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Brazilian constitutionalism in the Latin American context[1-2]

O constitucionalismo brasileiro no contexto latino-americano

El constitucionalismo brasileño en el contexto latinoamericano

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Abstract

This paper studies the evolution of Brazilian constitutionalism in light of the development of Latin American constitutionalism. It focuses on three major periods of this evolution: (i) a first "foundational" period (1850-1900) in which a majority of countries in the region, including Brazil, adopted constitutions that incorporate features of the two main legal influences in Latin America, liberalism and conservatism; ii) a second period (1917-1960), in which the old liberal-conservative constitutionalism began to acquire a profile more attentive to social issues and economic inequalities – the period (so-called) "social constitutionalism"; and iii) a more recent period, related to the so-called "new Latin American constitutionalism", which came to combine "the old" and "the new": the old institutional model, inherited from the nineteenth century, and the new social constitutionalism. The final part of the paper explores the (so called) problem of the "engine room" of the Constitution, that is, the problem of significantly changing the structure of rights, while basically preserving the old organization of power untouched.

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[SUMÁRIO]

Keywords
Brazilian Constitution; liberalism; conservatism; social constitutionalism; "engine room".

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Resumo
Este artigo estuda a evolução do constitucionalismo brasileiro à luz do desenvolvimento do constitucionalismo latino-americano. Ele se concentra em três períodos principais dessa evolução: (i) um primeiro período "fundacional" (1850-1900), no qual a maioria dos países da região, inclusive o Brasil, adotou constituições que incorporam características das duas principais influências jurídicas da América Latina, o liberalismo e o conservadorismo; ii) um segundo período (1917-1960), em que o antigo constitucionalismo liberal-conservador passou a adquirir um perfil mais atento às questões sociais e às desigualdades econômicas – o período do (chamado) "constitucionalismo social"; e iii) um período mais recente, relacionado ao chamado "novo constitucionalismo latino-americano", que passou a combinar "o velho" e "o novo": o antigo modelo institucional, herdado do século XIX, e o novo constitucionalismo social. A parte final do artigo explora o (assim chamado) problema da "casa de máquinas" da Constituição, ou seja, o problema de alterar significativamente a estrutura dos direitos, preservando basicamente intacta a antiga organização do poder.

Palavras-chave
Constituição brasileira; liberalismo; conservadorismo; constitucionalismo social; "sala de máquinas".

Sumário

Resumen
Este artículo estudia la evolución del constitucionalismo brasileño a la luz del desarrollo del constitucionalismo latinoamericano. Se centra en tres períodos principales de esta evolución: (i) un primer período "fundacional" (1850-1900), en el

que la mayoría de los países de la región, incluido Brasil, adoptaron constituciones que incorporaban rasgos de las dos principales influencias jurídicas de América Latina, el liberalismo y el conservadurismo; ii) un segundo período (1917-1960), en el que el viejo constitucionalismo liberal-conservador pasó a adquirir un perfil más atento a las cuestiones sociales y a las desigualdades económicas – el período del (así llamado) "constitucionalismo social"; y iii) un período más reciente, relacionado con el llamado "nuevo constitucionalismo latinoamericano", que pasó a combinar "lo viejo" y "lo nuevo": el viejo modelo institucional, heredado del siglo XIX, y el nuevo constitucionalismo social. La parte final del artículo explora el (llamado) problema de la "sala de máquinas" de la Constitución, esto es, el problema de alterar significativamente la estructura de los derechos, preservando básicamente intacta la antigua organización del poder.

Palabras clave
Constitución Brasileña; liberalismo; conservadurismo; constitucionalismo social; "sala de máquinas".

Índice

1. Introduction

In this paper, I would like to reflect on the evolution of Brazilian constitutionalism in light of the development of Latin American constitutionalism. I will focus on three major periods of this evolution, which implies that I will not make an exhaustive or complete overview of the history of constitutionalism in Brazil: (i) a first period, which we can call "foundational" (1850-1900) in which a majority of countries in the region, including Brazil, adopted constitutions that incorporate features of the two main legal influences in Latin America, liberalism and conservatism; ii) a second period (1917-1960), in which the old liberal-conservative constitutionalism began to acquire a profile more attentive to social issues and economic inequalities - this was the arrival of (so-called) "social constitutionalism" in the region; and iii) a more recent period, related to the so-called "new Latin American constitutionalism", and which in fact came to combine "the old" and "the new": the old institutional model, inherited from the nineteenth century, and the new social constitutionalism. In this last stage a relevant problem is consolidated,

also common to the whole region, and which is linked to what in other works I have called the problem of the "engine room" of the Constitution, that is, the problem of significantly changing the structure of rights, while basically preserving the old organization of power untouched (Gargarella 2013, Gargarella 2022).

2. Towards a liberal-conservative Constitution for Brazil

Towards the end of the eighteenth century, Brazil, like almost all countries in the region, had a Constitution that combined, imperfectly, features of the two main dominant political projects in Latin America. On the one hand, features of a liberal constitutionalism, which had arrived in the region from the United States, through the famous Constitution of 1787: a liberalism that pronounced itself against "tyranny" and "anarchy"; that demanded the separation and balance of powers (a system of "checks and balances"); and that required the adoption of a Bill of Rights aimed at safeguarding fundamental rights including, prominently, religious tolerance, freedom of the press and due process. On the other hand, Brazil, like other countries in the region, was influenced by the long period of colonialism. From that period of Spanish-Lusitanian rule, it derived a conservative constitutional model - that of "the Cross and the Sword" - which called for the concentration of powers in the President; which was less concerned with the separation and balances of power; and which demanded a prominent place for the Church in the affairs of public life.

In different ways, and since the mid-nineteenth century, the great majority of the countries of the region "synthesized", through their Constitutions, these two great influences. This result was sometimes achieved through negotiations between liberals and conservatives at the same constitutional discussion table (as in Argentina 1853, Mexico 1857). On other occasions, as in Chile, the strong conservative conservatism (of the Constitution of 1833) began to liberalize towards the end of the century; and on other occasions, as in Colombia, the strong liberalism of the middle of the century (years of the Presidency of José Hilario López, and of the radicalism of the Rionegro Convention), gained increasingly conservative features towards the end of the century. In Brazil, on the other hand, this process of agreement between liberals and conservatives came very late - at the dawn of the 19th century, but it finally arrived. Let me give a brief account of this evolution.

I shall begin by stating that, after the sudden -and very late- passage from Empire to Republic, which took place only in 1889, Brazil suffered many years of instability and uncertainty. The political scene was then occupied by different groups

that were in tension with each other. On the one hand, there were the landowners -and particularly those connected to coffee plantations- who dominated politics at the state level, in association with increasingly important political groups, mainly associated with liberal and republican ideologies (republicans, at the same time, found inspiration in the then widespread positivist philosophy). On the other hand, there were the army forces -a group that included some of the "heroes" of the war against Paraguay, like the noted Deodoro Fonseca and also military officers with links to the "positivist Church".[4]

While representatives of the first group promoted a federalist territorial organization; representatives of the army resisted those policies claiming that they put the national unity under risk. Frequently, military officers defend antiliberal views, and also the creation of a powerful Executive power -some of them even accepted the establishment of a dictatorship (Fausto 2006, 246).

The fall of the imperial regime was due ultimately to a military coup that, in 1889, ended decades of monarchical rule. The coup was led by Marshal Deodoro, and supported both by the army and by an increasingly powerful coffee bourgeoisie, which would be clearly favored by the end of the Empire. The regime change, moreover, was consistent with a profound change in the economic organization of Brazil. In effect, by the end of the Century, Brazil experienced a drastic transformation in the foundations of its economy, which changed from being dominated by the export of cotton and sugar, to be controlled by the export of coffee (Halperin Donghi 2007, 273). This shift had huge implications. It involved, first, an extraordinary change in the geography of power, whose central axis passed from the northeast (predominantly based on cotton and sugar), to the center-south, controlled by Sao Paulo and Minas Gerais - the great coffee producers. The political and economic change also generated a significant impact on the social level, because they came together with the end of the exploitation of slave labor, which was predominantly used in the traditional agricultural economy.[5] In this way, and much later than most Latin American countries, Brazil began to put an end to this unacceptable practice. Also in this way, the link between big landowners and the imperial administration came to an end.

All these events facilitated the fall of the Empire, although they did not favor a well-ordered transition -rather the contrary. The new government, under the

[4] Positivists in Brazil worked for the realization of the ideals of "order and progress" that are still written in the Brazilian flag.

[5] Owners of coffee-plantations tended to replace slaves by European immigrants, and locally unemployed people.

command of Mariscal Deodoro, promptly acquired the form of a dictatorship. As a result of this, different sectors of the government began to see the enactment of a new Constitution as a key element in the transition to a new political organization. The new document -they believed- could then provide a more solid and legitimate basis to the desired liberal Republic.

In order to promote the constitutionalization of the country, the Provisional Government created a five-member Commission, which would be in charge of drafting the new Constitution. The Commission then presented three different projects: The first one, the so-called Werneck-Pestana project, established a system of indirect election for the president and vice-president of the country; incorporated the institution of federal intervention; proposed the creation of a new Capital for the country; and favored a modest federalist organization of the national territory. The second one -the so-called Américo Brasiliense Project- also established the indirect election for the president and vice-president of the country (although in a somehow different manner than in the Werneck-Pestana project); regulated the institution of federal intervention; and proposed a substantive revision with respect to the states' territorial limits. Finally, the Magalhaes Castro project organized the election of the president and vice-president through municipal chambers; proposed the creation of a new Capital for the country; affirmed the principle of federal intervention; and explicitly prohibited contracts that were incompatible with the liberty and independence of individuals (Arinos 1967, 126-7). The Commission then revised the three different projects and summarized them in only final alternative, which they offered to the Provisional Government. In this process, the then Minister of Finance, the influential jurist Rui Barbosa, appeared as the most salient figure.

What resulted from that process of synthesis was a new Constitution, which would become known as Brazil's 1891 Republican Constitution. The new document had important differences with respect to the previous ones. Among other things, it put an end to the decisive influence of French and British constitutionalism, which had been the dominant influences during the Empire. The old model was replaced by a different one, much closer to the U.S. Constitution: it incorporated the institutions of presidentialism, federalism, judicial review and individual rights.[6] In addition, and through the new Constitution Brazil abandoned its traditional constitutional structure, which included a four-branches-organization of power, which included the noted Moderating Power, and replaced it by a more traditional one, based

[6] According to some, it represented "the text of the U.S. Constitution, together with some dispositions coming from the Argentine and Suisse Constitutions" (Amaro Cavalcanti, citado en da Silva 2010, 79).

on a three-branches-division (da Silva 2010, 79). The Constitution that was then approved, which established a "federative republic with maximum administrative decentralization" (Calmón 1958, 313)- represented a clear convergence between liberal and conservative ideals.

In its liberal side, the Constitution included the prohibition of retroactive laws, and also a much more detailed approach to individual rights.[7] In addition, the Constitution proclaimed the separation between the State and the Church; authorized free interstate commerce; favored federalism (in a way that many considered exaggerated);[8] promoted public instruction; granted powers of judicial review to the Superior Tribunal; created the mechanism of *impeachment*; made the president of the republic responsible for different crimes; and prohibited all those constitutional reforms that affected the republican and federal character of the national organization (Fausto 2006).

Meanwhile, in its conservative side, the Constitution incorporated the institutions of federal intervention and state of siege; and above all favored the creation of a strong presidentialist system.[9] Among other features, the Brazilian Constitution allowed the Executive to appoint and remove its Ministers at his own will, which put the Brazilian document in line with most other Latin American presidentialist systems: all of them reserved for the President more powers than the U.S. presidentialist Constitution.

The main intellectual responsible of its text was a noted jurist, namely Rui Barbosa, who became the person in charge of revising the (five) different projects presented by the commissions of experts.[10] Barbosa himself was, in addition, the

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[7] Although the Constitution expanded political rights, it did not extend them to illiterate people, women or the very poor. These decisions were heavily criticized by the so-called "Apostolado Positivista", which considered that there were no good reasons for leaving so many people deprived from their right to vote (Rodrigues 1965, 155-6).

[8] Some authors distinguished Brazilian from U.S. federalism, by making reference to the centripetal character of the U.S. model, composed by states that "being separated, looked for their reunion"; which they contrasted to the centrifugal character of the Brazilian system, composed by more integrated states that looked for their separation, in order to win autonomy(Mendes et al, 2008, 164).

[9] Some influential activists (including Rosa e Silva and Nilo Pecanha) objected to presidentialism, and called for the adoption of a parliamentary system. In their view, a "free government" had to always include the possibility of making their members accountable (Arinos 1967).

[10] Barbosa was a member of the Liberal Party, who was born in Bahia, and a Member of Parliament during the time of the Empire. From his position in Parliament, he advocated for the adoption of an electoral reform; the introduction of changes in legal education; the abolition of slavery; and the gradual democratization of the prevailing Monarchy (Barbosa 1921, 359-369). From the direction of the *Diario de Noticias*, he also worked for the transition towards a

key person in trying to approach the Constitution to the U.S. model (some people said, at the time, that Barbosa "wrote to Brazil by translating texts from the United States"). At the same time that he favored the "importation" of U.S. constitutionalism, Barbosa considered that it was impossible to "import" the Suisse model (which was then seen as a possible alternative), given Brazil territorial immensity, which made the country incomparable with Suisse. Similarly, Barbosa also rejected the possibility of following the French model, which many of his compatriots defended, given that, in his opinion, Brazil needed to become a federalist country. In the end, the Constitution that he advanced included a presidentialist system; a tripartite division of power; a federalist organization; and a Superior Federal Court, capable of controlling the political decisions of both the Executive and the Legislative (Arinos 1967).[11]

In political terms, the first years of the Constitution were particularly troublesome.[12] These unfortunate circumstances favored the strengthening of the more conservative features of the Constitution and, in particular, the Executive's supremacy (at the time, people referred to the President as a "king without throne"). As A. Wolkmer maintained, Brazilian constitutionalism became -since then, and until today- "the product of a conciliation-compromise between a modernizing and social authoritarianism, and a conservative bourgeois liberalism" (Wolkmer 1989, 35).

3. Brazilian social constitutionalism in the mid-twentieth century

To understand both the changes that occurred in Brazilian constitutionalism in the mid-twentieth century and the arrival of social constitutionalism in the country, it is important to pay attention to the fall of the First Republic of Brazil in the late 1930s. The fall of the First Republic came after a Revolution that was promoted by a liberal alliance led by powerful sectors coming from Minas Gerais. The *Mineiros*

more federalist system. With the end of the Empire and the arrival of the Republic -a regime that did not particularly attract his attention- Barbosa occupied different public positions, including that of the Vice-Chief of Government.

[11] As the main intellectual responsible of the new system, Barbosa was deemed the proponent of a formalistic, idealistic and liberal-individualist approach, which was considered totally foreign to the national political and social thought (V. da Silva 2011).

[12] Brazil faced at the time dramatic political situations, which the suppression of Congress, and the threat of a dictatorship, under the command of Deodoro; a civil war that followed Deodoro's resignation; a period of oligarchic rule; and the phenomenon of "colonelism", which emerged during the presidency of Prudente de Morais.

sectors considered that the *Paulistas* -who represented the coffee-interests- had broken the pact that existed between the two groups, and which had allowed them to share political power. Their agreement was broken -the *Mineiros* assumed- when the *Paulistas* decided to promote Julio Prestes as a presidential candidate. Against this possibility, the *Mineiros* sponsored an armed rebellion that ended with Getulio Vargas as the head of a provisional new government. In spite of its early promises (which included the political reorganization of the country and the promotion of substantial institutional changes), Vargas' government became soon transformed into a dictatorship. Vargas only accepted to call a Constitutional Assembly after three years, and as a consequence of an armed insurrection that took place in Sao Paulo -the so-called "constitutionalist revolution of 1932". This civil war became the "main armed conflict in Brazil`s 20th Century"; and mobilized more than 150 thousands combatants (Villa 2010, 38).

The process of legal and constitutional reform promoted by *Varguism,* in Brazil, was inspired by European authoritarian regimes, partly in response to the 1932 civil war; and partly due to the growing conflicts then generated by the numerous workers' strikes of the time, which were usually organized by foreign workers (Villa 2011, 53). At that juncture, there was "no more space for liberals" -as the noted writer and former deputy Gilberto Amado once said (ibid. 49). The military regime launched then a period of "xenophobic nationalism" (ibid. 52), which included numerous measures against foreign workers (and even eugenesic initiatives, aimed at "improving the race" and the "mental health of the population", and fighting against those who "poisoned" the social life, as indicated by art. 138 of the 1934 Constitution). These initiatives were strengthened by presidential decrees, which both restricted the incorporation of foreign workers and forced the expulsion of many of them, who were then associated with "economic disorder" and "social insecurity" (ibid., 53).

Regarding the majority of the working classes, the government promoted the massive inclusion of workers in politics, and also favored the organization of labor through the creation of trade unions. The State was then more economically active than never before. At the same time, Vargas' regime showed a strong disdain towards institutional forms, which it accompanied with an active anti-communist drive. An expression of its attitude towards institutions is the fact that Vargas' dictatorship worked "during seven years without the support of any Constitution, with the prohibition of all political parties, the dissolution of all legislative bodies, and the replacement of all state governors by agents who worked for Vargas" (Halperín

Donghi 2007, 381). Meanwhile, the government's anti-communist drive achieved became apparent with the bloody repression against the forces of the communist leader Luis Carlos Prestes who, in 1935, commanded an important rebellion movement against the dominant regime.

Vargas' constitutional legacy was very rich. During his years in government, Vargas promoted the enactment of two Constitutions. The first one was the 1934 Constitution – was the more innovative of the two, and also represented a significant rupture concerning the traditional Brazilian political-constitutional structure (Bercovici 2009). The second one, which was sanctioned in 1937, accompanied the creation of the *Estado Novo* and decisively contributed to the strengthening of the powers of the Executive. Again, social constitutionalism was coming hand in hand with the creation of a strongly presidentialist regime.[13]

The 1934 Constitution was mainly inspired by the Constitution of Weimar. The document was originally drafted by the so-called Itamaratí Commission, which gathered many noted Brazilian legal and political thinkers.[14] Among other members, the Commission included Afranio Melo Franco, Carlos Maximiliano, José Américo de Almeida, Temístocles Cavalcanti and, perhaps most significantly, Joao Mangabeira.[15] The Commission, first, and then the Convention, worked in isolation - in a context of almost complete absence of popular participation.[16]

From its very composition, the Constitutional Convention tried to reflect the different economic interests and also the demands of the different political elites existing in the country. As a consequence, the Convention included representatives of the *Paulistas* interests and local oligarchies; an ample 40-members group of so-called

[13] It must also be noted the Constitution's lack of impact in the political life of the country. This result was clearly linked to the presence of a too strong Executive, who was prepared to rule with independence of what the Constitution said. In any case, the 1934 Constitution appeared to be mainly directed to "constitutionalize the main measures that the Provisional Government of Getulio Vargas had already adopted" (Bercovici 2008, 382; Bercovici 2009).

[14] The Commission combined figures of a fascist origin, nationalists, militarists; with other figures, more closely related to the left, such as the jurist Joao Mangabeira; or defenders of a strong social State, like Oswaldo Aranha or José Américo; and also young brilliant activists, such as Themístocles Cavalcanti (see, for example, Marinho 1982).

[15] Mangabeira was one of the members who inaugurated the Commission's sessions. Mangabeira's work is of fundamental importance not only for explaining the main social aspects of the document, but also to understand the place left to professional representation, which Mangabeira promoted.

[16] There were four fundamental topics that were then discussed: centralization; regionalization; the need or not to federalize the country; the organization o f the judiciary; the classist type of (Wolkmer 1989, 74-5). It was also remarkable a proposal, inspired by the 1931 Spanish legal order, of including a unicameral legislature, which then implied the suppression of the Senate, and its replacedement by a "Superior Council of the Republic".

"classist Deputies", which included 18 employees; 17 employers; 3 members of the liberal professions and 2 public officers, which would have the decisive voice in issues concerning social and economic rights. The Convention also included two socialist representatives, namely Zoroastro Gouveia y Lacerda Werneck.[17] The project coming from Itamaratí was then examined at the Constitutional Assembly, where a special Commission discussed more than one thousand modifications to it.

The 1934 Constitution was characterized by two main notes, namely its strong corporatist character (Lima Lopes 2008, 361), and its decision to take the *social question* seriously (da Silva 2011, 69). The final text incorporated many of the basic features that characterized the previous Constitution, including federalism (the Convention rejected the excessively centralist orientation of the Itamaratí project); presidentialism, and republicanism. At the same time, the new Constitution incorporated some important novelties: it strengthened the capacities of the Union; transferred more powers to the Executive; replaced the more traditional bicameralism by a different one (where the Senate acted as a collaborator of the Chamber of Deputies -thus also abandoning the unicameral proposal advanced by the Itamaratí Commission); created the Electoral Justice; organized forms of corporatist representation (art. 23 established that the Chamber of Deputies would include representatives of the people at large, but also representatives of professional interests, related to the industry, commerce, transport, liberal professions and public officers).

Concerning the rights-section of the Constitution, the new document significantly expanded the traditional list of legal rights. On the one hand, the new Constitution extended political rights, for instance, through the establishment of secret ballot and the recognition of women's suffrage. On the other and, it included two new sections, previously inexistent, which referred one to social and economic order (Title IV), and the other (Title V, Chap. I) to the family, culture and education (da Silva 2010, 81-2; Reiner 1982; Mendes et al 2008, 167-8; Wolkmer 1989). Articles 120, 121 and 122 were also decisive in the shaping of a new social policy. Among other things, the social clauses prohibited de establishment of different payments to the same work; minimum salary; eight hours as maximum working hours; paid vacations; medical and sanitary assistance to workers; etc. The Constitution also made reference -for the first time in the country`s constitutional history- to the indigenous groups that inhabited in Brazil.

[17] During the debates, Gouveia denounced the "dictatorial Government", "the contradiction and Maquiavelism" of government, and also of the "dictatorship of money, the dictatorship imposed by capitalists" (Wolkmer 1989, 112).

However, after three years of only partial application of the Constitution, the same President Vargas abandoned its enforcement. Vargas justified his decision through a discourse that was transmitted to the entire country, in November 10th 1937. In that occasion, he claimed that the Constitution presented "manifest and lamentable failures", particularly as a result of the influences that it had received from "liberalism and the representative system". For Vargas, the Constitution was thus incapable of properly confronting the new realities posed by a "world crisis". More significantly perhaps, Vargas considered that the 1934 Constitution had not provided him with the powers that he needed in those times of crisis (Mendes et al 2008, 168).

In the same way that the 1934 Constitution emerged in dialogue with (if not in direct reaction to) the political ascension of Luis Prestes, the civil war of 1932, and an increasing workers' conflicts; the 1937 Constitution appeared as a clear response to the communist insurrection of November 1935. This popular upraise was again commanded by Luis Carlos Prestes who, taking advantage of the existing climate of social discomfort, tried to carry out now the revolution that he had been unable or unwilling to promote in 1930.

Vargas managed to contain the leftist insurrection and, immediately after, launched numerous measures against the rebels. In fact, and since that moment, the national legislation -and then the same Constitution- became clearly marked by an anti-communist and authoritarian character. First of all, Vargas announced the state of war, which was followed by a declaration of state of siege, and the detention of more than 7000 people. Soon afterwards, he created a National Commission for the Repression of Communism, and a National Security Court, which would be in charge of prosecuting the enemies of the government (there would be more than 4000 people under trial, during the period). Finally, in 1937, the government enacted a new Constitution.

The 1937 Constitution was also known as the "Poland Letter", given the inspiration it found in the authoritarian Constitution of Poland, 1935 (the Constitution was also inspired in Portugal's 1933 *Novo Estado*). The Constitution was characterized by the way in which it strengthened the powers of the President, and also by its "centralizing and antifederalist character" (Lima Lopes 2008, 362). It maintained the majority of the social clauses included in the previous one -but the right to strike, which it considered "anti-social" (art. 139) (See Bercovici 2008, 389, 399).

The main ideologist behind its text was Francisco Campos, who had worked as the Minister of Justice during Vargas dictatorship. Campos was also known as the Brazilian Carl Schmitt (dos Santos 2007). The jurist seemed little sympathetic with democracy, and openly resistant to liberal constitutionalism, an ideology that, in his opinion, "made government impossible" (Villa 2011, 65). Notably, in his work *Estado Nacional*, Campos developed his views on the topic, and stated: "The political regime of the masses is a dictatorship…People always ask for their own Cesar" (Bercovici 2008, 390; Campos 1937). Together with other noted jurists, such as Oliveira Viana (who at one point even defended racist and eugenisic policies), or the influential Alberto Torres (author of significant works, such as *O Problema Nacional Brasileiro* or *A Organização Nacional*), Campos advanced a legal approach that defended the concentration of power, with arguments in favor of a "substantive" and plebiscitarian democracy (dos Santos 2007). Their views represented a renewed approach to constitutionalism, which wanted to leave behind the legacy of the 1891 Constitution. This reactive approach was characterized by its anti-liberal; anti-idealistic; and anti-democratic features (V. da Silva 2011).

The new Constitution opened up with a Preamble that referred to the danger of a "communist infiltration" and the need to respond with "radical and permanent measures". For the first time in Brazilian legal history, the Constitution included the death penalty; created mechanisms of censorship; and put severe limits to the rights of freedom of expression and freedom of reunion. At the same time, it transferred extraordinary powers to the Executive, which included the capacity to declare the state of emergency or the state of war at will (without previous consultation with the Legislative, according to article 166). At the same time, and in order to strengthen the legislative role of the President, the Constitution established that the Executive would be also part of the Legislative power (¡); and granted to it the faculty of federal intervention.

In actual reality, the 1937 Constitution was used as an excuse for dissolving the Legislative Powers in the entire country. The pretext was that it was necessary to re-organize the whole institutional system. For that purpose, the Constitution established that the Nation would first have a plebiscite (in order to legitimize the new legal order) and then celebrate elections. But those initiatives finally did not prosper and Vargas ended up ruling at his will, almost without any institutional controls. As a consequence, the Constitution was never applied, and the regime became "a pure and simple dictatorship" (da Silva 2011, 71). A few years later -in 1946- a new Constitution was sanctioned. Enacted after the defeat of the Axis in the Second World War (an event that put Vargas regime in risk), the new document

returned to the basis of the 1934 Constitution, and reproduced many of its main aspects. In 1950, Vargas returned to the Presidency of the country, although this time through the democratic vote. His government, characterized by its nationalism, lasted until 1954, when he committed suicide.

4. Constitutions with "two souls": Brazil 1988 and the problem of the "engine room"

The influence of the last wave of dictatorships in the development of Brazil's new constitutional ideas, texts and discussions seems undeniable. Dictatorships had both a profound impact in the progress of regional and local constitutionalism. The case of Brazilian constitutionalism in the post-dictatorial period shows how, a newly elected democratic government was required to deal with the legacy of an authoritarian Constitution sanctioned by a dictatorial government. The Constitution at stake was the one of 1967, which was enacted during the military government of General Humberto Castelo Branco. The 1967 Constitution (amended in 1969), imposed severe limitations in the federal organization of the country; and also in the political and civil liberties of the population. Thus, massive meetings were subject to previous governmental authorization; political parties were restricted (only the official party, namely the National Renovating Alliance -ARENA- and an opposition party, the Brazilian Democratic Movement, MDB, were allowed to function as such); direct suffrage was directly suppressed in the main cities, for security reasons. In 1969, a provisional military junta introduced a profound amendment of the Constitution, which strengthened the repressive character of the previous document. It for example introduced the institution of death penalty; suppressed habeas corpus; created new military courts; and opened the door to new repressive laws, such as the Law of National Security, or another that came to regulate the press.

For that reason, shortly after the recovery of democracy, Brazilians wrote a new Constitution, which tried to repair, one by one, the worst consequences left by the previous one. Thus, the democratic 1988 Constitution prohibited the use of torture; re-established direct and secret suffrage; put the basis for the re-organization of democratic electoral competition; penalized the restriction of civil liberties; adopted anti-discriminatory measures; promoted political participation through plebiscites and referenda; expanded municipal autonomy and federalism; established protections for indigenous lands; included a long list of social rights and guarantees; etc.

Notably, however, this Constitution -perhaps because of the "trauma" of the 1946 Constitution that, according to many, created a too weak Presidency- maintained a strong presidential system, which was very much in line with the reforms introduced in the Executive branch by the same dictatorship.[18] In sum, the democratic Constitution took distance from the previous one, particularly in what concerns the Bill of Rights-section of the Constitution, but did not proceed in the same way in what regards the existing organization of power (Limongi 2008).

For many, the new 1988 Constitution appeared as the "ground zero" of a "new legal history" (Barroso & Barcellos 2005, 273). The 1988 document was thus deemed an "unprecedented catalogue of fundamental rights", particularly taking into account the recent legal history of the country, which was characterized by the "arbitrariness and violence exercised by the State," and a "long history" of inequalities (Vilhena Vieira 2006, 11; Peixinho et al 2006).[19]

[18] It must be remembered that a national plebiscite, in 1993, would reaffirm the presidential character of the system, over the parliamentary or monarchical alternatives.

[19] This case is somehow parallel to that of Chile. Chile, as we know, lived under a dictatorial regime since 1973, the year when a military coup ended with Salvador Allende's presidency. The dictatorial regime, commanded by general Augusto Pinochet, promoted a radical re-organization of society, which included the enactment of a new Constitution that took the place of that of 1925. With that purpose, Pinochet promptly designed a new commission -the so-called *Ortúzar Commission*- in charge of setting the bases of the new Constitution. The final draft of the document, however, was completed in 1980. The new Constitution, which reflected the impoverished and paternalistic conception of democracy of the Chilean Army Forces, transcended Pinochet's government, and thus remained as the national Constitution even after the return of democracy. This situation imposed a heavy burden upon the newly elected democratic regime. In effect, after the democratic elections of 1989, the democratic community had to make enormous efforts trying to overcome the numerous legal limitations imposed by the dictatorial document -the so-called *authoritarian enclaves* created by the Constitution in force. Those *enclaves* included the institutions of life-tenured Senators (which allowed Pinochet to be part of the Senate, during the democratic period) and the «designated Senators» (which allowed members of the coercive forces to be part of the Senate); a National Security Congress; an extremely exclusionary electoral system (which made very difficult for minoritarian forces to participate in electoral politics); or the requirement of qualified majorities in order to change basic aspects of the institutional system (from education, to the organization of Congress or the regulation of the Army). These were all limitations based on a clear and declare attitude of lack of confidence towards the democratic will of the people (Sierra 2012). Very slowly, however, and through successive constitutional reforms, the new democratic governments began to left behind these authoritarian legacies. The most important of these legal reforms took place during Ricardo Lagos' government. Among other significant reforms, the modifications included the following: limitations on the institution of "states of exception" (1989); changes in the organization of the provinces (1991); a reduction from 8 to 6 years in the presidential period (1994); changes in the modes of judicial appointments (1997); changes in the working of the Judiciary and the organization of the (second term of the) presidential election (1999); changes in the mechanisms for constitutional reform (2000); introduction of a guarantee to gratuitous education (2003); end of the institutions of the life-tenured and designated Senators; reduction of the presidential period to 4 years; permission to the President to remove the head of the Army forces and the director of the Police; changes in the National Security Council (2005); changes in the electoral system (2009).

My view is less optimist. In my opinion, the recent Brazilian constitutional development, culminating in the 1988 Constitution, gives a good account of the way in which regional constitutionalism has been developing since its birth, and in particular of the form this development has taken over the last half century. More precisely, what happened with Brazilian constitutionalism in all these decades (and which I tried to summarize in the previous pages) accompanied a problematic and controversial constitutional evolution that took place in Latin America in a similar period.

In fact, in Latin America, during the past decades, most constitutions experienced an explosive expansion of their declarations of rights. The rights section of our constitutions has changed and grown dramatically, but this fundamental innovation has not been accompanied by equivalent, consequent changes in constitutions' organization of powers. In this sense, and for example, Brazil's 1988 Constitution, together with that of India, is one of the most extensive in the world, as well as being one of those that incorporates the most fundamental rights in its text. This brings us to what I called the "engine room" problem of constitutionalism: expanding dramatically the list of constitutional rights, while keeping the organization of powers untouched (Gargarella 2013, Gargarella 2023).[20] Now, what is the problem with this decision, if any? In other words, why it may be wrong to have such a robust list of social rights while keeping the old organization of powers intact or unchanged? Let me try to explain why this could be deemed a (serious) problem.

For one thing, most of those changes in the Bill of Rights were in a clear direction, namely to improve the status of the most disadvantaged members of society. The incorporation of more rights wanted to ensure certain special protections for individuals and groups that had been traditionally marginalized by the law. These sections of society included, first and most significantly, members of the working class, but also women and children, and then the elderly as well as racial and ethnic minorities, and more recently aboriginal groups. In that way, the expansion of social, economic, and cultural rights came to make societies more egalitarian. Similarly,

[20] The expansion of legal and constitutional rights was remarkable, both in Latin America as in Europe. However, in Latin America -a region that was always at the avant-garde in terms of social, economic, and cultural rights- the legal commitment expressed concerning those rights was even stronger than in Europe, at least regarding the content of new constitutions. A quick overview of these constitutions shows that the documents included references to the rights to the environment, culture, health, education, food, housing, work, clothing, the promotion of gender equality, affirmative action, participatory democracy, the right to recall, and the right to hold a referendum or popular assembly. Many Latin American countries, in addition, provided constitutional or supralegal status to international human rights treaties (Argentina, article 75 inc. 22; Bolivia, article 256; Brazil, article 5; Colombia, article 93; Costa Rica, article 7; Dominican Republic, article 74; Ecuador, article 417; El Salvador, article 144; Guatemala, article 46; Honduras, article 18; Paraguay, article 141; Peru, article 56; Venezuela, article 23).

the expansion of political rights and the diffusion of participatory rights came to make societies somehow more democratic, more horizontal. The recognition of other groups' identities and the affirmation of their cultural rights recognized the multicultural and plural character of our societies.

As a consequence, one could have expected that the organization of powers of our constitutions changed accordingly, that is, in the direction of making our societies more egalitarian, democratic, horizontal, and toward reaffirming societies' multicultural character. However, this is not at all what has happened with our constitutions. By contrast, on many occasions, the organization of powers remained almost untouched, as if society had not made such a clear gesture in the direction of political equality. Even worse, on other occasions, the organization of powers did change, but in ways that made societies less egalitarian and less democratic; instead, the powers of the Executive were augmented, and the organization of powers became more vertical. In this way, we have been creating in recent years are constitutions that seem to have "two souls": they are rich and generous in their declarations of rights, but they retain or strengthen a regressive political system, which limits rather than facilitates popular inclusion and participation.

The concentration of powers tends to conspire both against the values of democracy and against the value of having a robust list of enforced rights (Gargarella 2013). The first part of this claim seems simply evident: the concentration of powers directly contradicts the principle of the democratization of power: we decide things either collectively, horizontally, or vertically -the latter when someone decides for us. For that reason, those of us who defend a radical democratization of society should favor a horizontal rather than vertical organization of powers. I should say something similar about the second part of the claim, that the concentration of powers tends to undermine the newly adopted and bold declarations of rights. I do not maintain that one thing necessarily comes with the other. In fact, history has given us examples of both situations: powerful presidents who build welfarist institutions and powerful presidents who dismantle the welfarism. However, there is something in the "logic" of the concentration of powers that works against this idea as a means for improving the enforcement of rights. Basically, the idea of concentrating powers does not seem to be conducive to the expansion of rights, which are supposed to make people more autonomous. Typically, there seems to be an obvious tension between the concentration of powers and the expansion of participatory rights. We have no good reason to expect that a privileged leader will encourage changes that would directly curtail his or her own powers; that is, if society has more chances to decide for itself on fundamental public issues, then a leader would have less power

to decide things by him- or herself). Additionally, in profoundly unequal societies like many of those in which we live, the concentration of economic powers tends to provide tremendously perilous incentives to the members of the sitting government: in such contexts, those who are benefited by the concentration of economic and political powers tend to work together rather than confront each other, thus reinforcing the dynamics of inegalitarianism and injustice.

5. Conclusion

In this paper, I was interested in analyzing the development of Brazilian constitutionalism, within the evolution of Latin American constitutionalism. I highlighted, then, three fundamental stages of Brazilian constitutionalism, which are, in my opinion, parallel to the three fundamental stages that characterize regional constitutionalism: a first, foundational stage, in which constitutionalism largely merges the original liberal and conservative models; a second stage in which constitutionalism makes room for social concerns (the stage of "social constitutionalism"); and a third stage, that of the so-called "new constitutionalism", in which a model is consolidated -still in force- that combines an organization of power concentrated in the Executive, and a long list of fundamental rights. I also criticized this model, still in force in the region, for generating constitutions "in internal tension" (or "with two souls"): Constitutions that affirm strong commitments to democracy and equality, through their Bill of Rights, which they then tend to deny through a concentrated organization of power with authoritarian traits.

On the one hand, Brazil's 1988 Constitution deserves recognition for the important changes it has introduced - its commitment to democracy, its recognition of the rights of disadvantaged minorities and, in particular, its unprecedented affirmation of the rights of women, indigenous groups and environmental protection. In terms of fundamental rights, we find ourselves with an avant-garde Constitution, typical of the 21st century. On the other hand, however (and repeating a defect typical of all regional constitutionalism), the Constitution leaves such innovations dependent on an organization of power that reproduces conservative features of the old Latin American constitutionalism of the 19th century.

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