

The 1988 Brazilian Constitution and the political regimes: an outline of intellectual history (1972-2019)

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Introduction

The current Brazilian Constitution turned 30 years old in October 2018. However, the anniversary went almost unnoticed outside the legal circles. The feeling that the New Republic, regime founded in 1985 which it helped to structure, ended after a five-year agony (since 2013), was like a cold-water bath on the Balzacian's anniversary. The New Republic had been ideologically anchored in certain progressive consensuses, due to the leading roles played by two parties – the 'toucan' Brazilian Social Democracy Party (Partido da Social Democracia Brasileira [PSDB]), center-right, and the 'red' Workers' Party (PT), center-left –, both of them grounded in a coalition presidentialism in which each party willing to support the administration got a portion of the public machine in the Brazilian Ministries Esplanade. All this is about to vanish, or some people intend it to disappear. What Brazil is facing today

consists in the resurgence of a conservative coalition, against which the New Republic, at first, was built up, joined by military party statist; culturalists belonging to churches of Christian denominations; and neoliberal economists. So, given the above, throughout the year, what was asked in the political and legal circles was whether the Constitution would survive. After all, throughout Brazilian history, regime changes have only happened in scenarios of acute political crisis, marked by a sense of accumulated wear and tear of the constitutional machine. And, in fact, the Constitution's credibility has been harshly attacked in recent years, since it is not possible to distinguish the political regime from the legal text that serves as a roadmap for its organization, signaling the mode of relationship between the three powers of the Republic, the federalism model, the presidential government system, etc. Another symptom of the novelty of the present day is the mobilization of constitutional institutes of exception,

which seemed to exist in the Constitution as a mere remnant of its predecessors and had never been invoked before. Casting out the repeated impeachment process 25 years after the first one, when the regime was not consolidated, yet, in February 2018 a federal intervention was decreed for the first time since 1966, which in turn forced the convening of the Republic Council, never assembled before to deliberate. With all this in view, if regime change proves to be a reality, as it seems, then it is the case of asking: will our Constitution die or live?

If, on the one hand, everything seems to lead us to believe, due to the historical background, that the Constitution will die, on the other, there are strong new elements in the sense that it can live. The main thing about these elements is that, for the first time in Brazilian history, a change of political regime is taking place without breaking the constitutional regime. This was a privilege that only advanced democracy countries seemed to enjoy, such as England, the United States of America (USA), and more recently, France and Italy. The last time a conservative coalition like the current one, consecrated by the 2018 electoral tsunami, took power was via military coup d'état. And in 1964 there was no democratic regime, yet, but a democratization process, marked by impeachment attempts, resignations, and presidential suicides, occasional parliamentary and military coups. Its drive was the rapid increase of the electorate, which reached 16% of an amount that seemed increasingly inclined to the left-wing. Its background consisted of breakneck demographic and economic growths. The military regime was justified in arguing that, by establishing

a whereabouts in this situation, it would ensure that democratization – i.e. the increased electorate – would remain within boundaries 'compatible' with national security and the need for accelerated development promotion. Its leaders believed that, among other benefits, the formula would reduce the chance that a Cuban-like revolution emerged in Brazil, which is inherent to poor countries and low socioeconomic complexity. Today, the situation seems to be different. Undoubtedly, the current conservative coalition not only resembles that of 1964, but it also makes a point of accrediting itself as its successor, mobilizing a similar imaginary. Otherwise, the scenario looks different. The flag of authority is unfurled, not in the context of a military coup d'état, but of a spectacular electoral rejection by the establishment identified with the New Republic after five years of economic crisis and political instability caused by, among other factors, the 'judiciary revolution' judges and prosecutors in the name of fighting political corruption. Moreover, the current conservatives have not simply revisited the formulas proposed by Golbery, Gilberto Freyre, and Miguel Reale. They have also been able to convey a 'mass' rhetoric, adapted from Donald Trump's followers in the USA, whose trait is verbal violence, if not pure and simple vulgarity.

In other words, if the overt novelty of the conservative resumption is its compatibility to a system of democratic normality, what remains of the 1988 Constitution is still on hold. Although it is thirty years old, it has been conceived to organize a value-based regime very different from that emerging now, which seems to fade before our eyes.

The answer cannot be rehearsed, however, before grasping its role as a character in the country's recent history. Such a history is yet to be written; a history capable of describing the richness of cleavages that accompanied its birth and the political and ideological disputes that marked its existence until the violent crisis of legitimacy that it experienced five years ago. This article brings a feasible starting point. It analyses three moments of the political constitutional imaginary from a methodological perspective close to Pierre Rosanvalon's and John Pocock's works¹. The first moment concerns the issue of the nature and boundaries of constituent power and, consequently, of the model of Constituent Assembly that would be in charge of bringing the authoritarian cycle (1977-1994) to an end. The second refers to the legal and political debates that took place after the political regime found its routine, which concerned its governance model, i.e. how the political powers – Executive, Legislative, and Judiciary – should relate to each other (1994-2013). Finally, this study dares to provide an explanation for the current constitutional crisis (2013-2018), starting from the clashing thesis of the two models through which the Constitution had been interpreted and which until then had been complementing each other: that of coalition presidentialism, interpreted by a hegemonic version of institutionalism, and that of judicialization of politics, interpreted by a certain version of neoconstitutionalism.

1. *The intellectual origins of the Constitution and the disputes between progressivists and conservatives during its preparation (1977-1994)*

From its inception, the military regime has been accompanied by ambivalence. Its leaders justified it through the need to keep pursuing the ideology of reforms and development, circumscribing democracy to the boundaries dictated by the ideology of national security. In other words, the regime could not or did not want to be overtly authoritarian, so it maintained a Legislative Power, albeit emasculated; allowed the existence of an opposition party, albeit restricted; drafted a new Constitution and always sought legal arguments for its acts of force. The contradictions resulting from the regime's hybrid nature were used by the democratic opposition since the 1974 elections. The very success of the autocratic development model has shed some light on the mismatch between the restricted institutions created by the regime and the aspirations of an increasingly complex civil society. Realizing the gradual loss of legitimacy and the impossibility of sustaining long-term restrictions on freedom, the regime admitted the need for gradual political openness². In turn, the opposition sought the society's support for resuming the rule of law, through political amnesty, direct presidential elections, and a new Constitution.

The dispute over the Constituent Assembly model exposed various views on the very meaning of redemocratization, which opposed those who wanted to change the regime of constitutionality by reform to those who wanted a break. The lawyers related to the regime themselves,

like Miguel Reale and Manoel Gonçalves Ferreira Filho, recognized the need to fit it into some acceptable institutional framework, in the form of a "Brazilian-style democracy" or a "feasible democracy"³. But the initiative should come from the military administration and it was subject to a comprehensive amendment to the Constitution. The idea of a Constituent Assembly was summarily rejected as a demonstration of the utopian idealism of a liberalism that had never recognized the nature of national culture and its development priorities in that order⁴. The regime's attempt to neutralize the electoral victory of the Brazilian Democratic Movement (Movimento Democrático Brasileiro [MDB]) by means of the 1977 'April Plan' (Pacote de Abril) made the call for the Constituent Assembly an opposition's priority. It was around this time that the lawyer and historian Raymundo Faoro (2003), president of the Brazilian Bar Association (Ordem dos Advogados do Brasil [OAB]), published a famous text – "Assembleia Constituinte: a legitimidade recuperada" (Constituent Assembly: legitimacy recovered) – in which he fought the conservative proposal to reform the OAB by amending the Constitution. Faoro saw that only a sovereign Constituent Assembly could break with a national past marked since colonization by negativity, obedient to the authoritarian and patrimonialist Iberian tradition. Only the leading role played by popular sovereignty could prevent this ominous heritage from being perpetuated through conciliatory transformations⁵.

Progressive sectors were on a front that ranged from radicals, in the nuclei around the PT, the Democratic Labour Party (Partido

Democrático Trabalhista [PDT]), and a part of the progressive sector of the Brazilian Democratic Movement Party (Partido do Movimento Democrático Brasileiro [PMDB]), to moderates advocating a covenant transition, like most of the old MDB. However, most of the alliance was inclined to an intermediate solution. A former leader of the Social Democratic Party (Partido Social Democrático [PSD]), Tancredo Neves stated that:

We do not see, in Brazil, how to make a dramatic change in the existing order, at once, to revolutionarily impose the new order. Lucid, energetic, clairvoyant reformism seems to us to be the ideal method for achieving the goals of a pluralistic society⁶.

Afonso Arinos de Melo Franco, former leader of the National Democratic Union (União Democrática Nacional [UDN]), held the same position, and his moderate constitutionalism opposed Faoro's radicalism. As soon as it began to work, the commission in charge of preparing the draft project, chaired by Arinos, received criticism for the alleged conservatism of its members. However, as the draft project was outlined, the radicals put criticism aside: it was, in the words of the group's main constitutionalist, José Afonso da Silva, a "serious and progressive study"⁷. In its turn, the right-wing accused the commission, as Ney Prado did:

The text of our draft project, in its scope, reveals its casuistic, prejudiced, utopian, socializing, xenophobic, and, in many cases, dangerously demagogic face⁸.

In *The Notables' Draft Project* (O Anteprojeto dos Notáveis), Ferreira Filho ended up, shortly after, fulminating the draft project due to its programmatic

nature, its excessive detail, its verbalism, its demagogy, its 'well-doing,' its impossible promises, its lack of originality, its xenophobia, its poor writing, etc.⁹ Ney Prado and Manuel Gonçalves Ferreira Filho resume a long-term conservative discourse¹⁰, present in authors such as Alberto Torres and Oliveira Viana, which criticizes abstract institutional forms and the belief in the law's ability to change social reality.

The fear of a conservative Constitution has not been confirmed. Several factors contributed to this end, such as the civic mobilization by the so-called 'Direct Elections Now' (Diretas Já); the influence of postwar European democratic constitutionalism; the mobilization of society in search of rights and guarantees; and the very low popularity of the Sarney administration. The progressive atmosphere of the time depicted the national past in a negative key and intended to refound the Republic from scratch. The final text turned out to be similar to the draft project by the so-called 'Arinos Commission' (Comissão Arinos), which had José Afonso da Silva as the main contributor. The adoption of programmatic clothes for the 'governing Constitution,' marked by an analytical outline, ensured a break with the standards of the previous order. Not only the main issues of the political game were constitutionalized, but also the very public policies that should be adopted by the administrations subject to it. The 'progressive' dimension of the Constitution was recognized by the defeated conservatives themselves. A symptom of this perception was the collective work organized by Paulo Mercadante (1990), whose subtitle showed the dimension of

criticism: 'The advance and regression' (O avanço do retrocesso). The collection book put into question the alleged anachronism of the new Constitution, which enshrined a socializing program known to be outdated due to historical events. Among the authors providing criticism there were José Guilherme Merquior, Miguel Reale, Antonio Paim, Vicente Barreto, and Ubiratan Borges de Macedo. The libertarian keynote emerged in full strength in the article written by Roberto Campos¹¹:

The 1988 Constitution virtually excludes us from the dynamic currents of the world economy. It generates an atmosphere better suited to past notarial-mercantilist societies than to present day societies, characterized by market integration and technological interdependence. In a dynamic society, the Constitution must be confined to the standards of State organization and operation and the fundamental rights of the citizen. Social achievements are not attained by mere insertion in the constitutional text. They depend on the productivity of society, the budget priorities, the creativity of individuals, the circumstances of companies¹².

But the Constitution went through its early years under the sign of disillusionment. The fall of the Berlin Wall contributed to it, as well as the demise of the Soviet Union, the crisis of welfare States, and the prestige of neoliberalism in England and in the USA, the initial refusal of the Judiciary Power to play its new constitutional roles, the failure of the Sarney and Collor administrations in fighting economic crisis and inflation. Conservatives bet so much on the 1993 constitutional review that constitutionalists like Paulo Bonavides and Marcelo Cerqueira publicly warned of the risks of regression embedded in it¹³. The truth is that this review was very poor, having rewritten the Magna Carta in secondary points. More

attention deserved the campaign around the referendum on the government regime and the system, which opposed the PSDB, advocating parliamentarism, to the PT and PDT, advocating the preservation of presidentialism. In the academic world, the discussion had as leading characters Bolívar Lamounier and Wanderley Guilherme dos Santos. Bolívar argued that Brazilian democracy was based on an exhausted tripod: corporatism; consociationalism; and plebiscitarian presidency. Parliamentarism might coexist better “with the existing plurality, fragmentation, multi-partyism [...] It will have more flexibility, more malleability to adjust to the pluriform and fragmented reality of Brazilian politics”¹⁴. Wanderley, on the other hand, argued that there were no guarantees that parliamentary “institutional enchantment” might work in the light of national history and political culture, accusing Parliamentarians of incurring institutional reification¹⁵. Regarding the government regime (monarchy or republic), the atmosphere of the time was still so progressive that the defenders of the monarchy themselves, such as Mario Henrique Simonsen¹⁶, did not resort to tradition, but to their ‘modernity’ in terms of liberal democracy. They cited as an example the successful monarchical restoration promoted in Spain, then ruled by a socialist prime minister¹⁷. Although the 1993 plebiscite was won by the presidentialists, the following year’s presidential elections led to the Planalto Palace (Palácio do Planalto), in the wake of the successful Real Plan (Plano Real), a Parliamentarian and exponent of progressive liberalism, Fernando Henrique Cardoso (FHC). He

not only adhered to presidentialism, but also approved the reelection amendment, going on with the opening of the economy to liberalism, grounded in a parliamentary base exemplarily anchored in the *coalition presidentialism* that he has planned.

2. *The political partisan routine of the constitutional regime and the debates around coalition presidentialism and neoconstitutionalism (1994-2013)*

The opposition between the PSDB and the PT throughout the plebiscite was the prelude to the animosity that polarized Brazilian politics for the next two decades. During the decay of the military regime, the two groups had differently pointed out the break with the supposedly statist and authoritarian tradition of Brazil, according to Raymundo Faoro’s diagnosis (including workers’ ‘populism’). As such, toucans and PT members bet on an agenda criticizing the historical role of the State in Brazilian society. In its nest, the PSDB accused the PMDB of preferring to “adhere to authoritarian State structures rather than reforming them,” agreeing with “bureaucratic inefficiency, unfair public employment practices, patronage, and corruption”¹⁸. By characterizing statism as authoritarianism, the toucan leaders believed that the advent of Brazilian modernity passed through the market society. Mário Covas, a historical leader against military dictatorship and future governor of São Paulo, claimed it in June 1989:

That is enough of so much aid, so many incentives, so many privileges without justification or proven usefulness. That is enough of unfair public employment. That is enough of notary's offices. That is enough of so much protection for mature economic operations. But Brazil does not need just a fiscal shock. It also needs a shock of capitalism¹⁹.

By bringing the long inflationary crisis to an end, the success of the Real Plan gave the party – FHC – a candidate with actual chances of taking power. In his farewell address to the Federal Senate, FHC set out his main purpose: bringing the 'legacy of the Vargas Era' to an end:

I firmly believe that authoritarianism is a turning page in the history of Brazil. There remains, however, a piece of our political past that still obstructs the present day and slows the advance of society. I refer to the legacy of the Vargas Era – its model of autarchic development and its interventionist State.

From the constitutional viewpoint, the Getulist legacy found expression precisely in certain expressions of the Magna Carta. The choice for State control in certain sectors of the economy and essential services, as well as the leading role played by the State to drive the economic policy, expressed a country's view that, first addressed by the 1934 Constitution, stood relatively untouched by all successors. On the other hand, FHC's political thinking echoed both Faoro's radical liberal formulations, which identified the evils that plague the national history of a patrimonialist State inherited from colonization, as well as his own reflections, written during his time as a political sociologist in São Paulo. His time in office exposed the Constitution to extensive surgery, designed to strip it as far as possible of the Getulist clothes. However,

FHC kept distance from the neoliberal arguments proposed by Hayek or Mises, who had few supporters in the country. He preferred to join the 'third way' movements that excited a considerable part of the international social democracy, seeing in the reduced interventionism a way to fight the stagnation faced by the welfare States. But the company of the Liberal Front Party (Partido da Frente Liberal [PFL]), and the growing adherence of the PSDB's right wing to postulates of monetarist economists eventually messed around with the 'third way' social liberalism through neoliberalism.

The PSDB's tendency to become a rather archetypal liberal party was supplemented by the growing polarization with the PT. The latter had emerged in the 1970s under the sign of a break with the past and building its identity through the same critiques of national statism and its trade union tradition, rejected as "flatterer"²⁰. The main symbol of this attitude had been Lula's famous statement that the Consolidation of Labor Laws (Consolidação das Leis do Trabalho [CLT]) might be the 'workers' Institutional Act Number Five (Ato Institucional Número Cinco [AI-5]).' Condemning the nationalist left-wing traditions, linked to laborism and communism, was a constant factor. Hegemony should come from society and not from the State, regarded as an autonomous and hypertrophied sphere hovering over the national reality, as agreed by progressive intellectuals like Florestan Fernandes, Raymundo Faoro, Francisco Weffort, and Dalmo de Abreu Dallari. Disagreeing with the final text of the Constitution, which seemed too shy to it, the PT claimed in its early years that

this is a bourgeois Magna Carta, hence the party refused to sign it²¹. As a result, the PT refrained from undersigning the new text. But the polarization with the PSDB, coupled with the party's domination by the more pragmatic currents, changed the old PT's way of looking at things. The PT members began to advocate the original text of the Constitution, regarded as 'progressive,' against the reformist impetus of the PSDB, attacked as 'neoliberal.'

Therefore, it was during the FHC administration, marked by polarization with the PT and supported by coalition presidentialism – i.e. the sharing of ministries and positions in the federal administration as a means of obtaining parliamentary majorities –, that the 1988 regime found its routine. Within this period, marked by stabilization and advances in the social agenda, the constitutional debate was dominated by discussing how political powers should relate to each other and by the challenges to the consolidation of a democratic culture. Despite the differences between the respective fields, both the neo-institutionalist political science and the neoconstitutionalist legal science looked at the constitutional text with the same spirit of providing it with effectiveness. Political science has debated the positive or negative nature of the arrangement established between the Executive and Legislative powers by coalition presidentialism. On the other hand, the legal science tried to absorb the theory of neoconstitutionalism, seen as a philosophy and hermeneutics of the Constitution, responsible for guiding the process of judicialization of politics that results from the institutional design of the Magna Carta, which had assigned a

central role to the Judiciary and the Public Prosecution Service.

In Brazilian Political Science, neoinstitutionalism emerged more strongly in the 1990s, when the studies on the transition from authoritarian to liberal regimes lost their dominant position. At least two major perspectives emerged in the wake of the 1993 plebiscite debate. Some analysis of the constitutional political system depicted it as marked by the same vices that had led to the collapse of the 1946 Republic. Brazilianists like Scott Mainwaring and Barry Ames saw the combination of presidentialism, proportional voting, open list, and federalism as an explosive formula, prone to producing an unstable and personalistic order. Encouraging the fragmentation of ideologically empty and parochial parties could prevent governance. This critical interpretation of the constituent power's institutional choices was put into question by political scientists like Argelina Figueiredo and Fernando Limongi, who argued that the National Congress's rules of procedure, the Presidency's power of agenda, and the prerogatives of party leaders might guarantee governability. The parliamentary majorities indispensable for stability might stem from the "degree of collaboration of the Congress and its willingness to cooperate in approving the government's agenda" and proper management of "presidential legislative powers"²². Thus, the scenario was different from the 1946's, when the constituent power had chosen a weak Executive Power. Otherwise, the Executive Power created in 1988 had 'a power of agenda' over the Congress, thanks to the considerable increase in its legislative possibilities



Popular participation to the Constituent process, 1988

inherited from the military regime. In times of strong attacks on the Constitution, the neoinstitutionalist perspective favored the bet on the Magna Carta as a document capable of overcoming the obstacles in society.

In the field of law, with a view to legitimizing the growing role of the Judiciary Power, new post-positivist constitutional doctrines gained prominence. Progressive lawyers opposed the military regime by criticizing legal positivism through Marxism and the apology of allegedly spontaneous forms of social regulation. However, this critique was not able to provide an alternative way in face of positivism. The actual path has been created throughout the 1980s by lawyers like Paulo Bonavides and José Afonso da Silva, who revitalized constitutional law by resorting to the new constitutionalism developed in Europe after World War II²³. Extracted from the Italian, Portuguese, and Spanish experiences, the

new doctrine, which had Canotilho's work as the central reference, recommended 'driving' constitutions able to oblige rulers and legislators to comply with progressive guidelines. At the same time, they followed hermeneutics that recognized the relatively undetermined nature of the standard and assigned the judge a prominent role in the effectiveness of constitutional rules and principles. Throughout the 1990s, such a guideline underwent the impact of the collapse of real socialism and the reception of German neoconstitutionalism, through authors like Konrad Hesse and Peter Häberle and Friedrich Müller; and, at last, the impact of U.S. theories of Justice formulated by liberals like Ronald Dworkin and John Rawls.

The new 'neoconstitutionalist' setting found its archetypal expression in the work by lawyer Luís Roberto Barroso, from the State of Rio de Janeiro. Against what he believed to be a story of

permanent constitutional ineffectiveness, marked by false promises of liberalism made by insincere elites, Barroso bet on a project for revitalizing the subject through constitutional jurisdiction²⁴. The *Constitution's effectiveness doctrine* started addressing constitutional principles such as rules and, because of their relatively vague utterances, would authorize the judge to interpret them with broad discretion in certain cases, in order to put them into practice in accordance with ethical and community-based political values. The advent of the 1988 order is seen as a turning point: since then, constitutional law has been taken seriously, and lawyers are now concerned about the effectiveness of its precepts. However, the doctrine is not built as an unrestricted praise for the 1988 Constitution. Starting from anti-liberalist interpretations of Brazil, proposed by authors like Raymundo Faoro, Sérgio Buarque, and Roberto da Matta, Barroso, identifies in patrimonialism, statism, lack of ethics, impunity for the rich, and inequality before the law the causes of the Brazilian civilizational lag²⁵. Thus, despite its democratic and right-guaranteeing nature, the Constitution would encompass provisions that hindered the building of a freer, fairer, and more egalitarian society, contrary to its own principles. In Barroso's view, it would be up to the legal community to resort to the liberal principles of U.S. progressivism to overcome a part of the Constitution's issues. Thus, he bet on the possibility of advancing by assigning to the Judiciary Power functions traditionally related to the Executive and the Legislative powers²⁶. The need to fight for the effectiveness of constitutional principles would impose a leading role to the legal

elites, able to make them prevail against ordinary laws preserving privileges, including political ones, through well-tempered activism. That was the praise for *judiciary rule*, exercised with prudence and moderation²⁷.

The bet on judicialization of politics guided by enlightened judges and triggered by prosecutors and civically mobilized lawyers as a formula for strengthening democracy was endorsed by a significant part of law sociologists at the turn of the century. Despite some relevant critic works, e.g. Rogerio Arantes²⁸ research about Brazilian Public Prosecutors, the controversial concept of judicialization of politics received a positive evaluation in Brazilian authors, left-wing parties and social movements. The strong critical approach of American and French bibliography wasn't the same in Brazil. A possible cause is the optimistic shadow over the Constitution²⁹. Based on a sovereignty to be grasped in complex terms, Luiz Werneck Vianna argued that contemporary democracy was no longer locked within narrow electoral boundaries and that the 1988 Constitution had relied on a revolutionary institutional design concerning the crucial bodies of Justice. Likewise, the centrality acquired by the Judiciary Power, in general, and by the Brazilian Supreme Court (Supremo Tribunal Federal [STF]), particularly, was hailed as positive and sound. It represented the primacy of the will of the constituent power and the organized civil society over the limitations inherent to the Legislative Power, which has undergone a weakening process worldwide. In this key, there would be a relationship of complementarity between the two types of representation, i.e. the electoral and the functional³⁰.

The coexistence between a neoinstitutionalist political science, which praised the benefits of coalition presidentialism and a neoconstitutionalist legal science, enthusiastic about judicialization and activism in the pursuit of effective human rights, has allowed a relative harmony between the three powers for fifteen years. This was a virtuous circle that fostered advances in the Brazilian agenda, above all in terms of social and minority rights.

3. *The collapse of coalition presidentialism, the judiciary rule revolution, and the return of conservatism: aspects of the current constitutional crisis (2013-2018)*

At some point, however, the plates of the scale began to unbalance. On the one hand, coalition presidentialism began to be put into question and, with it, the bulk of the political class, identified with the Brazilian National Congress (Congresso Nacional). As a result, the legitimacy of the model that underpinned the Executive-Judiciary relations began to erode. Causes include the increasingly widespread perception that the so-called 'physiologism' had become the primary trading currency to secure majorities, and that growing party fragmentation had no ideological diversity to justify it, raising suspicions about the so-called 'rent acronyms'. Legislative majorities might depend on the use of government resources to fund the election of allies, through the triangulation of contractors hired by means of fraudulent bids. Although acknowledged by all, the need for a reform capable of curbing the system's degradation failed to find

people really interested in that, either because the status of power dispersion and electoral weakening favored the building of majorities by the federal administration or because congressmen had already entered a comfort zone. Thus, during the celebrations for the 20th anniversary of the Constitution (2008), while the political rise of judges and prosecutors was hailed by literature and the public opinion, political scientist Bruno Wanderley Reis drew attention to the fact that the Legislative Power ran "the serious risk of being considered the 'ugly duckling'" of the ephemera:

I am afraid that, in recent times, the trivialization of the idea that politicians are a mass of bandits has reached a point that seriously undermines the system's authority. [...] If we become accustomed to routinizing practices that are unjustifiable to the public opinion, then the view that the *modus operandi* of the political system is vile tends to spread – and more strongly the more the system's stability depends to some extent on such practices³¹.

On the other hand, the rise of neoconstitutionalism, the judicialization of politics, and the judiciary rule began to be seen as solutions or compensations for the loss of centrality of the Legislative Power. This was what the philosopher Renato Lessa suggested when he recognized the positivity of the "preeminence of the Judiciary and Constitutional Law as dimensions in which the purposes and substantive values of Brazilian society are grounded." And he concluded: "with strongly personalized executive and political courts, 'pero' non-partisan, the life of parties and representation seems to follow the path of a supporting, if not progressive irrelevance"³².

It was a similar pro-judiciary rule diagnosis that, in the field of law, urged

Luís Roberto Barroso to stress the need to use judicial activism to fill the voids left by the Legislative Power. The latter would "go through a crisis of functionality and representativeness. In this power vacuum, as a result of the difficulty for the National Congress to secure consistent majorities and legislate, the Supreme Court has produced decisions that may be considered activist"³³. The need to put the country on the path of civilization required to emancipate the market and civil society from statism; to bring impunity for the rich and politicians to an end; to reduce racial, social, and gender inequalities; to introduce semi-presidentialism, mixed district voting; and to bring coalitions in proportional elections to an end³⁴. After taking his seat on the Supreme Court, Barroso openly advocated that the court works to tackle the deficit of legitimacy: "beyond the purely representative role, supreme courts play the role of the Enlightenment vanguard, in charge of pushing history when it is stuck. This is a dangerous skill [...] But sometimes this is an indispensable role"³⁵. The validation of believing in a widespread use of political corruption as a currency to governability by the Car Wash Operation (Operação Lava Jato) has allowed many judges and prosecutors, already accustomed to interfering with public policy, to take on the vanguard status aimed at refounding the country on the basis of republican and democratic constitutional principles, removing from circulation the regime's leaders highlighted by investigations.

The virtuous cycle of coexistence between neoinstitutionalism and neoconstitutionalism had ended. The collapse of coalition presidentialism led, ipso facto, judicial activism to bridge

this gap, giving rise to a 'judiciary rule revolution' driven by the then Prosecutor General of the Republic, Rodrigo Janot, and supported by the majority of the Supreme Court ministers, in charge of the civic duty to bring the rotten political establishment of the New Republic to an end. Indeed, the neoconstitutionalist turn was a rather general movement, just as the rise of the Judiciary Power as a corporation in charge of guaranteeing human rights and liberal democracy, which in Germany and in the USA might have an exemplary nature. However, some people forget that in Germany constitutional judges are no more than sixteen and that in the USA, although all judges have, otherwise, competence to exercise constitutional jurisdiction, the Constitution is very concise, involving just over forty commands. In Brazil, the detailed Constitution in force, which has hundreds of constitutional principles and thousands of commands, whose realization was assigned by neoconstitutionalism to 16,000 judges, virtually free of political control, has created a truly revolutionary situation. Each of them was in charge of implicit political power to, according to her/his own discretion, promote the regime's 'purification.' On the other hand, conservatism has resurfaced strongly after nearly 30 years of marginalization imposed by the progressive consensus forged in the end of the military regime. The left-wing hegemony, with the growing force of nationalist, State-based socialist orientations, and marked by redistributive and gender-based policies, since Lula's second time in office, followed by a severe economic crisis, created the conditions needed for that resurgence. The new radical right-wing shows to be adapted to

the context of a mass society. It is scholarly from the scholars' viewpoint and humble from the mass's, reaching an audience that previous conservative generations have never dreamed of reaching.

Every action has a reaction, and every revolution, a counterrevolution. As the Judiciary Power was used to overthrow Dilma Rousseff and to try overthrowing Michel Temer, criticism of judicial activism began to emerge on the right- and the left-wing. The political class persecution by judiciary rule has given rise to an anti-judiciary rule reaction. The Senate and the House of Representatives started disregarding the STF's decisions concerning their members accused of corruption, on the grounds that such sentences were unconstitutional. The evangelical row of seats began to intimidate the STF with bills designed to submit to Congressional referendum its 'Enlightenment' decisions regarding customs, such as abortion or gay marriage, or those providing churches with procedural legitimacy to challenge its sentences on a court basis. In the STF itself, encouraged by Temer, Minister Gilmar Mendes began to rhetorically resort to the guaranteeing doctrine in order to condemn the Public Prosecution Service and reverse arrest orders against businessmen and politicians. From the left-wing viewpoint, established since the 2016 presidential impeachment, ministers sympathetic to this political position, like Ricardo Lewandowski and Dias Toffoli, began to get closer to Mendes. In moments such as the 2017 Temer/Dilma candidacy trial at the Superior Electoral Court (Tribunal Superior Eleitoral [TSE]), situationism began to resort to State-based arguments with a view to maintaining the status quo, prioritizing

political and economic stability and advocating the STF's retreat in decisions taken to fight impunity, like restricting the privileged jurisdiction and the automatic execution of criminal sentences after the second instance court. Finally, conservative lawyers began publishing articles where, resuming arguments from the oligarchic establishment of the Old Republic (1889-1930), they simply denied the Constitutional Court supremacy in the name of independent Executive and Legislative powers, which might be free to comply or not comply with decisions made by the Judiciary Power³⁶. Also on the left-wing, political scientists have strongly criticized judiciary rule from a viewpoint that affects the democratic legitimacy of counter-majority institutions:

The *accountability* turn in Brazilian democracy has favored the emergence of institutional innovations in the judicial system, providing a kind of legal praetorianism. The latter, in turn, has led to a scenario of criminalization of political activity that endangers Brazilian democracy³⁷.

In short, the advance of liberal judiciary rule as a means of fighting corruption, which causes casualties in the political establishment, has generated a reaction from the right- and left-wing sectors affected. Undergoing unprecedented stress, now the 1988 Constitution has its legitimacy put into question. Liberal economists, like Samuel Pessoa reiterated that the current Constitution would not be compatible with modern economic standards. Marcos Lisboa and Gustavo Franco updated the criticism by liberals like Roberto Campos. The discourse spread through the conservative camp, which is stronger nowadays. An editorial published

by the newspaper *O Estado de S. Paulo*, on the suggestive date of March 31, 2017, stated:

The 1988 Constitution has already fulfilled its functions, and the main one was supporting the consolidation of the democratic process that was beginning. After this stage is over, it is time to think and design a new Constitution, realistic and functional, the result of a mature society, which realized that clear rights put down on paper are nothing if such rights cannot be put into practice. The challenge now is formulating a proper legal framework for the present times³⁸.

Shortly thereafter, in a “Manifesto to the Nation” (Manifesto à Nação), published by lawyers Modesto Carvalhosa, Flávio Bierrenbach, and José Carlos Dias, on April 9, 2017, the need for a new Constitution was claimed, written by a Constituent Assembly independent of the existing political parties. According to its authors,

[...] continued scandals prove the unfeasibility of the current political constitutional system. It represents an obsolete, oligarchic, interventionist, notarial, corporatist, and anti-isonomic model, which grants super wages, privileged jurisdiction, and many other benefits to a small group of public and political players, while the rest of the population has no means to overcome the State inefficiency and exercise their most basic rights³⁹.

The measure gained an academic outlook through the following endorsement by the well-known liberal political sociologist Simon Schwartzman:

Constitutions do not change all the time. This happens when there are major political and institutional breakdowns after a war or revolution, and the new constitutions always reflect, in some way, the prevailing values and currents of ideas. We are not going through any war or revolution, but an earthquake deep enough to justify that the proposal is discussed in depth, as it deserves⁴⁰.

In 2018, as the new conservative coalition headed by candidate Jair Bolsonaro was gaining momentum, wishes for a new Constitution reappeared. His deputy candidate, General Mourão, suggested, just as Miguel Reale e Manoel Gonçalves Ferreira Filho did in the early 1970s, a new constitutional text to be prepared only by ‘notables.’ But signs also began to appear that conservatives could get along with the Constitution. In an article published by the newspaper *Folha de S. Paulo*, on September 18, 2018, the coalition’s main lawyer, Ives Gandra Martins⁴¹, offered an anti-judiciary rule interpretation of the Constitution of a positivist inclination and wishing to bring constitutional hermeneutics back to the point where it was around 1995, before the advent of neoconstitutionalism and judiciary rule that spread under Gilmar Mendes, Joaquim Barbosa, and Luís Roberto Barroso. His criticism was straightforward:

Unfortunately, notwithstanding the unquestionable quality of the ministers in the Supreme Court, they have invaded the competences of the Legislative and Executive powers, legislating and making administrative decisions, without any reaction from their holders, who are accused of crimes through complaints and investigations⁴².

Given the tripartite principle of equal and equivalent powers in force, the Judiciary Power should be limited to the role of negative legislator, it cannot innovate in issues of legislative competence. As the National Congress has failed to draft laws to provide the Constitution with effect, the STF should resume the practice of simply notifying the Legislative Power about its omission rather than legislating in its behalf. Given the judicial activism of the STF’s ministers, the National Congress

might be authorized not to comply with its decisions. Finally, Ives Gandra removes from the Supreme Court its alleged position of moderating power of the Republic to give it back to the Armed Forces and goes further, by stating that the Constitution needs reforms, such as the adoption of the mixed district voting, parliamentarism, and a general downsizing of its clauses through 'liposuction'⁴³. The exposure of the leading conservative lawyer goes towards preserving the Constitution, reforming it in some of its central points, and reinterpreting the role of the Judiciary Power in order to oblige it to self-containment. The end of the 'judiciary rule revolution,' faced with the conservative manifestation of the ballot boxes, was confirmed by the new president of the STF, minister Dias Toffoli:

It is time for the Judiciary Power to go away. Politics must lead again the country's development process and the prospects for action⁴⁴.

Conclusion

There is no doubt about the central place played by the Constitution in the scenario after its making. Among critics and apostles, the issue involved the dispute over interpretation and, above all, the supposedly necessary changes that the circumstance imposed on the constitutional text. The more recent context has given other clothes to this clash, but it keeps taking place in a strongly 'constitutionalized' politics, where the main political struggles flow into the ground built by the Magna Carta. As some news, an even greater leading

role was taken by the Judiciary Power and the growing empowerment of authors who do not seek to reform but replace the current Constitution. On the one hand, the Constitution had never been claimed so much as a legitimizing instrument by those who use it – like some judges and prosecutors – as the basis of their respective political actions. On the other hand, not even in the moments of strong attack by the Presidency, during the Sarney administration, or during the reformist wave of the 1990s, in the Collor and FHC administrations, so many emphatic voices were raised to advocate the text's decrepitude. The joint attack on judiciary rule, from the left- and right-wing sectors, both identified with the establishment attacked by it, although they may avoid excesses, can also result in damage to the progressive cause, ultimately contributing to the end of the current constitutional order. The reconstruction of disputes over the meaning of the Constitution, its procedures, and its relations to the past, demonstrates its plural nature, as the result of marked and natural clashes in a long and intricate democratic transition process. Resuming the discussions in the political and academic world, we also shed some light on aspects of the constitutional text and reality, pointing out ways in which the Constitution may be interpreted in hard times such as the current ones.

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- ⁸ F. Ferreira, G. Manoel, *O Anteprojeto dos Notáveis*, São Paulo, Saraiva, 1987, p. 3 (our translation).
- ⁹ *Ibidem*, pp. 100-105 (our translation).
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- ¹⁶ Minister of Economy and Planning during Military Dictatorship, Mario Henrique Simonsen was well-known by his strong top-down modernizing ideas in the economic field.
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- ²⁷ L.R. Barroso, *Constituição, democracia e supremacia judicial: direito e política no Brasil contemporâneo*, in «Revista da Faculdade de Direito da Universidade do Estado do Rio de Janeiro», n. 21, 2012, p. 11.
- ²⁸ R.B. Arantes, *Ministério Público e política no Brasil*, São Paulo, Fapesp, 2002.
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