

Constituent power and constitution-making process in Brazil: concepts, themes, problems

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Introduction

Studies on constitutional law have often elected constituent dynamics¹ as a privileged object of analysis. However, current political dilemmas stimulate this interest in a new way. The recurrence of the state of “crisis” seems to afflict the expansive trajectory of the constitutional State² and, with it, of the democratic regimes. In such a context, if we wish to avoid a retrotopic view³, the questions that we can address to history can no longer be about the performative potential of ideas, concepts and devices, or rather, they can no longer be used to narrate a history of the emergence of ideas, or even merely to propose a genealogy of such ideas.

This approach to the heuristics of history has certainly offered a solid basis for several historiographic and theoretical itineraries in the past few decades. If it is true – as Flavio Lopez de Oñate had already highlighted – that the study of

the crisis serves to “put the action into the future” (“*infuturazione dell’azione*”)⁴, after the collapse of dictatorships and the Second World War, it was a matter of focusing on constituent processes and on the democratic perspective, as a way of definitively overcoming the inadequacies of the regime of the rule of law experienced in the liberal age. The idea of writing a history of the emergence (and performativity) of ideas, concepts and devices, one centered around the novelty of the democratic constitution (think of concepts such as fundamental rights, human rights, social rights, constituent power, citizenship, equality, political party, etc.) was related to the new constitutional framework and to an attempt to obtain a critical point of view of reality and contribute to opening up new horizons for law.

Today, however, the problem of “putting” the crisis into the future concerns precisely those new frameworks of constitutional States that have marked history since the end of the Second World

War (in Europe) and after the end of the last period of dictatorships (in South America). In order to maintain a critical viewpoint – and to maintain the problems that the constitutional State has managed to take care of at the center – it would seem convenient to try a different approach and to update the questions that we can address to history.

Instead of performativity, those questions should look at the original limits of the ideas of concepts and devices, they should clarify their bonds of theoretical sustainability (or even, we could say, their functional assumptions)⁵, after which those ideas, those concepts, those devices, cease to fulfil, guarantee, their expected functions. In this way, history would be able to highlight these constitutive limits and thus, with this, to contribute to an understanding of the perspectives of meanings within our conceptual arsenal, in order to face the current problems.

How would it be possible to write a constitutional history, one able to offer a reconstructive outlook of this kind? This article starts from this fundamental problem. Our aim is to point out some paths and potential for investigations. It is an initial presentation of ideas, which means that the following reflections will be rethought, re-read, in the light of the development of tangible research and of critical observations. We intend to indicate traces to be followed up by researchers in the field in general. At the end of the article, we will point out some elements that could be examined in greater depth in specific investigations of Brazilian constitutional history. We will start, however, by exploring the possibility of an approach to the study of the constitution-making process that

takes into account the positioning that we are suggesting.

For a phenomenology of the constitution-making process: a tentative assessment

Constitutions have various functions and are used in different ways by political and social actors. We could say, however, that they represent an important instrument of separation – and subsequent connection – between law and politics. On the one hand, they condense the fundamental political options of a given community in a single document. On the other, they assume the role of the supreme norm of the legal system.

Precisely because of these characteristics, constitutions are not produced routinely or even periodically. They have a certain uniqueness, which also manifests itself in the political and social processes that will have marked their elaboration. Some authors, such as Bruce Ackerman⁶, speak of “constitutional moments”. Although the expression “moment”, as we will explain, may not be entirely appropriate for our problem – since political processes have several temporalities, phases and, also, “moments” – what should be highlighted here is the *singularity of the process itself*.

We seek to emphasize that the process of drafting a constitutional text involves the expansion of any available options, if we compare it with ordinary legislative activity. A constituent assembly – a political body that may have very different origins and composition – is not limited by procedures established in the constitutional order that it is intended to overcome; above all, that same political situation which gave rise

to the convocation and the functioning of the assembly allows the political actors, in charge of writing the new constitutional text, to have greater freedom in structuring the connection between law and politics. In some cases, this *unique political situation* may even be an instrument of pressure for constitutional innovation. Political processes involving regime changes are particularly significant – such as the constituent process that took place in South Africa after *apartheid*, or the drafting of the new Constitution in Brazil after the end of military rule.

Another aspect that must be considered concerns the *temporal dimension*. By definition, law is a system that continuously articulates past, present and future. As a textual phenomenon, modern law thrives in a context of interpretation. Doctrinal reflections on legal rules and the collections of precedents (in similar cases or not) make up a powerful backdrop to which the interpreter seeks to refer. But, as is well known, interpreting norms is not an operation that focuses essentially on the past. Legal norms are used in processes that involve conflicts, dilemmas and demands. And these processes always give rise to decisions taken in the present, for situations that *presentify themselves*. There is also a forward-looking element in this context of interpretation: decision-making bodies (judges, administrative authorities, private entities) are aware of the historicity of decisions, aware of the fact that a certain change in the orientation of the institution that decides may denote a given direction for the future. The selection of cases that will be decided by a Supreme Court or a Constitutional Court in a given year, is part of a certain “agenda” within the institution

itself. By this, we mean that the law is *intrinsically marked by time*.

The impact of time on the constituent process is also evident from a different point of view. In fact, law can imply time also as a device for its own attributions of meaning. Seen from this angle, time is internal to the legal dimension. It acts as a factor that tends to determine the law and the dynamics of its development, placing the legal problem in a context of other problems that characterize that temporality.

It is a question of ascriptive time, i.e. time that *affects the content that the law assumes*⁷. It expresses attributive force, represents a special temporal condition, thus affecting the *law's regime* either of *permanence* or of *impermanence*.

As for the first type, let us think of custom, abrogation and constituent power; these are all legal configurations at the heart of constituent processes; they make time an element of their own content and use it to attribute foundation and stability (therefore, permanence) to the norms. As for the second type (the time that ties the law to a condition of impermanence) we think of temporal configurations such as *transition, crisis or emergency*. Insofar as they indicate and determine a temporary state of law, they act as factors that bring legitimacy to it. Both of these forms of attributive time are relevant for our problem.

Later on, we will return to this specific point. Here, however, we would like to highlight that the comprehension of attributive time differs from that of the *constitutional moment*. This latter tends to concentrate on the special importance of a historical moment (that comes into the light as a particular temporal condition) in

relation to the progress and the outcomes of the constituent process; on the other hand, *ascriptive time*, draws attention to the complex matrix from which the constitution-making process has taken shape.

Alongside *presentification* and *attributivity*, there is a third aspect in which the temporal dimension highlights its relevance in the making of the Constitution: the *discontinuity*. This can be found in the development of the work of a *political body* that claims to embody the original *constituent power*. Constituent processes are often related to demands for transformation. In many types of transformations, not only in the classic examples of revolution, such as those in the United States of America and France, one can speak of movements for the restoration of a regime⁸ or, even of the negotiated transition between actors of a closing political regime and the future members of a new political panorama in a given community⁹. There are also acts committed by authoritarian regimes, which seek and seize any opportunity to imbue their domination with the appearance of legality (which may include the element of constitutionality)¹⁰. Under all these circumstances – very different from one another and usually found coordinated, in some manner or another, in various episodes of history – there is one element all have in common: *discontinuity in relation to the immediate past*. Whether to establish a new order from a clear rupture with the past regime, or to proceed with a restoration (which is nothing less than the recovery of a distant past regarding to a near past), or to negotiate the terms of an agreement (which will involve a dispute over the past, that is, over what will remain in the “present of things future” of that past¹¹),

or even to impose an authoritarian regime, in all cases there will be choices, decisions, the affirmation of a new order.

Alongside the importance of the temporal factor, another element that characterizes the *mise en forme* of the constitution must also be considered: the resilience of old frameworks and resistance to the constitution-making process itself. Here, we are referring to a complexity that is barely perceptible if we restrict our attention to the strictly constituent moment, but that is decisive from the point of view of historical analysis.

Despite its centrality – which must be considered even after the “normalization” of the constituent activity, when the new text comes into force – the process of preparing a constitution is no more than an important part of the material available for investigation. The “other side of the coin” must be taken into consideration, namely, the *de-constituent pressures* that may arise during the period in which a constitutional text is in force¹². The combination of political agendas at the domestic and international levels may mean, at times, a *slowdown* in the implementation of a new constitution; this may occur through reforms required by partners at the international level, by situations of “white intervention” by supranational organizations or even stem from the transformation of the global economic panorama¹³.

Another observation seems necessary: constituent power can arise *gradually*, in a *non-planned way*, or even during the regular activity of a political or legislative body that did not originally have a mandate to draft a constitutional text. The two classic examples derive from the first two manifestations of original



Artists protesting against the military dictatorship, February 1968

constituent power. In the United States after Independence just as in Revolutionary France, two entities that had already been previously foreseen are convened and began to function. Throughout the process, political transformations took place and these same political bodies declared themselves constituent assemblies. The Philadelphia Convention was convened, as we know, to amend the Articles of Confederation, a constitutional document that had been in force in the United States since 1777. In France, the General States were called by the monarch in a context of political and economic crisis, without, initially any intention of drafting

a constitution. It was a typical organ of the *Ancien Régime*, with stratification inherent to its own configuration. As is well known, the Third State, when declaring itself autonomous, decided to become a constituent assembly¹⁴.

It is essential to emphasize that there is *no constitution created ex nihilo*. Even a hypothetical "original constitution" cannot avoid being inserted in time. The authors of the first modern constitutions – in the United States in 1787 and in France in 1791¹⁵ – had to deal with two constellations of past experiences. The first was composed of several legal and political documents that already existed when the texts were

drafted: in the case of the United States, the Declaration of Independence, the Articles of Confederation and the various state constitutions; in the French case, there already were the *Déclaration des droits de l'Homme et du Citoyen* and the legal norms in force both before and immediately after the revolutionary process had broken out. The second condensation of past events involves the relationship with the pre-existing regime regarding the aforementioned constitutions. The United States was a nation that had won its independence from Britain. Revolutionary France had had, in its past, a dense political history marked by the *Ancien Régime*, with its inequalities, its distinctions of *status* and its vestiges of feudalism.

This seemingly obvious observation – that every constitution is a *historical artifact* – also serves as a warning to constitutional history: that one should neither start from a radical separation between the moments of elaboration of the constitution (when the original constituent power comes into play) nor from situations of ordinary validity of constitutional texts (a circumstance in which only the derived constituent is present). Although the distinction deserves to be maintained, it is fundamental that the gap between the two activities does not widen too far.

In the aforementioned volume by Bruce Ackerman¹⁶, that soon became very influential in constitutional theory, the author sought to establish two modalities of relationship between politics and law, thus creating a persuasive explanation for American constitutional history. According to Ackerman, there are moments of broader mobilization of the population in general, in which central issues are decided

by the community, and which cannot be explained (or contained) by the regular functioning of the institutions, such as parliament, or the courts. In contrast, there is the usual operation of institutions, as provided for in modern constitutionalism: laws approved by the competent bodies, legal actions analyzed by the courts and, in this situation, the population is mobilized to a far lesser degree. By dealing with this polarity between “politics in *exceptional moments*” and “politics in *normal moments*”, Ackerman manages to show that, in the political history of the United States there were situations of the first type, such as when the Constitution of 1787 was drafted, the period of reconstruction after the Civil War and, in the twentieth century, the implementation of the New Deal, all moments of greater mobilization and participation of citizens in choosing the political direction of the community.

This distinction has been incorporated into constitutional theory and has given rise to a great deal of critical debate, which is still in full swing¹⁷. Its use, however, should not be seen as natural, as if the contrast were present at all times and in all places and were always operative for constitutional history. That is because the distinction can transmit a certain nuance. It is possible – and does occur in some historical contexts – that certain constitutional changes take place *without the presence of the original constituent power* or even without the broad mobilization of citizenship. Government policies, for example, can induce constitutional transformations.

Moreover, the twentieth century witnessed several manifestations of a certain authoritarian constitutionalism – regimes that sought to establish the constitution-

al bases of their own will. In these cases, there is the mobilization of a power apparatus against active citizenship. There are no "extraordinary politics", except in its worst aspects: the blatant use of the exception as a mode of constitutional construction.

On the other hand, situations of intense mobilization of the population may occur, with an increase in popular participation and in the occupation of spaces in the public sphere, but which are not followed by constitutional innovation. This occurs when the constitution operates as a kind of barrier, hindering the reform, or revision, of its own terms, by means of more elaborate and complex procedures being adopted for altering the text (such as the requirement of supermajorities for the approval of amendments). In these circumstances, there will be mobilization, demands and participation, but the institutional response will not materialize.

Constituent and Constitutive Dynamics in the constitution-making process

On the basis of the observations made so far, it is clear that the interest of constitutional history in the constitution-making process stems from the complexity of the analytical levels that such a topic encompasses. This is all the more relevant if, as we observed at the beginning, the problem today is that of promoting a historiographical discourse capable of preserving the quality of a critical knowledge. For example, above and beyond their relevant moments, the constitution-making process seems to be of interest for the *ascriptive times* that mark its passage, thus revealing the internal contradictions

and the complexity of the registers that characterize it. For the post-modern observer, the heuristics of the constituent process, rather than from the unilinear trajectory that links it to the result (the constituted constitutional system), seem to emerge from the *different tensions* that intersect it, from its dispersive multi-directionality and, from its essentially *conjunctural value*.

So, for historical discourse it is a question of achieving an analytical approach able to articulate and deconstruct the relevance of the constitution-making process. Here, we can try a first approach to the problem by rethinking the questions about its "how" and its "what".

With regard to the first point (the "how" of the constitution-making process) we propose considering the juxtaposition between the terms *constitutive / constituent*. With "constitutive" we intend to identify the constitutional dynamics that have effectively contributed to producing the constitutional order as a normative fact; they may have produced it either as a whole, or, in some of its aspects. These dynamics are both top-down or bottom-up, they can be multiple, simultaneous, asynchronous and competitive, and above all express conjunctural potential. Think, for example, of the concession of a Constitutional Charter, the enactment of a law of constitutional importance, a decision of a Constitutional Court that changes a constitutional rule, a transitional discipline, a revolutionary act or a *coup d'état*, that *de facto* establish a new constitutional order (the first finalizing the exercise of a constituent power, the second imposing, through the use of force, a new constitutional framework).

On the other hand, with the term "constituent" we mean the potential of the dynamics, the social and political facts that intend (or claim) to contribute to the production of a constitution. These are essentially bottom-up dynamics, the bearers of a programmatic projection. Think of the establishment, and the work, of a constituent assembly, of a mass strike, of the dynamics of social cohesion favored by the exercise of transitional justice.

Constitutive and constituent dynamics, thus defined, stand out as distinct concepts at the theoretical level. From a historical point of view – and this is precisely what allows this juxtaposition to open up original analytical perspectives – they can be combined (for example, when these constituent dynamics succeed in making the project that activated them come true) or contrasted (a constitutive dynamic that serves to block or prevent a constituent dynamic) or move on autonomous tracks (for example, when the constituent dynamics do not succeed or, when the constituent dynamics are implemented but without expressing a constituent force).

As stated above, alongside the question of the "how", it is also good to rethink the question of the "what" of the constitutional-making process. Here it is a question of trying to overcome the unilateral conception of the constituent process underlying categories, such as constitutional moment, turn, stage, etc.; it is a question of putting the *foundational significance* of the processes observed into the background. The problem becomes, in fact, that of prioritizing a semantic constellation capable of emphasizing the *conjunctural scope* of the constitutional-making process: the term "dynamic",

for example, or even the term "factor", or "situation" seem more suitable when searching for the constitutive/constituent differential referred to above. Likewise, this function could be performed by spatial concepts such as "field of action", "place of occurrence", "localization", "spatialization", etc. terms that a recent historiography has used to explain the complex phenomena of the construction of national legal identities and State building dynamics in particular with reference to Latin America¹⁸.

It is time, then, to address some elements of Brazilian constitutional history, considering the observations proposed so far.

Paths of constitutional history in Brazil. Problems

Brazil's constitutional history is an authentic laboratory of political and institutional experiences, given the diversity and intensity of the political disputes, social conflicts and institutional solutions¹⁹ there. In the last 20 years some innovative research projects have begun to analyze, with originality, the problems of constitutional law in the Brazilian experience²⁰. Let us look at some significant facts in this complex history.

In less than two centuries, Brazil has produced seven Constitutions. A significant finding in Brazilian constitutional history is the relationship between political change and constitutional construction. There is a direct correspondence between the transformations of the political regime and the emergence of a constitution. As soon as Brazil became an independent

nation, the Constitution of 1824 was drawn up, the choice being that of a unitary state and a monarchical form²¹. After the fall of the monarchy, and the subsequent transformation of the regime into a republic, the Constitution of 1891 was promulgated²². This Constitution was heavily influenced by the 1787 Constitution of the United States of America (with its federalism, bicameralism, Supreme Court with lifetime judges appointed by the President of the Republic and approved by the Senate). A Revolution broke out in Brazil in November 1930 which changed the relationship between central power and local leaderships and marked the beginning of a modernization project which remained within the framework of liberalism (combined with some state intervention in the economy) and democracy. The Constitution of 1934, drafted by a Constituent Assembly, was a political and legal document that sought to confer durability and stability to this new state organization. But the troubled 1930s still saw the emergence of a new constitution. The democratic experience came to an end with the self-coup unleashed by Getúlio Vargas with the support of sectors of the military. On the same day that the National Congress was declared closed, a Constitution was also granted. Thus, on November 10, 1937, Brazil began to be governed by a Constitution imposed by Vargas and, as one would expect, this Constitution also stipulated the leading role of the Executive Power in the direction of the country's modernization process.

In 1945, when the Vargas dictatorship ended, a Constituent Assembly was elected. Representing a wide range of political orientations, the Constitution

of 1946 largely rescued the structure and institutional design of 1934. From the 1950s onwards, Brazil entered a stage of economic modernization and greater industrialization, which took place amid particularly intense political and social conflicts. The impulse to modernize, and the conflicts, accelerated after 1961, with widespread popular mobilization in the early 1960s. In 1964, however, a civil-military coup took place, the President of the Republic was removed, and power was usurped by the military (with the support of sectors of the political class and the business community). A considerable number of political actors seem to have presumed that it would be just another of the occasional military interventions (along the lines of those which had occurred in 1945, 1954 and 1955), and would be followed by the rapid return of power to civilians. However, as we know, this was not the case. The military ruled Brazil for 21 uninterrupted years. In that period, a new Constitution, that of 1967, was soon amended by the Amendment Act of 1969 and was imposed on the National Congress (already severely mutilated by the removal of many members of Parliament from office). Power was finally returned to civilians through an intricate process of political transition and re-democratization. A Constituent Assembly was elected in 1986. The constituent work on it lasted from February 1, 1987 to October 5, 1988, when the current Constitution was promulgated²³.

It is clear how dense and multifaceted Brazilian constitutional history has been. There have been many constituent processes, much alternation between regimes, many situations of popular mobilization and, also, of repression by

authoritarian governments. Constitutive and constituent dynamics intertwine within this complex history, composing the fabric that determines the trends of the constitution-making processes. Even the attributive force of time seems to stand out clearly from those events. Therefore, an attempt at *conjunctural approach* to Brazilian constitutional history would seem possible. In the following we would like to propose three analytical perspectives that seem to us, also in the light of recent historiographical contributions, to be able to open the field to a similar approach.

Transition and its historical significance

The concept of transition plays an important part in Brazilian constitutional history, especially in cases of the changes in the connection between law and politics that occur when an old text is replaced by a new constitution. Indeed, as this article will seek to demonstrate, the very concept of transition itself will require revision.

Transition means a passage, a path of connection, between one stage and another. The field of "transitology" has emerged in political science, devoted to investigating processes of change from dictatorships to democracy, highlighting Latin American history in the second half of the Twentieth Century, during which time authoritarian regimes were replaced by democratic governments²⁴. Needless to say, these transitions occurred at different times in each country of the region, and they also had very diverse effects. Moreover, this phenomenon is not restricted to the South American continent: for example, during

the 1990s, there were processes involving political transition all over Eastern Europe²⁵ and in South Africa²⁶, to cite but two examples that have become emblematic, and are still extensively researched today.

After a few decades, it had become evident that these transitions were more complex than had previously been thought. Mere observation, classification and analysis of the different ways, in which some states have made the transition from authoritarianism to democracy, is by no means sufficient. In reality it is clear that these transitions cannot solely be understood as temporal operators, in the chronological sense of the term. Throughout an ongoing transition, decisions are made, choices about the past are explicitly made and new social and political configurations are formed. Such deliberations, such choices, may be projected into later stages of the process of "passage" from one regime to the other. They may shape the new regime, delineate choices that will become available to political actors; in short, they may bind the future.

Thus, there is no *one* time of transition. Rather, we could argue that there are several times produced during any transition. Because of this complexity, we propose the category of "*ascriptive times*" as a tool for observing transitional times, that is, the projection, for post-transitional times, of the effects of decisions made by political, social and, also, institutional actors during the transition processes. Such effects can be seen not only by the repercussions, on the future, of resolutions made in the present of such transitions. They may also be observed by the absence, that is, by the voices, demands, manifestations of social groups which, although mobilized during

the process of political transformation, had no impact, no voice, in the decisions that led to the new regime²⁷. Whenever transitions are triggered, the political and legal systems are affected differently. The duration of political time is different from that of legal time. Transformations can be faster in politics, while institutional structures can be resistant to change or adapt to them only gradually. Therefore, it is of utmost importance to observe and take note of what kinds of constitutional reforms are required by transitional processes, as well as how some of the pre-transitional constitutional arrangements can persist under democratic regimes.

Some of the constitutions written during transitions were written on the basis of a political agreement or "pact." To what extent do such political agreements influence the content it was common to intervene in trade union boards and to demand that the leaders comply with national security rules".

In some transitional cases, actors from the fallen political regime gain political capital from influencing the constitutional provisions. How, then, does such influence affect the transitional process *per se*, or the democratic credentials, of the new regime?

As regards Brazilian Constitutional history, which is distinguished by its intense processes of political transformation when alternating between regimes, the study of transitions is crucial for research in this field. One reason for such an interest is the connection between transitions and an instrument that is found in Brazilian political history: amnesty. In an extensive investigation, Ann M. Schneider finds 38 norms that granted amnesty in Brazilian history between 1891 and 1979²⁸. The

list compiled by Schneider includes only political amnesties. If the total number of amnesties granted is taken into account, notably those associated with reviewing the acts of removal of public officials or of workers on strike, the total will be substantially higher. Indeed, in most constitutions adopted in Brazil, amnesty was granted to political opponents (1934, 1946 and 1988) or at least the possibility was discussed during the work of drafting the document, as in the Legislative and Constituent Assembly of 1823²⁹.

Interestingly, as constitutions came and went one after the other, the dynamics of amnesty became more complex. As shown by the accurate research undertaken by Raphael Peixoto de Paula Marques, the effects of an attempt at a communist revolution, which took place in 1935, are still being felt today. This is why a legislative decree of 1961 provided an amnesty for the military who had committed themselves to the movement, even permitting them to return to the armed forces. Following the 1964 coup, the then ruling military resisted complying with the amnesty decree, until it was replaced by a more restrictive decree law in 1969 (which led to several demands that ended up being heard by the Federal Supreme Court). But when the 1988 Constitution came into force, those affected by the 1969 decree law were also granted amnesty. That means that the political amnesty established in the 1988 Constitution reaches back to an uprising in 1935³⁰. There are institutional consequences to it: the Amnesty Commission set up to ensure enforcement of the provisions of the Constitution continues to operate today, with around 9,000 applications still to be analyzed³¹.

And, as regards the current scenario, the political transition that took place, especially in the 1980s, remains a legal and political issue. On October 5, 2018, the Constitution celebrated its 30th anniversary at a real crossroads between past, present and future.

The major issue relating to the pre-1988 period has to do with the legacy of the military regime. In its temporary clauses (art. 8), the Constitution states that during the dictatorship "acts of exception" were perpetrated, that is, it clarifies that the fundamental elements of the rule of law were violated. Nevertheless, Brazilian courts have persistently ruled for the validity of an amnesty law enacted – on the initiative of the regime – in 1979, which precludes the opening of criminal proceedings to determine responsibility of the dictatorship's agents who have perpetrated serious violations of *jus cogens* of international law in human rights. In the cases of the Araguaia guerrilla group and the murder of journalist Vladimir Herzog, the Inter-American Court for Human Rights found that Brazil had failed to provide an appropriate response to a continuing violation of human rights. Not even the enactment of the 1988 Constitution has been able to remove the authoritarian past³².

As is well known, since January 2019 the Brazilian federal government has been in the hands of a political group that expressed its explicit endorsement of the acts of torture carried out during the military regime. Many authors involved in science and political philosophy have attempted to assess the interplay of conditions that has led to such a state of things. One prevailing interpretation highlights the

incompleteness and limitations of the Brazilian transition, which is characterized by conciliation, with no punishment for acts committed by agents of the regime³³.

These brief notes highlight how the time of transition is a decisive time crucial for understanding the institutional history of countries such as Brazil. A careful approach to studying the situations and constitutive factors in the constitution making process, even if detached from constituent dynamics, still allows us to consider its relevance at a deeper level.

Uses of the exception in constitutional history

There is an element that we must emphasize within Brazil's extensive constitutional history. Among the constituent assemblies and constitutional documents that have been imposed, as well as in both transitions and amnesties, one aspect seems to be ever-present in the Brazilian experience: that of activating mechanisms of exception.

This is a classic theme within the history and theory of the Constitution. The use, the duration, the consequences of the prescription of a situation of exception are variables, but the debates have one important point in common: what are the limits that should be set for those governments, that make use of such resources? What kind of developments can be achieved in connection with the rule of law?

It is well known that that was one of the main controversies that defined the Republic of Weimar. Article 48 of the Constitution enacted in 1919, which enabled the President of the Reich to

suspend individual rights and guarantees, was used in several situations, most often in the period before the Nazi Party³⁴ took power. More recently, the debate around “the exception” has returned to the surface in the US reaction to the September 11, 2001 attacks. How extensive is the prerogative of the President of the United States, as commander-in-chief of the armed forces, to restrain the exercise of the rights of enemy combatants in the campaign against Iraq and Afghanistan? To what extent is it possible to appeal to Courts to seek a ruling that would be a restraint on presidential power? Since the establishment of the Guantánamo prison camp, this latter issue has taken on a central role in US constitutional law. In successive decisions, the Supreme Court, after the division among the federal courts over the extent of presidential prerogative, ended up preventing several actions that were a real exacerbation of the presidential functions, such as the suspension of Habeas Corpus³⁵.

Now it is time to look at the issue of exception in Brazilian constitutional history.

The 1891 Constitution, the first to be enacted after the Proclamation of the Republic (which took place in 1889), had a long lifespan, as it survived until it was replaced by the 1934 Constitution. However, particularly during the First Republic period (which ended in 1930), it was routine for the executive branch to decree a state of siege. Of the ten politicians who were presidents of the Republic between 1891 and 1930, eight decreed a state of siege. Over the entire period of the First Republic (1889-1930), 2,365 days were passed in a state of siege³⁶. Thus, the exception was almost a standard procedure

at the time. Its primary function was to facilitate the repression of several social forces that mobilized to vindicate their rights³⁷.

But the collapse of the First Republic did not mean the end of the use of emergency measures. During the short time in which the 1934 Constitution was in force (that was democratically drawn up by a constituent assembly specially elected for this purpose³⁸), the then President, Getúlio Vargas, after he had neutralized the revolutionary movement that arose in 1935 (mentioned above), decided to create a National Security Court, clearly an “exception” Court, where defendants’ rights were reduced³⁹. A state of siege was also decreed. Interestingly, one expedient also used by Vargas was to extend the validity of the emergency measures: since the 1934 Constitution had been restrictive regarding the consequences of the decree of the state of siege (given the abusive use of the institute in the First Republic), Vargas searched for another way to suspend the constitutional guarantees of the population. His government launched a constitutional reform that passed in a remarkably short time (11 days), with some serious procedural shortcomings, in order to allow the suspension of guarantees through the decree of the state of war⁴⁰.

In the post-war period, the issue of the state of siege again played a central role in Brazilian history, mainly during two episodes of constitutional crisis. In the troubled 1950s, which were marked not only by the process of economic modernization, but also by a succession of political crises, a deadlock arose due to the attempt by sectors of the armed forces to prevent, in 1955, the inauguration of Juscelino Kubitschek,



Parliamentary session that then established the 1988 Brazilian Constitution

who had been elected president that year. Within a few months, the National Congress decided to remove two interim presidents both of whom were close to the military sector. After the second impediment, the Acting President declared a state of siege, which served as a justification for the Supreme Court not to consider the motivation for one of the impediments decided unilaterally by Congress⁴¹. In João Goulart's government, political tensions resurfaced. It was a period of heightened action by social movements (students, workers, artistic class sectors) and, also, of political polarization, which mirrored the Cold War context. In October 1963, after declarations by his political opponent, Carlos Lacerda, who openly defended a coup d'état, João Goulart manifested his willingness to decree a state of siege. But the political conditions were no longer there. Goulart backed down, however, the episode

was central in the process of undermining his leadership role in the executive branch. Five months later, the government was overthrown by a coup⁴².

After the fall of João Goulart, the military regime made extensive use of exception mechanisms, from the so-called "institutional acts", repressive regulations that were unilaterally decreed, and were neither submitted to the Congress, nor could be scrutinized by the judiciary. Seventeen institutional acts were issued between 1964 and 1969, the first of which, nine days after the coup d'état, imposed a series of punishments on civilians and the military, and removed several congressmen. The second act, in 1965, dissolved the existing political parties, creating bipartisanship, and extinguished the process of popular election of the president of the Republic. The No. 5 Act, of 1968, ordered the closing of the National Congress and inaugurated a

violent cycle of persecution, torture, deaths and forced disappearances⁴³.

As the regime came to an end, another mechanism of exception was activated. To avoid the approval of a draft constitutional amendment that would have provided for the popular election of the President of the Republic, the latest of the General Presidents decreed "emergency measures" in the Federal District, re-introducing censorship of the media, denying people access to the urban perimeter, and dissolving political meetings. The initiative turned out to be decisive for Congress to reject, in a first vote, the draft constitutional amendment⁴⁴.

What is the overall significance of these experiences for the constituent process? On the basis of modern legal culture, we are used to thinking of the exception in an *exclusionary* key, as something that does not belong to the legal order and even less to its foundations⁴⁵. The exception, in fact, represents an area in which the political dimension radically affirms its primacy over the legal sphere; this is true in the case of the general category of the "state of exception", whether it is declined to indicate a "state of the law" or an "empty legal space"⁴⁶.

Philosophy, however, explains that at the phenomenological level, the exception shows an *evenemential character*. It constitutes an event which, insofar as it is *a posteriori*, escapes from the conceptual *a priori*, and implies a re-stipulation of the *a priori* itself⁴⁷. There is, therefore, a relationship between event and hermeneutics, which allows us to discern a normative significance in the exception, that is, the consistency of a phenomenon which contributes to determine norms.

The exception is an event that suspends the rule, and precisely for this reason, imposes a mandatory change in considering the rule.

What we are observing – to return to our issue, which consists of a problem of interpretation of historical events and experiences – leads us to consider the experience of the exception as an ascriptive time, even though different from the transition: rather than preparing proactive constraints that prejudice future constitutional arrangements, the exception contributes to determining the *a priori* from which it is possible to elaborate a project for the future. In this sense, therefore, it can be investigated in its value as a constitutive factor in the constitution-making process.

Mobilizing social actors: the right to strike

One significant element – and a recurring feature in Brazilian constitutional history – is the emergence, in different contexts, of movements to mobilize segments of the population with a kind of constituent impulse, i.e., demands that point to social inclusion and civic participation (by pressure groups or collective entities formed in an autonomous way). The organizational forms and agendas for vindication are quite different; the task of the legal historian is to identify and analyze them, and then to assess their importance within the broader framework of Brazilian constitutional history.

It is a question here of focusing on the dynamics we have defined as constituent, where the distinctive element is its constitutive potential rather than its actual effect, or Impact, on framing the

constitutional order. These moments that we identify as constituent have their own specific relevance, particularly if we are interested in appreciating the conjunctural background of a constitutional history, since they carry a specific attributive force within the context of the constitution making process. This specificity is relevant and important if one is to understand the values and functions of constitutional structures.

One of the key elements of mobilization is the use of strikes as a social practice. Throughout the Republican period, trade unions and workers' associations generated mobilizations that assumed the form of a strike, and this inevitably led to repression by police and military forces. First of all, we must emphasize the vitality of the strike as a form of claim, even when there was no legal provision regulating the stoppage of services in place. In the early days of the First Republic, the Criminal Code of 1890, in its original version, included the strike as a crime committed against the organization of work. Nevertheless, at the time of the *vacatio legis* of the Code, a decree amended the original drafting of the article and kept violence during a strike, as criminal conduct⁴⁸. The right to strike, nonetheless, was not ruled by any legal norm. However, this did not prevent numerous strikes from being triggered, including a general strike in July 1917, which was widely adhered to in cities such as São Paulo, Campinas, Curitiba and Porto Alegre⁴⁹.

One interesting paradox emerged between the 1940s and the mid-1960s. Brazilian courts, including the Federal Supreme Court, began to interpret the provision of the 1946 Constitution that established the right to strike more

narrowly, arguing that it had not been regulated by law. Workers and unions, for their part, continued to mobilize and call new strikes. During the period from 1961 to 1964, exactly the time when activities in the public sphere, and among social actors in the urban context, became more intense, and, as mentioned above, there was a significant increase in the number of strikes occurring, including a large series of political strikes⁵⁰.

With the 1964 coup, the disruption of the political process led, clearly, to a decrease in the numbers of work stoppages. In fact, the regime, aware of the power of the demands of strikes, issued a legal act shortly after assuming power. The procedures required, foreseen by the act, in order to initiate strikes were complex and slow; state control was permanent; and, there were countless constraints on essential activities. Furthermore, the act introduced various crimes against the organization of work, including "promoting, participating in or inflating strikes or lock-outs in breach of this act". The penalty was imprisonment from six months to one year and a fine. For a recidivism, the penalty was doubled. Not by chance did the act become known among workers, as an "anti-strike act", as in practice it made it impossible for virtually all kinds of stoppages to take place. To further restrict an already very strict regime, the 1967 Constitution prohibited strikes in essential activities and public services. For its part, Decree-Law 314/1967 established that "Promoting a strike or lock-out that leads to the paralysis of public services or of essential activities, with the purpose of coercion of any of the Powers of the Republic" was a crime against national security, which was punishable

by two to six years of imprisonment⁵¹. There were strikes, in industrial towns (Osasco and Contagem) in 1968, but these were violently repressed by the military government. The trade unions, which had already been severely affected by arrests and persecutions, entered a period of near inactivity. This scenario would change, nevertheless, in the late 1970s.

After May 1978, workers from several automotive enterprises unleashed a wave of strikes. These industries were located in towns near São Paulo, in an area called the ABCD - Santo André, São Bernardo, São Caetano and Diadema. This was an intense and remarkable movement. The figures are impressive: in a nine-week period, from May 12 to July 13, 1978, 213 plants from nine cities were recorded as being on strike (as well as the ABCD, there were shutdowns in São Paulo, Osasco, Jandira, Taboão da Serra, Cotia and Campinas). Overall, 245,935 workers went on strike. If we consider the 1978 data for all Brazil, the results are as follows: fourteen professional categories went on strike, in seven states and there were 539,037 workers on strike in that year.

The 1979 and 1980s wage campaigns were also shaped by collective conflicts, strikes, assemblies, repression, intervention and the protagonism of workers. There were some differences between these strikes and the spontaneity of those in 1978: firstly, the strikes were prepared with more careful, more strategically. Simultaneously, the repression itself became more sophisticated: it was common to intervene in union boards and to demand that leaders complied with national security rules and norms. If one compares the 1979 and 1980 data with those already mentioned from 1978, one can observe an expansion of the

universe of mobilization of workers. In 1979, 26 professional categories went on strike in 15 states⁵². In total, there were 3,207,994 workers on strike. In 1980, the number of striking workers decreased to 664,700, which could be explained by a few factors: worsening of the economic crisis, increased unemployment, and, greater mobilization of the repressive structures⁵³. The period between 1978 and 1980 is marked by the convergence of several agendas of social movements, and strikes played an important role in this context, which was, however, broader.

One of the key points of the ABCD strikes was the horizontal articulation of the workers, i.e. mobilization, independent and outside of the union boards and, in some cases, contrary to the guidance of the labor hierarchy. This led to an internal struggle in workers representation; as well as fighting with the entrepreneurs, it was also essential to change the internal structures of professional unions themselves. As a result, the workers had to convince their coworkers (in union assemblies and elections) that the leaders traditionally associated with the government did not represent them. In short, that they had to fight for internal democracy too.

The workers and, gradually, the more combative unions as well as other social movements intensified the struggle against the dictatorship. As stated by Maria Helena Moreira Alves, "1979 was a decisive year for the opposition as a whole". During the most intense phase of the 1979 strikes, "a functional network of alliances was established between the grassroots organizations, the social movements linked to the Church (including the CEBs) and

the unions”⁵⁴. We should also mention the work done by the Brazilian Committee for Amnesty, a group that emerged from the demands of relatives of opponents to the military regime, who were exiled for reasons of political persecution, but whose return was considered to be crucial for the re-democratization of the country. And, finally, we can add the support of intellectuals, liberal professionals and members from the political opposition, and with this it will be possible to grasp the breadth of social and political mobilizations that accompanied and dialogued with the striking workers. With this whole dimension of the battle for citizenship, a phenomenon of “overflowing” the agenda of workers and union entities is clear: the struggle for democracy and freedom was also at stake⁵⁵.

Not surprisingly, the right to strike was given a special place in the 1988 Constitution, in the realm of social rights. The 1987-88 constituent, for that matter, adopted an interesting approach. Article 9 of the Constitution acknowledges the right to strike, “it being the competence of the workers to decide on the advisability of exercising it and on the interests to be defended thereby”⁵⁶. This constitutional rule allows the workers themselves to decide on the extent of the action they want to trigger. In other words, the agenda, form, moment and terms of the demands belong to the workers, who can also be understood as “collective legal subjects”⁵⁷. As one might expect, such a semantic shift in the right to strike under the 1988 Constitution would not have been automatically assimilated by the agencies in charge of resolving collective conflicts. A repressive memory had been built up regarding the right to

strike; rulings by the courts oscillated wildly and still do so, as regards the extent and the scope of the right, in a dispute that is still wide open⁵⁸.

This reconstruction in which strikes take place offers an important insight. When we speak of social or political mobilizations, we refer to very different phenomena: we are thinking about political subjects, the dynamics of their institutionalization, the social facts that have the tendency to insert demands for legal protection into a wider programmatic framework; but the phenomena of a more spontaneous nature are also important for our discourse, even though they are by no means part of a process of institutionalizing political dynamics or even when they are not part of a broader political program. As for our problem, which is to understand the conjunctural basis of the constitution-making process, which would seem to be very useful to throw more light on the complexity of the constituent dynamics; they are the bearers of a design impulse, but they can and must be rediscovered in all their multi-directionality.

Concluding remarks: constitutional history, transitions, and crisis

We have sought to demonstrate how ascriptive temporal categories, which contain both constituent and constitutive dynamics, can be useful analytical tools for an in-depth reading of the constitution-making process. This also allows us to develop a critical point of view regarding the present-day.

In the context of concrete experiences like those that have shaped Brazilian

constitutional history, attributive temporal conditions has served to reveal a twofold face. These temporal conditions are inextricably linked to the incandescence of ongoing political processes, however, they, contemporaneously, maintain their own autonomy, in that they constitute a conditioning factor for the political process itself.

It is essential to note, though, that legal time is not the same as political time. This is an evolutionary achievement of the form of functional differentiation, which is characteristic of modernity, and is related to the invention of the constitution as a form. Obviously, there will be repercussions in the law on changes and disruptions in the political system, but such repercussions will by no means be causal, immediate or automatic. This will depend on various mediations, and a major one is, precisely, the constitution itself (and its autonomy under the law). This is, in fact, one of the prerequisites of modern democracy: keeping a minimum degree of separation between law and politics⁵⁹.

For this very reason, a political crisis does not necessarily mean a legal crisis. When constructing constitutional history, that is one point that must be considered. Certain political crises may acquire an institutional dimension that will affect the legal system. Others may be resolved within the political system itself.

This same reasoning also applies to constitutional history from a global historical perspective. Crises may erupt to varying degrees, also, the relationship between politics and law may differ considerably from country to country.

2019 is a particularly troubled year in the political context of South America.

Even as the concluding lines of this article were being drafted, massive street protests were taking place in two South American countries: Ecuador⁶⁰ and Chile⁶¹. In Bolivia⁶², on the other hand, there were articulations between the armed forces and the police that led to the resignation of the President of the Republic, which was followed by huge street protests. In these three countries, measures of exception have been adopted in an attempt to contain the protests. In all of them there have been fatalities.

From the second decade of the 21st century onwards, a series of threats to democratic constitutionalism is discernible under the perspective of global history. Some political discourses that have eventually been given names such as "new populism", "sovereignisms" or "digital populism" arouse a degree of uncertainty for the future of contemporary democracies. The emergence of anti-global extreme right organizations, the massive use of technologies and social networks as influencing factors in elections and referenda and, in some cases, the institutional transformation of some communities are elements that together call into question the framework of post-war democratic constitutionalism. Examples of countries that are experiencing these uncertainties to varying degrees, are: Hungary, Poland, Italy, the United Kingdom⁶³.

Meanwhile, Brazil has been experiencing a constitutional crisis since 2016, when an impeachment process was initiated against the then President of the Republic without any demonstration of the existence of a crime of responsibility⁶⁴. Such a state of crisis intensified when in 2018 a candidate, who expresses views that are fundamentally

at odds with human rights and democracy, was elected. During the electoral campaign, his vice-presidential candidate declared that Brazil would need a new constitution, to be drafted by a group of distinguished jurists, and the Chief Justice of the Supreme Court objected to labeling the military takeover in 1964 as a coup d'état, having used the term "civil-military movement" to denote what was a classic coup d'état⁶⁵. Since taking office in 2019, the President of the Republic has made several laudatory statements about the 1964 coup, and has received, in his office, the widow of a military official who has been declared a torturer by the judiciary but was described by the President as 'a national hero'⁶⁶.

Despite the fact that the current situation in Brazil has specific features related to how the transition to democracy has been carried out, it is clear that recent developments are influenced by the general global context of political crises. Several of the political situations that arose in Brazil in 2019 bear close relation to earlier authoritarian contexts, witnessed in the twentieth century, such as, for example, the reinstatement of government control over the content of artistic performances, which has clear links with the censorship imposed on theater, music and television during the military regime (1964-1985)⁶⁷. Military presence in the ministry, verified from 2019, has always been a trait of dictatorial governments and also of the first post-dictatorship civilian government⁶⁸. However, these findings – the restoration of censorship and the return of military leadership – should not be interpreted as "repetitions" or as the re-emergence of "cyclical" elements.

As Koselleck stated in a major historiographical discussion, the past does not operate as a kind of storehouse of experiences that could directly "teach" something⁶⁹. Its non-repeatability is a real challenge for the historian. This constellation of elements that led to the current federal government of Brazil is unique in history and does not find direct comparison with political and electoral processes from the past.

But historical narratives (and, also, legal history) cannot renounce the diachronic, deep, inquiring look with regard to events that have taken place in political history. As observed, these new occupants of power have manifested a posture of re-reading and reinterpreting Brazil's recent past. There are, moreover, some political-institutional configurations that are also of interest from the historical perspective. Brazil's current political orientation could be described as a blend of increasingly authoritarian politics with an ultraliberal approach to the economy. That was the scenario in Chile during the Pinochet period, a model that has already been praised by the Minister of Economy, Paulo Guedes, on many occasions. Indeed, Chile was selected as the destination for the first official trip of the incumbent Brazilian President in Latin America⁷⁰.

One question that arises, over and above the political affinities of the past and present, concerns constitutional history: what are the implications of this turbulent political context from the second decade of the 21st century for the structure established by the Brazilian Constitution promulgated in 1988?

That question could be answered in many ways. None of them could have been

anticipated by historical discourse, which lacks divinatory powers. However, outlining the question requires a reconstruction and a careful observation of the past, its uses and its unfolding. In an important work, historians David Armitage and Jo Guldi have proposed the rediscovery of history as knowledge devoted to integrating various temporal dimensions⁷¹.

The crises – political, environmental, social – experienced in many countries after the financial breakdown of 2008 are also a challenge for the explanatory power of history. As already seen, South

America, and in particular, Brazil, are at the epicenter of such crises. Hence the importance of achieving an increasingly in-depth and diversified analysis of Brazilian constitutional developments, with particular emphasis laid on the constitution-making processes and on the transitional stages that have been observed during more than one hundred years of constitutional history.

¹ An updated contribution can be found in the two volumes edited by U. Müßig, *Reconsidering Constitutional Formation I National Sovereignty*, Cham, Springer, 2016, II *Decisive Constitutional Normativity*, Cham, Springer, 2018.

² M. Fioravanti, *Passato, presente e futuro dello stato costituzionale odierno*, in «Nomos. Le attualità nel diritto», 2, 2018; Id., *La Costituzione democratica*, Milano, Giuffrè, 2018.

³ S. Baumann, *Retrotopia*, Cambridge, Polity Press, 2017.

⁴ F. Lopez de Oñate, *La certezza del diritto*, Roma, Tip. Consorzio nazionale, 1942, p. 26; «Ogni epoca spiegava de Oñate «nel qualificarsi in crisi» progetta il suo futuro.

⁵ See M. Meccarelli, *The Assumed Space: Pre-reflective Spatiality and Doctrinal Configurations in Juridical Experience*, in «Rechtsgeschichte/ Legal history», 23, 2015, pp. 241-252 (249).

⁶ B. Ackerman, *We the People. 1. Foundations*, Cambridge (Ma), London, England, Harvard University Press, 1991.

⁷ See M. Meccarelli, *I tempi ascrittivi tra esperienza giuridica e ricerca storica*, in «Le carte e la storia», 2/2018, pp. 18-25.

⁸ A good example is the French *Charte Constitutionnelle* from 4th June 1814. See, on this point, H. Dippel, *Modern constitutionalism. An introduction to a history in need of writing*, in «The Legal History Review», n. 73, January 2015, 1-2, p. 162.

⁹ The most remarkable example is the Spanish Constitution from 1978. See M. Rosenfeld, *Constitution-Making. Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example*, in «Cardozo Law Review», n. 19, 1998, pp. 1891-1920; Id., *The Problem of 'Identity' in Constitution-Making and Constitutional Reform*, in «Cardozo Legal Studies Research Papers», n. 143, available at SSRN: <<https://ssrn.com/abstract=870437>>, September 2020.

¹⁰ See A. Pereira, *Political (In) Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina*, Pittsburgh, Pittsburgh

University Press, 2005. See also, regarding the new ways of creating an authoritarian State in Hungary, K.L. Scheppel, *Autocratic legalism*, in «University of Chicago Law Review», n. 85, March 2018, 2, pp. 545-583.

¹¹ We refer to this expression from the "Confessions" of St. Augustine, *The Confessions*, Chicago, Encyclopædia Britannica, 1989, XX, 26, p. 95.

¹² See for example the concerns expressed by Piero Calamandrei, in the famous article *Restaurazione clandestina*, in «Il Ponte», III, (11-12), 1947, pp. 959-968, reflecting on the transition to democracy in Italy, after the collapse of the Fascist regime.

¹³ See G. Pisarello, *Procesos constituyentes – Caminos para la ruptura democrática*, Madrid, Trotta, 2016, pp. 79-105.

¹⁴ See J. Elster, *Constitutional Bootstrapping in Philadelphia and Paris*, in M. Rosenfeld (ed.), *Constitutionalism, identity, difference, and legitimacy – theoretical perspectives*, Durham and London, Duke University Press, 1998, pp. 57-83.

- ¹⁵ I.e. the constitutions that gave shape to the ideas of modern constitutionalism; that is – as well defined by M. Fioravanti, *Costituzionalismo. Percorsi della storia e tendenze attuali*, Roma-Bari, Laterza, 2009, p. 5 – that movement of thought oriented to achieve, through the constitution, the limitation of public powers and the protection of spheres of autonomy.
- ¹⁶ See *supra* footnote n. 6.
- ¹⁷ There is a huge literature on this topic. We could recall here the contributions of M. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, in «Stanford Law Review», 44, 1991-1992, pp. 759-797; T. Dumm, *Review: We the People: Vol. I. Foundations*, in «Political Theory», 20, May 1992, 2, pp. 314-345; C. Scott, *Constitutional moments and creakpot revolutions*, in «Connecticut Law Review», 25, 1992-1993, pp. 967-989; J. Waldron, *Review: We the People: Vol. I. Foundations*, in «The Journal of Philosophy», n. 90, March 1993, 3, pp. 149-153; C. Hoke, *Arendt, Tushnet, and Lopez: The Philosophical Challenge behind Ackerman's Theory of Constitutional Moments*, in «Case Western Reserve Law Review», 47, 1996-1997, pp. 903-919; and M. Tushnet, *Misleading metaphors in comparative constitutionalism: Moments and enthusiasms*, in «International Journal of Constitutional Law», 3, May 2005, 2-3, pp. 262-268.
- ¹⁸ See P. Costa, *A 'Spatial Turn' for Legal History? A Tentative Assessment* and A. Agüero, *Local Law and Localization of Law. Hispanic Legal Tradition and Colonial Culture (16-18 Centuries)*, both in M. Meccarelli, M.J. Solla Sastre (eds.), *Spatial and Temporal Dimensions for Legal History. Research Experiences and Itineraries*, Frankfurt am Main, Max Planck Institute for European Legal History, 2016, pp. 27-62, 111-130. See also, A. Agüero et Alii (eds.), *Jurisdicciones, Soberanías, Administraciones. Configuración de los espacios políticos en la construcción de los Estados nacionales en Iberoamérica*, Córdoba, Universidad Nacional de Córdoba, 2018; A. Agüero, *Historia política e Historia crítica del derecho: convergencias y divergencias*, in «PolHis», 5, 10, pp. 81-88; M.J. Solla Sastre, *Ultramar excepcional. La construcción de un espacio jurídico para España y sus colonias, 1837-1898*, in «Rechtsgeschichte/Legal History», 23, 2015, pp. 222-238; M. Lorente Sariñena, *La Nación y las Españas. Representación y territorio en el constitucionalismo gaditano*, Madrid, UAM, 2010.
- ¹⁹ See C. Paixão, P. Blair, *Between Past and Future: The 30 Years of the Brazilian Constitution*, in «I-CONNECT - Blog of the International Journal of Constitutional Law» October 10, 2018, available at <<http://www.iconnectblog.com/2018/10/between-past-and-future-the-30-years-of-the-brazilian-constitution/>>, September 2020.
- ²⁰ For a broader picture, please see A. Koerner, *Habeas-Corpus, Prática Judicial e Controle Social no Brasil (1841-1920)*, São Paulo, IBCCRIM, 1999; C.E.C. Lynch, *O discurso político monarquiano e a recepção do conceito de poder moderador no Brasil (1822-1824)*, in «Dados», 48, 2005, 3, pp. 611-653; A. Cerqueira Leite Seelaender, *Notas sobre a constituição do direito público na Idade Moderna – a doutrina das leis fundamentais*, in «Sequência», 53, 2007, pp. 197-232; G. Bercovici, *O Poder Constituinte do povo no Brasil: um roteiro de pesquisa sobre a crise constituinte*, in «Lua Nova», 88, 2013, pp. 305-325; C. Paixão, *Autonomia, democracia e poder constituinte: disputas conceituais na experiência constitucional brasileira (1964-2014)*, in «Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno», 43, 2014, pp. 415-460; M. Cattoni, R. Dilly Patrus, *Constituição e poder constituinte no Brasil pós-1964: o processo de constitucionalização brasileiro entre "transição e ruptura"*, in «Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno», 45, 2016, pp. 171-191; Leonardo A.A. Barbosa, *História constitucional brasileira: mudança constitucional, autoritarismo e democracia no Brasil pós-1964*, Brasília: Edições Câmara dos Deputados, 2017. A historiographical turn on Brazilian constitutional history is, therefore, attested by the constant attention that has been paid, in the last ten years, to such topics in the Conferences of the *Instituto Brasileiro de Historia do Direito*, in particular in Brasília 2013, which was entirely devoted to the topic *História constitucional: percursos, narrativas, possibilidades*, in Curitiba 2015 and São Paulo 2018.
- ²¹ It is not aim of this essay to address the relevant problem of origins or influences in the history of Brazilian constitutional law. For further information, please see A. Wehling, *An Old Empire Gives Birth to a New One. Social practices and Transformations of the Luso-Brazilian Legal Order*, in «Rechtsgeschichte», 26, 2018, pp. 302-311; M. Berbel, C.H. Salles Oliveira (org.), *A experiência constitucional de Cádiz – Espanha, Portugal e Brasil*, São Paulo, Alameda, 2012.
- ²² P. Wolf, *Brasil en busca de una constitución moderna: La constitución de la República de los Estados Unidos del Brasil como carta magna a la moda americana*, in «Anuario Iberoamericano de Justicia Constitucional», 8, 2004, pp. 337-390.
- ²³ For the first six Brazilian Constitutions, see *Brasil, Constituições do Brasil: de 1824, 1891, 1934, 1937, 1946 e 1967 e suas alterações*, Brasília, Senado Federal (Subsecretaria de

- Edições Técnicas), 1986. The 1988 Constitution is available at: <<https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/CF.pdf>>, September 2020, (including the 6 Revision Amendments and 105 Constitutional Amendments, the last one enacted on 12th December 2019).
- ²⁴ See, for an overview, G. O'Donnell, P.C. Schmitter, *Transitions from Authoritarian Rule – Tentative Conclusions about Uncertain Democracies*, Baltimore and London, The John Hopkins University Press, 1986; J. Linz, A. Stepan, *Problems of democratic transition and consolidation – Southern Europe, South America, and Post Communist Europe*, Baltimore and London, The Johns Hopkins University Press, 2008.
- ²⁵ See E. Bos, *Verfassungsgebung und Systemwechsel: die Institutionalisierung von Demokratie im postsozialistischen Osteuropa*, Wiesbaden, VS, Verl. für Sozialwiss., 2004; A. Corbea-Hoisie, R. Jaworski, M. Sommer (eds.), *Umbruch im östlichen Europa. Die nationale Wende und das kollektive Gedächtnis*, Innsbruck, Studien-Verl., 2004; H. Schwartz, *The struggle for constitutional justice in post-communist Europe*, Chicago, Univ. of Chicago Press, 2000; S. Gilly (Hrsg.), *Transformation und historisches Erbe in den Staaten des europäischen Ostens*, Bern, Lang, 2000.
- ²⁶ There is a huge literature on this topic. Please see R. C. Slye, *Amnesty, Truth and Reconciliation: Reflections on the South African Amnesty Process*, in R. Rotberg, D. Thompson (eds.), *Truth v. Justice – the Morality of Truth Commissions*, Princeton and Oxford, Princeton University Press, 2000, pp. 170–188; D. A. Crocker, *Punishment, Reconciliation, and Democratic Deliberation*, in E. Barkan, A. Karn (eds.), *Taking Wrongs Seriously – Apologies and Reconciliation*, Stanford, Stanford University Press, 2006, pp. 50–82; S. LeFranc, *Faire retentir la «vérité des victimes»*. *La Truth and Reconciliation Commission sud-africaine, entre émotions et froideur juridique*, in J. Allard et al. (eds.), *La vérité en procès – les juges et la vérité politique*, Paris, LGDJ, 2014, pp. 213–234. A. Lollini, *Constitutionalism and transitional justice in South Africa*, New York, Oxford, Berghahn Books, 2011.
- ²⁷ C. Paixão, “Where the silences are mute”: *political transition, state violence, and the racial question in contemporary Brazil*, in C. Paixão, M. Meccarelli (eds.), *Comparing Transitions to Democracy. Law and Justice in South America and Europe*, Berlin, Springer, forthcoming.
- ²⁸ See A.M. Schneider, *Amnesties in Brazil, 1895–1985*, PhD Dissertation. University of Chicago, Department of History, December 2008.
- ²⁹ See C. Paixão, *Past and future of authoritarian regimes: constitution, transition to democracy and amnesty in Brazil and Chile*, in «Giornale di Storia Costituzionale», 30/II, 2005, pp. 89–105.
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- ³¹ Since the beginning of the Jair Bolsonaro administration on January 1, 2019, the Amnesty Commission’s profile has been entirely changed, the nomination of military and supporters of the 1964 regime, led to a notable reduction in the compensations that have been granted and a restraining guidance on the criteria for reparations. See: Orientação na Comissão de Anistia é negar pedidos em massa, diz conselheiro do órgão, in «Folha de São Paulo», 12th September 2019. Available at: <<https://www1.folha.uol.com.br/poder/2019/09/orientacao-na-comissao-de-anistia-e-negar-pedidos-em-massa-diz>>, September 2020.
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