão territorial e a consequente proximidade de representantes com os seus representados. Assim, sempre houve a situação de pertença aos municípios. E as municipalidades, de direito ou não, sempre formaram os estados federados. Assim ocorre no Brasil ou mesmo em outros países, mesmo que tais comunidades sejam cunhadas com outros nomes. Todavia, a Proposta de Emenda Constitucional nº 188/2019 foi formulada para que um município possa ser incorporado por outro, considerada uma situação fiscal objetiva.

O problema que move este artigo é o seguinte: qual o impacto no número de municípios gaúchos com eventual aprovação da PEC nº 188/2019? Considerada a distribuição territorial do estado do Rio Grande Sul ocorrerá um retrocesso constitucional pela sistemática escolhida pelo constituinte originário para a configuração da federação.

Este artigo, então, trata de realizar uma retrospectiva doutrinária da federação, da participação dos municípios dentro do federalismo brasileiro, incluindo nesse aspecto a temática de ser o ente mais próximo a desenvolver políticas públicas. Supondo-se a importância dos municípios para a própria democracia, faz-se uma análise dos impactos da dita Proposta de Emenda Constitucional na distribuição territorial-política do estado do Rio Grande do Sul.

Para o desenvolvimento deste artigo, será utilizado o método indutivo. A partir da apresentação do federalismo e a atual concepção a partir da qual os municípios são considerados como membros do Estado Federal, será exposta a participação que esses têm na democracia. A abordagem adotada será a qualitativa, com uso de investigação

bibliográfica e documental, essa última, fruto de pesquisa acerca do impacto da proposta apresentada no Senado. A partir do resultado da pesquisa documental, serão selecionados exemplos para a utilização do método estruturalista, realizando-se a análise desses.

2. FEDERAÇÃO, FEDERALISMO E OS MUNICÍPIOS NO CONTEXTO BRASILEIRO

O Estado (nação) pode se organizar de diversas formas. As mais comuns são os Estados Federais e Unitários, como, por exemplo, o Brasil de acordo com as constituições de 1988 e 1824, respectivamente. O que as diferencia é a (des)centralização do poder, existindo maior concentração no Estado Unitário e maior descentralização no Estado Federal. Como frisado, descentralização aqui se trata da autonomia política, e não da descentralização administrativa. No federalismo os membros da federação detêm autonomia (competências) que não podem ser usurpadas por parte do governo federal. Assim, não se trata de um dispersamento da execução dos atos de governo (descentralização administrativa/gerencial), mas de autonomia (liberdade), princípio que estrutura um Estado Federal.¹

Considerada a perspectiva da teoria dos sistemas de Luhmann a federação poderia ser considerada um sistema, com todos os Estados sendo subsistemas do sistema.² E cada um destes Estados sendo considerados uma organização, pois, como entes federados e formuladores de políticas públicas, decidem. Essa decisão acerca de políticas públicas são ações coletivas, atuando esses sistemas organizacionais com conexão com essas.³

O ambiente de um estado seria os demais estados e o limite para a federação seria justamente as fronteiras nacionais. Isso, pois a diferenciação entre sistema e ambiente resulta no perímetro de um limite, ocasionando a distinção e identificação dos dois lados da forma: justamente o sistema e o ambiente.⁴

Surgem, de tal possível inferência, algumas questões. Qual seria o código para a operação da distinção a ser aplicado na distinção da federação brasileira? Pela teoria clássica, uma nação é formada por povo, território e soberania, então não poderiam

¹ RUBIN, Edward L.; FEELEY, Malcolm. Federalism: Some Notes on a National Neurosis. **UCLA Law Review**, Los Angeles, vol. 41, p. 903-952, 1994. Disponível em: <http://heinonline.org/HOL/Welcome>. Acesso em: 29 nov. 2017. p. 910/911.

² BITENCOURT, Caroline Müller, RECK, Janriê Rodrigues. Paradoxos do federalismo: uma observação pragmático-sistêmica. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 12, n. 49, p. 151-176, jul./set. 2012.

³ LUHMANN, Niklas. **Organización y decisión. Autopoiesis, acción y entendimiento comunicativo**. Rubí (Barcelona): Anthropos; México: Universidad Iberoamericana; Santiago de Chile: Instituto de Sociología, Pontificia Universidad Católica de Chile, 1997, p. 59.

⁴ LUHMANN, Niklas. **Introdução à Teoria dos Sistemas**. 2. ed. Petrópolis: Vozes, 2010, p. 457.

ter um código povo-território-soberania versus não-povo não-território não-soberania, pois ocorreriam diversos tipos de combinações entre povo/território/soberania. Outro aspecto a ser levado em conta é o fato de que o sistema, para Luhmann, não pode ser considerado como algo formado a partir da diferenciação entre o todo e as partes, com as partes formando o todo e o todo sendo formado pelas partes⁵; para o autor, o sistema é as operações que realizam a diferença entre sistema e ambiente.⁶ O prejuízo a que está se comentando deve-se ao fato de constar no art. 1º da Constituição Federal de que a federação brasileira é formada pela união indissociável dos Estados, Municípios e Distrito Federal. Se é formado pela união, considera-se que é formado pela soma.

Caso realmente fossemos considerar a federação um sistema, entre os Estados-membros, existindo uma relação de Direito Constitucional,⁷ a Constituição, além de ser o acoplamento estrutural entre o sistema político e o direito, é também o acoplamento estrutural entre os Estados-membros.

A federação brasileira é formada pelos Estados-membros (Municípios e Distrito Federal) conforme definido na Constituição, sendo vedada a sua dissolução, havendo um sistema de determinação de competências legislativas e administrativas, entre definições do sistema de política e do direito. Essa construção federal acarreta as seguintes consequências⁸ e princípios⁹: (a) Constituição em cada Estado-Membro; (b) Poder Legislativo Federal bicameral, sendo uma câmara com representantes do povo e outra com representantes dos membros da federação; (c) competências para os entes federados e o Estado Federal, impossíveis de serem invadidas pelos outros entes (com graduação dependendo do tipo de federalismo – cooperativo ou dual); e (d) participação democrática dos cidadãos e dos Estados-membros em igualdade de condições.

O federalismo brasileiro traz uma situação *sui generis*, pois os municípios foram inseridos como parte da federação. A carta de 1998 expressamente estipula no art. 1º que os municípios são parte do Estado Federal brasileiro, trazendo uma inovação à tradição de uma federação ser composta somente de Estados-membros.

⁵ Na visão de Leonel Severo Rocha “o sistema seria um conjunto de partes diversas que constituem um todo organizado com propriedades diferentes daquelas encontradas na simples soma de partes que o compõem”, o que demonstra o diferente pensamento com relação à formação dos sistemas, como a constituição de um todo ao invés de mera soma de um todo. ROCHA, Leonel Severo. Observações sobre a observação Luhmanniana. In: ROCHA, Leonel Severo; KING, Michael; SCHWARTZ, Germano. **A verdade sobre a autopoiese no direito**. Porto Alegre: Livraria do Advogado Editora, 2009, p. 14.

⁶ LUHMANN, Niklas. **Sistemas sociais**: esboço de uma teoria geral. Petrópolis: Vozes, 2016, p. 23.

⁷ HAURIOU, André. **Derecho constitucional e instituciones políticas**. Barcelona: Ediciones Ariel, 1971, p. 177.

⁸ HAURIOU, André. **Derecho constitucional e instituciones políticas**. Barcelona: Ediciones Ariel, 1971, p. 181.

⁹ MIRANDA, Jorge. **Manual de direito constitucional**. Coimbra: Coimbra Editores, vol. 1, tomo I, 2014, p. 151.

Essa inovação foi motivo de inúmeras discussões no âmbito da construção da Carta Magna. Originalmente o anteprojeto Afonso Arinos (setembro/1986) indicava, no art. 67, que “a República Federativa do Brasil é constituída pela associação indissolúvel da União Federal, dos Estados e do Distrito Federal”, sem relacionar os municípios como entes federais.¹⁰ A inclusão definitiva dos municípios somente ocorreu após quase 2 anos, no Projeto B, posto em votação pelo plenário no início do 2º turno.¹¹ Nesse iter, mesmo nas comissões de sistematização, houve diversas proposições de redação implantando-se os entes municipais como membros da federação, incitando inúmeras divergências. Exemplo: A Comissão da organização do Estado dividiu-se em três subcomissões, sendo duas delas a Subcomissão da União, Distrito Federal e Territórios e a Subcomissão dos Municípios e Regiões. Ao término dos trabalhos das subcomissões, a segunda¹² inseriu na minuta de anteprojeto dos municípios, e a primeira¹³ não. E, ainda, na Subcomissão da União, Distrito Federal e Territórios ocorreram emendas para inserção, no texto, dos municípios, eis que “município que é a única e verdadeira realidade nacional”.¹⁴

Em parecer à emenda apresentada no âmbito da Comissão de organização do Estado, o relator assim justificou a presença dos municípios na federação: “chegou a hora de a Constituição brasileira alterar o federalismo dual e explicitar a integração dos Municípios no seio da Federação, tornando, assim, explícito o que já vem implícito desde a Constituição de 1934”,¹⁵ pois “desde a Carta de 1934, com exceção do período do Estado Novo, o Município é considerado como parte constitutiva do pacto federal e uma das originalidades das Constituições Brasileiras de 1934, 1946 e 1967 é a divisão tripartida da competência nacional, que reserva parte dessa competência ao Município”.¹⁶

¹⁰ BRASIL. Senado Federal. Anteprojeto Constituição, de 26 de setembro de 1986. **Diário Oficial da União**. Brasília, DF, 26 set. 1986. Disponível em <https://www.senado.leg.br/publicacoes/anais/constituente/AfonsoAri-nos.pdf>. Acesso em: 27 fev. 2020.

¹¹ LIMA, João Alberto de Oliveira; PASSOS, Edilenice; NICOLA, João Rafael. **A gênese do texto da Constituição de 1988**. Brasília: Senado Federal, Coordenação de Edições Técnicas, vol. 1, 2013, p. 66.

¹² BRASIL, Senado Federal. Anteprojeto da Subcomissão dos Municípios e Regiões, de 21 de maio de 1987. **Centro Gráfico do Senado Federal**, Brasília, DF, vol. 99, 22 mai. 1987, p. 2. Disponível em <https://www.camara.leg.br/internet/constituicao20anos/DocumentosAvulsos/vol-99.pdf>. Acesso em 27 fev. 2020.

¹³ BRASIL, Senado Federal. Anteprojeto da Subcomissão da União, Distrito Federal e Territórios, de 23 de maio de 1987. **Centro Gráfico do Senado Federal**, Brasília, DF, vol. 90, 23 mai. 1987. Disponível em <https://www.camara.gov.br/internet/constituicao20anos/DocumentosAvulsos/vol-90.pdf>. Acesso em 27 fev. 2020.

¹⁴ BRASIL, Senado Federal. Emenda 2A0152-1 ao Anteprojeto do relator da Subcomissão da União, Distrito Federal e Territórios, de 19 de maio de 1987. **Centro Gráfico do Senado Federal**. Brasília, DF, vol. 88, p. 209-210, 1987, p. 210. Disponível em <https://www.camara.leg.br/internet/constituicao20anos/DocumentosAvulsos/vol-88.pdf>. Acesso em 27 fev. 2020.

¹⁵ BRASIL. Senado Federal. Emenda nº 2C 0142-3, de 17 de maio de 1987. **Bases da Assembleia Nacional Constituinte 1987-1988**. Brasília, DF, 17 mai. 1987. Disponível em <http://www6g.senado.gov.br/apem/data/EMEN-B/1857.html>. Acesso em 27 fev. 2020.

¹⁶ BRASIL. Senado Federal. Emenda nº 200495-0 oferecida à Comissão de Organização do Estado. **Centro Gráfico do Senado Federal**. Brasília, DF, vol. 82, p. 129, jun. 1987. Disponível em <https://www.camara.leg.br/internet/constituicao20anos/DocumentosAvulsos/vol-82.pdf>. Acesso em: 27 fev. 2020.

A discussão sobre a inclusão dos municípios na federação ocorreu inclusive após a apresentação do Projeto B, sendo consagrado o entendimento de que os municípios deveriam fazer parte do pacto federativo. Além da disposição do art. 1º, os municípios constam como partícipes da organização político-administrativo brasileira, assegurada a não intervenção, salvo nas hipóteses do art. 35.

A partir de tal momento, constitucionalmente, o Brasil deixou de ser um federalismo dual, passando a ter uma dimensão trilateral, com a inclusão de uma terceira esfera de autonomia.¹⁷ Assim, “o Brasil retomou, na caminhada histórica, a trilha da descentralização político administrativa que caracterizou seus primeiros passos, enquanto colônia”.¹⁸

Para José Afonso da Silva, a Constituição acolheu a “reivindicação de municipalistas clássicos, como Hely Lopes Meirelles e Lordelo de Melo, que pleiteavam com insistência e veemência a inclusão dos Municípios no conceito de nossa Federação”, tendo em vista a essencialidade desses no Estado Federal.¹⁹ Todavia, o mesmo autor afirma que a Constituição é omissa na resposta se os municípios são entes federados, eis que “existem onze ocorrências das expressões unidade federada e unidade da Federação (no singular ou no plural) referindo-se apenas aos Estados e Distrito Federal, nunca envolvendo os Municípios”.²⁰ Deve-se ressaltar, entretanto, a existência de posições contrárias quanto à inclusão dos municípios como entes, como a de Silva²¹ e Roque Antonio Carrazza.²²

Questionamento pode surgir, pois o bicameralismo federal é formado por um órgão representante do povo e outro representante dos Estados-membros, isto é, os entes federativos, dos membros que constituem a federação. Ocorre que os municípios não possuem representantes no Congresso Nacional, ou seja, não possuem representatividade. Os Estados e o Distrito Federal são representados pelos Senadores, mas os municípios acabam sendo representados meramente pelo povo. Indiretamente tal sistemática tem sido mitigada pelo comportamento de congressistas de destinar recursos e batalhar por suas bases eleitorais. Assim, um deputado com um grande número de eleitores em um município, ou região de municípios, busca emendas constitucionais e

¹⁷ BONAVIDES, Paulo. **Curso de Direito Constitucional**. 15. ed. São Paulo: Malheiros, 2004, p. 344/345.

¹⁸ TAVARES, Iris Eliete Teixeira Neves de Pinho. O município brasileiro: sua evolução histórico-constitucional. **Revista de Direito Administrativo**, vol. 209, p. 169-187, jul/set. 1997, p. 186.

¹⁹ SILVA, José Afonso da. O regime constitucional dos Municípios. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 10, n. 42, p. 13-26, out./dez. 2010, p. 13.

²⁰ SILVA, José Afonso da. **Curso de Direito Constitucional Positivo**. 37. ed. São Paulo: Malheiros, 2014, p. 647.

²¹ SILVA, José Afonso da. **Curso de Direito Constitucional Positivo**. 37. ed. São Paulo: Malheiros, 2014, p. 479.

²² CARRAZZA, Roque Antonio. **Curso de Direito Constitucional Tributário**. 29. ed. São Paulo: Malheiros, 2013, p. 188/189.

normativos que viabilizem o desenvolvimento daquele local e, indiretamente, do município. Acaba o congressista sendo um representante dos interesses dos municípios de forma indireta com tal forma de atuação. Como não há possibilidade de se realizar uma casa legislativa com mais de 5.000 membros, representando cada um desses entes municipais, talvez a instituição de voto distrital misto possa mitigar a não representatividade dos municípios como entes do Estado Federal.

São questões que se levanta, para as quais, contudo, não há resposta pronta. O que se tem certeza é que, com o advento da constância dos municípios como ente federados, a partir da Constituição de 1988, “o mundo se abre hoje para um novo federalismo que foge aos estritos paradigmas oitocentistas. Não existe para ela um conceito absoluto e acabado. O direito acompanha a dinamicidade da vida, criando ordenamentos jurídicos diferenciados”.²³

3. OS MUNICÍPIOS COMO FOMENTADORES DE POLÍTICAS PÚBLICAS E DA DEMOCRACIA

No seio da temática do federalismo, encontra-se o federalismo fiscal. Para assegurar direitos são necessários recursos financeiros, conforme expõe Ricardo Lobo Torres: “A obtenção de receita para suprir as necessidades públicas, nota característica da atividade financeira, visa à prestação de serviços públicos e à defesa dos direitos fundamentais, missão precípua das pessoas jurídicas de direito público.”²⁴

Entre esses direitos não são considerados somente aqueles em que o Estado presta serviços para a população (positivos), mas também os direitos negativos, como citado por Stephen Holmes e Cass R. Sunstein, os “direitos individuais de propriedade, liberdade de expressão, imunidade ao abuso policial, liberdade contratual, liberdade religiosa”.²⁵

Os recursos são importantes, no contexto deste estudo, para que os municípios possam garantir direitos mínimos aos cidadãos. Felipe de Melo Fonte afirma que o mínimo de direitos preserva a liberdade e a dignidade do indivíduo, incluindo a participação nas decisões públicas – o que, por óbvio, faz parte do exercício da cidadania.²⁶ Ingo Wolfgang Sarlet ao tratar da existência de um mínimo existencial a ser garantido pela Administração Pública aos cidadãos o relaciona com a democracia, pois a garantia

²³ TAVARES, Iris Eliete Teixeira Neves de Pinho. O município brasileiro: sua evolução histórico-constitucional. *Revista de Direito Administrativo*, vol. 209, p. 169-187, jul/set. 1997, p. 182.

²⁴ TORRES, Ricardo Lobo. *Curso de Direito financeiro e tributário*. 18. ed. Rio de Janeiro: Renovar, 2011, p. 6.

²⁵ HOLMES, Stephen; SUNSTEIN, Cass R. *The cost of rights: why liberty depends on taxes*. New York: W.W. Norton & Company, 1999. p. 220. Tradução livre do original: “This is true not only of rights to Social Security, Medicare, and food stamps, but also of rights to private property, freedom of speech, immunity from police abuse, contractual liberty, free exercise of religion, and indeed of the full panoply of rights characteristic of the American tradition”.

²⁶ FONTE, Felipe de Melo. *Políticas públicas e direitos fundamentais*. 2. ed. São Paulo: Saraiva, 2015, p. 215.

de direito seria uma condição para a democracia, afirmando que tal mínimo tem um espectro mais restrito (condições materiais de sobrevivência) ou mais ampliado (“participação na vida política e cultural”).²⁷

Os municípios, entes federados conforme a Carta Magna brasileira, são os mais próximos dos cidadãos. Durante os trabalhos da Assembleia Nacional Constituinte muitas emendas foram apresentadas justamente buscando a inclusão dos municípios como entes, garantindo direitos/competências para eles, vez que são os que realmente estão frente aos administrados. Dessa forma, a cidadania é mais latente na participação dos indivíduos nos municípios do que em outras esferas da federação. Relacionando o federalismo fiscal e a participação social, Iris Eliete Teixeira Neves de Pinha afirma que, apesar do aumento dos custos com o aumento no número de municípios, como ocorreu na realidade brasileira, são criadas “enormes oportunidades de participação da sociedade, que, mais próxima da administração, sabe o que quer e como o quer”.²⁸

Pode-se também verificar a importância dos municípios quando se apresenta o que são políticas públicas, como elas se constroem e se desenvolvem.²⁹ Políticas públicas, conforme João Pedro Schmidt, “é um conjunto de decisões e ações adotadas por órgãos públicos e organizações da sociedade, intencionalmente coerentes entre si, que, sob coordenação estatal, destinam-se a enfrentar um problema político”.³⁰ São elementos constitutivos de uma política pública:³¹ (a) solução de problemas públicos; (b) grupos objetivos em determinados problemas públicos; (c) há uma coerência nos objetivos das políticas públicas; (d) diversas decisões e atividades, tais como análise dos impactos, escolha da política, aprovação pela casa legislativa; (e) há um programação de intervenção social; (f) papel chave dos atores públicos no desenvolvimento de políticas; (g) inúmeros atos formais (leis, portarias etc); e (h) obrigatoriedade de cumprimento das decisões e atividades.

²⁷ SARLET, Ingo Wolfgang. Dignidade (da pessoa) humana, mínimo existencial e justiça constitucional: algumas aproximações e alguns desafios. **Revista do CEJUR/TJSC: Prestação Jurisdicional**, vol. 1, n. 1, p. 29-44, dez. 2013. Sobre o tema do mínimo existencial, ver: HACHEM, Daniel Wunder. Mínimo existencial y derechos económicos y sociales: distinciones y puntos de contacto a la luz de la doctrina y jurisprudencia brasileñas. **Revista Eurolatinoamericana de Derecho Administrativo**, Santa Fe, vol. 1, n. 1, p. 93-138, ene./jun. 2014; SCHIER, Paulo Ricardo; SCHIER, Adriana da Costa Ricardo. Direitos sociais, reserva do possível e o mínimo existencial: a aporia do meio adequado de satisfação. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 18, n. 74, p. 67-96, out./dez. 2018.

²⁸ TAVARES, Iris Eliete Teixeira Neves de Pinho. O município brasileiro: sua evolução histórico-constitucional. **Revista de Direito Administrativo**, vol. 209, p. 169-187, jul/set. 1997, p. 186.

²⁹ RECK, Janriê Rodrigues; BITENCOURT, Caroline Müller. Categorias de análise de políticas públicas e gestão complexa e sistêmica de políticas públicas. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 16, n. 66, p. 131-151, out./dez. 2016.

³⁰ SCHMIDT, João P. Para estudar Políticas públicas: aspectos conceituais, metodológicos e abordagens teóricas. 2018. **Revista do Direito**. Santa Cruz do Sul, vol. 3, n. 56, p. 119-149, set./dez. 2018. p. 127.

³¹ HUMET, Joan Subirats; KNOEPFEL, Peter; LARRUE, Corinne; VARONE, Frederic. **Análisis y gestión de políticas públicas**. Barcelona: Planeta, 2012, p. 40-42.

O grau de democracia atualmente não se verifica pela quantidade de pessoas que pode participar do sufrágio universal, mas sim da intensidade de participação que os cidadãos possuem para participar ativamente da sociedade,³² o que inclui a construção das políticas públicas.³³

A municipalidade, ao vivenciar o funcionamento da comunidade, terá mais condições de fazer com que o cidadão participe da construção de uma sociedade próspera em conjunto com a Administração Pública do que um Estado ou a União Federal. Quando menor a distância entre o centro do poder e o cidadão, maior será a possibilidade de existir uma democracia que realmente espelha a comunidade.

Atenas era considerada uma democracia com a Ágora (local onde ocorriam as reuniões voltadas à tomada de decisões para a condução da sociedade), na qual os cidadãos poderiam participar (não adentrando em quem era consideração cidadão). Os municípios são o que mais próximo existe disso. O Estado e o Brasil pelas suas dimensões territoriais vivenciam uma democracia representativa, coerente com tal compromisso, mas, no município, há a possibilidade de o cidadão definir o rumo da comunidade local.

A participação dos municípios na democracia pode ser avaliada, também, sob a ótica da doutrina de Robert A. Dahl, quando o autor apresenta condições subjacentes que favorecem a democracia, afirmando que “instituições políticas democráticas têm maior probabilidade de se desenvolver e resistirem num país culturalmente bastante homogêneo e menor probabilidade num país com subculturas muito diferenciadas e conflitantes”.³⁴ Municípios tendem a ter uma cultura mais semelhante do que a extensão dos Estados-membros, o que torna mais fácil a existência de uma democracia se considerada a visão do autor. Com homogeneidade na cultura, as condutas tendem a ser menos conflitantes, pela similitude de aspectos comportamentais e morais, o que facilita o entendimento entre as pessoas. No mesmo sentido, Ernst Wolfgang Böckenförde, analisando pressupostos para a democracia, indica que “a democracia política

³² BOBBIO, Norberto. **O futuro da democracia**: uma defesa das regras do jogo. 15. ed. Rio de Janeiro - São Paulo: Paz e Terra, 2018, p. 92.

³³ Nesse sentido, ver: CASIMIRO, Lígia Maria Silva Melo de. A participação social no planejamento das políticas públicas urbanas. **Revista Eurolatinoamericana de Derecho Administrativo**, Santa Fe, vol. 4, n. 1, p. 7-21, ene./jun. 2017; RODRÍGUEZ-ARANA MUÑOZ, Jaime. La participación en el Estado social y democrático de Derecho. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 12, n. 48, p. 13-40, abr./jun. 2012; CARMONA GARIAS, Silvia. Nuevas tendencias en la participación ciudadana en España: ¿socializando la gestión pública o socializando la responsabilidad política? **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 16, n. 66, p. 29-60, out./dez. 2016; SCHIER, Adriana da Costa Ricardo; MELO, Juliane Andrea de Mendes Hey. O direito à participação popular como expressão do Estado Social e Democrático de Direito. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 17, n. 69, p. 127-147, jul./set. 2017; FERRARI, Regina Maria Macedo Nery. Controle social de políticas públicas. **Revista Eurolatinoamericana de Derecho Administrativo**, Santa Fe, vol. 3, n. 2, p. 21-35, jul./dic. 2016.

³⁴ DAHL. Robert A. **Sobre a democracia**. Brasília: Editora Universidade de Brasília. 2001, p. 166.

pressupõe necessariamente que exista um grau fundamental de convicções fundamentais comuns entre os cidadãos sobre o tipo e a ordenação da sua vida em comum”.³⁵

Não se pretende a substituição da democracia representativa municipal pela democracia direta, na toada do aviso de Norberto Bobbio no livro *O futuro da democracia: uma defesa das regras do jogo* (“é evidente que, se por democracia direta se entende literalmente a participação de todos os cidadãos em todas as decisões a eles pertinentes, a proposta é insensata”³⁶), mas de maior participação popular na construção e decisões que afetem a comunidade, porém se coaduna com a visão de Alexis de Tocqueville:

*No entanto, é na comuna que reside a força dos povos livres. As instituições comunais são para a liberdade o mesmo que as escolas primárias são para a ciência; elas a colocam ao alcance do povo, elas o fazem experimentar seu uso pacífico e o acostumam a utilizá-las. Sem instituições comunais uma nação pode atribuir-se um governo livre, mas ela não tem o espírito da liberdade.*³⁷

A importância do município para a democracia é justamente esta: é no referido ente que o povo aprende e apreende o que é ser cidadão, como se dá o exercício da cidadania, e de que forma participar do Estado Democrático de Direito.

4. A PEC DO PACTO FEDERATIVO (Nº 188/2019) E O IMPACTO NO RIO GRANDE DO SUL

No mês de novembro de 2019 foi proposta, no Senado Federal, a Proposta de Emenda Constitucional nº 188/2019. Essa, além de prever disposições de austeridade fiscal dos entes federados, tem o propósito de incluir novo artigo no Ato das Disposições Constitucionais Transitórias, nos seguintes termos:

Art. 115. Os Municípios de até cinco mil habitantes deverão comprovar, até o dia 30 de junho de 2023, sua sustentabilidade financeira.

§ 1º A sustentabilidade financeira do Município é atestada mediante a comprovação de que o respectivo produto da arrecadação dos impostos a que se refere o art. 156 da Constituição Federal corresponde a, no mínimo, dez por cento da sua receita.

§ 2º O Município que não comprovar sua sustentabilidade financeira deverá ser incorporado a algum dos municípios limítrofes, a partir de 1º de janeiro de 2025.

³⁵ BÖCKENFÖRDE, Ernst Wolfgang. *Estudios sobre el Estado de Derecho y la democracia*. Madrid: Editorial Trotta, 1993, p. 102.

³⁶ BOBBIO, Norberto. *O futuro da democracia: uma defesa das regras do jogo*. 15. ed. Rio de Janeiro - São Paulo: Paz e Terra, 2018, p. 71.

³⁷ TOCQUEVILLE, Alexis de. *A democracia na América*. São Paulo: Edipro, 2019.

§ 3º O Município com melhor índice de sustentabilidade financeira será o incorporador.
§ 4º Poderão ser incorporados até três Municípios por um único Município incorporador.
§ 5º Não se aplica a incorporação de que trata este artigo o disposto no § 4º do art. 18 da Constituição Federal.
§ 6º Para efeito de apuração da quantidade de habitantes de que trata o caput, serão considerados exclusivamente os dados do censo populacional do ano de 2020.³⁸

Em resumo: os municípios com menos de 5.000 habitantes que não obtiverem mais de 10% da receita total a partir dos impostos de competência municipal (art. 156 da Constituição Federal) deverão ser incorporados a municípios limítrofes. A justificativa para a proposta, quanto a esse ponto é:

Reputo essencial trazer ao debate desta Casa outro tema de relevante importância: a criação de Municípios como um fim em si mesmo. Temos mais de 5.500 Municípios no Brasil, sendo que, destes, mais de 1.200 possui população inferior a 5.000 habitantes e, em sua maioria, não arrecada receitas próprias suficientes para custear a sua própria estrutura (Prefeitura, Câmara de Vereadores etc.), isto é, custos que não existiriam (ou seriam substancialmente reduzidos) caso o Município fosse incorporado a outro.

Quanto a esse ponto, estamos propondo duas medidas:

- 1- Lei complementar federal poderá fixar requisitos de viabilidade financeira para a criação e o desmembramento de Municípios; e*
- 2- Municípios de até 5.000 habitantes deverão, até o dia 30 de junho de 2023, demonstrar que o produto da arrecadação dos impostos municipais corresponde a, no mínimo, dez por cento da sua receita total. Caso essa comprovação não ocorra, o Município será incorporado a partir de 1º de janeiro de 2025, ao município limítrofe com melhor sustentabilidade financeira, observado o limite de até 3 Municípios por um único Município incorporador.³⁹*

Para verificar o impacto de eventual aprovação da PEC, utilizou-se de pesquisa, realizada em momento anterior ao protocolo da proposta, no sítio eletrônico do Tribunal de Contas do Estado do Rio Grande do Sul, no Portal Dados Abertos, selecionando-se a opção “Balancete de receita consolidado 2018”. A escolha por dados de 2018 não prejudica a análise, pois os de 2019 ainda não estão disponíveis na totalidade, o que ocasionaria ausência de informações. De posse de tais dados, selecionaram-se as rubricas “Imposto sobre a Propriedade Predial e Territorial Urbana”, “Imposto sobre

³⁸ BRASIL. Senado Federal. **Proposta de Emenda à Constituição nº 188, de 2019**. Brasília, DF, 05 nov. 2019, p. 1-27. Disponível em: <https://www25.senado.leg.br/web/atividade/materias/-/materia/139704>. Acesso em: 27 fev. 2020.

³⁹ BRASIL. Senado Federal. **Proposta de Emenda à Constituição nº 188, de 2019**. Brasília, DF, 05 nov. 2019, p. 1-27. Disponível em: <https://www25.senado.leg.br/web/atividade/materias/-/materia/139704>. Acesso em: 27 fev. 2020.

Transmissão “Inter Vivos” de Bens Imóveis e de Direitos Reais sobre Imóveis” e “Imposto sobre Serviços de Qualquer Natureza”.

Para fins de comparação com a Receita Total, por questões metodológicas, utilizou-se a Receita Corrente Líquida, base para o cálculo dos gastos com saúde e educação. Não se fez uso do somatório de todas as receitas pela existência de receitas intraorçamentárias, o que impactaria o cálculo pelo caráter de duplicidade de valores.

Com base nessa equação, verificou-se que o percentual médio da relação entre a receita de impostos do art. 156 da Constituição Federal e a Receita Corrente Líquida Total é de 7,57%, e 372 dos municípios gaúchos possuem uma relação de receitas de impostos próprios e Receita Corrente Líquida menor do que 10%.

TABELA 1 – MUNICÍPIOS DO ESTADO DO RIO GRANDE DO SUL E PERCENTUAL NA FAIXA E NO ACUMULADO POR PERCENTUAL DE RECEITAS DE IMPOSTOS PRÓPRIOS X RECEITA CORRENTE LÍQUIDA – 2018			
	Qtde. de municípios	Qtde. (%)	Qtde. acumulada (%)
Total	497	100,00%	100,00%
Até 10%	372	74,86%	74,86%
Entre 10,01% e 20%	98	19,72%	94,58%
Entre 20,01% e 30%	20	4,02%	98,60%
Entre 30,01% e 40%	3	0,60%	99,20%
Entre 40,01% e 50%	3	0,60%	99,80%
Entre 60,01% e 70%	1	0,20%	100,00%

Fonte: Dados compilados pelos autores com informações do Portal Dados Abertos do Tribunal de Contas do Estado do Rio Grande do Sul (2018).

Conforme a tabela demonstra, somente um município gaúcho arrecada com os impostos previstos no art. 156 da Carta Magna um percentual maior do que 50% da receita total. Do total arrecadado pelo município, 77% referem-se ao Imposto sobre a Propriedade Predial e Territorial Urbana, 18% de Imposto sobre Transmissão “Inter Vivos” de Bens Imóveis e de Direitos Reais sobre Imóveis e 5% do Imposto sobre a Produção, circulação de Mercadorias e Serviços.

Para destacar a presença dos municípios com o menor percentual de participação de Receitas com impostos próprios x Receita Corrente Líquida, com relação à Receita Corrente Líquida, a partir da coleta de dados elaborou-se a seguinte planilha, que apresenta a média por determinada faixa de número de habitantes.

TABELA 2 – MUNICÍPIOS DO ESTADO DO RIO GRANDE DO SUL, PERCENTUAL MÉDIO DE RECEITA DE IMPOSTOS PRÓPRIOS X RECEITA CORRENTE LÍQUIDA E PARTICIPAÇÃO NO TOTAL POR HABITANTES – 2018

	Média (%)	Qtde.	Qtde. (%)
Total	17,10%	497	100,00%
Até 5.000	3,24%	231	46,49%
Entre 5.000 e 10.000	7,25%	100	20,12%
Entre 10.000 e 20.000	9,91%	57	11,47%
Entre 20.000 e 30.000	13,23%	36	7,24%
Entre 30.000 e 40.000	14,82%	19	3,82%
Entre 40.000 e 50.000	18,04%	10	2,01%
Entre 50.000 e 100.000	16,10%	25	5,03%
Entre 100.000 e 200.000	18,60%	7	1,41%
Entre 200.000 e 500.000	19,64%	10	2,01%
Acima de 500.000	29,16%	2	0,40%

Fonte: Dados compilados pelos autores com informações do Portal Dados Abertos do Tribunal de Contas do Estado do Rio Grande do Sul (2018).

Como se pode verificar, quanto menor é o número de habitantes menor é a média do percentual de Recursos de impostos próprios x a Receita Corrente Líquida, demonstrando que os municípios pequenos têm sido financiados com recursos de transferências de outras esferas da federação, sejam elas obrigatórias ou voluntárias.

Aplicando-se os critérios da PEC Nº 188/2019, com os dados do censo de 2010, o resultado é de que 229 municípios seriam incorporados por outros, conforme abaixo, compreendendo a alteração de domicílio de 686.635 habitantes.

TABELA 3 – MUNICÍPIOS DO ESTADO DO RIO GRANDE DO SUL COM ATÉ 5.000 HABITANTES, PERCENTUAL MÉDIO DE RECEITA DE IMPOSTOS PRÓPRIOS X RECEITA CORRENTE LÍQUIDA E PARTICIPAÇÃO NO TOTAL POR HABITANTES – 2018

	Qtde.	Qtde. (%)
Total	231	100,00%
Até 10,00%	229	99,13%
Entre 10,00% e 20,00%	2	8,66%

Fonte: Dados compilados pelos autores com informações do Portal Dados Abertos do Tribunal de Contas do Estado do Rio Grande do Sul (2018).

Outros estudos com o mesmo objeto chegaram a resultados semelhantes, com 226⁴⁰ e 224⁴¹ municípios extintos. Todavia, não foi divulgada a sistemática de cálculo, isto é, as rubricas envolvidas, vez que no presente, foram inclusas, por exemplo, as relativas à Dívida Ativa dos Municípios, que fazem de um esforço próprio do ente.

Como visto, há muitos municípios com mais de 5.000 habitantes que se encontram na situação prevista na PEC Nº 188/2019, pois, se 372 municípios do RS arrecadam menos de 10% e existem 229 entes com população abaixo de 5.000 habitantes, temos, acima da linha de corte estabelecida na mencionada Proposta, mais 143 municípios (quase 30% do total de municípios do RS). Não consta na justificativa apresentada pelos senadores proponentes da PEC qualquer impacto na federação, em especial a estimativa da pretensa economia a ser obtida. A utilização da expressão “pretensa” é proposital, eis que a própria justificativa assim traz: “custos que não existiriam (ou seriam substancialmente reduzidos)”⁴². Todavia, haveria a necessidade de aumento de custos com criação de subprefeituras, com combustíveis para os atuais municípios a serem incorporados, o que se acredita não foram mensurados e que não gerarão a pretendida diminuição substancial de custos.

A PEC está em tramitação sem prazo para votação, mas se aprovada haverá um grande impacto na divisão territorial do Estado do Rio Grande do Sul e na vida de muitos cidadãos.

5. CONCLUSÃO

A PEC 188/2018 pode ser meritória no âmbito da eficiência administrativa, mas talvez não o seja sob o prisma da eficácia e efetividade. Como visto, serão mais de 685 mil pessoas impactadas no caso de aprovação. Cidadãos que hoje possuem auto-organização por pertencer a um município, ente federado, com cultura peculiar e possibilidade de participar próxima, perderão tal status.

Tal ponto nos faz ter certeza de que sob o âmbito da democracia haverá perdas. Ao invés de participar democraticamente em uma esfera comunitária, passarão tais indivíduos a ter que participar em locais mais distantes de suas comunidades, o que é contrário ao caráter democrático da Constituição de 1988. Se as pessoas já não possuem muito tempo para a participação social, considerada a modernidade, se a sede

⁴⁰ MEDINA, Tiago; KLEIN, Samantha. PEC extinguiria até 226 municípios do Rio Grande do Sul. **Jornal Correio do Povo**, Porto Alegre, 5 nov. 2019. Disponível em: <https://www.correiodopovo.com.br/not%C3%ADcias/economia/pec-extinguiria-at%C3%A9-226-munic%C3%ADpios-do-rio-grande-do-sul-1.378113>. Acesso em: 27 fev. 2020.

⁴¹ XAVIER, Mauren. PEC federal gera debates. **Jornal Correio do Povo**, Porto Alegre, 23 fev. 2020, p. 9/11.

⁴² BRASIL. Senado Federal. **Proposta de Emenda à Constituição nº 188, de 2019**. Brasília, DF, 05 nov. 2019, p. 1-27. Disponível em: <https://www25.senado.leg.br/web/atividade/materias/-/materia/139704>. Acesso em: 27 fev. 2020.

do poder público mais próxima ao administrado for distanciada desse, com certeza ocorrerá déficit participativo. Como poderá haver uma decisão por parte do município (organização que realiza decisões que vinculam toda a sociedade, eis se tratar de políticas públicas) se a distância para a sede das decisões está mais distante. A participação social dos cidadãos mais longínquos restará prejudicada quando das decisões administrativas.

Temos assim uma colisão de princípios: o da eficiência, proposto pela PEC, e o da participação democrática, insculpido no Estado Democrático de Direito. Apesar de talvez ser salutar no ambiente da eficiência, como dito, é necessária a manutenção dos atuais entes municipais ameaçados de extinção para que se tenha maior participação popular e o não retrocesso social da democracia. Quanto a eventuais gastos públicos decorrentes da manutenção do *status quo*, talvez esse seja um preço bom a se pagar pela democracia.

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Os poderes hipertróficos do relator no STF, o desmembramento constitucional e o golpe de Estado jurídico

The rapporteur's hypertrophic powers in the Brazilian Supreme Court, constitutional dismemberment and juridical coup d'État

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Resumo

O presente artigo tem o objetivo de investigar como, no Supremo Tribunal Federal, o ministro relator tem se utilizado de seus poderes individuais para, de forma não autorizada pela Constituição, decidir monocraticamente medidas liminares, controlar o timing do processo e utilizar o poder de pauta para implementar a sua própria agenda. A pesquisa se desenvolve com base em uma linha crítico-metodológica, a partir da perspectiva teórica de Richard Albert e Alec Stone Sweet, e de pesquisas quantitativas e qualitativas, a fim de investigar criticamente como ocorre o uso desse poder individual pelo ministro relator. Ao final, conclui-se que a prática do STF, que hipertrofiou o poder individual de seus ministros, se aproxima de um verdadeiro desmembramento constitucional judicial, sobretudo pela forma como cada ministro, individualmente, se arvora na competência do colegiado e inova na ordem jurídica, muitas vezes divergindo da

Abstract

This paper has the purpose to investigate how, in the Brazilian Supreme Court, the Justice-Rapporteur has used his individual powers in a manner not authorized by the Constitution, to decide monocratically on injunctions, to control the timing of the process and to use the power to implement their own agenda. The research develops on the basis of a critical-methodological line, from the theoretical perspective of Richard Albert and Alec Stone Sweet, and of quantitative and qualitative research, in order to critically investigate how the use of this individual power by the Justice-Rapporteur occurs. In the end, it is concluded that the Brazilian Supreme Court practice, which has hypertrophied the individual power of its Justices, is approaching a true judicial constitutional dismemberment, above all by the way in which each Justice individually guards the collegiate competence and innovates in the legal order, often diverging from the Court's own jurisprudence. In addition,

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própria jurisprudência da Corte. Além disso, os ministros do STF, ao aumentarem o seu próprio poder, fragmentaram o poder da Corte e alteraram a regra de reconhecimento e a norma básica, para fazer valer uma decisão monocrática que modifica o direito constitucional objetivo, violando a Constituição, o que constitui verdadeiro golpe de Estado jurídico.

Palavras-chave: Supremo Tribunal Federal; ministro relator; poderes hipetróficos; desmembramento constitucional; golpe de Estado jurídico.

Justices of Brazilian Supreme Court, by increasing their own power, have fragmented the power of the Court and altered the rule of recognition and the basic norm to enforce a monocratic decision modifying the constitutional right, violating the Constitution, which constitutes a juridical coup d'État.

Keywords: Brazilian Supreme Court; Justice-Rapporteur; hypertrophic powers; constitutional dismemberment; juridical coup d'État.

SUMÁRIO

1. Introdução; 2. O poder supremo do relator: “líminares perpétuas” e uso estratégico do colegiado; 3. O poder de pauta: discricionariedade ou autoritarismo?; 4. O poder individual hipetrófico e o desmembramento constitucional; 5. O golpe de Estado jurídico; 6. Conclusão; 7. Referências.

1. INTRODUÇÃO

Ao abordar as problemáticas da atuação dos tribunais constitucionais e da expansão da jurisdição constitucional, grande parte dos estudos constitucionais põe ênfase na chamada “dificuldade contramajoritária”¹, colocando a democracia e o ativismo judicial em tensão. Nessa perspectiva, em razão de seu déficit de legitimidade, a revisão judicial da legislação poderia ser questionada como um modo de tomada de decisão final em uma sociedade livre e democrática.²

Assim, se a revisão judicial da legislação pode ser colocada em questão, do ponto de vista democrático, por permitir que um pequeno grupo de juízes não eleitos pelo povo possa derrubar uma lei aprovada pelo Congresso e sancionada pelo Chefe do Executivo, a prática da Corte Constitucional brasileira se apresenta muito mais grave, do ponto de vista da legitimidade, quando se observa que, de forma não autorizada pela Constituição, tem sido amplamente admitido que um ministro do STF, designado relator para o caso, possa, de forma individualizada, deferir medida liminar que suspende a legislação e controlar o *timing* do processo com o poder de pauta. Como adiante se mostrará, esse poder individual do ministro relator tem extrapolado os limites da autorização constitucional e tem sido utilizado de forma autoritária em diversas situações, algumas delas com graves impactos para o país.

¹ Trata-se de expressão cunhada e desenvolvida por Alexander Bickel que norteia grande parte das críticas direcionadas por constitucionalistas à revisão judicial de disposições normativas aprovadas por maiorias parlamentares. BICKEL, Alexander. **The Least Dangerous Branch**. New Haven: Yale University Press, 1986.

² WALDRON, Jeremy. The core of the case against judicial review. **The Yale Law Journal**, v. 115, n. 6, p. 1346-1407, 2006, p. 1348.

Com base nisso, a partir de uma perspectiva crítica, o presente artigo tem o objetivo de investigar como, no STF, o ministro relator tem se utilizado de seus poderes individuais para, de forma não autorizada pela Constituição, decidir monocraticamente medidas liminares, controlar o *timing* do processo e utilizar o poder de pauta para implementar a sua própria agenda. Questiona-se, assim, se haveria, no exercício do poder individual, um autoritarismo por parte dos ministros do STF, no sentido de abuso da prerrogativa que a autoridade do cargo confere, um fetichismo do poder. Assim, investiga-se se essa atuação configuraria algo que Richard Albert chama de desmembramento constitucional, ao ferir o núcleo fundamental da Constituição, e o que Alec Stone Sweet denomina de golpe de Estado jurídico, ao alterar, de forma não autorizada pelo texto constitucional, a própria regra de reconhecimento.

Para atingir os seus escopos, a pesquisa se desenvolve com base em uma linha crítico-metodológica, a partir da perspectiva teórica de Richard Albert e Alec Stone Sweet, e de pesquisas quantitativas e qualitativas, a fim de mostrar como ocorre o uso desse poder individual do ministro relator, como atua diante das medidas liminares, como controla o *timing* do processo, como se utiliza do poder de pauta e, enfim, como esse poder individual tem se hipertrofiado.

Inicia-se a investigação desenvolvendo-se uma análise teórica e empírica acerca das medidas liminares decididas pelo relator, e de como ele escolhe e se utiliza estrategicamente dos órgãos colegiados (pleno ou turma). Para subsidiar a pesquisa, serão analisados casos emblemáticos julgados, pesquisas quantitativas, bem como entrevistas feitas por outros autores com ministros e ex-ministros do STF. A seguir, busca-se analisar como o ministro relator se utiliza do poder individual que possui para controlar o *timing* do processo com base no poder discricionário de pedir pauta para julgamento da causa, o que acaba sendo condicionado pela sua própria agenda. Com base em Richard Albert, será investigado aquilo que se denomina de desmembramento constitucional judicial, na medida em que os ministros do STF, ao se utilizarem autoritariamente de um poder individual que não lhes foi concedido, subtraído do pleno da Corte, podem estar ferindo o próprio núcleo essencial da Constituição Federal. Por fim, analisa-se se essa prática configuraria o que Alec Stone Sweet denomina de golpe de Estado jurídico, na medida em que ela altera, de forma não autorizada pelo texto constitucional, a própria regra de reconhecimento.

Enfim, pretende-se investigar como a prática do STF tem outorgado poderes supremos ao ministro relator, sobretudo em razão do poder hipertrófico de decidir medidas liminares e do poder de pauta, o que pode colocar em xeque a própria legitimidade da revisão judicial, com graves consequências para a democracia e o constitucionalismo brasileiros.

2. O PODER SUPREMO DO RELATOR: “LIMINARES PERPÉTUAS” E USO ESTRATÉGICO DO COLEGIADO

As questões que envolvem a (i)legitimidade da revisão judicial ainda são bastante debatidas no direito constitucional contemporâneo. Questiona-se como poderia um órgão composto por poucos membros não eleitos derrubar uma lei aprovada pelo parlamento, composto por diversos membros, todos eleitos pelo povo. Ainda que a Corte Constitucional brasileira se legitime por sua previsão constitucional e, na estrutura institucional, haja a necessidade de um órgão que preserve os valores constitucionais, tal legitimidade pode se enfraquecer na medida em que as decisões da Suprema Corte são tomadas em violação a princípios democráticos.

Nesse ponto, as teorias da constituição *standard* defendem um controle de constitucionalidade fraco ou forte, levando em consideração a análise de situações concretas em diversos países. Ocorre que existe uma questão pouco explorada, sobretudo no Brasil, que talvez seja ainda mais instigante. Se a derrubada de uma lei ou emenda constitucional por 11 ministros do STF já pode ser algo questionável, essa questão se torna ainda mais problemática quando se observa que são deferidas medidas liminares por ministros da Corte, individualmente, suspendendo a eficácia de leis ou atos normativos, sem que essa questão jamais seja submetida a julgamento pelo Pleno.

A prática no STF acerca das medidas liminares gera um grande empoderamento dos seus ministros, individualmente considerados. As decisões liminares, em grande parte das vezes, causam impactos na política maiores do que as próprias decisões de mérito. Se uma decisão liminar suspender a eficácia da lei questionada, o impacto no sistema político é imediato, pois o governo e o parlamento terão de trabalhar para contorná-la ou dar outra feição ao seu conteúdo, a fim de implementar a política almejada. Nessa situação, se os atores políticos substituírem a política questionada por outra, terá perdido o objeto da ação de controle de constitucionalidade. Então, observe-se que, nessa situação, o impacto da decisão liminar pode ser maior do que a própria sentença final dessa ação.³

A gravidade disso aumenta na medida em que se observa que essa prática não é incomum e que esse tipo de atuação ocorre de forma contrária às leis que regem a matéria.

Com efeito, no art. 102, § 2º, da Constituição Federal, está previsto que as “decisões definitivas de mérito” proferidas pelo STF nas ações diretas de inconstitucionalidade (ADIs) e nas ações declaratórias de constitucionalidade (ADCs) “produzirão eficácia contra todos e efeito vinculante, relativamente aos demais órgãos do Poder Judiciário e à administração pública direta e indireta, nas esferas federal, estadual e municipal”.

³ TAYLOR, Matthew M. **Judging Policy: Courts and Policy Reform in Democratic Brazil**. Redwood City: Stanford University Press, 2014, p. 80.

A *contrario sensu*, as decisões liminares, que são provisórias (i.e., não definitivas) não possuiriam, segundo o texto constitucional, eficácia *erga omnes* e vinculante. Mas não é esse o entendimento do STF.

Além disso, a Lei n.º 9.868/1999, no seu art. 10, *caput*, estabelece que, em relação à ADI, “salvo no período de recesso, a medida cautelar na ação direta será concedida por decisão da maioria absoluta dos membros do Tribunal”. Da mesma forma, o art. 21, *caput*, dispõe que “o Supremo Tribunal Federal, por decisão da maioria absoluta de seus membros, poderá deferir pedido de medida cautelar na ação declaratória de constitucionalidade”. No tocante à ADI por Omissão, o art. 12-F da mesma Lei estabelece que, “em caso de excepcional urgência e relevância da matéria, o Tribunal, por decisão da maioria absoluta de seus membros, observado o disposto no art. 22, poderá conceder medida cautelar”.

Ocorre que, contrariamente à Constituição e a essa Lei, diversas questões sensíveis são decididas liminarmente de forma monocrática pelo ministro relator, e, após isso, ele controla se e quando a questão será submetida ao Pleno. Assim, por exemplo, segundo a prática admitida no STF, uma emenda constitucional, aprovada em dois turnos de votação por maioria qualificada de três quintos em cada Casa do Congresso Nacional (formada por 513 deputados federais e 81 senadores), pode ser, de forma ilegal e inconstitucional, derrubada por decisão de um único ministro, que, além disso, tem o poder de decidir se e quando o processo será submetido ao órgão pleno da Corte. Esse problema não é apenas teórico, pois as pesquisas quantitativas mostram uma realidade preocupante.

Nesse ponto, observa-se que, pelo Relatório Supremo em Números, realizado em 2014, constatou-se que o tempo médio de vigência de cada medida liminar (entre a decisão do relator sobre a medida liminar e o julgamento pelo plenário que a confirma ou não) era de 653 dias. Especificamente nas ações diretas de inconstitucionalidade, a média de vigência de uma decisão liminar era de 6,2 anos.⁴ Se consideradas as medidas liminares vigentes até à época da pesquisa (duração até dezembro de 2013), a média geral de vigência de uma medida liminar era de 6,6 anos.

A referida pesquisa também listou as liminares que demoraram mais tempo para serem levadas a plenário. As medidas liminares das seguintes ações diretas de inconstitucionalidade demoraram mais de 7 anos para serem levadas a julgamento pelo Pleno do STF: ADI n.º 1229, ADI n.º 2077, ADI n.º 1945, ADI n.º 1924, ADI n.º 2356, ADI n.º 2362, ADI n.º 2139, ADI n.º 2160, ADI n.º 1923 e ADI n.º 183. Em relação à ADI n.º 1229,

⁴ FALCÃO, Joaquim; HARTMANN, Ivar A.; CHAVES, Vitor P. **Relatório Supremo em Números**: o Supremo e o tempo. Rio de Janeiro: Escola de Direito do Rio de Janeiro da Fundação Getúlio Vargas, 2014, p. 13. Disponível em: <<http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/12055/III%20Relat%C3%B3rio%20Supremo%20em%20N%C3%BAmeros%20-%20O%20Supremo%20e%20o%20Tempo.pdf?sequence=5&iAllowed=y>>. Acesso em: 3 dez. 2018.

o pedido de liminar chegou ao plenário e foi indeferido após mais de 18 anos da data em que a ação foi ajuizada.⁵ Também é possível observar que, até 31/12/2013, havia diversas ADIs ainda não julgadas, cujas liminares já vigoravam há mais de 22 anos sem apreciação pelo Pleno, quais sejam: ADI n.º 144, ADI n.º 145, ADI n.º 351, ADI n.º 310, ADI n.º 429, ADI n.º 439, ADI n.º 509, ADI n.º 558, ADI n.º 570 e ADI n.º 290.⁶ Na ADI n.º 144, que acabou sendo julgada em 19/2/2014, a medida liminar teve eficácia por mais de 24 anos.

Observou-se, na referida pesquisa, que a média de vigência de medidas liminares (já confirmadas ou derrubadas) era mais longa quando se referia às matérias de Direito Tributário, atingindo duração média de 3,4 anos.⁷ Isso, em alguma medida, confirma a hipótese de que STF, politicamente, atua na proteção de interesses governistas, pois deixa de julgar o mérito de questões fiscais quando esse julgamento prejudica interesses governistas. Embora o fator tempo não possa revelar, por si só, que as medidas liminares são utilizadas como um recurso estratégico de cada ministro, é um aspecto relevante e que deve ser considerado.

Além disso, questões sensíveis são decididas diuturnamente de forma monocrática, de modo que um ministro do STF se investe no poder de tomar uma decisão que derruba uma lei ou emenda constitucional, e, além disso, diversas vezes o faz sabendo que a sua decisão é contrária ao entendimento dos demais membros da Corte Constitucional.⁸

Mas essa disfuncionalidade não é o problema mais grave. Quando se observa que o ministro relator tem o poder de decidir liminares monocraticamente e jamais submeter a questão ao pleno, isto se revela ainda mais problemático, pois, além de tudo, é autoritário e violador da ordem constitucional.

⁵ FALCÃO, Joaquim; HARTMANN, Ivar A.; CHAVES, Vitor P. **Relatório Supremo em Números: o Supremo e o tempo**. Rio de Janeiro: Escola de Direito do Rio de Janeiro da Fundação Getúlio Vargas, 2014, p. 39. Disponível em: <<http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/12055/III%20Relat%C3%B3rio%20Supremo%20em%20N%C3%BAmeros%20-%20O%20Supremo%20e%20o%20Tempo.pdf?sequence=5&isAllowed=y>>. Acesso em: 3 dez. 2018.

⁶ FALCÃO, Joaquim; HARTMANN, Ivar A.; CHAVES, Vitor P. **Relatório Supremo em Números: o Supremo e o tempo**. Rio de Janeiro: Escola de Direito do Rio de Janeiro da Fundação Getúlio Vargas, 2014, p. 50-51. Disponível em: <<http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/12055/III%20Relat%C3%B3rio%20Supremo%20em%20N%C3%BAmeros%20-%20O%20Supremo%20e%20o%20Tempo.pdf?sequence=5&isAllowed=y>>. Acesso em: 3 dez. 2018.

⁷ FALCÃO, Joaquim; HARTMANN, Ivar A.; CHAVES, Vitor P. **Relatório Supremo em Números: o Supremo e o tempo**. Rio de Janeiro: Escola de Direito do Rio de Janeiro da Fundação Getúlio Vargas, 2014, p. 41-42. Disponível em: <<http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/12055/III%20Relat%C3%B3rio%20Supremo%20em%20N%C3%BAmeros%20-%20O%20Supremo%20e%20o%20Tempo.pdf?sequence=5&isAllowed=y>>. Acesso em: 3 dez. 2018.

⁸ Também nesse sentido: CHADA, Daniel; HARTMANN, Ivar A. A distribuição de processos no Supremo é realmente aleatória?. In: FALCÃO, Joaquim; ARGUELLES, Diego Wernerck; RECONDO, Felipe. **Onze Supremos: o Supremo em 2016**. Belo Horizonte: FGV Rio, 2017, p. 54-55. Disponível em: <<https://bibliotecadigital.fgv.br/dspace/handle/10438/17959>>.

Esse cenário se torna mais preocupante quando se observa o quantitativo de decisões que são tomadas monocraticamente. Os dados mostram que, em 2016, houve 13.138 julgamentos colegiados e 94.501 decisões monocráticas.⁹ Num cenário em que 87,8% das decisões tomadas pelo STF são monocráticas de relator, a disfuncionalidade do órgão fica evidente.

E isso se revela ainda mais grave ao se constatar que muitas dessas decisões monocráticas contrariam de forma clara precedentes da própria Corte.

Por exemplo, no *Habeas Corpus* n.º 143480, o Ministro Celso de Mello, em 10/5/2017, mesmo após a pacificação da questão pelo STF no julgamento do *Habeas Corpus* n.º 118.533 (julgado em 23/6/2016)¹⁰, decidiu, em medida liminar, que ele não seguiria o precedente do próprio Tribunal. Num ambiente em que a legislação processual busca criar a cultura de obediência aos precedentes (o que ocorreu com a nova sistemática de precedentes estabelecida pelo Código de Processo Civil de 2015), o Ministro Celso de Mello, nessa decisão, deixou de seguir o precedente firmado pouco tempo antes, ao mero argumento de que esse precedente, cujo julgamento ele participou, não era de observância obrigatória.¹¹ E o mais curioso é que a decisão impugnada no referido HC, proferida por ministro do STJ, havia respeitado e referenciado o precedente do STF, mas o Ministro Celso de Mello decidiu que o precedente da própria Corte que compõe não precisaria ser por ele respeitado. Observe-se a sua argumentação: “Em que pese o respeitável posicionamento do I. Magistrado, calcado em respeitabilíssimo

⁹ “A presidente do Supremo Tribunal Federal, ministra Cármen Lúcia, fez um balanço das atividades do STF antes de encerrar o Ano Judiciário, anunciando que em 2016 foram realizadas 80 sessões plenárias, sendo 36 ordinárias e 44 extraordinárias. Foram realizados, segundo a ministra, 13.138 julgamentos colegiados e 94.501 monocráticos, sendo publicados no ano 12.819 acórdãos. A ministra Cármen Lúcia informou ainda que este ano foram baixados 80.297 processos e que o acervo atual do STF é de 61.816 processos em tramitação, diante de um acervo de 53.618 processos herdados de 2015. Em relação ao acervo atual, tramitam no STF 14.970 processos originários, previstos no artigo 102, inciso I, da Constituição Federal, e 46.846 recursais, previstos no inciso II do mesmo artigo. Foram 90.713 processos protocolados, dos quais 33.780 destinados à triagem prévia ou competência exclusiva da Presidência do STF e outros 56.933 distribuídos aos gabinetes dos ministros. A presidente comunicou em plenário que nessa triagem prévia foi possível diminuir em até 20% o número de processos que chegariam aos gabinetes por possuírem vícios que impossibilitavam a distribuição e tramitação no Tribunal.” SUPREMO TRIBUNAL FEDERAL. Ministra Cármen Lúcia faz balanço de atividades do STF e encerra Ano Judiciário 2016. **Notícias STF**, Brasília, 19 dez. 2016. Disponível em: <<http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=332571>>. Acesso em: 13 nov. 2018.

¹⁰ SUPREMO TRIBUNAL FEDERAL. **Habeas Corpus n.º 118533**. Relatora: Ministra Cármen Lúcia. Tribunal Pleno. Julgado em 23/6/2016. DJe-199, divulg. 16/9/2016, public. 19/9/2016.

¹¹ “Trata-se de *writ*, com pedido de liminar, impetrado em favor Rafael Spínola do Amaral, contra decisão proferida por Ministro do Superior Tribunal de Justiça, que indeferiu a cautelar requerida no Habeas Corpus 395.015/SP. [...] A D. Autoridade Judiciária entendeu, na esteira da decisão proferida pelo Supremo Tribunal Federal no Habeas Corpus n.º 118.533, a qual afastou incidentalmente a natureza hedionda do crime de tráfico de entorpecentes na hipótese em que reconhecida a causa de diminuição do artigo 33, § 4º, da Lei n.º 11.343/06, que os benefícios devem ser calculados, efetivamente, com lastro nas frações previstas para os crimes comuns. Em que pese o respeitável posicionamento do I. Magistrado, calcado em respeitabilíssimo precedente da Corte Suprema, é certo, porém, que a decisão mencionada foi proferida incidentalmente, de modo que não possui efeito vinculante. [...]” SUPREMO TRIBUNAL FEDERAL. **Habeas Corpus n.º 143480**. Relator: Ministro Ricardo Lewandowski. Julgado em 10/5/2017. DJe-099, divulg. 11/5/2017, public. 12/5/2017.

precedente da Corte Suprema, é certo, porém, que a decisão mencionada foi proferida incidentalmente, de modo que não possui efeito vinculante”.¹²

Além disso, mesmo após o STF ter firmado entendimento sobre a possibilidade de execução da pena privativa de liberdade a partir da decisão penal condenatória de segunda instância, diversos ministros, monocraticamente, deferiram medidas liminares em *Habeas Corpus* contrariando o precedente do órgão pleno da Corte.¹³ Aliás, há estudos que apontam que ministros do STF deferiram monocraticamente em torno de 23% das liminares em *Habeas Corpus* impetrados por réus presos em razão de decisão condenatória de segunda instância, contrariando a jurisprudência da Corte.¹⁴ Ou seja, decidem como se o precedente vinculante da Corte não existisse.¹⁵

Dentro de um sistema em que o controle de constitucionalidade pode ser exercido por qualquer magistrado, desde a primeira instância até os tribunais superiores, o papel constitucional do STF de manter a jurisprudência íntegra e coerente é fundamental, na medida em que suas decisões, com ou sem força vinculativa, servem de paradigma para as decisões das demais instâncias judiciais. No entanto, para que as decisões do STF sejam respeitadas, é necessário que os seus membros também a respeitem. Esse é o requisito primeiro para garantir a autoridade das suas decisões. Se os

¹² SUPREMO TRIBUNAL FEDERAL. **Habeas Corpus n.º 143480**. Relator: Ministro Ricardo Lewandowski. Julgado em 10/5/2017. DJe-099, divulg. 11/5/2017, public. 12/5/2017.

¹³ O STF, analisando o tema de repercussão geral n.º 925, fixou a seguinte tese: “A execução provisória de acórdão penal condenatório proferido em grau recursal, ainda que sujeito a recurso especial ou extraordinário, não compromete o princípio constitucional da presunção de inocência afirmado pelo artigo 5º, inciso LVII, da Constituição Federal”. SUPREMO TRIBUNAL FEDERAL. **Agravo em Recurso Especial n.º 964246 RG**, Relator(a): Min. Teori Zavascki, julgado em 10/11/2016, processo eletrônico repercussão geral - mérito DJe-251 divulg. 24/11/2016 public 25/11/2016. Tal tese foi reafirmada no julgamento da medida liminar da ADC n.º 43 pelo Pleno do STF. SUPREMO TRIBUNAL FEDERAL. **Ação Declaratória de Constitucionalidade n.º 43**. Relator: Ministro Marco Aurélio Mello. Acompanhamento processual. Disponível em: <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=4986065>>. Acesso em: 20/8/2018. Posteriormente, foi novamente mantida pelo Pleno do STF no julgamento do **Habeas Corpus n.º 152752**. SUPREMO TRIBUNAL FEDERAL. **Habeas Corpus n.º 152752**. Relator: Ministro Edson Fachin, Tribunal Pleno, julgado em 04/04/2018, processo eletrônico DJe-127, divulg. 26/6/2018, public. 27/6/2018.

¹⁴ “Sem consenso sobre o cumprimento da pena após condenação na segunda instância da Justiça, os ministros do Supremo Tribunal Federal (STF) concederam liberdade a pelo menos um quinto dos casos que chegaram à Corte. O levantamento do jornal Folha de S. Paulo aponta que, apesar do entendimento sobre constitucionalidade do início da execução da pena, os ministros concederam pedidos de liberdade de condenados em segunda instância em 23% dos recursos analisados pelo STF. O levantamento do jornal analisou 390 pedidos de *habeas corpus* levados ao Supremo nos últimos dois anos e verificou que os ministros suspenderam ordens de prisão ou determinaram soltura dos condenados em 91 desses casos. Os beneficiados pelos *habeas corpus* cometeram, na maioria, crimes de colarinho branco ou tráfico de drogas”. CONGRESSO EM FOCO. Ministros do STF contrariam entendimento sobre prisão em segunda instância. **Congresso em Foco**, Brasília, 4 mar. 2018. Disponível em: <<https://congressoemfoco.uol.com.br/especial/noticias/ministros-do-stf-contrariam-entendimento-sobre-prisao-em-segunda-instancia/>>. Acesso em: 19 nov. 2018.

¹⁵ MENDES, Conrado Hübner. Na prática, ministros do STF agredem a democracia, escreve professor da USP. **Folha de São Paulo**, São Paulo, 28 jan. 2018. Disponível em: <<http://www1.folha.uol.com.br/ilustrissima/2018/01/1953534-em-espiral-de-autodegradacao-stf-virou-poder-tensionador-diz-professor.shtml>>. Acesso em: 19 nov. 2018.

próprios ministros não seguem a jurisprudência da Corte, as suas decisões ficam mais fragilizadas; aliás, a própria existência de uma jurisprudência do STF perde muito do seu sentido.¹⁶

Ademais, se o caráter contramajoritário da revisão judicial pelo STF já pode ser algo problemático do ponto de vista democrático, o que se dizer da revisão judicial individual, realizada por um ministro da Corte monocraticamente, que pode, de forma solipsista, suspender determinado ato normativo, sem levar a questão ao plenário.¹⁷ Isso submete a ordem democrática ao voluntarismo, às preferências pessoais de um único ministro, que, em grande parte das vezes, não reflete a posição do Tribunal, como no caso acima citado. A esse respeito, aliás, há autores que falam em “contramajoritarismo interno”, na medida em que essa decisão individual de ministro seria contrária à maioria do STF.¹⁸

Isso cria um espaço de decisão individual sem controle do colegiado. Há, assim, um contramajoritarismo individual descontrolado, na medida em que um ministro pode decidir mesmo contra o entendimento do STF e, em razão de regras processuais e regimentais, jamais submeter a questão ao plenário.

Quando os próprios ministros do STF não respeitam as decisões da sua instituição, o autoritarismo deixa de ser velado, pois passa a ser ostensivo. A prática autoritária de alguns ministros corrói a imagem e a legitimidade da Corte, frustrando as expectativas dos jurisdicionados.¹⁹

Além disso, é possível observar o uso estratégico pelo relator em relação ao órgão colegiado a que submeterá a questão a julgamento. Nesse tocante, o STF tem admitido a prática de que seja levada de imediato ao julgamento do Plenário uma questão que seria de competência da Turma. Isso possibilita que, nos casos em que o relator verifica que, por uma contagem virtual de votos, o seu entendimento tem mais chances de prevalecer no Órgão Pleno do que na Turma, submeta a questão diretamente àquele.

¹⁶ MENDES, Conrado Hübner. Na prática, ministros do STF agridem a democracia, escreve professor da USP. **Folha de São Paulo**, São Paulo, 28 jan. 2018. Disponível em: <<http://www1.folha.uol.com.br/ilustrissima/2018/01/1953534-em-espiral-de-autodegradacao-stf-virou-poder-tensionador-diz-professor.shtml>>. Acesso em: 19 nov. 2018.

¹⁷ Idêntica crítica é feita por Diego Arguelhes e Leandro Ribeiro: ARGUELHES, Diego Werneck; RIBEIRO, Leandro Molhano. Ministrocrazia: o Supremo Tribunal individual e o processo democrático brasileiro. **Novos Estudos CEBRAP**, São Paulo, v. 37, n. 1, p. 13-32, jan./abr. 2018, p. 15.

¹⁸ ARGUELHES, Diego Werneck; RIBEIRO, Leandro Molhano. Ministrocrazia: o Supremo Tribunal individual e o processo democrático brasileiro. **Novos Estudos CEBRAP**, São Paulo, v. 37, n. 1, p. 13-32, jan./abr. 2018, p. 16.

¹⁹ MENDES, Conrado Hübner. Na prática, ministros do STF agridem a democracia, escreve professor da USP. **Folha de São Paulo**, São Paulo, 28 jan. 2018. Disponível em: <<http://www1.folha.uol.com.br/ilustrissima/2018/01/1953534-em-espiral-de-autodegradacao-stf-virou-poder-tensionador-diz-professor.shtml>>. Acesso em: 19 nov. 2018.

Os processos criminais relacionados à Operação Lava Jato são um bom exemplo disso. A competência para julgar a maioria dos processos criminais relacionados à Operação Lava Jato seria da Segunda Turma, em razão da prevenção do Ministro Luiz Edson Fachin, relator dessas ações penais. Entretanto, é possível verificar que o Ministro passou a submeter a grande maioria desses julgamentos ao Pleno do STF, na medida em que percebeu que havia se formado, na Segunda Turma, uma maioria “contrária às investigações”, a partir do momento em que a Ministra Cármen Lúcia deixou a referida Turma para exercer a Presidência do STF.²⁰ A Ministra, que tinha uma posição mais favorável à punição dos crimes em questão, foi substituída, na referida Turma, pelo Ministro Dias Toffoli, mais “garantista”. Aliás, nesse jogo estratégico, há especulações de que, após o transcurso do biênio, com o retorno da Ministra Cármen Lúcia à Segunda Turma e a saída do Ministro Dias Toffoli para a Presidência da Casa, questões importantes que “aguardavam a nova composição” sejam liberadas para julgamento pelo relator e submetidas à referida Turma, o que, segundo diversos analistas, passou a preocupar as defesas dos réus da Operação Lava Jato.²¹

No entanto, as hipóteses de hipertrofia dos poderes do relator não são exclusividade das medidas liminares e do uso estratégico do Pleno da Corte. Como adiante se demonstrará, essa disfuncionalidade também ocorre diante do uso estratégico do poder de pedir pauta (ou não) para julgamento.

3. O PODER DE PAUTA: DISCRICIONARIEDADE OU AUTORITARISMO?

O poder de pauta é um instrumento estratégico poderosíssimo para os ministros do STF. Ele permite, por exemplo, que cada ministro busque estabelecer a sua agenda dentro da Corte. Dois principais atores podem influenciar fundamentalmente no poder de pautar o julgamento da causa, quais sejam, o relator e o presidente. No presente artigo, interessa o poder do relator de pedir pauta.

O ministro relator pode, em tese, desvirtuar o poder de pauta em duas principais situações: quando há pedido de liminar, se ele não decide e nem submete a questão ao pleno, ficando a medida liminar pendente de decisão; quando há pedido liminar, se ele decide (favoravelmente ou não), mas não submete a questão para referendo pelo Pleno. Em tais situações, pode haver o uso estratégico do poder de pauta e do

²⁰ CRUZ, Valdo. Fachin deve evitar temas polêmicos na Segunda Turma, avaliam procuradores da Lava Jato. **G1**, Brasília, 26 abr. 2018. Disponível em: <<https://g1.globo.com/politica/blog/valdo-cruz/post/2018/04/26/fachin-deve-evitar-temas-polemicos-na-segunda-turma-avaliam-procuradores-da-lava-jato.ghtml>>. Acesso em: 19 nov. 2018.

²¹ CAMAROTTI, Gerson. Volta de Cármen Lúcia para Segunda Turma do STF já preocupa defesa de acusados. **G1**, Brasília, 22 abr. 2018. Disponível em: <<https://g1.globo.com/politica/blog/gerson-camarotti/post/2018/04/22/volta-de-carmen-lucia-para-segunda-turma-do-stf-ja-preocupa-defesa-de-acusados.ghtml>>. Acesso em: 19 nov. 2018.

fator tempo, quando o ministro relator sabe que o órgão colegiado é contrário ao seu entendimento.

O desvirtuamento do poder de pauta fica mais evidente quando se observa que ele é utilizado inclusive em relação ao (não) julgamento de medidas liminares, já que, nessas hipóteses, há urgência, e o retardamento da tutela jurisdicional provisória causa grande gravame às partes.

Nesse tocante, é extremamente problemática a demora existente para que diversos processos tenham as suas medidas liminares pautadas para julgamento no STF. Na pesquisa denominada Supremo em Números, da lista das liminares que demoraram mais tempo para serem apreciadas pelo Pleno do STF, destacam-se as seguintes: ADI n.º 1229, ajuizada em fevereiro de 1995 e cuja liminar foi julgada pelo Pleno do STF somente em abril de 2013, ou seja, 18 anos e 1 mês após o ajuizamento; ADI n.º 2077, cuja liminar foi decidida pelo Pleno da Corte em março de 2013, ou seja, 13 anos e 3 meses após o ajuizamento; ADI n.º 1945, cuja liminar foi decidida pelo Pleno 11 anos e 2 meses após o ajuizamento; ADI n.º 1924, com decisão liminar proferida somente 10 anos e 4 meses após o ajuizamento; ADI n.º 2356, cuja liminar foi decidida pelo Pleno do STF somente 9 anos e 10 meses após o ajuizamento; ADI n.º 2362, com liminar decidida 9 anos e 10 meses depois; ADI n.º 2139, cuja liminar foi apreciada 9 anos e 2 meses após o ajuizamento; ADI n.º 2160, com liminar analisada após 9 anos e 1 mês; ADI n.º 1923, em que a liminar foi apreciada depois de 8 anos e 8 meses; e ADI n.º 183, cuja liminar foi julgada pelo Pleno do STF mais de 7 anos e 7 meses após o ajuizamento.²²

O deferimento da medida liminar e a sua não submissão ao Pleno também constituem um recurso estratégico relacionado ao poder de pauta, mas, como já foi examinado no tópico anterior, não será abordado novamente aqui. Ressalta-se, apenas, que diversas ações tiveram as suas liminares deferidas e demoraram anos ou décadas para serem levadas a plenário.

Assim, por exemplo, quando o ministro relator acredita que não possui maioria no colegiado, pode simplesmente jamais pedir pauta para julgamento. Da mesma forma, se o ministro relator entende que o STF não deve intervir na questão, porque ela deve ser resolvida pelo Legislativo ou pelo Executivo, ou simplesmente que a circunstância fática não deve ser modificada, pode, por exemplo, dizer que não há urgência, indeferir a liminar (por uma questão de forma) e jamais pautar o processo.

Também se observa grande disparidade entre a média de tempo que cada ministro demora entre a data da distribuição e a devolução do processo com relatório.

²² FALCÃO, Joaquim; HARTMANN, Ivar A.; CHAVES, Vitor P. **Relatório Supremo em Números: o Supremo e o tempo**. Rio de Janeiro: Escola de Direito do Rio de Janeiro da Fundação Getúlio Vargas, 2014, p. 119-121. Disponível em: <<http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/12055/III%20Relat%C3%B3rio%20Supremo%20em%20N%C3%BAmeros%20-%20O%20Supremo%20e%20o%20Tempo.pdf?sequence=5&iAllowed=y>>. Acesso em: 3 dez. 2018.

No Relatório Supremo em Números, observou-se que o ex-Ministro Joaquim Barbosa levava em média 283 dias para decidir ou devolver o processo. Nos anos de 1997 a 2001, o Ministro Sepúlveda Pertence sempre foi quem alcançou a maior média de tempo, acima de 400 dias. De outro lado, o Ministro Oscar Corrêa levava em média 13 dias, sendo o mais rápido. Considerando membros do Tribunal em 2013, o Ministro Barroso era quem devolvia o processo com menor média de tempo, qual seja, de 40 dias.²³

Assim, o *timing* para apreciação das liminares e o poder de pauta podem ser utilizados como um recurso estratégico pelos ministros do STF, para estabelecer a sua agenda dentro da Corte. A esse respeito, na pesquisa de campo realizada por Virgílio Afonso da Silva, alguns Ministros da Suprema Corte brasileira mencionaram que o relator possui um grande “poder de agenda”. Um dos Ministros afirmou que “o relator administra a tese que ele tem sob julgamento com o tempo”. E continuou o mesmo Ministro: “Se ele for uma pessoa de visão tática, aí é uma questão não estritamente técnico-jurídica, mas que faz parte da formação do ser humano e também de quem chegou à Suprema Corte, de saber o seguinte: ‘olha esse não é o momento de eu levar tal tema’”.²⁴ Outro Ministro, em relação à mesma questão, salientou que “o relator tem um papel quase absoluto quanto à agenda, porque o processo só vai a julgamento a partir do momento em que ele resolva levar o processo a julgamento. [...] Esse é um poder grande de supressão da discussão”.²⁵

É possível observar, ainda, que a ineficiência do STF como um órgão julgador empoderou muito o ministro relator, pois diminuiu os constrangimentos para a demora na inclusão em pauta. Vale dizer, sempre cabe a escusa de que há muitos processos para julgar. Assim, o poder de pedir inclusão na pauta de julgamento pode, pragmaticamente, ser utilizado pelo relator como um grande instrumento estratégico,²⁶ de forma abusiva e autoritária.

²³ FALCÃO, Joaquim; HARTMANN, Ivar A.; CHAVES, Vitor P. **Relatório Supremo em Números**: o Supremo e o tempo. Rio de Janeiro: Escola de Direito do Rio de Janeiro da Fundação Getúlio Vargas, 2014. Disponível em: <<http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/12055/III%20Relat%C3%B3rio%20Supremo%20em%20N%C3%BAsmeros%20-%20O%20Supremo%20e%20o%20Tempo.pdf?sequence=5&isAllowed=y>>. Acesso em: 3 dez. 2018.

²⁴ SILVA, Virgílio Afonso da. “Um voto qualquer”? O papel do ministro relator. **Revista Estudos Institucionais**, Rio de Janeiro, v. 1, n. 1, p. 180-200, 2015, p. 189.

²⁵ SILVA, Virgílio Afonso da. “Um voto qualquer”? O papel do ministro relator. **Revista Estudos Institucionais**, Rio de Janeiro, v. 1, n. 1, p. 180-200, 2015, p. 190.

²⁶ “Por caminhos diferentes, os ministros podem influenciar o momento de a corte enfrentar certa questão. Nesses casos, a questão ‘o que pautar?’ se torna refém de opções individuais sobre ‘quando pautar?’. Motivações diversas podem acelerar ou retardar essas escolhas. O ministro Ayres Britto, por exemplo, ao ser perguntado sobre a decisão mais difícil que tomou sobre o caso Mensalão foi claro ao dizer: ‘colocar em pauta o julgamento. Marcar o dia para começar’”. LEAL, Fernando. A dança da pauta no Supremo. In: FALCÃO, Joaquim; ARGUELLES, Diego Wernerck; RECONDO, Felipe. **Onze supremos**: o supremo em 2016. Belo Horizonte: FGV Rio, 2017, p. 58. Disponível em: <<https://bibliotecadigital.fgv.br/dspace/handle/10438/17959>>.

4. O PODER INDIVIDUAL HIPERTRÓFICO E O DESMEMBRAMENTO CONSTITUCIONAL

Segundo Richard Albert, algumas reformas constitucionais não são simples alterações, senão esforços autoconscientes para modificar as características essenciais de uma constituição e destruir a sua base. Para Albert, comumente essas mudanças transformadoras não são diferenciadas das demais, mas uma alteração radical desse tipo não é uma simples emenda à Constituição, senão um desmembramento constitucional. Nesse sentido, o autor preconiza que o desmembramento constitucional é “um esforço deliberado para transformar a identidade, os valores fundamentais ou a arquitetura da constituição sem romper com a continuidade jurídica”.²⁷

O desmembramento constitucional, conforme Albert, existe como um fenômeno hoje, pois, em todo o mundo, “vimos e continuamos a ver esforços para fazer mudanças constitucionais transformadoras sem romper a continuidade jurídica”. Para ele, o desmembramento constitucional “procura deliberadamente alterar a identidade, os valores fundamentais ou a arquitetura da constituição, recorrendo às regras ordinárias da emenda constitucional”. A teoria convencional da mudança constitucional nega a legitimidade de um desmembramento constitucional. Segundo ele, “normalmente, os tribunais impedem os desmembramentos constitucionais por exceder o poder de emenda dos atores modificadores”.²⁸

Na Constituição Federal brasileira, existe um núcleo duro, denominado de cláusulas pétreas. Diz respeito aos direitos fundamentais e às questões constitucionais que formam a base do Estado Democrático de Direito brasileiro. De acordo com o art. 60, § 4º, da Constituição Federal, são cláusulas pétreas “a forma federativa de Estado”; o “voto direto, secreto, universal e periódico”; a “separação dos Poderes”; e “os direitos e garantias individuais”. Trata-se de um limite inclusive ao poder de emenda constitucional. Tal dispositivo tem por objetivo impedir, no plano institucional, aquilo que Richard Albert chamaria de desmembramento constitucional.

Analisar em que medida leis ou emendas constitucionais violam as cláusulas pétreas depende de interpretação, a qual é feita, em última instância, pela Corte Constitucional brasileira.²⁹ Assim, um desmembramento constitucional somente ocorreria, na prática, se houvesse conivência do STF. Desse modo, problema maior existe quando

²⁷ ALBERT, Richard. Constitutional Amendment and Dismemberment. *Yale Journal of International Law*, Boston College Law School, v. 43, Research Paper 424, p. 1-117, nov. 2016, p. 1.

²⁸ ALBERT, Richard. Constitutional Amendment and Dismemberment. *Yale Journal of International Law*, Boston College Law School, v. 43, Research Paper 424, p. 1-117, Nov. 2016, p. 115.

²⁹ Em perspectiva de direito constitucional comparado, Richard Albert dá como exemplo de desmembramento constitucional a Proposta de Emenda Constitucional (posteriormente promulgada como Emenda Constitucional n.º 95/2016) que limitou os gastos públicos no Brasil por 20 anos, por atingir direitos sociais. ALBERT, Richard. Constitutional Amendment and Dismemberment. *Yale Journal of International Law*, Boston College Law School, v. 43, Research Paper 424, p. 1-117, Nov. 2016, p. 29-31.

é a própria Corte Constitucional brasileira que toma decisões que parecem afrontar esse núcleo duro da Constituição, na medida em que esse tipo de conduta pode ficar praticamente sem controle se não houver uma resistência forte dos demais Poderes Constituídos.

Desse modo, o risco de desmembramento constitucional no Brasil deve ser analisado à luz da atuação do STF frente a esses direitos estruturais e fundamentais.

Na base da Constituição brasileira, estão as disposições sobre a distribuição de competências entre os Poderes Constituídos. Em determinadas hipóteses especificadas na Constituição, é possível que o STF exerça o controle de constitucionalidade e, quando isso é realizado de forma concentrada e em abstrato, as suas decisões possuem força *erga omnes* e vinculante.

A revisão judicial, amplamente admitida e utilizada na maior parte dos países do mundo, não é um problema em si. Pelo contrário, em geral, tem dado respostas satisfatórias em termos democráticos. O problema é a forma como a revisão judicial tem sido utilizada no Brasil contemporaneamente.

A Constituição brasileira estabeleceu a competência para a revisão judicial ao Supremo Tribunal Federal, composto por 11 ministros. Entretanto, como se mostrou acima, cada ministro tem agido cada vez mais individualmente. Decisões monocráticas liminares que suspendem leis, emendas constitucionais e outros atos normativos têm sido uma prática em ascensão por ministros do STF, inclusive contra a jurisprudência consolidada da própria Corte.³⁰ Medidas liminares extremamente controversas e que acabam tornando prejudicado o próprio mérito também têm sido comuns.³¹ Já houve até medida liminar que concedeu, monocraticamente, aumento a carreiras jurídicas³².

³⁰ Aliás, há estudos que apontam que Ministros do STF deferiram monocraticamente em torno de 23% das liminares em Habeas Corpus impetrados por réus presos em razão de decisão de segunda instância, contrariando a jurisprudência da Corte: "Sem consenso sobre o cumprimento da pena após condenação na segunda instância da Justiça, os ministros do Supremo Tribunal Federal (STF) concederam liberdade a pelo menos um quinto dos casos que chegaram à Corte. O levantamento do jornal Folha de S. Paulo aponta que, apesar do entendimento sobre constitucionalidade do início da execução da pena, os ministros concederam pedidos de liberdade de condenados em segunda instância em 23% dos recursos analisados pelo STF. O levantamento do jornal analisou 390 pedidos de *habeas corpus* levados ao Supremo nos últimos dois anos e verificou que os ministros suspenderam ordens de prisão ou determinaram soltura dos condenados em 91 desses casos. Os beneficiados pelos *habeas corpus* cometeram, na maioria, crimes de colarinho branco ou tráfico de drogas." CONGRESSO EM FOCO. Ministros do STF contrariam entendimento sobre prisão em segunda instância. **Congresso em Foco**, Brasília, 4 mar. 2018. Disponível em: <<https://congressoemfoco.uol.com.br/especial/noticias/ministros-do-stf-contrariam-entendimento-sobre-prisao-em-segunda-instancia/>>. Acesso em: 19 nov. 2018.

³¹ A título de exemplo, a medida liminar concedida pelo Ministro Gilmar Mendes, no Mandado de Segurança Coletivo n.º 34.070, em 18/3/2016, para suspender a nomeação de Luiz Inácio Lula da Silva para o cargo de Ministro Chefe da Casa Civil de Lula durante o Governo Dilma. SUPREMO TRIBUNAL FEDERAL. **Mandado de Segurança n.º 34070**, Medida Cautelar. Liminar. Relator: Min. Gilmar Mendes. Julgado em 18/3/2016. DJe-054, divulg. 22/03/2016, public 28/3/2016.

³² Na Ação Originária 1773/DF, o Ministro Luiz Fux decidiu, liminarmente, em 15/9/2014, conceder auxílio-moradia a juizes e membros do Ministério Público. SUPREMO TRIBUNAL FEDERAL. **Ação Originária n.º 1773/DF**. Decisão monocrática. Relator: Ministro Luiz Fux. Julgado em 15/9/2014, publ. 18/9/2014.

Enfim, se já é questionável a legitimidade de a Corte Constitucional legislar – discussão que se tem ao redor do mundo –, o que se dizer da possibilidade de um ministro do STF, de forma monocrática, por medida liminar, suspender leis ou proferir decisões que, na prática, inovam na ordem jurídica, derrubando emendas constitucionais, leis e atos de natureza política do Presidente da República, sem que haja uma forma de constranger o ministro a levar imediatamente a questão ao Plenário do STF?

Como se pode observar, os poderes individuais dos ministros do STF, individualmente considerados, têm se hipertrofiado, ou seja, tem crescido de forma anormal, excessiva, não autorizada pela Constituição. O exercício autoritário desse poder hipertrófico tem causado diversos problemas do ponto de vista do papel que deveria a Suprema Corte brasileira desempenhar na ordem constitucional. As decisões tomadas individualmente, a supressão do caso ao órgão colegiado, a mudança de entendimento conforme a parte do processo, o controle individual sobre o tempo da decisão e a prática de, individualmente, contrariar os próprios precedentes da Corte não apenas esvaziam a missão constitucional do STF, como também desrespeitam a Constituição e diminuem o papel simbólico da Corte na ordem constitucional, na medida em que um tribunal constitucional sem respeitabilidade pode ser desobedecido sem custos.³³ Além disso, essa atuação individual prejudica a formação de uma “esfera pública constitucional”.³⁴

A revisão judicial tem sido realizada individualmente, em decisões monocráticas, por ministros do STF. Entretanto, num Estado Democrático de Direito, o poder estatal não pode estar concentrado nas mãos de uma só pessoa. Além disso, todo aquele que exerce poder também deve estar submetido ao direito, de modo que possa ser controlado por outros órgãos ou poderes. Ocorre que os poderes individuais dos juízes constitucionais brasileiros são hipertróficos e têm se tornado praticamente incontroláveis.

Assim, as práticas acima expostas dos ministros do STF, individualmente considerados, têm violado o cerne do Estado Democrático de Direito, onde o constitucionalismo tem sido utilizado abusiva e autoritariamente como um instrumento retórico para ações estratégicas e ilegítimas.

Enfim, se a revisão judicial pode ser um instrumento importante para a democracia e para o constitucionalismo, no Brasil, a prática do STF, que hipertrofiou o poder individual de seus ministros, se aproxima de um verdadeiro desmembramento

³³ MENDES, Conrado Hübner. Na prática, ministros do STF agredem a democracia, escreve professor da USP. **Folha de São Paulo**, São Paulo, 28 jan. 2018. Disponível em: <<http://www1.folha.uol.com.br/ilustrissima/2018/01/1953534-em-espiral-de-autodegradacao-stf-virou-poder-tensionador-diz-professor.shtml>>. Acesso em: 19 nov. 2018.

³⁴ MENDES, Conrado Hübner. Na prática, ministros do STF agredem a democracia, escreve professor da USP. **Folha de São Paulo**, São Paulo, 28 jan. 2018. Disponível em: <<http://www1.folha.uol.com.br/ilustrissima/2018/01/1953534-em-espiral-de-autodegradacao-stf-virou-poder-tensionador-diz-professor.shtml>>. Acesso em: 19 nov. 2018.

constitucional judicial, sobretudo pela forma como alguns deles, individualmente, se arvoram na competência do STF e inovam na ordem jurídica, de forma contrária à Constituição, à ordem democrática e, aliás, muitas vezes de forma contrária à própria jurisprudência da Corte.

5. O GOLPE DE ESTADO JURÍDICO

Alec Stone Sweet denomina de golpe de Estado jurídico (*juridical coup d'État*) a “transformação fundamental” na “base normativa” de um sistema jurídico por uma mudança constitucional promovida por decisão de um tribunal. Quando fala em “base normativa”, quer dizer um “preceito superior de um sistema”.³⁵ Nesse sentido, faz referência à noção de “*Grundnorm*” em Kelsen³⁶ e da “regra de reconhecimento” em Hart³⁷. A par da diferença entre essas teorias e conceitos, afirma que um golpe de Estado jurídico seria uma decisão do tribunal que altera ambas. De outro lado, na sua concepção de golpe de Estado jurídico, “transformação fundamental” é conceituada restritivamente, no sentido de que a mudança do direito constitucional realizada pela decisão do tribunal teria sido rejeitada pelos constituintes se fosse colocada na mesa de negociação; além disso, essa “transformação fundamental” deve alterar fundamentalmente o funcionamento do sistema jurídico, para um formato que não foi planejado pelos constituintes. Isto é, a transformação fundamental é aquela que, para um observador, não seria possível deduzi-la diretamente do *design* constitucional anterior. Por último, ainda dentro desse conceito de golpe de Estado jurídico, por mudança constitucional (*constitutional*

³⁵ SWEET, Alec Stone. The Juridical Coup d'État and the Problem of Authority. *German Law Journal*, v. 8, n. 10, p. 915-928, Oct. 2007, p. 915.

³⁶ “Como já apontamos, a norma que representa o fundamento de validade de uma outra norma é, em face desta, uma norma superior. Mas a indagação do fundamento de validade de uma norma não pode, tal como a investigação da causa de um determinado efeito, perder-se no interminável. Tem de terminar numa norma que se pressupõe como a última e a mais elevada. [...] Uma tal norma, pressuposta como a mais elevada, será aqui designada como norma fundamental (*Grundnorm*). [...] A norma fundamental é a fonte comum da validade de todas as normas pertencentes a uma e mesma ordem normativa, o seu fundamento de validade comum. [...] É a norma fundamental que constitui a unidade de uma pluralidade de normas enquanto representa o fundamento da validade de todas as normas pertencentes a essa ordem normativa.” KELSEN, Hans. **Teoria pura do direito**. Tradução: João Baptista Machado. 6. ed. São Paulo: Martins Fontes, 1998, p. 217.

³⁷ Para Hart, o sistema jurídico é formado por normas primárias (aquelas que impõe obrigações) e normas secundárias (normas de reconhecimento). As normas secundárias (de reconhecimento) são as que reconhece determinada norma como sendo norma jurídica. Segundo Hart, “[...] só podemos apresentar claramente essas verdades e avaliar corretamente sua importância se supusermos um contexto social mais complexo no qual, para a identificação de normas primárias de obrigação, seja aceita e utilizada uma norma secundária de reconhecimento. Se algo merece ser denominado fundamento de um sistema jurídico, trata-se dessa situação”. HART, H. L. A. **O conceito de direito**. Tradução: Antônio de Oliveira Sette-Câmara. São Paulo: Martins Fontes, 2009, p. 129. Além disso, Hart reconhecia que, “num sistema jurídico moderno, no qual existem várias ‘fontes’ do direito, a norma de reconhecimento é correspondentemente mais complexa: os critérios para identificar a norma jurídica são múltiplos e geralmente incluem uma constituição escrita, a promulgação pelo legislativo e precedentes judiciais.” HART, H. L. A. **O conceito de direito**. Tradução: Antônio de Oliveira Sette-Câmara. São Paulo: Martins Fontes, 2009, p. 130.

lawmaking), quer dizer a modificação da Constituição através da adjudicação judicial (interpretação e aplicação). Assim, para Alec Stone Sweet, golpe de Estado jurídico constitui um tipo particular de mudança constitucional pelo tribunal, através da adjudicação judicial, que altera a “Norma Fundamental” e uma “Regra de Reconhecimento”.³⁸

Nesse tocante, Alec Stone Sweet diferencia um golpe revolucionário de um golpe de Estado jurídico. Segundo o autor, um golpe revolucionário se procede através de atos que não estão autorizados de acordo com a Norma Fundamental, enquanto um golpe de Estado jurídico se sucede através do exercício de poderes que foram delegados pela Norma Fundamental à autoridade judicial. Para o autor, um golpe de Estado jurídico produz efeitos jurídicos, de modo que, fundado em Kelsen, afirma, por conseguinte, que uma norma que produz efeitos jurídicos deve ser considerada válida. Entretanto, o conteúdo de uma decisão judicial pode não ter sido autorizado, ou pode até ter sido proibido, pelo conteúdo de uma norma básica anterior. Nesse tocante, afirma que uma questão estrutural importante diz respeito à questão de saber se a delegação constitucional ao juiz inclui restrições substanciais à sua tomada de decisão, no sentido de produzir norma jurídica (*lawmaking*). Nesse aspecto, ressalta que o golpe de Estado jurídico pode ser institucionalizado como uma revisão judicial bem-sucedida da Norma Básica, com efeitos transformadores no direito e na política.³⁹

Alec Sweet destaca que muitas teorias jurídicas positivistas constroem suas bases sob a perspectiva de autoridade judicial legítima e do legítimo exercício do poder discricionário do Judiciário, ao descrever as maneiras pelas quais o sistema jurídico restringe (ou deve restringir) o julgamento. Nesse sentido, afirma que se espera que os juízes empacotem suas decisões de modo que pareçam ser relativamente “redundantes”, “autoevidentes”, “extensões dedutivas de materiais legais existentes”. Ressalta que H. L. A. Hart argumentou que a extensão da discricionariedade judiciária defensável em qualquer ponto era inversamente proporcional à extensão da indeterminação da lei aplicável, desde que os juízes resolvessem as disputas de forma “adequada” ou “razoavelmente defensável”, em vez de “arbitrárias” ou “irracionais”; refere que, para Hart, a legislação judicial seria defensável, em vez de arbitrária, na medida em que se procedesse à luz da lei pré-existente e das decisões passadas, e na medida em que “tornasse” essa lei existente “mais determinada”. Alec Sweet ressalta que Neil MacCormick tinha como principal objetivo de sua teoria jurídica desenvolver padrões para avaliar a jurisprudência de um tribunal como “boa ou ruim”, “aceitável ou não aceitável”, “racional ou arbitrária”, ressaltando que, para este autor, as decisões ruins seriam aquelas que não poderiam, em última instância, ser embaladas como uma dedução de normas e princípios anteriores

³⁸ SWEET, Alec Stone. The Juridical Coup d'État and the Problem of Authority. *German Law Journal*, v. 8, n. 10, p. 915-928, October 2007, p. 915-916.

³⁹ SWEET, Alec Stone. The Juridical Coup d'État and the Problem of Authority. *German Law Journal*, v. 8, n. 10, p. 915-928, Oct. 2007, p. 916-917.

de primeira ordem.⁴⁰ Após sintetizar as teorias desses dois autores, Alec Sweet afirma que um golpe de Estado jurídico mina fatalmente esse projeto, pois, em seus próprios termos, não haveria escolha senão classificar os golpes jurídicos como resultado de “decisões ruins, arbitrárias e irracionais”.⁴¹

Contudo, na linha da teoria de Alec Stone Sweet, pragmaticamente, parece haver certa dificuldade para, em certos casos, dizer se a decisão de um tribunal constitucional afronta a “Norma Básica” ou a “Regra de Reconhecimento” ou, ao revés, se apenas seria uma das possíveis interpretações sobre os limites da atuação da própria corte. A esse respeito, o próprio Sweet afirma que “haverá casos difíceis de classificação”⁴². Na prática, isso será ainda mais difícil porque a corte constitucional, quando amplia a sua competência ou viola a tripartição de poderes, o faz com o discurso de que a sua decisão está apenas sendo resultado daquilo que diz a constituição, ou seja, de que estaria apenas desvelando o conteúdo da norma fundamental.

Ocorre que, quando o tribunal constitucional profere uma decisão que, fora do texto constitucional, amplia a sua competência e atinge questões afetas a outros Poderes Constituídos, alterando o próprio sentido do texto constitucional, pode haver um conflito fundamental de autoridade, diante do fato de o órgão que teve as suas competências “invadidas” pode se recusar a cumprir a decisão.⁴³

Com base nas pesquisas acima realizadas, pretende-se chamar a atenção para o golpe de Estado jurídico promovido pela violação da Corte Constitucional brasileira à Constituição e às Leis.

A Constituição da República outorgou ao STF o poder de decidir sobre questões constitucionais em última instância. Além disso, a própria Constituição outorga ao STF a possibilidade de interpretá-la de forma objetiva, ou seja, em controle abstrato e concentrado de constitucionalidade, pode dizer se determinada lei é constitucional ou inconstitucional, ou ainda, dar uma interpretação conforme a Constituição. Contudo, essa atribuição é da Corte Constitucional brasileira, como instituição, e não de um ou outro ministro isoladamente.

Como já se demonstrou, as decisões liminares em ADI, ADC e ADI por Omissão deveriam ser tomadas pelo órgão colegiado e somente poderiam ser deferidas por decisão de maioria absoluta de seus membros.

⁴⁰ Sobre essa questão, vide: MACCORMICK, Neil. **Retórica e Estado de Direito**. Tradução: Conrado Hübner Mendes. Rio de Janeiro: Elsevier, 2008.

⁴¹ SWEET, Alec Stone. The Juridical Coup d'État and the Problem of Authority. **German Law Journal**, v. 8, n. 10, p. 915-928, Oct. 2007, p. 917.

⁴² SWEET, Alec Stone. The Juridical Coup d'État and the Problem of Authority. **German Law Journal**, v. 8, n. 10, p. 915-928, Oct. 2007, p. 917.

⁴³ SWEET, Alec Stone. The Juridical Coup d'État and the Problem of Authority. **German Law Journal**, v. 8, n. 10, p. 915-928, Oct. 2007, p. 919.

Ocorre que os ministros do STF vêm reiteradamente descumprindo a Constituição e as leis que regem o controle de constitucionalidade. Isto é, violam sistematicamente a regra de reconhecimento, porque as decisões da Corte somente constituem fonte legítima e autorizada de direito enquanto proferidas pelo órgão colegiado, como estabelecem a Constituição e as leis de regência. O exercício indiscriminado dos poderes do Pleno pelos ministros individualmente, como demonstrado, somente pode ser caracterizado como uma forma velada de autoritarismo e não como fonte legítima de direito.

Se todas as distorções procedimentais tratadas acima fossem a exceção, isso talvez não atingisse tanto o sistema jurídico. Todavia, num contexto em que a exceção se torna a regra, em que a grande maioria das ações do controle abstrato são decididas liminarmente e demoram vários anos para serem levadas ao Pleno – quando o são –, está-se diante de um Estado de exceção permanente.

No contexto institucional atual, como foi acima demonstrado, em que cada ministro age de forma isolada e autoritária, tomando para si o poder constitucionalmente atribuído ao colegiado, o critério aleatório de distribuição acaba sendo fator determinante para o sucesso ou o insucesso de determinada reivindicação constitucional, e os ministros tornam-se *players*⁴⁴ num complexo e intrincado jogo político, esmaecendo, de forma perigosa, a fronteira entre os sistemas do direito e da política.

Assim, a forma autoritária como são subvertidos os papéis do órgão e de seus membros acaba por desvirtuar a função da Corte brasileira como verdadeiro tribunal constitucional, enfraquecendo-se as perspectivas de que seja capaz de corrigir as disfunções e melhorar as condições democráticas.

Com efeito, a democracia, do ponto de vista das disputas de poder, possui o grande mérito de que as forças políticas se submetam ao resultado da deliberação. Na democracia, as forças políticas conflitantes estão submetidas à regra de que devem concordar com as normas especificadas e que as eleições, um “dispositivo aleatório”, decidem quem deterá o controle do poder. Os perdedores devem esperar a chance de ganhar o cargo no futuro.⁴⁵ Portanto, quando os ministros do STF passam a atuar como *players* dentro do contexto das disputas políticas e eleitorais, tornam-se manipuladores ou suscetíveis a manipulações próprias do jogo político. Assumem qualquer papel, menos o de guardiões da integridade e da estabilidade do sistema jurídico.

Os ministros, ao aumentarem o seu próprio poder, fragmentaram o poder da Corte e alteraram a regra de reconhecimento e a norma básica, para fazer valer uma

⁴⁴ ARGUELHES, Diego Werneck; RIBEIRO, Leandro Molhano. O Supremo Individual: mecanismos de atuação direta dos Ministros sobre o processo político. **Direito, Estado e Sociedade**, Rio de Janeiro, n. 46, p. 121-155, jan./jun. 2015, p. 123.

⁴⁵ PRZEWORSKI, Adam. Democracy as an equilibrium. **Public Choice**, v. 123, n. 3-4, p. 253-273, Jun. 2005, p. 269-270.

decisão monocrática que altera o direito constitucional objetivo, violando a Constituição. Isso pode interessar a cada ministro individualmente, mas não à instituição do STF, nem à sociedade. Esse empoderamento individual, por essa prática de sistemática violação à Constituição e às leis, constitui verdadeiro golpe de Estado jurídico.

6. CONCLUSÃO

Os ministros do STF, de forma não autorizada pela Constituição, decidiram monocraticamente, em medida liminar, questões que mudaram o panorama político do país. Por decisão liminar, o Ministro Gilmar Mendes suspendeu a nomeação do ex-Presidente Lula para o cargo de Ministro da Casa Civil do governo Dilma⁴⁶; o Ministro Luiz Fux suspendeu a tramitação e determinou que fosse reiniciado na Câmara dos Deputados o Projeto de Lei das “10 Medidas contra a Corrupção” (Projeto de Lei n.º 4.850/2016⁴⁷)⁴⁸; o Ministro Marco Aurélio determinou que a Presidência da Câmara desse prosseguimento ao processo de *impeachment* contra o Presidente Michel Temer⁴⁹. Esses são alguns exemplos de decisões monocráticas de ministros do STF que mudaram a dinâmica da política e, provavelmente, os destinos do país, sem que passassem pelo crivo do pleno da Corte.⁵⁰

Além disso, em diversas situações, os ministros do STF agiram autoritariamente de forma a evitar um julgamento colegiado, ou seja, o voluntarismo prevaleceu sobre a razão.

Contudo, a utilização abusiva e autoritária das regras procedimentais para impedir que a decisão colegiada prevaleça viola o cerne da Constituição, pois, quando esta prevê a competência do Supremo, pressupõe um julgamento institucional, pelo seu órgão colegiado, e não a conduta voluntarista de um ministro, que impede o julgamento colegiado.

O poder individual tem sido utilizado abusivamente pelos ministros do STF nos últimos anos, muitas vezes sob a justificativa de sobrecarga de trabalho. Contudo, o que tem se visto, na prática, é um aumento de decisões concedidas monocraticamente e o exercício, formal ou informal, de poderes individuais de forma estratégica. Enfim,

⁴⁶ SUPREMO TRIBUNAL FEDERAL. **Mandado de Segurança n.º 34070**, Medida Cautelar. Liminar. Relator: Min. Gilmar Mendes. Julgado em 18/3/2016. DJe-054, divulg. 22/3/2016, public. 28/3/2016.

⁴⁷ CÂMARA DOS DEPUTADOS. **Projeto de Lei 4.850/2016**. Disponível em: <<http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=2080604>>. Acesso em: 18/8/2018.

⁴⁸ SUPREMO TRIBUNAL FEDERAL. **Medida Cautelar em Mandado de Segurança n.º 34.530**. Relator Ministro Luiz Fux. Decisão monocrática. Julgado em 14/12/2016.

⁴⁹ SUPREMO TRIBUNAL FEDERAL. **Medida Cautelar em Mandado de Segurança n.º 34.087**. Relator Ministro Marco Aurélio Melo. Decisão monocrática. Julgado em 5/4/2016.

⁵⁰ No mesmo sentido: ARGUELHES, Diego Werneck; RIBEIRO, Leandro Molhano. *Ministrocracia: o Supremo Tribunal individual e o processo democrático brasileiro*. **Novos Estudos CEBRAP**, São Paulo, v. 37, n. 1, p. 13-32, jan.-abr. 2018, p. 14.

a prática mostra que o autoritarismo individual dos ministros do STF talvez seja um problema bem maior do que os que são tradicionalmente desenvolvidos a respeito das cortes constitucionais ao redor do mundo.

Quando os juízes constitucionais brasileiros agem de forma isolada e autoritária, tomando para si o poder constitucionalmente atribuído ao colegiado, o critério aleatório de distribuição a determinado relator (o fator sorte) acaba sendo fator determinante para o sucesso ou o insucesso de determinado pleito.

Como se mostrou anteriormente, é rotineira a prática de ministros do STF, individualmente, subtraindo a decisão do colegiado, decidirem com força vinculante e *erga omnes* medidas liminares que derrubam leis e emendas constitucionais aprovadas pelo parlamento, bem como atos políticos do governo. Essa prática de decisões individuais com força de lei é algo extremamente problemático na democracia constitucional brasileira, pois se trata de um poder não concedido pela Constituição.

Embora a revisão judicial possa ser um instrumento importante para a democracia e para o constitucionalismo, no Brasil, a prática do STF, que hipertrofiou o poder individual de seus ministros, se aproxima de um verdadeiro desmembramento constitucional judicial, sobretudo pela forma como cada ministro, individualmente, se arvora na competência do colegiado e inova na ordem jurídica, muitas vezes divergindo da própria jurisprudência da Corte, de forma contrária à Constituição e à ordem democrática.

Além disso, os ministros do STF, ao aumentarem o seu próprio poder, fragmentaram o poder da Corte e alteraram a regra de reconhecimento e a norma básica, para fazer valer uma decisão monocrática que modifica o direito constitucional objetivo, de forma contrária à Constituição e às leis que regem as ações do controle concentrado de constitucionalidade. Isso pode interessar a cada ministro individualmente, mas não à instituição do STF, tampouco à sociedade. Esse empoderamento individual, por essa prática de sistemática violação à Constituição e às leis, constitui verdadeiro golpe de Estado jurídico.

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*Instructions for authors**

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Ao menos um dos autores do artigo deverá possuir o título de Doutor (Dr.), Doctor of Juridical Science (J.S.D. ou S.J.D), Doctor juris (Dr. iur. ou Dr. jur.), Doctor of Philosophy (Ph.D.) ou Legum Doctor (LL.D.). A exigência poderá ser relativizada, nunca extrapolando o percentual de 30% por edição, em casos excepcionais de: (i) artigos de autores afiliados a instituições estrangeiras; (ii) artigos escritos em inglês.

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Os textos para publicação na *Revista de Investigações Constitucionais* deverão ser inéditos e para publicação exclusiva, salvo no caso de artigos em língua estrangeira que tenham sido publicados fora do país. Uma vez publicados nesta revista, também

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4. IDIOMAS

Podem ser submetidos artigos redigidos em Português, Espanhol, Inglês, Italiano, Alemão ou Francês.

5. APRESENTAÇÃO DO TEXTO E ELEMENTOS PRÉ-TEXTUAIS

5.1. Recomenda-se que o trabalho tenha entre 15 e 30 páginas (tamanho A4 – 21 cm × 29,7 cm), compreendendo a introdução, desenvolvimento, conclusão (não necessariamente com esses títulos) e uma lista de referências bibliográficas.

5.1. As margens utilizadas deverão ser: esquerda e superior de 3 cm e direita e inferior de 2 cm.

5.2. No corpo do texto deverá ser utilizada Fonte Times New Roman, tamanho 12, espaçamento entre linhas de 1,5, e espaçamento de 0 pt antes e depois dos parágrafos.

5.3. Nas notas de rodapé deverá ser utilizada Fonte Times New Roman, tamanho 10, espaçamento simples entre linhas.

5.4. No desenvolvimento do texto, os parágrafos deverão conter recuo de 1,5 cm em relação à margem esquerda. Títulos e subtítulos deverão estar alinhados à margem esquerda, sem recuo.

5.5. A estruturação deverá observar a seguinte ordem:

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5.5.3. Título em inglês, com apenas a primeira letra da sentença em maiúscula, em negrito e em itálico, centralizado. No caso de artigos redigidos em inglês, este elemento deverá ser substituído pelo título em português.

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vinculado como docente ou discente, ou, caso não seja docente ou discente, a instituição onde foi obtido o seu maior título acadêmico, como doutorado, mestrado, especialização, etc.). O nome da instituição deverá constar por extenso e na língua original da instituição (ou em inglês quando a escrita não for latina), seguida da indicação do país de origem da instituição entre parênteses. Caso o autor seja docente e esteja cursando mestrado ou doutorado em outra instituição, a filiação principal será a da instituição na qual o autor figura como mestrando ou doutorando.

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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.

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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.

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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...).

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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.

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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.

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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 editoriais.

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.