Judges and Courts Destabilizing Constitutionalism: The Brazilian Judiciary Branch's Political and Authoritarian Character

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Abstract

Contemporary democracies may confront several instances of exceptions that co-exist with constitutional institutions; they are never free from any risks. This Article relies on recent Brazilian judicial experiences in order to present and highlight how courts and judges, from within the institutional structure, can act as elite actors that endanger the constitutional system, giving it the characteristics of unstable constitutionalism. By presenting the recent political and juridical facts that drove Brazil to constitutional crisis, the work brings not only judicial rulings but also the institutional and corporative structure that served as the main methods of avoiding the judicial reforms that could have led to a true transition from dictatorship to democracy. The conclusion is that the Brazilian courts blocked effective transitional constitutionalism in Brazil, making room for the current unstable constitutionalism.

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A. Introduction

In the midst of the political, economic, and juridical crisis Brazil has been confronting for at least the past three years, one of the main features is related to the judicial rulings that, at a first glance, resemble a typical state of exception, sometimes in a sense that would surprise even Carl Schmitt.[1] From the time of the parliamentary coup of 2016[2] and the lawsuits against its supposed legitimizing procedure in the Brazilian Supreme Court, the *Supremo Tribunal Federal*, through several rulings made by judges and circuit courts, there is a great number of decisions that violate the constitutional or legal dispositions in their most direct language. One thing, though, is right: Brazilian constitutionalism, as envisaged by the Constitution of 1988, is being changed day by day, its survival is contested continuously and there are disputes regarding the appropriate arrangement for democracy. The political actors in this dispute have been trying to shape institutional judicial arrangements, and at the same time, members of the judicial branch are advancing into political spaces that had been reserved for the executive and the legislative arenas until very recently.

It is no easy task to simply presuppose the existence of a Brazilian constitutionalism. In a country that has had during its existence seven constitutions, one empire, uncountable state of siege declarations, *coups d'état*, two impeachment processes (one akin to a parliamentary coup, as mentioned), and two transitions to democracy with severe obstacles, considering the incidence of a consolidated constitutional movement can become a difficult endeavor. Nonetheless, at least from the time of the Brazilian Constitution of 1988 onward, there were conditions that indicated stability: Elections held immediately, both right and left-wing parties having incumbent presidents, two presidents (Fernando Henrique and Lula) transferring the batons, judges recognizing some degree of civil liberties, and so on. All things considered, it would be possible to talk about some kind of constitutionalism, as we will try to do later.[3]

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[1] *See* CARL SCHMITT, CONSTITUTIONAL THEORY (Jeffrey Seitzer ed., 2008). Ideas like "exceptional moments" or the need to preserve a special kind of "political stability" will be part of several Brazilian court rulings mentioned in this Article. For an analysis of Brazilian and Latin American judiciaries from an "exceptionalism" explanation based on Georgio Agamben, see PEDRO SERRANO, AUTORITARISMO E GOLPES NA AMÉRICA LATINA: BREVE ENSAIO SOBRE JURISDIÇÃO E EXCEÇÃO (2016).

[2] For a pluralistic description of President Dilma Rousseff's ousting as coup, *see* A RESISTÊNCIA AO GOLPE DE 2016 (Carol Proner et al. eds., 2016). For the opposite perspective, *see* Marcos Melo, *Crisis and integrity in Brazil*, 27 J. DEMOCR. 2, 50–65 (2016).

[3] For an approach that recognizes the existence of other forms of constitutionalism other than the liberal one, see Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV., 390–462 (2014–15). This article will presuppose a strong relationship between constitutionalism and stability in order to remedy one of the recurring problems that Latin American constitutionalism must address, that is, political instability. Such an assumption goes directly against what some scholars have been arguing in what has been called the "new Latin American constitutionalism". *See* Roberto Pastor & Rubén Dalmau, *El Nuevo Constitucionalismo Latinoamericano: Fundamentos para Una Contrucción Doctrinal*, 9 REVISTA GENERAL DE DERECHO PÚBLICO COMPARADO, 1–24 (2011). For this debate in American

More than trying to explain how social movements have been fighting to protect the social pact envisaged by the Brazilian Constitution of 1988, this Article aims to present the landscape in which Brazilian judges have recently played the role of one of the main actors responsible for endangering the constitutional commitment to the separation between the political and the legal systems. With no need to rely on a Luhmannian perspective,[4] this Article will presuppose a simple Dworkinian point of view based on the differences between arguments of policy versus arguments of principle; the latter being the typical foundation for a judicial ruling.[5] This hypothesis relies on the fact that the judicial rulings here analyzed left behind such distinction while ignoring the direct textual mandatory dispositions of the Brazilian Constitution of 1988 or legislation. In doing so, judges would advance an approach of constitutionalism that endangers stability (or they try to concretize their own idea of stability), making their participation in politics more important than enhancing the normative characteristic of constitutions.

What occurred (and is occurring) over the past few years depends severely on the support of what a Brazilian sociologist called the juridical-political apparatus,[6] which could provide

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constitutionalism, *see* STEPHEN GRIFFIN, AMERICAN CONSTITUTIONALISM (1996); RESPONDING TO IMPERFECTION (Sanford Levinson ed., 1995).

[4] *See generally* NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (2004).

[5] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 82 (1977).

[6] JESSÉ SOUZA, A RADIOGRAFIA DO GOLPE (2016). For another analysis on the judiciary's role in the parliamentary coup in Brazil in 2016, see Miguel Martins, *Entrevista: Boaventura De Souza Santos*, CARTA CAPITAL (Nov. 2, 2016), http://www.cartacapital.com.br/politica/o-que-mais-custa-aceitar-e-a-participacao-do-judiciario-no-golpe. In the words of Santos

> In the Brazilian case, what is hard to accept is the aggressive participation of the judiciary in the coup's occurrence in view of two factors that formed the great historical opportunity for the judicial branch to affirm itself as one of the safest cornerstones of Brazilian democracy. On one hand, it was during the PT's [Partido dos Trabalhadores, 'Workers Party'] government that the judicial and criminal investigation system was significantly improved, not only financially but also institutionally. On the other hand, it was clear right from the start that Dilma Rousseff did not commit any crime of responsibility that could justify the impeachment. The conditions to start a vehement fight against corruption without compromising the political instability were created and, on the contrary, enhanced democracy. Why was this opportunity so grossly wasted? The judicial branch owes an answer to Brazilian society.

Free translation from: "No caso do Brasil, o que mais custa a aceitar é a participação agressiva do sistema judiciário na concretização do golpe, tendo em vista dois fatores que constituíam a grande oportunidade histórica de o sistema judicial se afirmar como um dos pilares mais seguros da democracia brasileira. Por um lado, foi durante os governos PT que o sistema judicial e de investigação criminal recebeu o maior reforço não só financeiro como institucional. Por outro lado, era evidente desde o início que Dilma Rousseff não tinha cometido qualquer crime de

legitimation to several constitutional and legislative changes that would depend on legislative activity or even on another constitution. The hypothesis is that strategic behaviors evolving Brazilian elites would reinforce the politicization of justice without the need for a constitutionalization movement. This is an alternative interpretation to Ran Hirschl's proposal on juristocracy.[7] To strengthen the hypothesis it is necessary to pay attention to the motives that have been animating judicial authorities in Brazil since, at least, the transition promoted by the Constitution of 1988. This analysis of the movement in the direction of a transitional constitutionalism will provide a partial portrait of what has been motivating judges in Brazil, beyond the superficial creed of impartiality discourses.

Specifically, these are some of the questions at stake here: (1) How can the judiciary play a role in legitimizing institutional ruptures or juridical-political crises that affect different branches?; (2) What are the main instances where judges and courts cross the boundaries between law and politics?; (3) When do judicial authorities act much more like judges in a dictatorship than those in a democracy while practicing decision-making in post-authoritarian countries?; (4) How can corporative concerns shape the way judicial authorities move from authoritarian rule to democracy?; (5) What is the role of constitutional courts in shaping democratic institutions in new democracies?; (6) What is the role played by legal elites in shaping the deconstruction of a constitutional enterprise?; and (7) Under the Brazilian Constitution of 1988, what is the kind of constitutionalism that is taking place?

To present an analysis of the possible answers to those questions, we shall follow this path: (A) understanding some of the main issues at stake related to the so-called "impeachment process" and why some are depicting it as coup; (B) revisiting important judicial rulings made during 2015 and 2016 and also omissions in deciding that had particular consequences; (C) discussing, even from a restricted perspective, how and why institutional and corporative matters have been affecting judicial authorities general performance; (D) adopting a critical point of view about the transition from the 1964-1985 civil and military dictatorship in order to pinpoint the absence of institutional reforms that could have restricted the role of the Brazilian judiciary in the exceptional rulings that have contributed to the present political crisis; (E) providing a theoretical analysis that tries to present an adequate comprehensive concept of Brazilian constitutionalism since the 2016 coup and the judicial rulings that came after it, particularly using the constitutional court's role in recent democracies; (F) presenting the elite's interests that are driven by judiciary authorities; and, finally, concluding with (G) the way Brazil is approaching an unstable constitutionalism model.

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responsabilidade que justificasse o impedimento. Estavam criadas as condições para encetar uma luta veemente contra a corrupção sem perturbar a normalidade democrática e, pelo contrário, fortalecendo a democracia. Por que é que esta oportunidade foi tão grosseiramente desperdiçada? O sistema judicial deve uma resposta à sociedade brasileira . . . ."

[7] *See* RAN HIRSCHL, TOWARDS JURISTOCRACY (2004).

B. An Approach to the Impeachment Process: Courts Between Law and Politics

It is not the purpose of this Article to recover in detail all the factors that were involved in President Dilma Rousseff's impeachment process. The idea is to focus on how the judicial authorities cooperated in the process to achieve the result or to focus on how to criticize their failure or agency roles in what could be depicted as a parliamentary or legislative coup. Using impeachment as a way of controlling state power is not something new to Latin America. As Pérez-Liñan shows, impeachment processes have been manipulated as substitutive tools for the ancient military coups; in fact, the author argues that a legislative coup should combine unconstitutional measures from the legislative branch supported by military actors.[8] New situations that could not allow armed forces to act in daylight would encourage other actors to support the parliament in its desire to seize power. From 1992 to 2015, several presidents have been indicted in impeachment processes.[9] If on the surface it appears that the legislative branch (structurally the branch more sensitive to civil society's desires) could improve democracy, we can see that other complicated *realpolitik* factors can stimulate the misuse of the impeachment process in favor not of constitutional norms but of political interests that are strategically hidden. This would set aside the distinction between presidential and parliamentary systems, making constitutional instability the rule with a kind of political recall always available.[10] One solution would be for the judicial branch,

[8] *See* ANÍBAL PÉREZ-LIÑÁN, PRESIDENTIAL IMPEACHMENT AND THE NEW POLITICAL INSTABILITY IN LATIN AMERICA 68 (2007)

> Despite their name, legislative coups against the president are not always conducted by the legislators themselves. In most historical circumstances, the members of Congress have simply offered congressional support for a military conspiracy. This leads to an important distinction between proactive legislators, those who initiate and control the confrontation with the president, and reactive legislators, those who jump on the bandwagon of a confrontation driven by the military or by other social actor[s].

It is striking that Pérez-Liñán used the Brazilian example of 1955 to describe his idea of a legislative coup; we will see, however, that what happened in 2016 depended much more on the role played by other institutional and social actors, such as judges.

[9] Collor, in Brazil, in 1992; Perez, in Venezuela, in 1993; Samper, in Colombia, in 1996; Bucaram, in Ecuador, in 1997; Cubas Grau, in Paraguay, in 1999; González Macchi, in Paraguay, in 2002; Lozada, in Bolivia, in 2003; Mesa, in Bolivia, in 2005; Lugo, in Paraguay, in 2012; Molina, in Guatemala, in 2015. In the middle of crisis, Fujimori, in Peru, in 2000, and De la Rua, in Argentina, in 2001, renounced. *Id*. at 189.

[10] Pérez-Liñan declared that presently in Brazil the *PMDB* (*Partido do Movimento Democrático Brasileiro*, Brazilian Democratic Movement Party, which recently changed his name for the one adopted during the dictatorship, *MDB, Movimento Democrático Brasileiro* or Brazilian Democratic Movemente) freed the genius from the "constitutional lamp," allowing any executive branch chief (in the Union, in the States, and in the Municipalities) to face impeachment processes in the future. *See* Bruno Lupion, *O gênio está solto, e não será fácil controlá-Lo, diz pesquisador de impeachments na América Latina*, NEXO (Apr. 24, 2016),

particularly the Brazilian Supreme Court, to act vigorously through judicial review to avoid constitutional instability, interpreting impeachment clauses in such a way as to preserve stability, popular sovereignty, and constitutional normativity.

For the purposes of this Article, the term constitutional instability shall be used to refer to the possibility of using constitutional instruments, such as impeachment, only for political aims, which harms the stability that should be part of the constitutional presidential system. As we shall see, this idea is directly linked to Tushnet and Khosla's concept of unstable constitutionalism.[11] If constitutions aim to build a regime that must endure even against temporary majority decisions, clear definitions of what are impeachable conducts must be made. Pérez-Liñán, from a political scientist's point-of-view, brings to the debate the literature in this field that explains the difference between *regimes* and *government* crises.[12] Democratic regimes could remain untouched, while democratic governments would abandon the political scenario. This differentiation would allow for recognizing a movement towards the *parliamentarization* of Latin American countries' presidential systems; relying on Valenzuela, Pérez-Liñán indicates that impeachment results are beyond a legislative-executive critical relationship, finding its source in popular uprisings echoed in parliament.

This analysis does not capture the whole picture of what occurred in Brazil. Popular uprisings were, at the time, large in size but restricted to certain subgroups within the population.[13] There has been a clear struggle between the executive and legislative branches since the first moments of Dilma Rousseff's second term in 2015. The way the National Congress echoed the street protests cannot be fully comprehended without paying attention to how Brazilian media vehicles broadcasted and covered those protests and considering the proper organization of the media in Brazil.[14] The same coalition (largely integrated by the *MDB*, *Movimento Democrático Brasileiro*, Brazilian Democratic Movement party) that supported Dilma Rousseff changed its position during the impeachment process, moving from an initial refusal to cooperate with her to direct opposition of her.[15] Then, Vice-President Michel

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https://www.nexojornal.com.br/expresso/2016/04/24/O-gênio-está-solto-e-não-será-fácil-controlá-lo-diz-pesquisador-de-impeachments-na-América-Latina.

[11] *See* MARK TUSHNET & MADHAV KHOSLA, *Introduction* to UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA, 5 (Mark Tushnet & Madhav Khosla eds., 2015).

[12] ANÍBAL PÉREZ-LIÑÁN, *supra* note 8, at 203.

[13] We shall return to this point in the further topics.

[14] For the protests, see Simon Romero, *Protesters Across Brazil Call for President Dilma Rousseff's Ouster*, N.Y. TIMES, (Mar. 13, 2016), https://www.nytimes.com/2016/03/14/world/americas/brazil-dilma-rousseff-protests.html?_r=0.

[15] *See* Jonathan Watts, *Brazil President Closer to Impeachment as Coalition Partner Quits*, GUARDIAN, (Mar. 29, 2016), http://www.theguardian.com/world/2016/mar/29/brazil-president-dilma-rousseff-closer-impeachment-coalition-partner-quits.

Temer—a constitutional lawyer—deliberately targeted Rousseff with the support of the House of Deputies (*Câmara dos Deputados*, the lower house) Speaker, Eduardo Cunha. Notably, both Temer and Cunha were cited in plea bargains and investigations into the corruption scheme involving *Petrobrás* and other companies.[16]

This huge corruption investigation called *Operation Carwash* (*Operação Lava Jato*) brought sinister facts to light, making important politicians act in order to try to create a safer situation for them in a future Michel Temer administration. Eduardo Cunha was suspended from his legislative chairman position by the Brazilian Supreme Court—he was accused of intervening in the investigations related to the operation—lost his mandate after a decision by the House of Deputies, and was finally imprisoned for corruption, money laundering, and currency law evasion, and condemned to fifteen years in prison by Judge Sérgio Moro.[17] Some analysts also argue that the earlier Brazilian Supreme Court ruling imprisoning the Brazilian ex-Senator Delcídio do Amaral was one of the main catalysts of the political backlash.[18] Finally, Senator Romeró Jucá, a former Temer minister, was recorded discussing with an *Operation Carwash* informant the need for a huge agreement to remove Dilma Rousseff and put Michel Temer in her place. Jucá even mentioned that he would have information from Brazilian Supreme Court Justices saying that while Dilma was in power the corruption investigations would continue.[19]

On August 31, 2016, twenty-four years after impeachment was last used against a sitting president in Brazil—against Fernando Collor)—the Brazilian Senate finally condemned Dilma Rousseff in a very controversial decision. It is important to refer to the context where Rousseff's party, the Worker's Party (*PT, Partido dos Trabalhadores*), was involved in

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[16] Cunha was also cited in the Panama Papers. *See The Power Players*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://panamapapers.icij.org/the_power_players/, in the section relatives/associates of politicians/public officials.

[17] Jonathan Watts, *Speaker of Brazil's Lower House Eduardo Cunha Suspended*, GUARDIAN, https://www.theguardian.com/world/2016/may/05/speaker-of-brazils-lower-house-eduardo-cunha-suspended; Jonathan Watts, *Brazilian Politician Who Led Rousseff Impeachment Is Expelled from Office*, GUARDIAN (May 5, 2017), https://www.theguardian.com/world/2016/sep/13/eduardo-cunha-brazilian-politician-impeachment-dilma-rousseff-expelled; Matt Sandy, *Brazilian Politician Who Led Rousseff Impeachment Arrested on Corruption Charges*, GUARDIAN (Oct. 19, 2017), https://www.theguardian.com/world/2016/oct/19/eduardo-cunha-arrested-corruption-charges-brazil; *Brazilian Politician Who Orchestrated Ousting of Rousseff Sentenced To Prison*, GUARDIAN (Mar. 30, 2017), https://www.theguardian.com/world/2017/mar/30/brazil-eduardo-cunha-guilty-prison-dilma-rousseff-impeachment.

[18] *See* REUTERS, *Senior Brazilian Senator and Billionaire CEO Both Arrested for Corruption*, GUARDIAN, https://www.theguardian.com/world/2015/nov/26/senior-brazilian-senator-and-billionaire-ceo-arrested-for-corruption. We shall discuss Amaral's arrest later.

[19] Jonathan Watts, *Brazil Minister Ousted After Secret Tape Reveals Plot to Topple President Rousseff*, GUARDIAN (Nov. 25, 2015), https://www.theguardian.com/world/2016/may/23/brazil-dilma-rousseff-plot-secret-phone-transcript-impeachment.

accusations of corruption and bribery, starting with a well-known case from 2005 involving high-level government members who were accused of bribing deputies in exchange for their votes, money laundering and other crimes with a subsequent condemnation by the Brazilian Supreme Court in 2012.[20] In addition, the main party actors—accompanied by many other Brazilian factions, such as the *MDB*, the *PP* (*Partido Progressista*, Progressive Party), and the *PSDB* (*Partido da Social Democracia Brasileira*, Brazilian Social Democracy Party)—are cited, investigated, and prosecuted in *Operation Carwash*.[21] None of these accusations, though, were leveled at Dilma Rousseff, at least at the time of the impeachment.[22]

The crimes of which Rousseff stood accused, and which would end her presidential term, were limited to two main elements during the process.[23] The first element related to modifications in the budget that could violate budgetary constitutional and statutory norms. Specifically, she would have issued presidential decrees in 2015 in order to open supplementary budget funding beyond the debt limit ceiling defined in the Annual Budgetary Statute of 2015,[24] which was established as the primary surplus target. The core accusation, as defined by the Senate Final Report, related to the expedition of four presidential decrees that would go beyond the "limit ceiling" stipulated in the Annual Budgetary Statute. As Bustamante argues, there are huge controversies with regard to this accusation: The Annual Budgetary Statute explicitly authorized the supplementations.[25] When Rousseff's government realized the impossibility of observing the limit ceiling, it sent a bill to the National Congress to raise it and the legislature approved it, changing the limit

[20] *See Brazil Mensalão Trial: Ex Lula Aide Dirceu Condemned*, BBC NEWS (Nov. 13, 2012), http://www.bbc.com/news/world-latin-america-20305926. In the case of President Lula's former Minister, José Dirceu, the Brazilian Supreme Court referred to a controversial interpretation of the German Criminal Law, the control theory of perpetration, specifically the branch entitled *functional domination of the act*. Professor Claus Roxin was the person in Germany who was responsible for systematizing the theory. *See* Claus Roxin, *Crimes as Part of Organized Power Structures*, 9 J. INT. CRIM. JUST., 193–205 (2011).

[21] *See* Esther Addley, *Why's Brazil Government in Crisis? - The Guardian Briefing*, GUARDIAN (Mar. 17, 2016), http://www.theguardian.com/world/2016/mar/17/brazil-government-crisis-briefing-dilma-rousseff-lula-petrobas.

[22] *See* Editorial on *The Guardian View on Dilma Rousseff's Impeachment: A Tragedy and a Scandal*, GUARDIAN (Apr. 18, 2016), http://www.theguardian.com/commentisfree/2016/apr/18/the-guardian-view-on-dilma-rousseffs-impeachment-a-tragedy-and-a-scandal; Jens Glüsing, *Staakrise in Brasilien: Kalter Putsch*, SPIEGEL ON LINE; Editorial on *In Brazil, the Real Crime is Corruption*, MIAMI HERALD (Apr. 23, 2016), http://www.miamiherald.com/opinion/editorials/article73445397.html.

[23] I would like to thank Thomas Bustamante for clarifying some of the further issues concerning the supposedly impeachable acts. *See* Thomas Bustamante, *Democracy and the Rule of Law When Dialogue Is No Longer Possible: Is Brazil's 2016 Impeachment Process a Coup?* 16 (unpublished manuscript, on file with the author).

[24] BRAZIL, STATUTE LAW nº 12.952 of 2014.

[25] BUSTAMANTE, *supra* note 23, at 16.

ceiling from a primary surplus target to a primary deficit target.[26] Additionally, the supplementary decrees are always issued at the same time that other expenses are canceled. Notably, the Senate Final Report ignored the new statute and stated that the National Congress—composed of the same Federal Senate, the *Senado Federal*)—could not validate a "crime of responsibility" or an "impeachable offense."

The second element concerned borrowing assets from a Union bank, *Banco do Brasil* (Bank of Brazil), in order to provide money for a rural social program, the *Plano Safra* (*Safra* Plan). The Bank of Brazil could finance rural producers and their cooperatives using a variety of economic grants. The accusation stood that there were many delays, and they were causing a kind of fiscal instability so that the public banks would be deprived of their alleged credits. The defense argued that there was no payment deadline in the statute that regulates the rural social program and that the Brazilian Federal Audit Court (Tribunal de Contas da União) had validated the processes as far back as fifteen years ago. The unusual change in the jurisprudence only came in 2015 and had Rousseff's government as its target. This indictment is highly unusual since the statute that defines the impeachable offenses forbids credit operations between the Union and the States, including their agencies, but not between the Union and its own banks; additionally, the case is not a true credit operation.

To summarize the formal accusations, the legal arguments that served the impeachment clauses were defined as follows: (A) the first accusation, related to the decrees of the supplementary budget, was based on the Brazilian Constitution, articles 85, VI, and 167, V,[27]

[26] BRAZIL, STATUTE LAW nº 13.242 of 2015.

[27] BRAZ. CONST. OF 1988, tit. IV, ch. 2, article 85, n. VI, and tit. VI, ch. II, article 85. *See* the version translated by Keith Rosenn for the *Constitute Project*, https://www.constituteproject.org/constitution/Brazil_2015?lang=en (I will use the same source for translation of the Brazilian Constitution of 1988 hereafter). For interest purposes, the norms will be reproduced here:

> Article 85
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> Acts of the President of the Republic that are attempts against the Federal Constitution are impeachable offenses, especially those against the:
>
> (. . .)
>
> VI. the budgetary law;
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> (. . .)
>
> Article 167
>
> It is prohibited to:
>
> (. . .)

and on the law that defines the impeachable crimes of responsibility, Statute Law nº 1.079 of 1950, article 10, number 4, and article 11, number 2; (B) The second accusation, regarding the measures related to the rural social program, was based on the Brazilian Constitution, article 85, VI, and Statute Law nº 1.079 of 1950, article 11, number 3.[28]

All of these charges have generated a large amount of controversy in Brazil among lawyers, academics, and other professionals, mirroring the social dissent in society, both in favor and against the impeachment process. When the lower house authorized the opening of the impeachment process in the upper house (the Federal Senate), deputies felt free to use all kinds of hate speech, none of which actually provided justifications regarding what really mattered in terms of the accusations.[29] The speeches showed that there was an absence of

> V. open a supplemental or special appropriation without prior legislative authorization and without indication of the respective funds[;].

BRAZIL, STATUTE LAW nº 1.079 of 1950 (translated by the author). The original Portuguese version can be found here: http://www.planalto.gov.br/ccivil_03/leis/L1079.htm.

> Article 10
>
> These are crimes of responsibility against the budgetary law:
>
> (. . .)
>
> 4 – Violate, clearly, and in any way, the budgetary statute disposition.
>
> Article 11
>
> These are crimes against the maintenance and legal spending of public money:
>
> (. . .)
>
> 2 – Open credit without legal funding or without the legal requirements[;].

[28] Those are the norms of the Statute Law nº 1.079 of 1950 (translated by the author. The original Portuguese version can be found here: http://www.planalto.gov.br/ccivil_03/leis/L1079.htm)

> Article 11
>
> These are crimes against the maintenance and legal spending of public money:
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> (. . .)
>
> 3 – Get a loan, issue currency or insurance policies or commit credit operation without legal requirements.

[29] *See* Dilma*, Out!*, ECONOMIST (Apr. 23, 2016), http://www.economist.com/news/americas/21697284-few-pro-impeachment-congressmen-cited-specific-charges-dilma-out?fsrc=scn%2Ftw%2Fte%2Fpe%2Fed%2Fdilmaout; Antonio Jiménez Barca, *Más del 50% de los Diputados Brasileños Tiene Cuentas Pendientes con la Justicia*, EL PAÍS

adequate treatment of constitutional institutions and processes. In other words, there was no concern that the impeachment process was being misused as a vote of non-confidence, blurring the distinctions between law and politics and between presidential and parliamentary systems. When the Federal Senate started to prosecute and then try Dilma Rousseff, legal contours started to substitute the *realpolitik* motives presented by the House of Deputies members. Still, the lack of gross acts that could meet the terms of the articles of impeachment became clearer when Rousseff was condemned without being subject to Brazilian Constitution's article 52, sole paragraph: she was not sanctioned to an eight year suspension for holding public office, all of this with then Brazilian Supreme Court President Ricardo Lewandowski's blessing.[30]

Our main interest, nonetheless, concerns the role of the judiciary during the crisis. We shall concentrate on some recent Brazilian Supreme Court rulings and the rulings of other judges and tribunals related to this scenario: (A) the Brazilian Supreme Court decision to imprison then Senator Delcídio do Amaral; (B) the rulings on the impeachment process—and the postponement position of the Brazilian Supreme Court relating to the main accusations; (C) the decisions that changed the way the presumption of innocence was interpreted in Brazil (and its exceptions); and (D) the ruling on taping the former Presidents Dilma Rousseff and Lula da Silva, which was made by Judge Sérgio Moro, and the administrative proceeding that followed in the Fourth Federal Courts of Appeals. It is important for this Article to examine the ways judges acted or failed to act in the enforcement of the Constitution of 1988, which are important ingredients in the political crises Brazil has faced from 2015 on. The question is how—and if—the courts can play this type of political role and what constitutional accounts are at stake here.

C. Effects on the Political Arena Caused by the Judicial Rulings in Brazil

I. Imprisoning a Senator

One important first ruling by the Brazilian Supreme Court was one of the first contributions towards reading the Brazilian Constitution in a very flexible way; this approach would be repeated several times in the near future. The Federal Attorney-General, Rodrigo Janot, filed a lawsuit in the Brazilian Supreme Court asking for a stay in order to protect an investigation

(Apr. 25, 2016), http://internacional.elpais.com/internacional/2016/04/23/actualidad/1461428271_674627.html?rel=lom. One of the deputies even dedicated his vote to Dilma Rousseff's former torturer, Carlos Alberto Brilhante Ustra, someone who was condemned in a civil lawsuit for perpetrating torture against the Brazilian Teles family. The shameless speech provoked an outrageous debate. Several associations from Latin America and other parts of the world condemned the declaration and asked for the deputy's punishment, agreeing with the initiative proposed by the Latin America Transitional Justice Network Executive Secretariat (http://www.rlajt.com/noticia/334/.html).

[30] The Brazilian Supreme Court President is due to preside over the Senate's impeachment process trial. *See* BRAZ. CONST., tit. IV, ch. 1, article 52, sole paragraph.

related to a plea bargain involving one of the main *Petrobrás* scandal informers. Those who were accused, including former Senator Delcídio do Amaral, his chief of staff, the informer's son and the informer's lawyers, were discussing ways to remove the informer from Brazil (in an escape to Spain through the border between Brazil and Paraguay) in order to avoid charges against the Senator and the owner of a Brazilian bank. The plan included financially helping the informer and paying a large amount of money to the lawyer, but also comprised previous conversations with Brazilian Supreme Court Justices—namely, Dias Toffoli and Teori Zavascki—who would be drawn to rule on the case. Amaral would also talk to another Justice, Edson Fachin, and promote a dialogue between then Vice-President Michel Temer and another Justice, Gilmar Mendes. A plea bargain agreement copy would even be in the custody of the Brazilian banker, which was another sign that there was some interference with the investigation. All of these facts would be substantially proven by covert listening device recordings among those who were accused.

As previously mentioned, the lawsuit was filed in the Brazilian Supreme Court, receiving the identification *Ação cautelar 4.039*, and was assigned to the same Justice mentioned in the conversations of the accused, Teori Zavascki.[31] Mr. Zavascki agreed with the Federal Attorney General, defining a clear position of judicial reaction per the gross facts presented in the lawsuit. The Brazilian Supreme Court Second Panel would affirm the ruling. Justice Zavascki justified his position recognizing the exceptional character of a preventive prison in Brazil, which is a species of precautionary prison that has clear requirements in article 312 of Brazilian Criminal Procedure Code and that can only be used if no other precautionary measure—such as using an electronic anklet, something that the Federal Attorney-General asked for as a subsidiary requirement—is sufficient to protect the criminal procedure values.

All the gross facts that would endanger criminal justice enforcement in the case are part of the *Ação cautelar 4.039* ruling, especially in Justice Zavaski's opinion. It appears that all the legal requirements for the preventive prison were met in the case and that, in fact, ex-Senator Delcídio do Amaral would have committed infractions that could create severe problems for *Operation Carwash*. Brazilian Statute Law nº 12.850 of 2013, article 2º, defines the permanent crime perpetrated by those accused, that is, either promoting, creating or participating in a criminal organization or compromising investigations into criminal

[31] AC 4.039, Brazilian Supreme Court, Nov. 24, 2015, http://www.stf.jus.br/arquivo/cms/noticianoticiastf/anexo/acao_cautelar_4039.pdf. It is notable that Justice Teori Zavascki would die in a plane crash in January 2017. *See* Jonathan Watts, *Brazil Supreme Court Justice Overseeing Vast Corruption Case Dies in Plane Crash*, GUARDIAN (Jan. 19, 2017), https://www.theguardian.com/world/2017/jan/19/brazil-supreme-court-corruption-case-teori-zavascki-dies-plane-crash.

organizations.[32] Additionally, no illegal proof would serve as the basis for the prison ruling.[33] Notably, the Brazilian Supreme Court would have to address a greater obstacle: The Brazilian Constitution, article 53, forbids a Congressman's arrest except in cases of flagrante delicto and for a non-bailable crime.[34]

If creating embarrassment for the investigation of criminal organizations or even being part of a criminal organization can be understood as continuously occurring crimes as long as several acts are perpetrated during a major timeline—allowing the flagrante delicto—this creates a problem of determining whether or not this is a bailable offense. Justice Zavascki overcomes this obstacle by relying on a disposition of the Brazilian Criminal Procedure Code, which states that no bail is applied in situations where the requirements for preventive prison are present.[35] Yet, it is possible to conclude from the ruling that the proper Brazilian Supreme Court institutional image was at stake; therefore, it was not necessary for a non-bailable crime to be at the center of the accusation, only that an exceptional situation needed exceptional measures. Justice Zavascki did not use those words, but the Justice relied on and quoted another Brazilian Supreme Court precedent that did.[36]

The Brazilian Supreme Court would go further in its battles against the National Congress cases regarding interfering with investigations. The second round would involve the already mentioned House of Deputies Speaker Eduardo Cunha. The Attorney General of the Republic

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[32] There are several Brazilian Supreme Court rulings that affirm this idea. For instance, see HC 112.454, Brazilian Supreme Court, Mar. 19, 2013, http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3625670.

[33] BRAZ. STATUTE LAW nº 12.850 of 2013, http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12850.htm.

[34] BRAZ. CONST. tit. IV, ch. 1, article 53.

> Article 53
>
> The Deputies and Senators shall enjoy civil and criminal immunity for any of their opinions, words and votes.
>
> §1° From the date of their investiture, Deputies and Senators shall be judged by the Supreme Federal Tribunal.
>
> §2° From the date of their investiture, members of the National Congress may not be arrested, except in flagrante delicto for a non-bailable crime. In this case, the police record shall be sent within twenty-four hours to the respective Chamber, which, by a majority vote of its members, shall decide as to imprisonment.

[35] BRAZ. CRIM. CODE, book I, tit. IX, ch. VI, article 324, n. IV.

[36] *See* HC 89.417, Brazilian Supreme Court, Aug. 22, 2008, http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=395000, 917 ["à excepcionalidade do quadro há de corresponder a excepcionalidade da forma de interpretar e aplicar os princípios e regras do sistema constitucional . . . ."] ["to the exceptionality of the situation must correspond the exceptionality of the interpretation and application of constitutional system principles and rules . . . ."].

accused Cunha of using his positions as deputy and speaker to perpetrate corruption crimes and avoid investigations by the lower house Council of Ethics.[37] Zavascki, followed unanimously by the other Brazilian Supreme Court Justices, held that Cunha should be suspended from the exercise of his mandate as Federal Deputy and, consequentially, from the exercise of the function of lower house Speaker. He relied upon the norms of the Brazilian Criminal Procedural Code, especially those concerning cautionary measures.[38]

Zavascki also stated that the Brazilian Constitution forbids someone who is formally accused of a common crime in the Brazilian Supreme Court from exercising the office of President of the Republic.[39] Since the Speaker of the lower house is next in the line of succession after the Vice-President, Cunha would not meet the constitutional requirements to act in this office, and this was an additional argument in favor of suspending him from the speaker functions. It is not a surprise that Justice Zavascki would state in his opinion that "What is decided here is an extraordinary, exceptional and, because of it, timely and individualized situation . . . . Even if there is no specific constitutional provision concerning the removal of members of parliament from their offices by the criminal prosecutor or the imposition of removal of the Speaker of the lower house when its officer is criminally accused, it is demonstrated that, in the present case, both actions are clearly necessary."[40]

Concerns about the line of the President of the Republic's succession may have contributed to the political party *REDE Sustentabilidade* filing a lawsuit using the concentrated constitutional control in the Brazilian Supreme Court, the ADPF 402.[41] The political party stated that the Brazilian Supreme Court recognized that if any of the authorities in the President of the Republic's line of succession are indicted they should leave their positions. The court, by a majority of six Justices, decided in favor of the political party thesis, though

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[37] *See* AC 4.070, Brazilian Supreme Court, May 5, 2017, http://www.ebc.com.br/sites/_portalebc2014/files/atoms/files/ac4070.pdf.

[38] *See* BRAZ. CRIM. CODE, book I, tit. IX, article 282.

[39] *See* BRAZ. CONST. tit. IV, ch. 2, article 86, § 1º, number 1.

[40] *See* AC 4.070, Brazilian Supreme Court, May 5, 2017, http://www.ebc.com.br/sites/_portalebc2014/files/atoms/files/ac4070.pdf 72-73

> Decide-se aqui uma situação extraordinária, excepcional e, por isso, pontual e individualizada. . . Mesmo que não haja previsão específica, com assento constitucional, a respeito do afastamento, pela jurisdição criminal, de parlamentares do exercício de seu mandato, ou a imposição de afastamento do Presidente da Câmara dos Deputados quando o seu ocupante venha a ser processado criminalmente, está demonstrado que, no caso, ambas se fazem claramente devidas.

[41] The ADPF, a claim of non-compliance with a fundamental precept in a direct translation (*arguição de descumprimento de preceito fundamental*) is one of the ways of provoking the Brazilian Supreme Court to decide constitutional matters based on a concentrated or European model of constitutional review.

without a final decision on the merits until now. As the proceedings continued, Justice Marco Aurélio issued a unilateral injunction to remove the President of the Brazilian Federal Senate Renan Calheiros, another legislative member indicted previously by the court. The board of the Senate refused to receive official notification on the ruling, and two days later, under a constitutional crisis, the majority of the Justices of the Court reviewed the holding deciding that Calheiros should remain in office, but removing him from the line of succession.[42]

In a very confused line of precedents in 2017, the Brazilian Supreme Court faced the case of 2014 presidential candidate Senator Aécio Neves who was investigated in at least six different procedures. Neves was taped asking for money from the owners of a giant company, JBS. Similarly, President Temer would face requirements for the lower house authorization for his criminal indictment based on accepting that JBS paid for Eduardo Cunha's silence in prison. On March 18, 2017, Justice Edson Fachin suspended Neves from office;[43] almost three months later, Justice Marco Aurélio would also unilaterally reverse Fachin's ruling.[44] Nonetheless, the Brazilian Supreme Court First Panel would also reverse Justice Marco Aurélio's unilateral ruling to again suspend Neves from office on September 26, 2017.[45]

Allegedly aiming at some juridical security related to the different positions held by the Brazilian Supreme Court, political parties filed another concentrated constitutional review lawsuit. The aim was that the court could deliver an 'interpretation according to the Constitution' regarding the cautionary measures provided for by the Brazilian Criminal Procedure Code, affirming that any of these measures should be submitted to validation by the house to which the investigated member of parliament belongs within twenty-four hours after the judicial organ rules on it.[46] In other words, not only cases of flagrant imprisonment for a non-bailable crime must follow the constitutional provision, but also any

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[42] *See* ADPF 402, Brazilian Supreme Court, http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=4975492.

[43] *See* Consultor Jurídico, *Fachin Afasta Aécio e Loures; Pedidos de Prisão Preventiva Foram Negados*, https://www.conjur.com.br/2017-mai-18/fachin-afasta-aecio-deputado-pedidos-prisao-plenario.

[44] *See* Júlia Affonso & Fausto Macedo, *Aécio tem 'fortes elos com o Brasil' e 'carreira política elogiável*, *diz Marco Aurélio* (June 30, 2017), O ESTADO DE S. PAULO, http://politica.estadao.com.br/blogs/fausto-macedo/aecio-tem-fortes-elos-com-o-brasil-e-carreira-politica-elogiavel-diz-marco-aurelio/.

[45] *See* Supremo Tribunal Federal, *1ª Turma determina afastamento do senador Aécio Neves do cargo*, http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=356966; *see also* AC 4.327, Brazilian Supreme Court, http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=5188006.

[46] It is important to elucidate that, like several other courts in the world, the Brazilian Supreme Court, in constitutional review procedures, goes far beyond the binomial constitutionality/unconstitutionality, using remedies like the 'interpretation according to the Constitution' or Italian techniques such as the *sentenze additive* or German techniques such as the *Apellentscheidung*. For an overview of all those techniques, see EMILIO MEYER, DECISÃO E JURISDIÇÃO CONSTITUCIONAL (2017).

criminal procedure cautionary measure. By a very tight majority of six against five, the Court agreed with the political parties, but in relation to those cautionary measures that could impede the exercise of the office by members of the National Congress.[47] The Federal Senate would keep Aécio Neves in office as a Federal Senator without any concern about the criminal investigations.[48]

This landscape authorizes us to draw conclusions about how the Brazilian Supreme Court has been treating its relationship with the National Congress, which has given more attention to how the media and a fraction of popular opinion see the facts, than to what the constitutional norms establish. No coherent arguments were presented since the first senator's (Delcídio do Amaral) imprisonment. Even if one accepts that Eduardo Cunha was abusing of his parliamentary immunities, it is questionable whether or not he could be removed not only from his position as Speaker of the lower house office, but also from his Federal Deputy functions. The thesis regarding Presidential line of succession exclusion created even more confusion—and one must remember that suspension from office in this case depends on the authorization of an external organ—the National Congress lower house—and the crime supposedly perpetrated by the President must be related to the office (a *propter officium* crime).

The several different decisions concerning Senator Aécio Neves also demonstrate that there is no pattern and that the Justices are much more worried about their individual roles than about the court's institutional existence. If the Senate had refused to implement the Brazilian Supreme Court First Panel ruling suspending Neves from office, another chapter of the constitutional crisis would have been written. Quickly, the Brazilian Supreme Court tried to show that it agreed with what the Senate could decide regarding the Neves mandate. If the decision had constitutional plausibility, its timing was the consequence of an erratic comprehension of parliamentary immunities instead of a constitutionally adequate interpretation.

II. The Brazilian Supreme Court and the Impeachment Process

During Dilma Rousseff's impeachment process, the Brazilian Supreme Court was asked to interfere in a range of subjects. When condemnation occurred, once again the court was provoked: Beyond the Senate's strange decision to impeach Dilma Rousseff but not to block

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[47] *See Notícias do STF*, SUPREMO TRIBUNAL FEDERAL, http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=358853; *see also* ADI 5.526, BRAZILIAN SUPREME COURT, http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=4982736.

[48] *See* O Globo, *Aécio Neves diz em nota que recebeu 'com serenidade' decisão do Senado*, https://oglobo.globo.com/brasil/aecio-neves-diz-em-nota-que-recebeu-com-serenidade-decisao-do-senado-21959044.

her from holding public office for an eight-year period, as the Brazilian Constitution demands,[49] there was, in her defense, a discussion on the merits and due process of law. It was alleged, right from the start, that facts imputed to her by the accusation do not amount to crimes of responsibility and that the Brazilian House of Deputies Speaker, Eduardo Cunha, had used the process to reach his own political and private interests. This would mean Rousseff could not face an impeachment process without a clear and strong basis and that impartiality was absent from the whole procedure. As soon as the condemnation occurred, Dilma Rousseff filed a lawsuit that was assigned to Justice Teori Zavascki as the rapporteur;[50] there is no final decision in the case, but Justice Zavascki's refusal to grant a stay showed what may or may not occur in the future since then, as now, the Brazilian Supreme Court President Cármen Lúcia would have been using her discretion to avoid bringing the proceedings to judgment.[51] After Justice Zavascki passed away, the new Justice, Alexandre de Morais—Michel Temer's ex-Minister of Justice, affiliated with the *PSDB* until recently[52]—has taken office and will be responsible for his lawsuits, so it looks like no ruling will appear soon.

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[49] *See Ministra decide em mandados de segurança contra divisão de sanções no impeachment*, SUPREMO TRIBUNAL FEDERAL (Sep. 8, 2016), http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=324885.

[50] *See* Brazilian Supreme Court, MS 34.441, Oct. 21, 2016, http://www.stf.jus.br/portal/processo/verProcessoPeca.asp?id=310585765&tipoApp=.pdf.

[51] There is a huge gap in the proper rulings for the judicial docket in Brazil and the ways to control it. *See* Diego Arguelhes & Ivar Hartman, *Timing Control Without Docket Control: How Individual Justices Shape Brazilian Supreme Court's Agenda*, 5 JLC 1, 105–40 (2017) (discussing how Brazilian Supreme Court Justices have the power to control the court's agenda by formal and informal means).

[52] Juliano Zaiden Benvindo, *Brazil's Increasingly Politicized Supreme Court*, INT'L J. CONST. L. BLOG (Feb. 16, 2017), http://www.iconnectblog.com/2017/02/brazils-increasingly-politicized-supreme-court/

> After some suspense and bets, amid a political crisis and a criminal investigation involving many bigwigs in Congress, President Michel Temer nominated Alexandre de Moraes, the justice minister of his government and a political figure affiliated with the Brazilian Social Democracy Party (PSDB), to the Supreme Court. His political background notwithstanding, his legal credentials are also in question. Even though he is a professor of constitutional law at the University of São Paulo and has written some books in the field, scholars and the media have mentioned the shallowness of his work and have even exposed the occurrence of plagiarism. His nomination is emblematic of the moment Brazil is currently experiencing and points to how the current government seems to be taking advantage of the Supreme Court's institutional flaws and its soaring power to set up a political court. This is a critical moment in Brazilian democracy. If there is any hope, however, it lies in the fact that, now more than ever, Brazilians have started to critically discuss who will be their next Supreme Court justice.

Brazilian legislation, like the Brazilian Supreme Court internal rules, allows the rapporteur of a case to solely determine whether or not to grant stays.[53] Dilma Rousseff's defense was cautious to try to distinguish the impeachment process from a vote of non-confidence; in that way, even if the Senate's trial is a political part of the impeachment process, that fact does not affect the need for the accusation to present a clear delimitation of the gross offenses perpetrated in juridical language. In other words, the Senate makes political judgments on a juridical basis. The defense also added the great range of acts that would compromise Deputies' and Senators' impartiality, mainly those practiced by then House of Deputies Speaker Eduardo Cunha. In this sense, Dilma Rousseff asked that the Brazilian Supreme Court suspend the Federal Senate's decision and then, at the end of the procedure, nullify it.

Justice Zavascki's ruling denying the stay is meticulous in analyzing all the arguments in Dilma Rousseff's five hundred pages petition. In contrast, in less than three pages, he was able to indicate that the Brazilian Supreme Court would, in fact, leave the Senate's decision untouched. First, he stated that the legislation that regulates the impeachment process is anachronistic and the theme is very complex in relation to the separation of powers clause. At the same time, he did not prevent himself from making some political observations: The impeachment process would have occurred in a period of nine months and resulted in a condemnation that overcame the constitutional majority of two-thirds of the Senate; a probably mutable judicial intervention would cause huge institutional consequences; only a thorough demonstration of the necessity to avoid grave damages to institutions could lead to a judicial ruling in that moment; the President is elected, as the Brazilian Constitution establishes in article 77, with the Vice-President, and there was a need to avoid constitutionally compromising his legitimacy to govern (even using the opposite political program); finally, there was a lack of a demonstration of the risks to republican institutions, constitutional law or the constitutional order that could allow any intervention.

In the 1990s, in judging the case of ex-President Fernando Collor, the Brazilian Supreme Court ruled that the Senate's condemnation was eminently political, using a self-restraint that would have forbidden her to review the decision.[54] The problem is that this precedent has blurred connotations. The Brazilian Supreme Court could interfere if constitutional rights of those involved were violated. It is remarkable that, at that time, Justice Carlos Velloso quoted a passage from Raoul Berger that would strengthen the judicial review of impeachment if the supposed offenses were outside constitutional authorization.[55]

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[53] BRAZILIAN SUPREME COURT INTERNAL RULES, part I, tit. I, ch. V, section II, article 21, n. V. *See* http://www.stf.jus.br/arquivo/cms/legislacaoRegimentoInterno/anexo/RISTFintegral.pdf.

[54] *See* Brazilian Supreme Court, MS 21.689, Dec. 16, 1993, http://www.stf.jus.br/arquivo/cms/sobrestfconhecastfjulgamentohistorico/anexo/ms21689.pdf.

[55] "One who enters government service does not cease to be a «person» within the Fifth Amendment, and an impeachment for offenses outside constitutional authorization would deny him the protection afforded by «due process.» It would be passing strange to conclude that a citizen may invoke the judicial «bulwark» against a

Considering the completely different historical context, we could imagine that the current court would have reached a different conclusion. Yet, what in fact has occurred is that some Justices have already proclaimed their positions, clearly violating impartiality and functional rules that exist in Brazil.[56, 57]

III. Presumption of Innocence

The impacts of the rulings from the 2015-2016 judiciary terms would not end here. In February 2016, the Brazilian Supreme Court ruled on a very sensitive, fundamental right in Brazil: The presumption of innocence. The Brazilian Constitution, article 5, LVII,[58] guarantees

twenty-dollar fine but not against an unconstitutional impeachment, removal from and perpetual disqualification to hold federal office." RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS, 116–17 (1973).

[56] Congresso em Foco, *Ministros do STF criticam referências a "golpe,"* CONGRESSO EM FOCO, http://congressoemfoco.uol.com.br/noticias/ministros-do-stf-criticam-referencias-a-golpe/.

[57] The Brazilian Supreme Court ruled on the same impeachment procedure in the ADPF (a kind of concentrated model of constitutional review) nº 378 right at the start of the procedure. In this case, the court was much more prolix, relying on the idea that there was not, at the time, a need to discuss the merits of the accusations. *See* Brazilian Supreme Court, ADPF 378, Dec. 17, 2016, http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=4899156. Since the merits of the impeachment process were not, until now, ruled by the Brazilian Supreme Court, the only forecast we can make is that the court, relying in its conservative background, will not discuss the seriousness of the accusation and will repeat its precedent from 1993, whose foundations rely in the American "political question doctrine." For an overview of this doctrine, see SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS, 152 (2015).

[58] BRAZ. CONST., tit. II, ch. I, article 5, n. LVII. *See* the translation by Keith Rosenn for the *Constitute Project*, https://www.constituteproject.org/constitution/Brazil_2015?lang=en,

> Article 5
>
> Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners residing in the Country the inviolability of the rights to life, liberty, equality, security and property, on the following terms:
>
> . . .
>
> LVII. no one shall be considered guilty until his criminal conviction has become final and non-appealable[;]

Some Constitutions make explicit associations between the presumption of innocence and "res judicata." Albany's Constitution of 1988 demands a final ruling to set aside the presumption of innocence (article 30). Angola's Constitution of 2010 establishes the presumption of innocence until a final decision be involved by "res judicata" (article 67, no. 2). The Bulgarian Constitution of 1991 also demands a final ruling (article 31, no. 3); the Croatian Constitution of 1991, article 28, mentions a final judgment to set aside the presumption of innocence; similar clauses are found in the Dominican Republic's Constitution of 2010 (article 69, no. 3), Ecuador's Constitution of 2008 (article 76, no. 2); Italy's Constitution of 1947 (article 27); Poland's Constitution of 1997 (article 42, no. 3); the

that no one shall be considered guilty until the last appeal of a criminal conviction is ruled as final (*res judicata*). In 2009, ruling on the issue, the Brazilian Supreme Court recognized that not only should appeals to the second jurisdiction in the judicial system be ruled upon to allow for condemnation but also appeals to the Brazilian Supreme Court (the extraordinary appeal or *recurso extraordinário*) or to the Brazilian Superior Court of Justice (the *Superior Tribunal de Justiça*, which rules on special appeals or *recurso especial*).[59] In February 2016, though, the court decided to overrule that holding in order to enforce the conclusion that those appeals to the Brazilian Supreme Court and Brazilian Superior Justice Court are not able to revise the facts of the case and that the number of appeals that allowed for a true review were very small, delaying the execution of the condemnation.[60, 61]

Justice Barroso's opinion suggested that the presumption of innocence is a principle, not a rule, and after a condemnation by a court of appeals—the second moment of judgment—the court would be allowed to balance the presumption of innocence against the public interest in criminal law enforcement. Then, Barroso expressly mentions Robert Alexy's idea that constitutional rights are optimization requirements in a sense that has been, since at least the end of 1990s, the dominant theory of constitutional interpretation in Brazil, as in other countries and supranational courts.[62]

Barroso remarked that the absence of an immediate prison sentence after the confirmation of the condemnation by a court would mean a violation of the principle of proportionality in its deficient protection prohibition. He also stated that the same idea of the presumption of innocence has gone through a constitutional mutation, evoking—but without citing—the authoritarian construction made by Paul Laband, Georg Jellinek, Hsü Dau-Lin, and Konrad Hesse in Germany.[63] In the end, his opinion would weaken the same normative text of the

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Portuguese Constitution of 1976 (article 32, no. 2); and Romania's Constitution of 1991 (article 23, no. 11) (all data collected at https://www.constituteproject.org/?lang=en).

[59] *See* Brazilian Supreme Court, HC 84.078, Feb. 5, 2009, http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=608531.

[60] *See* Brazilian Supreme Court, HC 126.292, Feb. 17, 2016, http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=10964246.

[61] However, it is important to notice that another way of getting access to these courts and having some success is filing a habeas corpus writ.

[62] *See* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (2002); MEYER, *supra* note 46, at 219; JULIANO BENVINDO, ON THE LIMITS OF CONSTITUTIONAL ADJUDICATION: DECONSTRUCTING BALANCING AND JUDICIAL ACTIVISM (2010). For a broader perspective on the use of the proportionality, see AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012) and PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES (Vicki Jackson & Mark Tushnet eds. 2017).

[63] All of them, with different points of view. For the idea of "constitutional mutation" in German Public Law, see FLÁVIO PEDRON, MUTAÇÃO CONSTITUCIONAL NA CRISE DO POSITIVISMO JURÍDICO (2012); *see also* PETER CALDWELL, POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY & PRACTICE OF WEIMAR CONSTITUTIONALISM (1997); ARTHUR JACOBSON & BERNHARD SCHLINK, WEIMAR: A JURISPRUDENCE OF CRISIS (2002).

Brazilian Constitution of 1988. By October 2016, the Brazilian Supreme Court would confirm, by a majority, this perspective in two other cases relating to lawsuits on concentrated constitutional review.[64] Justice Barroso's opinion enshrines a judicial power that uses supposed foreign innovations to substitute for a general positivistic approach in the name of new constitutionalism in order to transform constitutional adjudication into a politicized activity.

The Brazilian Supreme Court ruling on presumption of innocence would produce direct effects in 2018 Presidential elections. After being condemned by Federal Judge Sérgio Moro in a criminal complaint for supposed bribery and money laundry in exchange for a flat in Brazilian coast, ex-President Lula faced the possibility of anticipated imprisonment before final ruling. It is noteworthy that several accusations of lack of impartiality did not avoid that Federal Judge Moro could issue a warrant and jail Lula. When the Brazilian Supreme Court faced a writ of habeas corpus filed by the ex-president, it ruled on a tight majority (six majority opinions and five dissenting ones) based on Justice Rosa Weber opinion, someone who said that her position favored something called a "collegiality principle"–Weber did not think the presumption of innocence could be restrained, though in that case she thought the Court needed to be less incoherent.[65] In other words, she used one single case to build coherence with something she did not believe was right. Needless to add that Lula was (and still he is, even in jail) the best positioned candidate in polls for the election. One must not set aside that the Army's Commander declared in his Twitter account his institution "repudiate[s] impunity", something that would pressure the Court.[66]

On the 8 July 2018, the unstable status gave by the Brazilian judiciary to constitutionalism would show itself blatantly clear. Three lawyers that are also *PT*'s representatives in the Lower House filed a habeas corpus writ in the Fourth Federal Courts of Appeals against the acts practiced not by Federal Judge Sérgio Moro, but by the Federal Judge Carolina Lebbos,

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[64] *See* Brazilian Supreme Court, MC in ADC's 43 and 44, (Barroso, J.), http://s.conjur.com.br/dl/voto-ministro-barroso-prisao-antes.pdf.

[65] *See* Brasilian Supreme Court, HC 152.752, April 5, 2018, http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?numero=152752&classe=HC&origem=AP&recurso=0&tipoJulgamento=M. *See*, also, Lênio Streck and Emilio Meyer, 'O HC de Lula — maioria transformada em minoria: a "colegialidade" em ação!', Conjur, 2018, https://www.conjur.com.br/2018-abr-05/opiniao-hc-lula-maioria-transformada-minoria. The criminal complaint against Lula is filled with irregularities, beyond Moro's suspect competence. In the same *Operation Carwash*, appeals in the Fourth Federal Court of Appeals took 96 days to be tried; Lula's appeal was tried in 42 days (Estelita Carazzai and Joelmir Tavares, 'Recurso de Lula foi o que mais rápido chegou à 2ª instância', Folha de S. Paulo, 2017, https://www1.folha.uol.com.br/poder/2017/08/1912821-recurso-de-lula-foi-o-que-mais-rapido-chegou-a-2-instancia.shtml. For further information on Lula's advocates perspective, *see* Geoffrey Robertson, 'The Case for Lula: He Deserves a Fair Trial, Not Persecution', Foreign Affairs, 2017, https://www.foreignaffairs.com/articles/brazil/2017-04-19/case-lula.

[66] *See* Ernesto Londoño and Shasta Darlington, 'Lula, Brazil's Ex-President, Can Be Jailed, Court Rules', NY Times, 2018, https://www.nytimes.com/2018/04/04/world/americas/brazil-lula-corruption-prison.html.

the one responsible for the prison's oversight. They argued that the imprisonment was unnecessary and that Lula had his political rights restricted, since he could not participate in political debates. Article 14, § 3, of the Brazilian Constitution states that only a final ruling can suspend political rights. In the Fourth Federal Courts of Appeals, at 09:05 a.m., Judge Rogério Favreto (who became a member of the court by an indication of Dilma Rousseff and who was a former member of *PT*), exercising jurisdiction in duty (it was Sunday, but Brazilian legal order provides functions during those periods on a urgent basis), granted the order on the grounds that Lula's political rights have been unduly affected.[67] At 12:05 p.m., Federal Judge Sérgio Moro (not a member of the Fourth Federal Courts of Appeals and who was on vacation) delivered a ruling in the original criminal complaint stating that the member of the second degree tribunal had not competence to rule in favor of Lula.[68] At 12:24 p.m., Judge Rogério Favreto reaffirmed his ruling determining Lula's immediate release.[69] The original criminal lawsuit Judge rapporteur Gebran Neto, at 2:13 p.m., issued another ruling, now in the same habeas corpus filed by Lula's lawyers, ordering that the Federal Police should not practice any act that could lead to the release of the ex-president. Again, at 4:04 p.m., Federal Judge Favreto ordered that Lula was freed and criticized Judges Moro and Gebran Neto.[70] Finally, at 7:30 p.m., Federal Judge Thompson Flores, President of the Fourth Federal Court of Appeals, decided that the ruling of the original criminal lawsuit Judge rapporteur Gebran Neto of keeping Lula imprisoned should prevail.[71]

An analysis of the different rulings concerning the liberty of ex-President Lula would demand a specific article (or book). However, the series of events give a glimpse of how Brazilian judicial authorities are far from being concerned with Brazilian regime constitutional stability.

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[67] Brazilian Fourth Federal Courts of Appeals, HC 502561440.2018.4.04.0000/PR, 8 July 2018, http://estaticog1.globo.com/2018/07/08/DESPADEC.pdf.

[68] Brazil, 13th Federal Court of Curitiba, AP 5046512-94.2016.4.04.7000/PR, 8 July 2018, http://estaticog1.globo.com/2018/07/08/decisao_08072018_consulta.pdf.

[69] Brazilian Fourth Federal Courts of Appeals, HC 502561440.2018.4.04.0000/PR, 8 July 2018, http://estaticog1.globo.com/2018/07/08/DESPADECHO_2.pdf.

[70] Brazilian Fourth Federal Courts of Appeals, HC 502561440.2018.4.04.0000/PR, 8 July 2018, https://congressoemfoco.uol.com.br/especial/noticias/desembargador-volta-a-ordenar-soltura-de-lula-apos-gebran-negar-habeas-corpus/.

[71] Brazilian Fourth Federal Courts of Appeals, SL 5025635-16.2018.4.04.0000/PR, 8 July 2018, https://politica.estadao.com.br/blogs/fausto-macedo/wp-content/uploads/sites/41/2018/07/THOMPSON.pdf.

IV. Taping the President

It is noticeable that twelve years before the Brazilian Supreme Court ruling on the presumption of innocence, a lower court judge would advocate, even academically, the idea that the presumption of innocence would be a principle subject to balancing. After all this time, and parallel to what is going on the highest level, he would be the same judge responsible for trying one of the biggest corruption scandals in Brazil. Judge Sérgio Moro wrote in 2004 a very laudatory piece on the Italian *mani puliti* operation.[72] He emphasized the role played by public opinion in supporting the judicial activities of investigating and punishing white-collar crimes. Not only were the guarantees of independence but also the investigation's publicity and the support of the majority of the population could favor new proofs. He advocated that, if the legal conditions for a cautionary prison order are present, there are no "moral obstacles" to keeping the accused imprisoned in order to obtain a confession or a plea bargain. Instead, the cautionary imprisonment would be a sign of the judicial system's seriousness.

From 2014 on, *Operation Carwash* captured media and popular attention. In a disputable interpretation of judicial powers, all the investigations and criminal lawsuits were concentrated into the hands of Federal Judge Sérgio Moro. The huge number of the Brazilian federal prosecutors (*Ministério Público Federal*) investigations and accusations indicated a very close relationship among the Federal Police (*Polícia Federal*), fiscal authorities (*Receita Federal*), and Federal Judge Moro in the sense very similar to the one that Moro himself asked for in 2004; he also argued against the idea that the judicial branch should be only a proof addressee, allowing it to participate in the production of proofs. According to a Brazilian juridical website, the cautionary imprisonments related to *Operation Carwash* lasted an average of 281 days or 9 months. Eighty-one people were arrested under these conditions. Two, who were accused, were imprisoned for more than 1,000 days without a final judgment of their appeals by a tribunal.[73] The Brazilian Constitution guarantees a fundamental right to a "reasonable process duration"[74] and there is no clear provision pertaining to this issue in the Criminal Procedure Code, what made the courts and authors adopt a fictional parameter of 169 days, which is tantamount to the sum of the deadlines for general criminal procedures. Yet, for *Operation Carwash* that pattern does not apply: *Habeas corpus* writs continue to be denied in most of the cases, as ruled upon by Judge

[72] *See* Sérgio Fernando Moro, *Considerações sobre a operação mani puliti*, 26 R. CEJ. 56, 56–62 (2004). *See also* Margarida Lacombe & José Ribas Vieira, *A estratégia institucional do Juiz Sérgio Moro descrita por ele mesmo*, JOTA, https://jota.info/artigos/estrategia-institucional-juiz-sergio-moro-descrita-por-ele-mesmo-28032016.

[73] *See* Pedro Canário, CRITICADAS POR GILMAR, PREVENTIVAS DA "LAVA JATO" DURAM EM MÉDIA 9, 3 MESES, CONJUR, http://www.conjur.com.br/2017-fev-07/criticadas-preventivas-lava-jato-duram-media-93-meses.

[74] BRAZILIAN CONSTITUTION, tit. II, ch. 1, article 5, n. LXXVIII.

Moro, the Fourth Federal Courts of Appeals, the Brazilian Superior Court of Justice or the Brazilian Supreme Court.[75]

Beyond all of those controversial interpretations of what a cautionary imprisonment means in the Brazilian constitutional and criminal systems, Judge Sérgio Moro caused perplexity when he authorized the publication of conversations between ex-President Luís Inácio Lula da Silva and ex-President Dilma Rousseff from the time she was in office. Judge Moro authorized wiretapping measures when investigating supposed unjust enrichment acts practiced by Lula, an ex-President who, in accordance with Brazilian legislation, can be tried by any lower court judge.[76] March 16, 2016 would be the landmark for Brazil's political crisis. In the morning, former President Dilma Rousseff announced that Lula would be nominated as her Chief of Staff (*Casa Civil*) of the Presidency of the Republic, an office responsible for political coordination, which is something that Rousseff's second term really lacked. In the afternoon, the main newspapers and television broadcasters were almost simultaneously publishing conversations between Rousseff and Lula when Rousseff spoke about giving Lula a term of office that he could use in any situation. There were several rumors about Lula's imprisonment, especially after he was forcefully driven by federal police authorities during an investigation.[77]

There are some very tricky details about the timing of every detail here. In his ruling, Judge Moro argues that there are constitutional rules regarding publicizing matters related to crimes against public administration in Brazil, referring to article 5, n. LX, and 93, n. IX, of the Brazilian Constitution of 1988. "Democracy in a free society demands that the governed know what public authorities are doing, even when they intend to act protected by the

[75] In April 2015, 204 habeas corpus actions were filed, but only 5 were granted in place of definitive rulings. *See* Júlia Affonso, Fausto Macedo, & Ricardo Brandt, *Contra a Lava Jato, investigados pediram 204 habeas corpus, mas ganharam apenas dois*, O ESTADO DE S. PAULO, http://politica.estadao.com.br/blogs/fausto-macedo/contra-a-lava-jato-investigados-pediram-204-habeas-corpus-mas-ganharam-apenas-dois/. In a habeas corpus writ tried by the Brazilian Superior Court (*Superior Tribunal de Justiça*), Justice Felix Fischer mentioned, albeit avoiding speaking in terms of an "exception judgment," the need to recognize the "circumstances and peculiarities of the situation," quoting another judge who classified the fact as something singular in the last 50 years. Brazilian Superior Court, HC 75.286, https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1552055&num_registro=201602276315&data=20161114&formato=PDF.

[76] *See* Brasil, 13th Federal Court of Curitiba, PEDIDO DE QUEBRA DE SIGILO DE DADOS E/OU TELEFÔNICOS 5006205-98.2016.4.04.7000/PR, http://s.conjur.com.br/dl/decisao-levantamento-sigilo.pdf.

[77] *See* Fernando Castro, Samuel Nunes, & Vladimir Netto, *Moro derruba sigilo e divulga grampo de ligação entre Lula e Dilma; ouça*, G1, http://g1.globo.com/pr/parana/noticia/2016/03/pf-libera-documento-que-mostra-ligacao-entre-lula-e-dilma.html; Ricardo Brandt, Fausto Macedo, & Julia Affonso, *Lava Jato pegou conversas de Lula e Dilma no telefone; ouça*, O ESTADO DE S. PAULO, http://politica.estadao.com.br/blogs/fausto-macedo/ouca-lula-e-dilma-no-telefone/; Filipe Coutinho, Thiago Bronzato, & Daniel Haidar, *Dilma cai em escuta da PF em conversa com Lula. Ouça*, ÉPOCA, http://epoca.globo.com/tempo/noticia/2016/03/dilma-cai-em-grampo-da-pf-em-conversa-com-lula.html.

shadows," Moro stated in his ruling. At the same time, Moro recognized that once he was aware of the fact that Lula would be nominated as Chief of Staff Minister, the process should be relocated to the Brazilian Supreme Court, as the Brazilian Constitution guarantees that this court shall try ministers.[78] Moro also evaluated Rousseff's conversations, mentioning that he did not see any kind of criminal act being perpetrated in a way that would demand the Brazilian Supreme Court's jurisdiction.

Of course, the ruling would have political effects. Lula would be prevented from taking office by a Brazilian Supreme Court Justice, Gilmar Mendes, who wrote a cautionary and monocratic ruling in two lawsuits filed by Rousseff's opposition political parties.[79] Justice Gilmar Mendes, who is known for political interventions via rulings, public manifestations and other maneuvers, agreed with the thesis of a "deviation of goals" in the nomination, ignoring his own ideas about the suitability of that particular lawsuit and the political character of the Minister's nomination.[80] Incidentally, the decision was made on March 18, 2016.

The Brazilian Supreme Court would further analyze the legality of Judge Moro's decision: In the procedure, between other arguments, Moro would ask for apologies to the court.[81] In this another lawsuit, reported by Justice Teori Zavascki, the Brazilian Supreme Court noted the unconstitutionality and illegality of the ruling, as it ignored rules on jurisdiction, violated the fundamental right to privacy and secrecy guaranteed in the Brazilian Constitution and infringed on Statute Law nº 9.296 of 1996, which establishes that any taping not useful to criminal investigation must be discarded.[82] Of course, all of the political consequences had already occurred, and none of them could be changed.

Much more complicated would be the way the Fourth Federal Court of Appeals, to which Judge Moro is bound for administrative effects, ruled on a procedure required by the Regional Corrective Magistrate in order to start a disciplinary administrative procedure

[78] BRAZ. CONST., tit. IV, ch. III, section II, article 102, n. I, letter 'c'.

[79] *See* Brazilian Supreme Court, MS's 34.070 and 34.071, March 18, 2016, http://www.stf.jus.br/portal/processo/verProcessoPeca.asp?id=308995627&tipoApp=.pdf.

[80] *See* Emilio Meyer, *A Colcha de Retalhos de Gilmar Mendes*, JOTA, https://www.jota.info/opiniao-e-analise/artigos/colcha-de-retalhos-de-gilmar-mendes-26032016.

[81] Interestingly, in November 2017, long after Rousseff was impeached and Lula indicted, Judge Moro would publicly declare that he had no regrets on the disclosure. *See* Tahiane Stochero, *Moro diz não se arrepender de ter divulgado áudio entre Lula e Dilma*, *G1*, https://g1.globo.com/sp/sao-paulo/noticia/moro-diz-nao-se-arrepender-de-ter-divulgado-audio-entre-lula-e-dilma.ghtml.

[82] *See* Brazilian Supreme Court, RECL. 23.457, June 13, 2016, http://www.stf.jus.br/arquivo/cms/noticianoticiastf/anexo/rcl23457.pdf. *See*, also, BRAZ. CONST., tit. II, ch. I, article 5, n. XII, and BRAZ. STATUTE LAW nº 9.296 of 1996.

against Judge Moro, suspend him from office, and apply the proper disciplinary sanctions. Judge Moro would have violated Fourth Federal Courts of Appeals internal rules, the National Magistrates Organic Complementary Law nº 35 of 1979 (article 35, I), the National Magistrates Ethics Code (articles 12 and 25) and Resolution nº 59 of 2008; the last two rules are both from the National Magistrates Council.[83] The Regional Corrective Magistrate rejected the petition from the start, and the plaintiffs appealed to the full bench of the Fourth Federal Courts of Appeals.

Judge Rômulo Pizzolatti was the judge rapporteur and stated in his ruling that all the norms invoked by the plaintiffs only have correct meaning in normal situations.[84] *Operation Carwash*, under Judge Moro's jurisdiction, would be an exceptional case, an unprecedented situation that escapes the general norms. Judge Pizzolatti quoted a former Brazilian Supreme Court Justice, Eros Grau, who incorrectly relied on Schmitt and Agamben when ruling on what he called exceptional situations.[85] Repeating the evaluation on the conversations' content already made by Judge Moro and criticized by the Brazilian Supreme Court, Pizzolatti stated that the general interest in the investigations' successes would trump the rights to privacy and secrecy of those involved. Eventual threats to the investigations would require "exceptional treatment." Only after the Brazilian Supreme Court's ruling on the case would Brazilian magistrates have clear idea of what to do in such cases. "[I]nvestigations and criminal lawsuits of the so-called 'Operation Carwash' are an *unprecedented case*, bringing *unprecedented issues* and requiring *unprecedented solutions,*" stated Judge Rômulo Pizzolatti.

What is common in all of these cases? They all rely on exceptional circumstances that would demand exceptional remedies. It is not the aim of this paper to check how and why these rulings rely on exceptional theories to build their arguments. Nonetheless, most of them do it in a very superficial sense without showing what is behind the magistrate's idea. One of the premises of this Article is that those holdings in the last two years were the start of an inherited authoritarian political pattern, which was probably not adequately reformed during Brazil's long-term transitional constitutionalism.

This does not mean these kinds of decisions did not occur in Brazil's judicial branch in the recent democratic period; on the contrary, there are several examples of them happening. Yet, the authoritarian political pattern is clearer now, and judges seem to have lost their shame in showing it. In our account, there are institutional and personal motives that lie

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[83] *See* BRAZ. COMPLEMENTARY LAW nº 35 of 1979, tit. III, ch. I, article 35, n. I; BRAZ. NATIONAL MAGISTRATES ETHICS CODE, ch. IV, article 12, and ch. VIII, article 25; BRAZ. NATIONAL MAGISTRATES COUNCIL RESOLUTION nº 59 of 2008.

[84] *See* Brazilian Fourth Federal Courts of Appeals, PA CORTE ESPECIAL 0003021-32.2016.4.04.8000, Sep. 23, 2016, http://s.conjur.com.br/dl/lava-jato-nao-seguir-regras-casos.pdf.

[85] *See* EROS GRAU, POR QUE TENHO MEDO DOS JUÍZES (2016).

behind current judicial practices. In the next topic, we shall have a look at what may have contributed to allowing judges to decide these very controversial holdings at the same time that they were arguing for more corporative advantages.

D. Corporative Guarantees: Judges in an Extremely Unequal Context

As the Brazilian Constitution of 1988 states, there are justices and judges appointed by the President (in the so-called "superior courts" and in one-fifth of the offices in the federal courts of appeals), judges appointed by Governors to be part of the state's Courts of Appeals in one-fifth of the offices, and judges that are approved in public tests organized by the federal and state' courts and who can also achieve office in courts through career progress. This last situation represents most of the Brazilian magistrates. In a census from 2014, with data collected in 2013, there were 16.812 magistrates in office. The average age of the magistrates was 44.7 years old; 64.1% were men and 35.9% women; 82.8% were white, 14.2% were mulattos, 1.4% were black; 51.2% studied law in private institutions, and 48.8% in public institutions; 37.3% took office in the 1990s; 85.9% did not engage in educational activities as professors or teachers; 91.8% were satisfied with the career they had chosen; only 15.7% declared they were able to accomplish the activities given the scale of their job; and 27.8% were satisfied with the work they practiced, considering their age.[86]

At the time of the impeachment process, the once Brazilian Supreme Court President, Justice Ricardo Lewandowsky, was attempting to increase the already high judiciary wages of its public servants, though there was an ongoing economic crisis. Lewandowsky asked for the support of the House of Deputies immediately after that body authorized Rousseff's impeachment. The wages would increase on average from 16.5% to 41.47%.[87] Therefore, in a country where judges received US$ 14,241.00 in 2015 on average (and 87% of the total expenditures 87% was used to pay wages and other values to staff, comprising magistrates and public servants),[88] it is an important fact to consider that in the midst of the impeachment process against Dilma Rousseff, public servants in the judicial branch would receive another salary increase of up to 41%.[89]

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[86] *See* Conselho Nacional de Justiça, *Censo do Poder Judiciário: VIDE – Vetores Iniciais e Dados Estatísticos* (2014), http://www.cnj.jus.br/images/dpj/CensoJudiciario.final.pdf.

[87] *See* Thiago Resende & Raphael di Cunto, *Lewandowski Obtém Apoio de Líderes na Câmara ao Reajuste do Judiciário*, VALOR ECONÔMICO (Apr. 26, 2016), http://www.valor.com.br/politica/4539721/lewandowski-obtem-apoio-de-lideres-na-camara-ao-reajuste-do-judiciario.

[88] *Judiciário fica mais caro e leva 1,3% do PIB; juiz custa R$ 46 mil/mês*, UOL NOTÍCIAS (Oct. 17, 2016), http://noticias.uol.com.br/politica/ultimas-noticias/2016/10/17/judiciario-fica-mais-caro-e-leva-13-do-pib-juiz-custa-r-46-milmes.htm.

[89] Fábio Góis, *Temer sanciona sem vetos projeto que concede aumento de 41% a servidores do Judiciário*, CONGRESSO EM FOCO (July 21, 2016), http://congressoemfoco.uol.com.br/noticias/temer-sanciona-sem-vetos-projeto-que-concede-aumento-de-41-a-servidores-do-judiciario/.

Nonetheless, the most incredible move in order to keep these wages high came from the same judicial branch in discussions about the range of a controversial rule of the National Magistrates Organic Complementary Law nº 35 of 1979 granting housing benefits for judges. Concerning this issue, a lawsuit was filed in the Brazilian Supreme Court. Federal judges were arguing that since only some state judges received the housing benefits, there was a clear violation of the constitutional norm of equality. Justice Luiz Fux was the lawsuit rapporteur. He decided that there was a violation of the principle of equality and determined that all Brazilian judges should receive housing benefits, except if there was official housing in the city where the judge could exercise this benefit.[90] So a single decision on September 7, 2014 granted individual benefits of, on average, US$ 1,355.00, which led in July 2015 to an expense of at least US$ 266 million, all provided by public resources.[91] Justice Luiz Fux kept the lawsuit in his office drawer—because term limits for Brazilian judges are simply ignored by them—refusing to take the lawsuit to STF's full bench. Only on 22 March 2018, the lawsuit was docked to be tried. In the last moments, though, the Brazilian Magistrates Association (*Associação dos Magistrados Brasileiros*) asked Fux for submitting the procedures to an arbitration panel conducted by the federal administration.[92]

Luciano Da Ros and Matthew M. Taylor have been developing important research on the Brazilian judicial branch structure entitled *Opening the Black Box: Three Decades of Reforms to Brazil's Judicial System*, and the first results of that work provide a glimpse of the costs and impacts of judicial activity.[93] In 2013, the total amount of expenses for judicial bodies represented US$ 20.1 billion,[94] which is a value that is equal the GDP of 12 individual Brazilian states. This means that each Brazilian citizen would have to pay approximately $130.32US for the annual cost of judicial adjudication; in a gross comparison, in Switzerland, this value is $142.87US; in Germany, $120.49US; in Spain, $31.30US; and in Argentina, $19.10US. Staff expenditures equal 89%. For example, the judges from Minas Gerais State start their careers with a monthly wage of $8,473.00US and can reach $9,883.00US; beyond that "basic value" (called *subsídio* by the Brazilian Constitution,[95] supposedly in order to

[90] Brazilian Supreme Court, AO 1.773 (Sep. 18, 2014), http://www.stf.jus.br/portal/processo/verProcessoPeca.asp?id=261622279&tipoApp=.pdf.

[91] *See* Felipe Recondo, *Por liminar, auxílio-moradia de juízes já custa R$ 860 milhões*, JOTA, http://jota.info/por-liminar-auxilio-moradia-de-juizes-ja-custa-r-860-milhoes.

[92] *See* Ana Pompeu, *Fux retira processos sobre auxílio-moradia da pauta do Plenário do Supremo*, CONJUR, https://www.conjur.com.br/2018-mar-21/fux-retira-processos-auxilio-moradia-pauta-pleno-stf.

[93] The first results can be found at Luciano da Ros, *O custo da Justiça no Brasil: uma análise comparativa exploratória*, 9 OBSERVATORY OF SOC. AND POL. ELITES IN BRAZIL NEWSL. 1, 1–15 (2015).

[94] In a dollar rate of R$ 3.09.

[95] BRAZ. CONST., tit. III, chap. VII, article 379, § 4º.

avoid extra payments that the same judiciary always read as indemnifications), they receive food benefits ($258.00US), housing benefits ($1,418.00US) and health benefits ($847.30US) every month. In the initial steps of their careers, judges in Minas Gerais State can have a total monthly salary of $10,996.30US. The problem is not different from other juridical careers, such as prosecutors and public attorneys. In a country where, in 2016, the average income was $397.28US and the Gini coefficient was, in 2013, 0.50, it is hard not to consider the judicial branch an economic capital elite.[96]

Brazilian sociologist Jessé Souza argues there is a juridical caste in Brazil. To reach this conclusion, he relies on Pierre Bourdieu and Charles Taylor's theories.[97] Based on a division of classes in Brazilian society that uses as criteria not only economic or financial capital, but also social and cultural capital, it is possible to connect contemporary judges, prosecutors, and some federal police officers to the highest ranks of the community. The juridical caste would be the direct heir of a privileged class that can buy its sons time to study and prepare for the hard and competitive public tests that create pathways for most of the current sitting judges. This juridical caste has its own corporative ethics with two main elements: One, the competitive public tests legitimize the wide variety of benefits and privileges that judges and prosecutors receive (something like the mandarins in patrimonialist China); two, this caste must justify itself by telling people they do something important, such as being the guardians of Brazilian morals. If the second element has a clear connection with what is occurring with criminal and procedural guarantees in Brazil, the first element, concerning the privileges, would be partially protected by other government branches and partially by the judiciary itself.

E. Transitional Constitutionalism and the Role Played by the Judiciary

As Ruti Teitel describes, as long as constitutionalism depends on several different concepts for its construction (federalism, separation of powers, judicial review, and fundamental rights), the third wave of democratization (Huntington) appears to be preoccupied with not only state actions but also with state omissions.[98] Changes in international legal accountability have led to transformations in collective and individual constitutional identity, demanding rights and public policies adequate to respond to the conflicts and violence perpetrated by the state. The ancient preoccupation with regular monarchic abuses is substituted by the controlling nature of national socialism and the violence associated with dictatorships. Transitional constitutionalism assumes a fundamental role in a region where

[96] Instituto Brasileiro de Geografia e Estatística, *IBGE divulga o rendimento domiciliar per capita 2016*, ftp://ftp.ibge.gov.br/Trabalho_e_Rendimento/Pesquisa_Nacional_por_Amostra_de_Domicilios_continua/Renda_domiciliar_per_capita/Renda_domiciliar_per_capita_2016.pdf.

[97] SOUZA, *supra* note 6, at 121; JESSÉ SOUZA, A TOLICE DA INTELIGÊNCIA BRASILEIRA (2015).

[98] RUTI TEITEL, GLOBALIZING TRANSITIONAL JUSTICE: CONTEMPORARY ESSAYS 182 (2014).

countries have confronted several authoritarian regimes. What is lacking, for now, is a serious effectiveness of all the elements involved in this concept. Especially in Brazil, the absence of truly institutional reforms in the judicial branch has contributed to the present scenario.

Brazilian judicial authorities had an important role in the deliberations that led to the design of the Constitution of 1988. Appointed by General Ernesto Geisel, Justice Moreira Alves presided over the first constituent assembly session, remarking that this was the final term of a period of revolutionary cycle, as the Institutional Act nº 1 of 1964 and its supporters called the coup.[99] Relying on the National Constituent Assembly (NCA) of 1987-1988 databases maintained by the Brazilian Senate, Alexandre Carvalho investigates how the impartiality flag could be used to make corporative benefits and institutional design grow without great changes in the authoritarian regime of 1964-1985.[100] It is important to note that before the NCA, a "Commission of Intellectuals" was formed by then President José Sarney in order to provide a first draft of the Constitution (which was ultimately discarded): 32 of the 49 members were lawyers. The NCA members could be similarly characterized: 43,50% had a legal education. The Brazilian Supreme Court participated actively in the process, sometimes as an arbiter and sometimes as an actor with direct interests.

No important distinction between the judicial institution and its agents was made; most of the time, problems such as the volume of lawsuits and the lack of a proper structure were presented as part of the same issue. The discourse on intellectual education and moral superiority, which mainly targeted other public servants such as prosecutors and public attorneys, as mentioned by Jessé Souza, could be found at that time, according to Carvalho.[101] Of the eleven Brazilian Supreme Court Justices, nine had been appointed by the military, and they would not face any obstacle in keeping their seats. In contrast, these justices clearly opposed a proposal of creating a constitutional court in Brazil or transforming the Brazilian Supreme Court into a court of final appeals, leaving the constitutional review to that first court. This would also oppose executive interests, because the executive's role in appointing justices would be shared with the same judiciary and with the legislature.

Worse than the constitutional court proposal, the idea of an external control of magistrates' activities received severe criticism from judges' associations. From 1977 on, there was a National Magistrates Council that was integrated by seven justices from the Brazilian Supreme Court and exercised the external control. The new proposal included external

[99] LEONARDO BARBOSA, HISTÓRIA CONSTITUCIONAL BRASILEIRA 205 (2012).

[100] Alexandre Carvalho, *Juscorporativismo: os juízes e o judiciário na Assembleia Nacional Constituinte*, 114 REVISTA BRASILEIRA DE ESTUDOS POLÍTICOS 31, 31–77 (2017). *See generally* VANESSA SCHINKE, JUDICIÁRIO E AUTORITARISMO: REGIME AUTORITÁRIO (1964–1985), DEMOCRACIA E PERMANÊNCIAS (2016).

[101] *Id*. at 43.

control. The magistrates' associations accused the proposal of trying to implement in Brazil something similar to what would have occurred in the regimes of Hitler, Stalin, or Idi-Amin.[102] An internal control would only have been created in 2004 since the National Justice Council is integrated mostly by judges and was forming part of the judicial branch.[103] In contrast, proposals on administrative and budgetary judicial autonomy were plainly supported by all judges in such a clear way that newspapers editorials criticized what was called a "corporatist deviation." The commission in the NCA responsible for the systematization of the constitution project did not deliberate on the constitutional court's creation; proposals that tried to pluralize the way the members of the Brazilian Supreme Court were nominated were rejected as also those that established fixed terms for the justices. Free nominations of public servants managed by the judges and integral retirement benefits were approved.

All of those corporative interests brought to the NCA a stronger authoritarian and corporative judicial branch, though now it has to address a new context, guided by a democratic constitutional document. Yet, if no institutional reform was on the table, on the horizon there would be for more decisions coming from above without any sense of democratic reinforcement. In the 1990s, the Brazilian Supreme Court's jurisprudence was still linked to the political question doctrine and was quite subservient to what occurred in the legislative or the executive branches. For instance, then-President Fernando Henrique Cardoso used extraordinary legislative powers without any large confrontation with the court, though he did act industrially. From the 2000s on, a new generation of justices relied on theories such as the proportionality idea to give space to the effective judicialization of politics or, if necessary, to legitimization processes.

In some cases, at stake was how the court viewed the same authoritarian past in which it shared and lived. Brazilian judges, especially the ones appointed by the military regime, cooperated by not confronting the executive decisions of the dictatorship during the 1970s;[104] when formal democracy arrived and a real test existed, the judges backed off. In 2010, the Brazilian Supreme Court ruled in a highly criticized decision that the Amnesty Law of 1979 was able to grant an auto-amnesty for state agents that committed gross violations of human rights during the dictatorship.[105] The decision was so heavily criticized that the

[102] *Id*. at 50.

[103] BRAZ. CONST., tit. IV, ch. III, article 92, I-A and 103-B.

[104] *See* ANTHONY PEREIRA, POLITICAL (IN)JUSTICE: AUTHORITARIANISM AND THE RULE OF LAW IN BRAZIL, CHILE, AND ARGENTINA (2005).

[105] *See* EMILIO MEYER, DITADURA E RESPONSABILIZAÇÃO (2012); Emilio Meyer, *Criminal Responsibility in Brazilian Transitional Justice: A Constitutional Interpretative Process under the Paradigm of International Human Rights Law*, 4 IDON. J. INT'L & COMP. L. 1, 41-71 (2017); Yi Shin Tang, *International Justice Through Domestic Courts*, 9 INT. J. TRAN. JUST. 2, 259–77 (2015).

Inter-American Court of Human Rights expressly censored it, although it separated the fields of conventionality and constitutional review and was followed by Brazilian prosecutors, the National Truth Commission, and Brazilian Amnesty Commission, a reparatory organ. As expected, few judges opposed the Brazilian Supreme Court, and most judges simply agreed that the Brazilian Constitution would allow amnesty for crimes against humanity.[106]

Of course, these were not the only problems. The Brazilian Supreme Court has recognized several private or civil rights in the past few decades.[107] If one adds to this the normative feature that must entangle constitutional entrepreneurs, maybe the way is not to present the scenario as an ongoing state of exception, as some have been doing in Brazil; some people are even denouncing the judiciary's role in this approach.[108] As depicted by Gargarella, several constitutions in the region have gone through transformations, reforms, and substitutions that gave way to an advanced—if ineffective—system of human rights. Something still remained unchanged: The constitution's machine room, its organization of powers. Two facts noted by Gargarella that can be considered of huge importance for Latin-American constitutionalism—workers' class participation in politics, and the outbreak of multicultural politics—would change the declarations of rights but would not affect the organization of power, leaving things unchanged from the nineteenth century onwards.[109] The connection between rights and democracy is still something to be achieved in the future.

This lack of legitimacy has pernicious effects on Latin-American constitutionalism. If it is not possible to link the exercise of power to the popular autonomy exercised through human rights, the result is that political regimes will remain much more dependent on other sources of power, for example, economic power, than on political engagement with civil society. The result is the so-called "coalitional presidentialism," where the submission of the executive branch to the legislative branch distorts the way even liberal constitutionalism makes its basic differences (parlamientarism vs. presidentialism and impeachment vs. confidence

[106] *See* JUSTIÇA DE TRANSIÇÃO EM PERSPECTIVA TRANSNACIONAL (Emilio Meyer ed., 2017). Brazil was condemned for maintaining that the Amnesty Law of 1979 reached state perpetrators by the Inter-American Court of Human rights in two opportunities: in 2010, in *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil* (http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf), and in 2018, in *Caso Herzog e Outros v. Brasil* (http://www.corteidh.or.cr/docs/casos/articulos/seriec_353_por.pdf).

[107] For instance, the cases decided by the Brazilian Supreme Court when it recognized the constitutionality of gay marriage, the legitimacy of public manifestations in favor of decriminalizing marijuana usage, and the illegitimacy of private companies financing elections. *See* Brazilian Supreme Court, ADI 4.277 and ADPF 132, http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628633; Brazilian Supreme Court, ADPF 187, http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=5956195; Brazilian Supreme Court, ADI 4.650, http://www.stf.jus.br/portal/processo/verProcessoPeca.asp?id=308746530&tipoApp=.pdf.

[108] *See* SERRANO, *supra* note 1.

[109] ROBERTO GARGARELLA, LA SALA DE MÁQUINAS DE LA CONSTITUCIÓN: DOS SIGLOS DE CONSTITUCIONALISMO EN AMÉRICA LATINA 360 (2014). One must be aware, however, that Gargarella does not explore sufficiently the potential devices of democratization that were available recently in countries like Brazil, Ecuador or Bolivia.

vote) and weakens the difference between the juridical and the political systems.[110] The situation becomes worse when transitional constitutionalism is not able to promote its tools in the judiciary: After years of the doctrine of the political question, judges now feel comfortable guaranteeing liberal rights since they do not have to take on complex decisions that could affect a perversely unequal system, even if the constitution explicitly establishes a welfare state. In political crises, judges see themselves as saviors of a kind of stability that is not a product of the constitution but of their own views on how society should work. A question, then, takes shape: Do new democracies need different courts—constitutional ones, for instance—in order to advance constitutional and political stability?

F. Constitutional Courts and Political Instability

Taking into account the fact that constitutionalism creates conditions of possibility for modern democracies, instead of only creating barriers, one must locate the best constitutional design available to understand the role of judges and courts. In transitional societies, judicial authorities gain more attention since they can work as institutional guarantors of the rules of the game. Samuel Issacharoff tried to identify—in either post-conflict or post-authoritarian regimes—the devices necessary to enable a constitutional court's leading role in consolidating democracy in fragile situations beyond acting as an exercise in a "critical process limitation on the exercise of democratic power."[111]

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[110] The situation can get worse if we add other conditions: Economic and political crises; parliamentary crises where a party (the *MDB*) that was the result of every kind of opposition to the dictatorship and would become the best example of any kind of arrangement to remain in power during a democracy; the absence of popular control in main public policies, especially those related to infrastructure, generating high levels of corruption. *See* LEONARDO AVRITZER, IMPASSES DA DEMOCRACIA NO BRASIL (2016) (discussing social mobilization maneuvered by media concentration, especially social mobilization focused on demonizing the state and glorifying market).

[111] ISSACHAROFF, *supra* note 58, at 12 (2015). The second role can be illustrated by control over the enforcement of constitutional rules against dominant parties inherited from the authoritarian regime. In this sense, Brazil faces a double confrontation: a) coalition presidentialism based on the pulverization of political parties creates serious obstacles for the President to gain parliamentary support. *See* Sérgio Abranches, *Presidencialismo de coalizão: o dilema institucional brasileiro*, 31 REVISTA DE CIÊNCIAS SOCIAIS 1, 4–34 (1988); José Antonio Cheibub & Fernando Limongi, *Legislative-Executive Relations*, *in* COMPARATIVE CONSTITUTIONAL LAW 222 (Tom Ginsburg & Rosalind Dixon eds., 2011) b) the presence of a political party, the MDB, born as the oppositional party during the dictatorship of 1964–1985. If during the dictatorial period, the MDB encompassed all progressive forces that could oppose the regime, during the 1980s the permission for the multiparty system's return ensured that MDB could represent not social movements but Brazil's political elite. This is something that can be seen by its role in the "Centrão" (big center) during the ANC, which was a way of preventing the social and popular forces that appeared in the constitutional design moment from leading all the deliberations. Since José Sarney's presidency, [a former member of the dictatorship party, the ARENA (*Aliança Renovadora Nacional*), who was chosen to represent the MDB only for political circumstances], the MDB has developed a physiological performance supposedly needed in the name of governability. This way of conducting politics became dominant. The PMDB was always the force that supported or exercised the executive branch: It did so with the FHC (1994–2002); Lula (2002–2010, but mainly after 2005, when the "Mensalão" scandal was brought to light); Rousseff (2010–2016, with Michel Temer, from the PMDB, as her Vice-President for the two terms and ultimately betraying her); and, finally, Temer (2016–2017, with the PMDB, in the executive branch, putting into action the right's austerity program with the support of the once opposition

The author characterizes "fragile democracies" as those that inherit political authority from authoritarian regimes and where political institutions or civil society supporting groups are not able to manage political conflict.[112] It is hard to simply adopt this concept for a transition such as the one that occurred in Brazil, where it looks like elite groups always stood beyond any real civil society control and, at the same time, occupied the three branches. For the purposes of this Article, we should verify the positions that judges must take on in order to avoid acting only as a political branch. One must recognize that it is a fine line; yet, the relationship between the judicial branch (mainly the constitutional courts) and the democratic process must be taken seriously in order to avoid the juridical system's loss of autonomy.

Issacharoff presents, for instance, the case of the Constitutional Court of Mongolia. To define the government system as a presidential one, the court confronted the parliament and ruled that members of the legislative branch cannot hold presidential cabinet positions, both in 1996 and in 1998. Although reading the court's argument as a constitutional commitment to stabilize governance, Issacharoff notes this case is an important one in which courts defined the basic idea of democracy for a society.[113] In contrast, seminal cases such as *Luther v. Borden*,[114] which illuminated the birth of political question doctrine, would affect American courts' dominant view on the lack of judicial oversight for impeachment processes.[115] The American case—albeit not sufficiently explained—is the object of

political party, the PSDB). *See* MARCOS NOBRE, IMOBILISMO EM MOVIMENTO: DA ABERTURA DEMOCRÁTICA AO GOVERNO DILMA (2013). As we mentioned, *PMDB* recently readopted its original anacronym, *MDB*.

[112] ISSACHAROFF, *supra* note 58, at 10.

[113] ISSACHAROFF, *supra* note 58, at 194.

[114] 48 U.S. 1 (1849).

[115] Under the U.S. Constitution (article II, section 4), the President can be impeached for treason, bribery or high crimes and misdemeanors. For the Andrew Johnson and Bill Clinton cases, the same phrase, 'high crimes and misdemeanors,' gave space for accusations that brought presidential acts to political light. In the case of Johnson, it is important to remember that the impeachment articles would rely on the supposed violation of the Tenure of Office Act; this means that an act with juridical effects should be present from the beginning. In Clinton's situation, 'perjurious, false and misleading testimony' and, also, 'obstructing justice' would not only have a juridical character but also a criminal one, although it was grave enough to remove the President from office. That is, for the phrase 'high crimes and misdemeanors,' a juridical qualification should stand, even if not a criminal one: The question is if, for the safety of democratic procedures, courts can avoid impeachment processes used only for controversial or illegal political aims. *See* OTIS STEPHENS, JR. & JOHN SCHEB II, AMERICAN CONSTITUTIONAL LAW: SOURCES OF POWER AND RESTRAINT 174 (2008). Although Tribe recognizes that no judicial oversight is due in impeachment processes, he calls for a congressional responsibility on interpreting 'high crimes and misdemeanors' to avoid understanding it as "[a] . . . category . . . purely politicized in character or definition . . . ." [LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, 154 (2000)]. It seems to me that, on one hand, the object of impeachment articles must put the constitutional project in peril, must be a grave act; on the other hand, if the offenses do not have to be criminal, for the reasons the President can be severely punished and presidentialism calls for executive stability, criminal procedural guarantees must be granted to the accused. An accusation that, for the sake of being constructed, must rely on reading several different statutes, depend on a court's surprisingly overruling, dismiss clear Presidential decisions on a complicated chain of command or stay in the realm of political administration or budget politics, cannot simply

comparison with two others: The Czech and the South Korean cases. In the case of the Czech Republic, the impeachment of Václav Klaus, who was accused of using the presidency to meet his personal agenda, was condemned by the Senate by a 38-30 majority. Nonetheless, the Czech Republic Constitution states that the process is authorized by the Chamber of Deputies, though the President was impeached by the Senate and finally tried by the Constitutional Court.[116] Weighing aspects of possible future partisan uses of impeachment aimed at exclusion from political life, the Constitutional Court considered the fact that Klaus' term had ended to avoid ruling on the impeachment.[117]

Another case brought by Issacharoff is that of South-Korea, involving ex-President Roh Moo-hyun who was accused of using his office to find support for his political party during a National Assembly election. Again, here, the legislative branch via the National Assembly, must accept by a two-thirds majority a motion proposed by the majority of members, suspending the President until the Constitutional Court can try him.[118] The South-Korean Constitutional Court agreed with the National Assembly that Moo-hyun had committed several constitutional infractions; yet, the court did not agree that the impeachment process should continue, largely because partisan political activity cannot undermine constitutional rules.[119] This seems to be a case where the distinction between presidentialism and parliamentarism is reinforced, as the necessary intervention by courts shall occur where the boundaries of politics attempt to blur the law completely. Of course, one must consider that Czech Republic and South Korean cases are different in the sense that their constitutions attribute jurisdiction for impeachment trials directly to the courts; in cases such as the U.S. or Brazil, judges would be restrained from guaranteeing procedural rules. The issue is that, from a constitutional point of view, if only bad politics are at stake and if they dominate the way an impeachment is managed, even in the definition of the articles, no difference between law and politics can stand.

Nonetheless, at least at first glance, Issacharoff's analysis seems to rely excessively on how legislative and executive hypertrophies can be fought by constitutional courts. The issue in

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be read as an impeachment offense. That is why courts must, in cases like these, oversee the procedural rules and the basic substantial accusation.

[116] CZECH CONST., ch. II, article 65, 2.

[117] Klaus was impeached by the Senate on March 4, 2013; three days later, his term was over. The Czech Republic Constitutional Court holding was handed down on March 28, 2013. It is interesting to compare this case with Brazil's ex-President Fernando Collor: While Collor resigned right after the Senate session that would try him had started, the Brazilian Supreme Court decided that even if he could no longer be condemned to losing office, there was no obstacle in the Brazilian Constitution to apply to him the exclusion from public offices for eight years established in article 52. *See* Brazilian Supreme Court, MS 21.689, Dec. 16, 1993, http://www.stf.jus.br/arquivo/cms/sobrestfconhecastfjulgamentohistorico/anexo/ms21689.pdf.

[118] S. KOREA CONST., ch. III, article 65, 2 and 3; ch. VI, article 1, 2.

[119] ISSACHAROFF, *supra* note 58, at 199.

Brazil currently seems to be dislodged in the direction of the judiciary. If the constitutional court's way out was refused by an authoritarian judicial branch during the Brazilian NCA of 1987–1988, the effect was prolonged through the transition to arrive at an apex right now with no clear institutional exit on the horizon. Recently, the Brazilian Electoral Superior Tribunal dismissed the accusation of illegal campaign funding against the Rousseff/Temer slate—calling for another court to confront the possibility of changing the way politics occur in Brazil.[120]

The issue is that, once again, institutional stability is back on the agenda, now with reference to who is in charge of political power. In addition, comparative models such as the South-African or German models do not seem to fit: In both cases, at least with regard to the apex of constitutional interpretation, the courts were filled with new minds collected from the previous opposition to the authoritarian regimes. Yet, from a comparative point of view, the German example also offers reasons for concern: The proportionality analysis seems to have a great deal to do with the extra empowerment of the court.[121] The way the Brazilian Supreme Court has imported this notion has been cause for local doctrinal concerns since at least the 2000s, and the same proportionality idea provided room for leaving the constitutional text behind, such as the presumption of innocence case described above.[122]

It is important, then, to define a weak democracy and how courts can cooperate in strengthening it. It is remarkable that since the very first moment of the 2014 Brazilian presidential election results, the PSDB has provoked the Electoral Superior Court to declare the illegitimacy of the Rousseff/Temer slate. Now, the political party is supporting the *MDB* in the executive branch, putting into practice a political plan that was defeated in the 2014 ballots. Issacharoff's analyses of Schumpeter's account of democracy is correct in arguing for competitive elections for new democracies;[123] nonetheless, the political opposition to the leftist PT's governments used the wrong tools to achieve political power, and what should be an opportunity for the Brazilian Supreme Court to avoid a real political instability

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[120] *See* Anthony Boadle & Ricardo Brito, *Brazil Electoral Court Dismisses Case That Could Have Ousted President*, REUTERS (June 9, 2017, https://www.reuters.com/article/us-brazil-politics-ruling-idUSKBN19033V.

[121] *See* Ingeborg Maus, *Judiciário como superego da sociedade: o papel da atividade jurisprudencial na "sociedade órfã"*, 58 NOVOS ESTUDOS CEBRAP, 183–202 (2000); JÜRGEN HABERMAS, 'BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY' §6 (1996).

[122] *See* MARCELO CATTONI, DEVIDO PROCESSO LEGISLATIVO'(3rd ed., Fórum 2016); ÁLVARO CRUZ, JURISDIÇÃO CONSTITUCIONAL DEMOCRÁTICA (2nd ed., Arraes Editores 2015); LÊNIO STRECK, JURISDIÇÃO CONSTITUCIONAL E DECISÃO JURÍDICA (3rd ed., RT, 2013); MEYER, *supra* note 46.

[123] ISSACHAROFF, *supra* note 58, at 246. In 2014, the Rousseff/Temer (PT/MDB, mostly) slate beat the Aécio/Nunes slate (PSDB) by a small margin of 3.3% of the total votes. *See* Jonathan Watts, *Brazilian Election: One Battle ver but Another Begins for Dilma Rousseff*, GUARDIAN (Oct. 27, 2014), https://www.theguardian.com/world/2014/oct/27/dilma-rouseff-brazil-election-president-battle.

became its own way of participating in politics.[124] All in all, the issue is that PT did not gain excessive political power right after the transition years (1985–1988); they remained in power from 2002 on and were confronted by competitive elections in 2006, 2010, and 2014. The problem is that for coalitional presidentialism one-party domination came not from the PT, but from the always-present support for governability in Brazil by the MDB.

Some contradictions are also at stake here. In a comparative analysis, the South African Constitutional Court refused to create a substantive account of democracy when it refused to rule on the illegitimacy of high burden requirements on the political party anti-defection norms established by the South African Constitutional Amendment Act of 2003.[125] The Brazilian Supreme Court in 2007 was responsible for creating, based on constitutional principles such as the republican one, anti-defection rules that were not expressly defined in the Brazilian Constitution, forbidding political party change during a term in office except if a "just cause" is presented, such as creating a new political party or internal

[124] In analyzing a lawsuit against the constitutional amendment procedure that created an austerity program for the next 20 years in Brazil (BRAZ. CONST. AMEND. nº 95 of 2016), Justice Barroso denied any aggression to the entrenchment clauses established in the Brazilian Constitution (article 60, § 4º, among them, fundamental rights and popular periodical vote) and affirmed his own view on the necessity of austerity measures and the "size" of the Brazilian state (Brazilian Supreme Court, MS 34.448, Oct. 10, 2016, http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/MS34448.pdf). The argument sounded much more like a free adherence to the institutional economic models designed by Hirschl by which judicial review should act as the guarantor of investors' main interests regarding how an economy should function. For an analysis that reads the constitutional amendment as a 'dismemberment' of social rights that are part of the Brazilian Constitution of 1988, *see* Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YJIL 1, 41-43 (2018).

Also in 2016, the Brazilian Supreme Court promoted severe limits to public servants' right to strike, allowing state agencies to discount wage values correspondent to days that were not worked (Brazilian Supreme Court, RE 693.456, Oct. 27, 2016, http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/RE693456.pdf). Justice Fux mentioned the economic crises Brazil was facing and the possibility of worker uprisings. The Brazilian Supreme Court's approach to economic issues and its increasing judicialization of politics can be compared with the U.S. Supreme Court's point of view and with the constitutionalization movement in Israel that happened *pari passu* with economic liberalization.

> Indeed, the pro-constitutionalization stance of Israel's economic elite is not be surprising given the American experience of "market friendly" constitutional jurisprudence. The U.S. Supreme Court—the most frequently cited producer of constitutional rights jurisprudence in western world— has long been a zealous guardian of economic liberties and has maintained its historic position on the right of the American spectrum of economic thought.
>
> As in other western countries, there has also been a sustained attempt by economic elites in Israel in recent years to dismantle the country's local version of the Keynesian welfare state and to install market-oriented economic policies . . . ." (HIRSCHL, *supra* note 7, at 61).

[125] *See United Democratic Movement v. The President of the Republic of South Africa*, 2003 (1) SALR 495 (CC) (S. Afr.).

discrimination.[126] Currently, no substantive account of an impeachment judgment seems plausible, even if there is a fragile accusation or if the process is used to achieve divergent aims.[127]

Furthermore, this situation is not unique to Brazil in the region. The Argentinean Supreme Court ceded to a new composition that would defy years of consolidating jurisprudence towards the superiority of human rights interpretations in favor of a regional system conducted by the Inter-American Court of Human Rights.[128] The Venezuela Supreme Tribunal attempted a real *coup d'état* by seizing congressional legislative functions, though it backed down in the face of domestic and international pressure.[129] All of these cases show how courts are clearly inside what Hirschl called mega politics.

G. Judges as Elite Actors in Political Crises

It is not hard to adapt Ran Hirschl's viewpoint on juristocracy building to what is occurring in Brazil. Even if the author directs his analyses to the Canada, Israel, and New Zealand cases, adding South Africa for its challenging and nuanced qualities, some of the remarks in the explanation of a process towards juristocracy seem to be present in the Brazilian single transition scenario.[130] In particular, the constitutionalization is due to self-interested hegemonic preservation with political, economic, and judicial actors building institutions that could benefit themselves. In the case of Brazil, the democratic character of the ANC of 1987-1988 was fought by conservative forces mainly in the formation of the judicial branch, as mentioned. But this challenge has been recently reinforced in an extraordinary way,

[126] Brazilian Supreme Court, MS's 26.602, 26.603 and 26.604, Apr. 10, 2007, http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=555539.

[127] *See* Issacharoff's observation on South African Constitutional Court democracy's restrictive account and compare it to what Brazilian Supreme Court had been refusing to do concerning Rousseff's impeachment. ("Unfortunately, the challenge of creating a substantive constitutional doctrine of democratic integrity proved a step too far, at least initially. Instead, the court retreated to a formalist account of the constitution as guaranteeing primarily procedural norms and individual rights and not a broader commitment to democratic engagement") (ISSACHAROFF, *supra* note 58, at 252).

[128] Argentina, Corte Suprema de Justicia de la Nación (CSJN) (National Supreme Court of Justice), CSJ 368/1998, (Feb. 14, 2017), http://www.cij.gov.ar/nota-24822.html.

[129] Venezuela, El Tribunal Supremo de Justicia, Sala Constitucional, Recursos de Interpretación (Mar. 3, 2017).

[130] HIRSCHL, *supra* note 7, at 11. Hirschl presents six main scenarios of constitutionalization: a) the reconstruction wave post World War II; b) the independence scenario of post-colonial countries; c) the single transition scenario from authoritarian to democratic rule, including that of Brazil; d) the dual transition scenario from both authoritarian and socialist models; e) the incorporation scenario that captures the situations of countries that were impacted by international and supranational norms, like Sweden, Denmark, and the United Kingdom; and f) the "no apparent" scenario with constitutional reforms that do not significantly change political and economic regimes, like Canada and New Zealand.

mainly with the support of the same actors interested in changing politics: The media, the privileged classes and the so-called "juridical-police apparatus."[131]

Hirschl mentions that usually threatened political, economic, and judicial elites—eager to inflate their political influence—play a key role in constitutional reforms towards juristocracy. The difference for the Brazilian situation is that the constitutionalization allowed by the Constitution of 1988 was not only due to elites' maneuvers, but also due to popular pressures that pressed for a constitution that could entail some kind of social constitutionalism that would call on judges for its enforcement vis-à-vis legislator omissions. In the 1990s, the Brazilian Supreme Court jurisprudence was mostly auto-contentious to avoid the effectiveness of rights, using the argument that statutory regulation was needed.[132] In the 2000s, this jurisprudence suffered a Copernican revolution that was also reinforced by a politicization that was understood by other courts and judges as the moment for them to act in the absence of correct (in their view) political practices by the other branches. What is happening now in the 2010s results from the fact that a lot was done to make this judicial elite a fundamental actor in deciding politics in Brazil.

Nonethless, Hirschl's ideas on the power of constitutionalization and judicial review to enhance private rights or negative liberties that only requires the state to refrain from excessive interference—besides being a failure of the same factors to make a more egalitarian society through socio-economic rights that demand more "stateness"—are currently gaining ground in Brazil's neo-liberal and pro-austerity context. The Brazilian Supreme Court, based on its interpretation of the Constitution of 1988, recognized the legitimacy of gay marriage, marijuana-using supporter's protests, the anticipation of anencephalic childbirths, the constitutionality of stem cell research, and the legitimacy of higher education affirmative actions quotas.[133] Nonetheless, socio-economic rights directly

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[131] Souza divides Brazilian society into the following categories: a) the economic and moneyed class or elite; b) the medium class that serves the domination of the moneyed elite in disfavor of the popular classes; c) a working class; and d) the excluded class, which is situated under the dignity qualification. The sociologist uses Bourdieu's ideas to create these categories, referring not only to economic capital but also to cultural and personal relationship capital. The medium class, in which judges could be included, uses a great amount of cultural capital but also, of course, needs economic and social capital. *See* SOUZA, *supra* note 6, at 59–60.

[132] *See* Supremo Tribunal Federal (S.T.F.) (highest court of appeals on constitutional matters), MI 372, Aug. 1, 1994, http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=81794 (Braz.)

[133] *See* Supremo Tribunal Federal (S.T.F.), ADI 4.277 and ADPF 132, May 5, 2011, http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628633; Supremo Tribunal Federal (S.T.F.), ADPF 187, June 15, 2011, http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=5956195; Supremo Tribunal Federal (S.T.F.), ADPF 54, Apr. 12, 2012, http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334; Supremo Tribunal Federal (S.T.F.) (highest court of appeals on constitutional matters), ADI 3.510, May 29, 2008, http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=611723; Supremo Tribunal Federal (S.T.F.), ADPF 186, Apr. 26, 2012, http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=6984693; *see also* Paulo Iotti, *STF: Um Tribunal Amigo "Apenas" de Liberdades Individuais?*, JUSTIFICANDO (July 11, 2018),

affected by the enormous, twenty-year-old austerity program constitutionalized by the Temer administration did not cause too much perplexity in the court since Justice Barroso refused to interfere in the legislative process, arguing that no rights would be affected.[134]

The novelty in the Brazilian case is that the elites, who could have started to feel threatened either by income redistribution programs or Rousseff's government shutdown to finance groups' political interests, did not end with judicial reinforcement via constitutional reform. It would seem easier to captivate PSDB's eagerness to come back to power and add to it conservative media vehicles' support, resulting in keeping the long existing trust in a supposed impartial judiciary—the same one that is never subject to any reform in spite of the democratic character of the constitutional text of 1988. "Typically, the pro-constitutionalization elites are made up of the urban intelligentsia, the legal profession, and the managerial class".[135] If one swaps "pro-constitutionalization" for the "politicization of the judiciary," it is possible to have a glimpse of the whole portrait. Just a glimpse though, because as mentioned, the Brazilian Supreme Court ruled even in prejudice of textual dispositions of the Brazilian Constitution of 1988.

H. Conclusion: Unstable Constitutionalism in Brazil?

Through the lens of Tushnet and Khosla's unstable constitutionalism, Brazilian courts and judges have contributed as parts of the constitutional separation of powers arrangement to bring instability to the system designed by the Brazilian Constitution of 1988. The authors conceptualize unstable constitutionalism as an idea that could embrace the obstacles that law faces when trying to reconcile norms and facts and when trying to produce more stable situations in societies that once experienced exceptional circumstances.[136] In other words, the idea is to focus on external pressures and domestic risks to the overall constitutional system. Constitutional instability could be the result of pressure from external actors, such as the military or a dominant religion, or be part of anomalies in the exercise of powers by institutional actors inside the constitutional system. Of course, in these analyses, the blurred frontiers between law and politics can be mentioned since they are part of a normative point of view of the demand for legal answers in constitutional matters.

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http://justificando.cartacapital.com.br/2016/10/28/stf-um-tribunal-amigo-apenas-de-liberdades-individuais-de-autonomia-privada/.

[134] The Brazilian Supreme Court recognizes that if due legislative process is not applied by the National Congress, Deputies and Senator can appeal to the court to suspend or interrupt the proposal. *See* the leading case, prior to the Constitution of 1988: Brazilian Supreme Court, MS 20.257, http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=85046.

[135] *See* HIRSCHL, *supra* note 7, at 44.

[136] *See* Mark Tushnet & Madhav Khosla, *Introduction* to UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA, 5 (Mark Tushnet & Madhav Khosla eds., 2015).

Pakistan would offer a remarkable instance for discussing what role judicial authorities played under Brazilian constitutionalism. Osama Siddique underlines that how Pakistanis judges individual and group behavior cannot be neglected in the complex phenomena of the judicialization of politics.[137] The clearer examples in Pakistani politics concern the legitimization processes that judges led during the last decades with few mentions of democratic rule in the spaces between martial rule. After the 1999 General Pervez Musharraff coup in 2000, the Supreme Court would invoke the doctrine of necessity to legitimize the institutional rupture and also to provide the president with constitutional amendment powers using a discourse in favor of guaranteeing integrity, sovereignty and stability. With the several holdings from 2015 onward, Brazilian judges walked the dangerous path of putting into practice an unstable constitutionalism platform that is contrary to what was demanded by the Constitution of 1988.

The constitutional text of 1988 provides the basis for building a true welfare state. The Brazilian Constitution enshrined norms on human dignity; equalitarian society objectives; integration with Latin America; submission to an international human rights system, including a human rights court, civil liberties, and individual, collective, and socioeconomic rights; regulatory norms on economics, environmental protection, and consumer rights, which is a huge catalogue of fundamental rights.[138] Completing the traditional constitutional law material, even without clear institutional reforms, the Brazilian Constitution of 1988 aimed at keeping an institutional design of collaboration between the three branches of power with all the defects "coalitional presidentialism" could allow. Judicial authorities—mainly the Brazilian Supreme Court—were empowered with several remedies to concentrate judicial review in the European Kelsenian model. Any of these changes, though, would be enough to block the increasing judicialization of politics, though less so in times of generalized accusations of corruption against executive and legislative members.[139]

If the way Brazilian politics are truly conducted is part of public disclosure now, on the other side, no constitutional guarantees and institutions are concretely implemented, allowing for judges and courts to take the place of an uncontrolled sovereign. As long as the Brazilian Constitution of 1988 made room for important results from a never seen democratic

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[137] Osama Siddique, *The Judicialization of Politics in Pakistan: The Supreme Court After the Lawyer's Movement*, *in* UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA, 160 (Mark Tushnet & Madhav Khosla eds., 2015).

[138] *See* BRAZ. CONST., tit I, article 1º, n. III; article 3º, n. III; article 4º, sole paragraph; tit. II, ch. I, arts. 5º; ch. III, arts. 6º until 11; tit. VII, ch. I, article 170; tit. VIII, ch. VI, article 225.

[139] The Brazilian Supreme Court Justice Edson Fachin allowed the Federal Attorney General to investigate eight Temer Ministers, including House of Representatives and Federal Senate presidents, twenty-four senators, forty federal deputies, three state governors, and former Presidents Fernando Henrique Cardoso, Lula, and Dilma Rousseff (*Dilma, Lula e FHC têm pedido de investigação na Lava Jato encaminhado a outras instâncias*, UOL (Apr. 11, 2017), https://noticias.uol.com.br/politica/ultimas-noticias/2017/04/11/fachin-encaminha-pedidos-de-abertura-de-inquerito-de-dilma-lula-e-fhc-a-outros-foros.htm.

movement—especially during the ANC of 1987-1988—threats to democracy returned in astonishing way, with several collaborations from courts and judges.[140] In the end, Brazilian transitional constitutionalism would not make it possible to overcome an authoritarian judiciary branch in favor of a democratic one: Without effective institutional reforms, Brazil is now free to be driven toward unstable constitutionalism.

As mentioned a few times, there is not only bad news. Brazilian courts are sensitive to private fundamental rights. The possibility that they could understand their republican role in also guaranteeing stable constitutionalism through participatory democracy is not zero. Beyond that, there are institutions, such as the National Magistrates Council, that could cooperate in fulfilling their constitutional roles. Therefore, it looks like we are in a deadlock: We need a remedy to heal the problem from the same authorities that provide the poison. In institutional or theoretical terms, though, what to do? Seek unstable constitutionalism through another constitution? This seems to be the worst scenario, taking into account the present day political class. Again, it is necessary that courts and judges stop acting like politicians and start doing what is expected of them: To apply constitutional and legal norms, first, in their most direct sense, and, second, as the Brazilian Constitution of 1988 entails as a system.

[140] This is not, of course, a Brazilian privilege. *See* STEVE LEVITSKY & DANIEL ZIBLLAT, HOW DEMOCRACIES DIE? (2018); DAVID RUNCIMAN, HOW DEMOCRACIES END (2018).