IN SEARCH OF THE BRAZILIAN CONSTITUTIONAL ETHOS: A COMPARATIVE STUDY OF LIBERAL CONSTITUTIONALISM[1]

EM BUSCA DO ETHOS CONSTITUCIONAL BRASILEIRO: UM ESTUDO COMPARADO DO CONSTITUCIONALISMO LIBERAL

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ABSTRACT: This article argues that the Brazilian constitutional *ethos* is constructed upon an asymmetrical distribution of powers which, if not addressed, imposes a hindrance to the protection of democracy and the human rights recognised in the constitutional pact. The establishment of the 1988's Constitution in Brazil represented a strong political stance in which the country sought to overcome its democratic deficiencies and human rights violation practices after experiencing an intense military dictatorship. Thus, the constituent assembly was strongly influenced by the liberal perspective of constitutionalism, establishing a system that defined constitutional rights and principles, recognizing their normative force within the legal framework of the state. On the other hand, liberal constitutionalism tends to suppress the political nature of the constitution. How this development impacts the exercise of power in Brazil and the United States? This article proposes to analyse critically how the configuration of the strictly liberal perspective of constitutionalism impacts Brazilian socio-political structure, considering both the tendency of liberal constitutionalism to overshadow the political aspect of the constitution and the specificities of Brazilian distribution of power within the state.
Keywords: Comparative Constitutional Law. Brazil. Constitutional History. Liberal Constitutionalism.

RESUMO: Este artigo argumenta que o *ethos* constitucional brasileiro tem por base uma distribuição assimétrica de poderes que, se não abordada, impõe um impedimento à proteção da democracia e dos direitos humanos positivados no pacto constitucional. O estabelecimento da Constituição de 1988 no Brasil representou uma forte posição política na qual o país procurou superar suas deficiências democráticas e práticas de violação de direitos humanos após experimentar uma intensa ditadura militar. Assim, a assembleia constituinte foi fortemente influenciada pela perspectiva liberal do constitucionalismo, estabelecendo um sistema que definia direitos e

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princípios constitucionais, reconhecendo sua força normativa no marco legal do Estado. Por outro lado, o constitucionalismo liberal tem a tendência de suprimir a natureza política da constituição. Como esse desenvolvimento afeta o exercício do poder no Brasil e nos Estados Unidos? Este artigo propõe analisar criticamente como a configuração da perspectiva estritamente liberal do constitucionalismo afeta a estrutura sociopolítica brasileira, considerando tanto a tendência do constitucionalismo liberal de ofuscar o aspecto político da constituição quanto as especificidades da distribuição brasileira de poder dentro do Estado.
Palavras-Chave: Direito Constitucional Comparado. Brasil. História Constitucional. Constitucionalismo liberal.

1. INTRODUCTION

The experience of constitutionalism in western contemporary societies is both an outcome of region-specific cultural developments and the assertion of a more universal set of postulates established in western philosophical paradigms and the international law (BERMAN, 2009; DOWDLE; WILKINSON, 2017). Therefore, while certain themes are common in the consideration of a nation-state through the lenses of constitutional theory, such as the main institutions in constitution-design, the procedures and norms that inform the transference of political power, the idea of rule of law, democracy, and human rights, other features are specific to the regional consideration and the development of those principles within the nation-state.

Liberal constitutionalism is the political theory that argues for the limitation of political power through a written constitution, on the terms of modern contract theory (LOUGHLIN, 2010a, p. 275–310). As such, the premises of constitutionalism are the limitation of power through a constitutional document, representative of a constitutional contract between the people and the sovereign, which allocates political

power to different institutions within the state. The contract is then representative of the will of the nation, and the instrument through which the people can autonomously and democratically exercise its political power (LOUGHLIN, 2015). Established as such, a Constitution is set as the most fundamental positive law, with its supremacy protected by a Supreme Court, which enhances its legalised and technical interpretation (LOUGHLIN, 2010b, s/p).

This is representative of a liberal paradigm of constitutionalism that disregards the political aspect inherent to state formation and human rights protection. As such, political and social changes are interpreted and only affected, by the institutionalised legalistic form of constitutional adjudication, which can disregard other societal components that sometimes influence how power is exercised within the boundaries of the law.

Considering this perspective, this article aims to engage in a comparative constitutional study to better assimilate the traces that define constitutionalism in Brazil. Thus, rather than presupposing the Brazilian constitutional imagination through the establishment of the 1988's Constitution, this study envisages to comprehend common features in the country's constitutional history since its independence from Portugal's colonial rule in order to pinpoint the characteristics that have shaped the notion of constitutional and democratic rule and continue to influence our notion of constitutionalism today.

To do so, this article will first establish its methodology for the comparative constitutional study, and then contrast the experience of constitutionalism in the United States and Brazil. The use of the comparative exercise will enlighten how constitutional theory and practice in both countries respond to the asymmetrical consideration between law and politics, also informing how the development of the constitutional state is entrenched in a never-ending historical process. In sum, in the United States, the supremacy of law over politics is contested but circumvented by

its tradition of law, the doctrine of precedent, and a strong system of checks and balances. Contrastingly, the Brazilian Constitution is marked by the asymmetry of political powers, even though maintaining the legalistic and liberal perspectives of constitutionalism. The asymmetry is represented through Brazil's constitutional history, and its institutional formation, which, it is argued, culminated in an exacerbate number of attributions for the Judiciary and its Supreme Federal Tribunal.

2. COMPARATIVE CONSTITUTIONAL LAW - ESTABLISHING COMPARATIVE CONSTITUTIONAL METHODOLOGY AND CASE SELECTION

Considering the comparative nature of this study, this first section will summarize the methodological choices made in selecting the case studies of Brazil and United States to critically assess the specific way in which liberal constitutionalism is understood and exercised in Brazil.

Ran Hirschl prescribes that the comparative analyses of constitutional systems can be made with several different methodologies, each entailing a specific purpose, encompassing, for example, constitutional interpretation, constitution-making and constitutional design (HIRSCHL, 2014, p. 2). Therefore, Hirschl proposes different modes of comparative constitutional enquiry regarding case-selection, purpose, theoretical framework and method, which informs the necessity of defining the specific methodology engaged and the purpose envisioned in each comparative investigation.

On the other hand, a different approach is given by Tushnet (TUSHNET, 1999, s/p), who focus, specifically, in which way one nation is capable of learning from another constitutional experience, designating three approaches that correlate with the way in which comparative constitutional law is formulated either by courts, lawyers, or academics (TUSHNET, 1999, p. 1228). Thus, while both scholars focus

on methodological questions, Hirschl is more preoccupied with the outcome of the research, maintaining the possibility of different methodological approaches to fulfil different quests in comparative constitutional research whereas Tushnet presents a more utilitarian perspective on the subject, aiming to define the best, among many, methodological route to highlight and inform critical scholarship through comparative mechanisms.

Thus, considering the perspective from both authors, it is important to designate specific purposes and modes of inquiry when drawing comparisons of constitutional law, and also assimilate how the comparative exercise will enhance the comprehension of one's constitutional system.

The present study engages with a generative method of comparison. Therefore, its purpose is, specifically, to generate 'analytical frameworks for thinking critically about constitutional norms and practices' in two or more different countries (HIRSCHL, 2014, p. 238). This method is characterized by a universalist approach that emphasizes the similarity of constitutional challenges and functions across liberal constitutional democracies and uses the comparative method to assess the different responses to common problems within the liberal tradition of constitutionalism (HIRSCHL, 2014, p. 238).

As Kennedy presents us, this universalist approach is also, at its core, a functionalist redemption of comparative legal studies which relies on the assumption that law is an instrument to social ends and can, through its institutions, provoke social change and development (KENNEDY, 2012, p. 33). Also, while universalism is entrenched in the way in which this comparative methodology functions, by assimilating common traits and perspectives in a general category of the constitutional thought, this characteristic is troublesome as it does not account for the different variables in the exercise of power and the framework of institutions within the constitutional systems, rendering a comparative perspective that lacks for the

understanding of the particular history, politics and cultural aspects of different nations (TUSHNET, 1999, p. 1268).

Considering this, the present comparative study will engage in a critique of the theoretical framework of liberal constitutionalism in the United States and Brazil to highlight the shortcomings of this political theory and the main issue in its predominance in comparative constitutional law studies. As such, the present study tries to avoid the commonalities described by Kennedy as the overshadowing of ideology (KENNEDY, 2012), and the universalist approach inherent to this mode of comparison, once the main focus will be to question the liberal standards of constitutionalism and how they excel in different socio-political realities. As such, this perspective takes into account the context-bound aspects of liberal constitutionalism in Brazil, instigating a reflection on the particularity of the constitutional *ethos* in the country and contrasting its premises with the basic tenants of liberal constitutionalism in the United States.

This leads the discussion to professor's Tushnet elaboration of the possibilities of comparative constitutional studies as an instrument for constitutional interpretation and constitution-making. Tushnet describes three major perspectives in the field that engage in comparison in a different manner, being the aforementioned functionalism, expressivism, and bricolage (TUSHNET, 1999, p. 1226–1230).

According to Tushnet, in the functionalist approach liberal constitutionalism is understood as a common assumption of the study and not an object of investigation in itself. Therefore, the comparison addresses issues with the presumption that political institutions perform certain tasks common to all systems of governance, limiting the comparison to institutional frameworks and power relations (TUSHNET, 1999, p. 1234). Thus, Tushnet highlights comparative studies that focus on different designs for the separation of powers, ensuring the tripartite allocation of power, the balance between the Legislative and Executive power, and the extension of roles

assigned to the Judiciary and constitutional courts as examples of comparative constitutional studies that use this method of analysis (TUSHNET, 1999, p. 1234).

An expressivist methodology of comparative constitutional law is significantly different, as it does not rely solely on the presumptions of liberal constitutionalism. In this regard, Tushnet argues that in the expressivist perspective, constitutions are considered to emerge out of each nation's distinctive history and express its distinctive character. As such, the comparison should take into consideration the history and culture of different nations, understanding their constitutional developments in a political and historical context that is more comprehensive than the juridified constitutional text, acknowledging 'that constitutions vary in the extent to which they shape the cultures in which they are located'[3] (TUSHNET, 1999, p. 1271).

The third method of comparative constitutional law described by Tushnet is understood as an instrument both for constitutional interpretation and constitution-making. Borrowing the concept of *bricolage* from Claude Lévi-Strauss (LÉVI-STRAUSS, 1966, s/p), the author argues that constitution-makers and interpreters 'find themselves in a political world that provides them with a bag of concepts ''at hand'', not all of which are linked to each other in some coherent way' (TUSHNET, 1999, p. 1286). The *bricoleur* selects different principles and theories according to the immediate problem they are facing, either in constitution-making or interpretation, which results in a plethora of legal arguments, justifications and constitutional norms that are not entirely coherent with a nation's political culture, and long-term aims (TUSHNET, 1999, p. 1286).

This perspective seems to be more coherent with the expansion of

[3] This perspective is consonant with Montesquieu's critique of comparative engagements in constitutional law. The author argues that 'the political and civil laws of each nation… should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another' (MONTESQUIEU, 1989, p.8)

constitutionalism in the western world. As Wilkinson and Dowdle explain, at the same time each modern nation developed constitutional discourses in specific relation to their historical condition and political moment, the regional perspectives were also interlocked with other experiences of constitutionalism elsewhere (DOWDLE; WILKINSON, 2017, p. 27–32). Thus, even though each nation-state promoted constitutional concepts to tackle specific issues within their polity, the exchanging of ideas and concepts allowed for the layered construction of what constitutionalism is considered to be in the western tradition of law.

From these three perspectives, and considering the critique of functionalism, the present study follows the bricolage rationale, understanding the political influence of the American experience of constitutionalism in the construction of the Brazilian constitutional imagination. Thus, while it is acknowledged that both countries exert principles and interpretations from the liberal perspective of constitutionalism, the following sections seek to assess the shortcomings of this tradition in contrast with the socio-political structure of power in Brazil, considering both its history and contemporary political changes.

3. LIBERAL CONSTITUTIONALISM AND THE UNITED STATES CONSTITUTION

As already established, the political theory of constitutionalism is a modern concept that argues for the limitation of political power through the establishment of a constitutional structure that provides for the separation of power, the protection of constitutional rights, the establishment of judicial review, and the sovereignty of the constitutional text.

The modern conception of constitutionalism is, in fact, a liberal construct of different nations, and as such had different interpretations for different problems and political realities. For example, Wilkinson and Dowdle explain how the concept of

constituent power in France was influenced by the necessity of the Third State to emancipate itself from the aristocratic rule. At the same time in the United Kingdom both Whiggish constitutionalism, based on the concept of Parliamentary Sovereignty, and Tory constitutionalism, underpinned by Burke's (BURKE, 1986) consideration of an ancient and immaterial constitution, relates to the fear, among the British aristocracy, of a similar constituent upheaval in British politics. The interlocking of perspectives continues as in the United States, the necessity of constraining the revolutionary forces after the Civil War instigated the formation of a specific form of constitutionalism that even though libertarian, isolated the radical perspective of constituent power, following similar strains from the British constitutional thought in order to promote the sovereignty of the constituted powers (DOWDLE; WILKINSON, 2017, p. 27–32).

This illustrates how constitutionalism is 'a complex, uneven, and ever-changing historical discourse – it is 'bricolage' rather than blueprint' (DOWDLE; WILKINSON, 2017, p. 31). Thus, the realisation of constitutionalism is pluralist and diverse, and for that reason does not limit itself to the structural-liberal vision and discourse, as no single perspective is able to fully grasp the full possibilities of the political phenomenon of emancipation.

In time, this interlocking visions of constitutionalism were surpassed by the phenomenon of constitutionalisation, characterised by the predominance of the liberal perspective of constitutionalism, in which the political characteristic of constitutions (the notion of *droit politique*) is overshadowed by the legal consideration of the constitution (LOUGHLIN, 2010b, p. 57–59). As such, the notion of constituent power is relativized and exchanged for the concept of constitutional rights and legal interpretation, with the purpose to stabilize state-society relations, softening political disagreement and deliberation through a technocratic and legalised form of decision-making (WILKINSON, 2017, p. 52). The trend is present even in the domestic

systems of constitutional law, with the outsourcing of political authority to counter-majoritarian institutions such as Supreme Courts, independent regulatory agencies, and independent central banks (WILKINSON, 2017, p. 52).

In the United States, where the liberal conception of constitutionalism took its form, the shutdown of the political has been a contested theme in constitutional scholarship[4]. Even still, the constitutional system has, to some extent, circumvented the issues related to the concentration of power on the Judiciary, through its unique institutional structure of checks and balances, federalism and the Doctrine of Stare Decisis, in which courts are bound by its previous decision, being able to distinguish and overrule cases upon an extensive hermeneutic and argumentative process (BARBOZA, 2014).

The common law rationality of constitutional adjudication allows the consideration of the necessity of coherence within the legal system and the necessity of maintaining the integrity of the law, providing certainty and evading surprise decisions (SCHAUER, 2009, p. 90). As such, the constructive quality of many Supreme Court decisions depends on extensive legal reasoning, with the use of specific modes of interpretation (DWORKIN, 1985, p. 9–32).

Contrastingly, the critique of the common-law perspective of constitutionalism is based on a republican ideal (BELLAMY, 2007; WALDRON, 2006), and argues for the predominance of political restraints on constitutional

[4] The juridification of the constitution through constitutional adjudication and the establishment of the Supreme Court as a fundamental political power has been the main theme of major research in the United States academic sphere. Examples are Bickel's contention of the Judiciary as the least dangerous branch, Tushnet academic evaluation on the possibilities of weakening the role of courts while maintaining the strength of constitutional rights, through a dialogic system of judicial review, Dworkin's legal and philosophical contention on the moral reading of the constitution and the concept of law, Tribe's analyses of the possibility of an invisible and living constitution, beyond the parameters of the written document, and Waldron's republican and democratic critique of Dworkin's analyses and the role of Judicial Review, defending a concept of deliberative democracy. In this sense: BICKEL, 1986; DWORKIN, 1977, 1986, 1996; TRIBE, 2008; TUSHNET, 2008; WALDRON, 1999 and 2006).

interpretation, focusing more on the separation of powers established in the institutional framework of the constitution (POST; SIEGEL, 2009). This perspective is parallel to the critique of political constitutionalism in the United Kingdom, which understand that the fundamental values and rights limiting governmental power have a political nature and should, therefore, be interpreted by legal institutions more democratically accountable (BELLAMY, 2007, p. 146).

Marco Goldoni (2016) argues that this republican critique in the United States, called political constitutionalism in the United Kingdom, is limited by its formal positivist discourse, which maintains a normative assumption of constitutional law, neglecting the notion of the constitution as a political right (*droit politique*) and still reinforcing the concept of the constitution only in its formal and textual establishment as the most supreme law of the land (GOLDONI, 2016, p. 53–54). As such, the American and British republican critiques remained attached to the liberal vision of constitutionalism, arguing for the necessity of a 'stronger normative justification' for parliamentary sovereignty, centred on the individualist premises of liberal normativism (GOLDONI, 2016, p. 54).

Therefore, in the liberal tradition of constitutionalism in the United States, the Supreme Court is held accountable by its political decisions both through the legalistic system of precedents inherent to the common law tradition of *stare decisis*, and through a definitive separation of powers and attributions established in the constitution, which is regarded as the fundamental positive law of the nation's legal system. These safeguards allow for the stabilization of the system of checks and balances in the American political environment and, to a certain extent, circumvent the issues inherent with the legalised conception of the constitution.

4. BRAZILIAN CONSTITUTIONAL *ETHOS*: AMBIGUITIES AND ASYMMETRICAL POWER STRUCTURES IN A LIBERAL CONSTITUTIONAL ESTABLISHMENT

In the previous section, I have summarized the main tenants of liberal constitutionalism and how the United States constitutional framework deal with problems inherent to the depreciation of the political aspect of the constitution. Now, I intend to analyse how the liberal perspective of constitutionalism presented some ill-fated results in Brazil, considering its historical and political aspect of the distribution of power.

The 1988 Constitution established a liberal-normative system of law, prescribing huge safeguards for the protection of the individual, social and diffusive rights (BARROSO, 2012, p. 28–29). As such, the Brazilian constitution became extremely analytical, with provisions regarding individual rights, labour rights, social security, and the economy, specifying legal norms that address themes such as education, tax reform, and property rights.

Therefore, the constitution established a system of safeguards that represented the pinnacle of liberal constitutionalism, where a vast number of norms and principles were accredited with a constitutional standing, making it possible for the Supreme Federal Tribunal to enforce them notwithstanding legislative and executive action. In other words, if rights were not protected by the Executive or Legislative powers, the Judiciary was charged with the responsibility of ensuring the effectiveness of the Constitution and its provisions (CLÈVE, 2012, p. 53–70). This was secured by a complex system of judicial review, encompassing the ability of certain officials and representative bodies to petition the court directly in an abstract exercise regarding the constitutionality of legislation or executive order, or the assessment of the constitutional standing regarding a concrete case (SARMENTO;

PEREIRA NETO, 2015, p. 115), where the analyses of the constitutionality of a norm would be incidental in a legal dispute between two private parties or against the state government (SARMENTO; PEREIRA NETO, 2015, p. 73–114).

Thus, the Judiciary had its power increased, with some of its decisions becoming politically controversial, considering the inherently political character of fundamental rights (BELLAMY, 2007, p. 148), even though they were *prima facie* defending the rights of minorities and exercising a counter-majoritarian role.

It must be highlighted that the 1988's Constitution was a product of an organized polity, reacting to the years of state repression, disregard for human rights, and violence committed during the military dictatorship established in 1964. The constituent assembly was considered one of the most democratic assemblies in the nation's constitutional history and it modelled the constitutional system to American standards of liberty and equality. As such, the Constitution inaugurates a new political and normative order, where its establishment is no longer understood as a mere document of organization and distribution of political powers, but as a fundamental commitment of a community governed by the principle of equality and freedom (BONAVIDES; ANDRADE, 2008), which guarantees its centrality in the normative framework of the state (CLÈVE, 2012, p. 53–70).

Even still, an assessment of the re-implementation of constitutionalism and democracy in Brazil, after the period of military dictatorship, is not enough to comprehend the nation's constitutional imagination. Brazil has had seven different Constitutions since its independence from Portugal's colonial rule and its constitutional history is rich with strong influences from other countries, such as France and the United States, spanning from a model that established a constitutional monarchy in the first half of the nineteenth-century to a federative republic.

Considering this history, it is of utmost importance to delineate the nation's tendency to authoritarian rule and centralization of power, as well as the United

States' influence in the nation's normative order (TOTA, 2009). For that purpose, this section will scrutinize three constitutional moments in Brazil's history that are representative of the asymmetry and centralization of political power in the country. The argument here is that considering this historical perspective, the rise of the Supreme Federal Tribunal as a centralizing institution of power, even in an indirect way, is consonant with past examples of centralization power.

Primarily, the first Constitution of the country was imposed by the Emperor in 1824, establishing a constitutional monarchy in the country after the movement for independence from Portugal's colonial rule. This first constitution was in itself a product of a coup, as Emperor D. Pedro I had instituted a Constitutional assembly to produce a Constitution for the independent nation of Brazil, but, upon losing the control over the deliberations, used military forces to destitute the Assembly and enforce its own (less liberal) Constitution (VILLA, 2011, p. 7–10).

The Constitution of 1824 then, lost several of its liberal and despotic provisions, which was represented by the creation of a fourth power besides the Executive, Legislative and Judiciary – the Moderating power (LUNA; KLEIN, 2006, p. 7). This fourth institution of power was representative of the Emperor as the supreme chief of the nation and gave him supervisory functions and intervention capacities regarding all exercise of power in the nation. Upon the adoption of this Constitution, the Emperor justified the need for this concentration of power to defend the liberties enshrined in the Constitution for Brazilian citizens, which transvested the arbitrary power in the liberal promises of constitutionalism (VILLA, 2011, p. 11).

The idea of the Moderating Power followed the theorisation of the French philosopher Benjamin Constant (CONSTANT, 1997b). In his definition of the fourth power, and considering the France's experience with Revolutionary movement of 1789, Constant envisioned an institution that would further limit the sovereignty of the people in order to maximize the defence of fundamental values and human rights

in the nation established post 1789, conciliating the former structure of monarchical rule with the new postulates of modernity (CONSTANT, 1997a; LYNCH, 2010).

Upon the destitution of the constitutional assembly of 1823 and the establishment of the imposed Constitution of 1824, the Emperor D. Pedro I reasserted his conception that a tripartite separation of powers within a nation-state is dependent of an arbiter, a constitutionally-established institution that would prevent the enlargement of other institutions within the structure of government (MACAULAY, 1986, p. 189). This first historical example is important because, after the destitution of the Brazilian monarchy, the concept of the moderating power remained in the constitutional imagination of Brazil as, the attributions of this power were absorbed in the recently created Supreme Federal Tribunal, with the first Republican Constitution of 1891 (VILLA, 2011, p. 92), and were also discussed in the constitutional assembly of 1933 (LYNCH, 2010, p. 103).

The second and third examples from Brazilian history are comprised of the two dictatorships established in Brazil. First, the Vargas dictatorship and its constitution, which spanned from 1937 to 1945, and afterwards the military dictatorship, established between the years of 1964 and 1985, which represented the absolute asymmetry between the powers of the state, even though maintain a smokescreen of constitutionalism in its structural format (CÂMARA, 2017, s/p).

During the Vargas dictatorship, the country was internationally put in an ambiguous position. On one hand, in many aspects, there was a huge American influence in political and economic decisions, when even the official title of the country was styled in an Americanised fashion (the United States of Brazil) and civil liberties were enshrined as constitutional rights, following the liberal predicament of the United States constitution (TOTA, 2009; VILLA, 2011, p. 44–57). On the other hand, Vargas presidency was marked by an affinity with the European fascist movement, the broadcast of nationalist views regarding immigration and trade, anti-

Semitic sentiment, disdain for democratic values and political liberties, and a national-security discourse that condoned arbitrary rule (LUNA; KLEIN, 2006, p. 9).

The constitution of 1937 was aligned with the need for a unitary national front for the centralization of power and all duties regarding the governance of the nation, besides the ideological transition advocating for a strong intervention of the state into the economy, in accordance with the changes happening in other constitutional experiences in the world following the Great Depression, such as the New Deal in the United States and the ordoliberalism of the Weimar Republic in Germany (WILKINSON, 2017, s/p).

In 1964, the military dictatorship followed parallel premises, displaying also a dubious character. While the regime was committed to the Cold War, being extremely anticommunism and neoliberal, it was also structured as a powerful centralized state, dominated by the federal executive branch and with regional states exercising limited governance. Civil liberties such as freedom of expression and political association were formally acknowledged but institutionally disregarded, with massive killings and torture chambers distributed in the major political cities in the country, thwarting any attempt of political deliberation and resistance (LUNA; KLEIN, 2006, p. 17).

An important aspect of both dictatorships in Brazil is the belief that the centralization of power was held for a greater cause, as well as the defence of some type of liberty and fundamental rights for a parcel of the population. In this sense, the 'communist threat' was the rationality behind many normative and legal structures that framed the coup d'état in a legal structure that was repressive and authoritarian, once again transvesting arbitrary power in constitutional discourse. In other words, the constitutional imagination of Brazil allowed for the maintenance of the belief on a unitary, and many times arbitrary, source of power that would act as the guardian of the state and protector of the nation's political morality, considering the propagated

fear of communism and the human rights discourse.

As argued before, the Constitution of 1988 was a direct response to this historical past of undemocratic rule. As such, the constitutional imagination of Brazil post-1988 focused strictly on a structural-liberal perspective of the constitution, establishing a normative concept that minimizes its political character through the institutionalization of power (BARBOZA, 2014; CHUEIRI, 2006). As such, the political character of the Brazilian constitution was set aside through the concentration of power in the Judiciary, as the Supreme Federal Tribunal consolidated its role as a constitutional court (CONCEIÇÃO, 2017, s/p).

Thus, Barroso argues that the court concentrated three main roles in the structure of power: first the role of guardian of the Constitution, defending its supremacy against the unconstitutional executive and legislative actions. Second, the role of a counter-majoritarian institution, allowing for the defence of rights of minorities that would not have been protected through the representative democratic bodies (BARROSO, 2016). Thirdly Barroso argues that the Supreme Federal Tribunal 'occasionally play the role of an enlightened vanguard, in charge of pushing History forward when it stalls' (BARROSO, 2016, p. 83). Therefore, the Judiciary, through constitutional adjudication, is empowered not only to perform constitutional mutation when exercising its hermeneutic exercise of protecting the rights established in the Constitution but also to perform the political function of creating new rights and norms when it deems necessary (BARROSO, 2016, p. 79–87).

Barroso's account of the functions of the Supreme Federal Tribunal is representative of an ideological shift in Brazilian's legal and philosophical framework towards a post-positivist consideration of law, in which the rule of law is considered in its substantive conception and principles are accredited with normative standing, blurring the strict division between law and morality (DWORKIN, 1977, p. 25–29, 37, 125–130). On the other hand, the account also reinforces the belief of a unitary

source of power that acts as the guardian and protector of constitutional rights and ideals, dismissing their inherently political nature (BELLAMY, 2007, p. 145–175).

As analysed before, this trend is consistent with the predominance of the structural-liberal vision of constitutionalism in the western legal tradition and what Loughlin describes as 'constitutionalisation' (LOUGHLIN, 2010b, s/p). The major problem is that even though it can be argued that constitutionalisation makes the distinction between legal traditions void[5] (HIRSCHL, 2014, p. 233), internal differences remain and the simple exportation of institutions and legal structures fail to account them.

Even with the legal-philosophical paradigm shift, Brazil's legal tradition remain focused on a civil law structure where the concept of judge-made-law is not consistent with the democratic quality of the constitutional system. As such, for a long period the Judiciary has maintained a decision-making procedure that was not based on the doctrine of *stare decisis* and, therefore, previous decisions would only entail a manipulative rationality that was not in fact legally binding (CONCEIÇÃO, 2017, p. 227–233; MITIDIERO, 2017), creating a scenario where the Court's autonomy to decide became completely unrestricted.

Nowadays, in Brazil's current constitutional crises, the role of the Supreme Federal Tribunal has become contested, as the court does not bulge from the democratic deficiencies of its exercise of power[6]. In many ways, the Court has

[5] As the author argues: 'the rise of supranational rights regimes and the emerging global canon of constitutional law are increasingly defying traditional common law/civil law distinctions. Although "legal tradition" still accounts for considerable differences in modes of constitutional adjudication, reasoning, and foreign citation sources, legal families cannot explain why constitutional jurisprudence in Germany, Spain, Israel, Canada, and South Africa looks increasingly similar'.

[6] Brazilian scholarship has dealt with the paradox between constitutionalism and democracy, judge-made law and Parliamentary sovereignty, with a similar theoretical background that deals with the problem in the United States. As such, arguments for a deliberative performance of courts have clashed with more critical perspectives that draw from the theory of popular constitutionalism, as well as considerations for the enhancement of coherence and integrity of the constitutional adjudication system or a reassessment of the institutional design in the constitutional establishment.

become bigger than the Constitution for which it is vowed to protect, manoeuvring different ideologies through hermeneutic exercises that fail to consider the Constitution, once again in an effort to bring apparent legality to an arbitrary exercise of power.

An example of this trend is the decision of the court in the Habeas Corpus proceedings no. 126.292, in 2016. The court changed its position regarding the principle of presumption of innocence, allowing the imprisonment of an accused criminal before the exhaustion of all legal appeals in the Judiciary. The Constitution specifically prescribes in its art. 5, section 57, the impossibility of incarceration without an un-appealable sentence, enshrining the principle of the presumption of innocence as a fundamental right within the legal system. The controversial decision by the Court was challenged through judicial review proceedings and, afterwards, through another Habeas Corpus petition of ex-President Lula (HC 152.752) (MENDES, 2018, s/p). During the court hearings, many Justices vocally expressed concern with the Court's previous decision, arguing that it is, in fact, an unconstitutional decision as it overrules an explicit norm of the constitutional text, but maintained the decision to avoid the political implications of letting Lula out of jail for the remaining of his process, which incapacitated him to run for the 2018's presidential election.

This is evidence that the Supreme Federal Tribunal has become an unaccountable political power that reinforces the asymmetry of political power in Brazil which defeats the basic tenants and purposes of both democracy and constitutionalism.

These discussions can be analyzed in: BARBOZA, 2014; BARROSO, 2016; CHUEIRI, 2006; CLÈVE, 2012; GARGARELLA, 2006, and 2013; MENDES, 2013

5. CONCLUSIONS

By approaching the analysis of the Brazilian constitution from a political and historical perspective, this article dismisses the optimism displayed in the establishment of the Brazilian Constitution of 1988. This is inherent to the consideration that constitutionalism, both as a theory and as a practice, cannot be considered isolated in time or region, being instead of construction that is at the same time regional and global. Thus, the Brazilian constitutional *ethos* was influenced both by foreign conceptions of the constitutional thought, and also its local history and customary political practices.

Therefore, signalling that the perspective of liberal constitutionalism allows for the constituted to overcome the constituent power in the definition of the constitutional system, thus overshadowing the inherent political aspect of the constitution and the human rights it is set to protect while focusing on a purely technical and legal interpretation of the constitutional norm, this study proposed to analyse critically how the constitutional system of Brazil and the United States dealt with this outcome in context of the separation of powers and their symmetry in the constitutional-design established.

As demonstrated, the centralization and asymmetry of political powers are predominant in the Brazilian constitutional history, which implicated in a normative effort of the 1988's constitution to break with the historical pattern of abuses of power and disregard to fundamental human rights. As such, the constitution is established from a liberal perspective, whereas the judicial branch undertakes the responsibility to make the constitution effective, through its activism in judicial review and a constructive interpretation.

While the outcome sought after by this institutional design can work in favour of the rule of law and the human rights prescribed in the constitutional text, its

exercise can be troublesome if not mindful of the contextuality of Brazilian cultural and political practices, as experienced through history. Nowadays, as some of the most polemic manifestations of the constitutional court shows, this design has the capacity of endangering democracy as the Court many times fails to defer its political power and actively use its position to steer the history of the nation, despite its character as a non-political branch.

As seen, in the United States the political deficit is surpassed by the establishment of a strict system of precedents and the legal practices inherent to the common law mindset. Thus, while the Supreme Court maintains the power to protect the sovereignty of the constitution trough adjudication and legal interpretation, the Federal structure and the strong separation between the Legislative, Executive and Judicial powers allow for a more accountable exercise of power from this political branch.

In Brazil, not only the Civil Law structure of the legal system prevented the establishment of a system of precedents imbued with coherence and integrity, but also the federalist pact and the separation of powers followed a more centralizing tone, in which the majority of powers was concentrated with the federal government (ALMEIDA, 2013) and the Supreme Federal Tribunal accumulated powers through the enlargement of its jurisdiction.

This accumulation of power is consistent with Brazil's constitutional *ethos*, in which the protection of civil liberties and the postulates of constitutionalism are believed to be dependent of a strong central figure of power, which conceals the arbitrary character of this institutions while concurrently proclaiming them the defenders of the nation's moral and political principles.

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