ano 22 – n. 88 | abril/junho – 2022
Belo Horizonte | p. 1-272 | ISSN 1516-3210 | DOI: 10.21056/aec.v22i88
A&C – R. de Dir. Administrativo & Constitucional
www.revistaaec.com

A&C

Revista de Direito ADMINISTRATIVO & CONSTITUCIONAL

A&C – ADMINISTRATIVE & CONSTITUTIONAL LAW REVIEW

FORUM

A&C – REVISTA DE DIREITO ADMINISTRATIVO & CONSTITUCIONAL

IPDA
Instituto Paranaense
de Direito Administrativo

INSTITUTO DE DIREITO ROMEU FELIPE BACELLAR

FÓRUM
Luís Cláudio Rodrigues Ferreira
Presidente e Editor

Av. Afonso Pena, 2770 – 15º andar – Savassi – CEP 30130-012 – Belo Horizonte/MG – Brasil – Tel.: 0800 704 3737
www.editoraforum.com.br / E-mail: editoraforum@editoraforum.com.br

Impressa no Brasil / Printed in Brazil / Distribuída em todo o Território Nacional

Os conceitos e opiniões expressas nos trabalhos assinados são de responsabilidade exclusiva de seus autores.

A246 A&C : Revista de Direito Administrativo & Constitucional. – ano 3, n. 11, (jan./mar. 2003)- . – Belo Horizonte: Fórum, 2003-

Trimestral
IISSN impresso 1516-3210
ISSN digital 1984-4182

Ano 1, n. 1, 1999 até ano 2, n. 10, 2002 publicada pela Editora Juruá em Curitiba

1. Direito administrativo. 2. Direito constitucional. I. Fórum.

CDD: 342
CDU: 342.9

Coordenação editorial: Leonardo Eustáquio Siqueira Araújo
Aline Sobreira de Oliveira
Capa: Igor Jamur
Projeto gráfico: Walter Santos

Periódico classificado no Estrato A2 do Sistema Qualis da CAPES - Área: Direito.

Qualis – CAPES (Área de Direito)
Na avaliação realizada em 2017, a revista foi classificada no estrato A2 no Qualis da CAPES (Área de Direito).

Entidade promotora
A *A&C – Revista de Direito Administrativo & Constitucional*, é um periódico científico promovido pelo Instituto de Direito Romeu Felipe Bacellar com o apoio do Instituto Paranaense de Direito Administrativo (IPDA).

Foco, Escopo e Público-Alvo
Foi fundada em 1999, teve seus primeiros 10 números editorados pela Juruá Editora, e desde o número 11 até os dias atuais é editorada e publicada pela Editora Fórum, tanto em versão impressa quanto em versão digital, sediada na BID – Biblioteca Digital Fórum. Tem como principal objetivo a divulgação de pesquisas sobre temas atuais na área do Direito Administrativo e Constitucional, voltada ao público de pesquisadores da área jurídica, de graduação e pós-graduação, e aos profissionais do Direito.

Linha Editorial
A linha editorial da A*&C – Revista de Direito Administrativo & Constitucional*, estabelecida pelo seu Conselho Editorial composto por renomados juristas brasileiros e estrangeiros, está voltada às pesquisas desenvolvidas na área de Direito Constitucional e de Direito Administrativo, com foco na questão da efetividade dos seus institutos não só no Brasil como no Direito comparado, enfatizando o campo de intersecção entre Administração Pública e Constituição e a análise crítica das inovações em matéria de Direito Público, notadamente na América Latina e países europeus de cultura latina.

Cobertura Temática
A cobertura temática da revista, de acordo com a classificação do CNPq, abrange as seguintes áreas:
- Grande área: Ciências Sociais Aplicadas (6.00.00.00-7) / Área: Direito (6.01.00.00-1) / Subárea: Teoria do Direito (6.01.01.00-8) / Especialidade: Teoria do Estado (6.01.01.03-2).
- Grande área: Ciências Sociais Aplicadas (6.00.00.00-7) / Área: Direito (6.01.00.00-1) / Subárea: Direito Público (6.01.02.00-4) / Especialidade: Direito Constitucional (6.01.02.05-5).
- Grande área: Ciências Sociais Aplicadas (6.00.00.00-7) / Área: Direito (6.01.00.00-1) / Subárea: Direito Público (6.01.02.00-4) / Especialidade: Direito Administrativo (6.01.02.06-3).

Indexação em Bases de Dados e Fontes de Informação
Esta publicação está indexada em:
- Web of Science (ESCI)
- Ulrich's Periodicals Directory
- Latindex
- Directory of Research Journals Indexing
- Universal Impact Factor
- CrossRef
- Google Scholar
- RVBI (Rede Virtual de Bibliotecas – Congresso Nacional)
- Library of Congress (Biblioteca do Congresso dos EUA)
- MIAR - Information Matrix for the Analysis of Journals
- WorldCat
- BASE - Bielefeld Academic Search Engine
- REDIB - Red Iberoamericana de Innovación y Conocimiento Científico
- ERIHPLUS - European Reference Index for the Humanities and the Social Sciences
- EZB - Electronic Journals Library
- CiteFactor
- Diadorim

Processo de Avaliação pelos Pares (*Double Blind Peer Review*)
A publicação dos artigos submete-se ao procedimento *double blind peer review*. Após uma primeira avaliação realizada pelos Editores Acadêmicos responsáveis quanto à adequação do artigo à linha editorial e às normas de publicação da revista, os trabalhos são remetidos sem identificação de autoria a dois pareceristas *ad hoc* portadores de título de Doutor, todos eles exógenos à Instituição e ao Estado do Paraná. Os pareceristas são sempre Professores Doutores afiliados a renomadas instituições de ensino superior nacionais e estrangeiras.

DOI: 10.21056/aec.v22i88.1595

The differences between presidentialism and parliamentarism in perspective: the problem of majority support in Brazil

As diferenças entre presidencialismo e parlamentarismo em perspectiva: o problema do apoio majoritário no Brasil

Daniel Augusto Vila-Nova G.*
Instituto Brasileiro de Ensino, Desenvolvimento e Pesquisa (Brazil)
professorvilanova@gmail.com

Henrique Smidt Simon**
Universidade de Brasília (Brazil)
henrique.s.simon@gmail.com

Recebido/Received: 11.03.2022/March 11th, 2022
Aprovado/Approved: 20.06.2022/June 20th, 2022

Abstract: This paper aims to identify gray areas in the differences between Presidentialism and Parliamentarism concerning the balance of powers. For this analysis, the text initially focuses on the theoretical approaches that enable to figure out this proximity of models. The second section compares

Como citar este artigo/*How to cite this article:* VILA-NOVA G., Daniel Augusto; SIMON, Henrique Smidt. The differences between presidentialism and parliamentarism in perspective: the problem of majority support in Brazil. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 22, n. 88, p. 51-74, abr./jun. 2022. DOI: 10.21056/aec.v22i88.1595

* Professor at Instituto Brasileiro de Ensino, Desenvolvimento e Pesquisa – IDP (Brasília, Distrito Federal, Brasil). PhD in Political Science at Universidade Federal Fluminense (UFF); Lawyer. E-mail: professorvilanova@gmail.com.

** Professor at Faculdade de Direito da Universidade de Brasília – UnB (Brasília, Distrito Federal, Brasil), Instituto Brasileiro de Ensino, Desenvolvimento e Pesquisa – IDP (Brasília, Distrito Federal, Brasil) and Centro Universitário de Brasília – CEUB (Brasília, Distrito Federal, Brasil). PhD in Law, State and Constitution at UnB. Lawyer. E-mail: henrique.s.simon@gmail.com.

two paradigmatic cases: Collor (1992) and Rousseff (2016). The argument of the similarity in the majority problem with respect to both systems will be developed focusing on the Brazilian case. The reason for this emphasis is that, although Presidentialism is said to be a non-politically accountable system, in Brazil the impeachment mechanism is also a type of political judgment. By the perspective of loss of majority in Congress, the paper argues that no significant difference occurs between Presidentialism and Parliamentarism regarding the need for majority in government and that the legislature is still a key issue to reflect on the balance of powers, especially in Brazil.

Keywords: Balance of Powers. Presidentialism. Parliamentarism. Brazil. Impeachment.

Resumo: Este artigo procura identificar áreas nebulosas na diferenciação entre presidencialismo e parlamentarismo no que respeita ao equilíbrio de Poderes. Para tanto, o texto desenvolve os elementos históricos e teóricos que permitem perceber a proximidade entre os dois modelos. A seguir, é feita a comparação entre os dois casos de *impeachment* ocorridos no Brasil: Collor (1992) e Rousseff (2016). O argumento de similaridade entre os dois sistemas de governo com relação ao problema da sustentação por maiorias será desenvolvido a partir do caso brasileiro. Isso porque, apesar de o presidencialismo garantir a independência do chefe de governo, no Brasil o *impeachment* é um mecanismo de julgamento político. Pela perspectiva da perda do apoio da maioria, o artigo defende que não há diferença significativa entre presidencialismo e parlamentarismo e o Legislativo ainda é o ponto principal para se refletir sobre o equilíbrio entre os poderes.

Palavras-chave: Equilíbrio de Poderes. Presidencialismo. Parlamentarismo. Brasil. *Impeachment*.

1 Introduction

In Western tradition, one can say that Presidentialism and Parliamentarism are constitutional structures arisen to institutionalize a system of checks and balances, a central reference to Enlightenment philosophy. The main idea in both models is to balance the opportunities, conditions and influences regarding policy-making and its repercussions on institutional and on constitutional fields.

At first sight, Presidentialism seems to fix a separation of powers system and Parliamentarism, on the other hand, a fused-power system. On another institutional level, whilst the President-centered model is based on the idea that the head of government is not politically accountable to the legislature, at the Parliament-centered model, accountability to the Legislative Power appears to limit the independence of the Executive Chief.

The article takes on the premise that, in both models, one cannot govern without the legislative majority. This dependence on a majority may be seen in many Western democracies when migration law, economic union or political autonomy are on the line.

In Brazil, since the Constitution of 1988, the loss of the legislative majority is one of the elements that might lead to impeachment procedures. Curiously, in less than 3 decades, this kind of political tension has been activated at least in

two opportunities: Fernando Collor de Mello (1992); and, more recently, Dilma Vana Rousseff (2015/2016).

The aim of this paper is to identify gray areas between Presidentialism and Parliamentarism concerning the critical balance of powers. For this analysis, the text initially focuses on the theoretical approaches that enable, or not, to figure out this proximity of models. The second section compares the 2 paradigmatic cases of recent Brazilian Constitutional history: Collor (1992) and Rousseff (2015/2016) cases. The argument of the similarity about the majority problem in both systems will be developed focusing on the Brazilian case.

The reason for this emphasis is explained by the fact that, although Presidentialism is said to be a more stable system, in Brazil, the impeachment mechanism is a type of political judgment, in which two presidents have been already overthrown (1992 and 2016).

While a Prime Minister experiences legislative support, he can enjoy even more stability in power, even with his political accountability. By the perspective of loss of majority in Congress, the central thesis of the paper is that there fails to be a significant difference between Presidentialism and Parliamentarism with regard to the need of majority in government and that the legislature is still an interesting key issue to reflect on the balance of powers, especially in recent Brazilian Constitutionalism (1988-2016).

2 Separation of Powers, types of government and constitutionalism

Separation of Powers, in its three functions (Legislative, Executive and Judiciary) is a theoretical response to a historical problem: the abuse of power that was the characteristic of absolute monarchies.[1] This problem was shared among countries from insular and continental Europe as were the theoretical proposals. Even though the institutional responses were not the same, each empirical endeavour to restrain the crown's powers dealt with the same set of conceptual tools. In order to grasp the process that leads to the transformation of the *Ancien Regime*, it is essential to understand current problems regarding the types of government and the balance of powers. They have a common origin: liberal constitutionalism. Although this is not the case for a full analysis of constitutional evolution, its main lines are essential for the discussion on the relations between balance of powers and types of government.[2]

1 See MONTESQUIEU, Charles Louis de. *De l'esprit des lois*. Paris: Éditions Gallimard, 1995. (Electronic edition).

2 See BIANCHI, Alberto B. *Historia constitucional inglesa*. Buenos Aires: Cathedra Jurídica, 2009 and FIORAVANTI, Maurizio. *Constitución*: de la antigüedad a nuestros días. Traducción: Manuel Martínez Neira: Editorial Trotta, 2001.

The constitutional problem is directly related to the idea of power restraint.[3] The Magna Carta, signed in 1215, was a feudal chart agreed upon between the English lords and king John of England, which aimed to limit the royal abuses against the nobility. In this sense, the document forced the king to recognize the crown's limits; a reaction against tyrant attempts that jeopardized the barons' customary rights.[4] The Magna Carta anticipated the problems of absolute power and the royal duty to rule within the law.

Since then, the constitutional history of England developed itself within an implicit and explicit confrontation between nobility and the crown. The following step was the establishment of the Parliament as a locus for the representation of English social order. Two chambers for three estates: The House of the Lords for the spiritual and temporal representatives and The House of the Commons, for the lower nobility and the representatives of the cities. Henceforth the disputes involving the kings and their pairs tended to become a dispute between the Crown and the Parliament.[5]

There is no need to thoroughly describe English constitutional History. It suffices to say that the beginnings of constitutionalism demonstrated the point of constitutional theory: the law as the limit for the use of the power to rule.[6] Then, if one understands the constitutional problem as an issue concerning the settlement of government boundaries, it is possible to see why constitutional thought is mainly linked to the reaction against absolute power, liberal doctrines, individual rights, and system of government.

Yet, it is relevant to say that the constitutional thought can combine English and French political issues, broadly speaking. That happens because of the development of the absolutism in France.[7] While in England the development of constitutional institutions forced the king to recognize the role of Parliament (even though the country was still attempting to concentrate the power in the Crown), French kings had the opportunity to ignore the institutions that could restrain their powers.

France, as well as England, had a representative body of its feudal states: the General Estates. The first estate represented the clergy; the second, the nobility; and the third, the people. The French monarchy had its Parliament, also: a type of high nobility council that could promulgate the king's decrees and, by exercising this

[3] See BOBBIO, Norberto. *Locke e o direito natural*. Translated by: Sérgio Bath. 2. ed. Brasília: Editora UnB, 1997.

[4] See BIANCHI, Alberto B. *Historia constitucional inglesa*. Buenos Aires: Cathedra Jurídica, 2009 and VAN CAENEGEN, R. C. *An historical introduction to Western constitutional law*. New York: Cambridge University Press, 1995.

[5] See BIANCHI, Alberto B. *Historia constitucional inglesa*. Buenos Aires: Cathedra Jurídica, 2009.

[6] See DIPPEL, Horst. *História do constitucionalismo moderno*. Lisbon: Calouste Gulbenkian, 2007.

[7] See ELIAS, Norbert. *O processo civilizador*. Vol. 2: Formação do estado e civilização. Translated by: Ruy Jungmann. Rio de Janeiro: Jorge Zahar, 1993.

function, attempted to control the king's decisions.[8] Although these institutions shared the same purpose as English feudal ones, the French crown was granted so many powers that the kings were able to dismiss or overlap them. This state of affairs is reflected in Bodin's conception of sovereignty: to give the law without the consent of the subjects.[9]

In England, Charles I had attempted to convert the balance between the crown and the nobility into French style absolutism. The concerns about how to control the king's power were equipollent in both countries and the remedies were similar. As England had a tradition of power restraint by the nobility, the reactions against absolutism came from the English first.[10]

Constitutionalism initiates with the liberal theory on the limitation of the crown's power. Before the institutionalization of fundamental rights in a formal and written text called constitution, these were moral rights (natural rights) that should be realized by an ideal form of government.

The problem that liberal theory was trying to solve was how to establish clear boundaries for rulers. For the power to govern, the possibility of abuse was imminent and there would be no guarantee for individual freedom. It was necessary to deprive power from intervening in individual privacy and freedom of action. Liberals foresaw that by hindering the monarch's concentration of power, it was possible to control it. As such, the king would not be able to decide on his own behalf nor make his will the law.

Thus, the separation of powers was a technique of constitutional engineering aimed at rendering the power to rule restrained, once again. It was not an issue whether the ruler would still be a hereditary king or not. The certainty that there would be no abuse lied in the fact that the king could no longer be the lawmaker, the head of the military force, and the judge, all at the same time. There should be different agencies to exercise these distinct functions.[11]

Therefore, the sovereignty should be broken in three different functions, with three different agencies to exercise each one of these roles, and each one of them limited by the competence of the other. The checks and balances equilibrium should guarantee that the abuse of power would not happen and the capacity to decide and judge would be a shared endeavor. With the separation of powers doctrine, governing would not be an activity on the personal behalf of the holder of power.

---

8 See MORABITO, Marcel. *Histoire constitutionnelle de la France*: de 1789 à nos jours. 13e. éd. Paris: Lextenso éditions, 2014.

9 See BODIN, Jean. *On sovereignty*: four chapters from 'The Six Books of the Commonwealth'. Edition and translation by: Julian H. Franklin. Cambridge University Press, 1999.

10 See BIANCHI, Alberto B. *Historia constitucional inglesa*. Buenos Aires: Cathedra Jurídica, 2009.

11 See MONTESQUIEU, Charles Louis de. *De l'esprit des lois*. Paris: Éditions Gallimard, 1995. (Electronic edition).

Limiting the power to rule into the sphere of three different provinces would amplify the individual freedom, as it would be more difficult to create abusive laws.[12]

Despite the possibility of the monarch's continuity, the control of power was the way to promote freedom. However, no one could have his or her freedom granted without equal treatment by the lawmakers. The absolutist kingdoms still had a stratified society. The representation of the feudal states played the role to display parts of society before the king. With the loss of the king's divine legitimation and the rise of the idea that power should serve people's will, political decision (and, therefore, law making) was now to be seen as emerging from the representatives of the people. Soon the only legitimate group to decide in the name of the whole society became the organ that housed the people's representatives, while the king became responsible for the execution of representatives' decisions, as well as maintaining order and the security of the kingdom. Therefore, the people's representation became the legislative organ, while the king kept, initially, the coercive power and the duty to realize the people's representatives' decisions.[13]

With the change in the legitimacy criterion, collective political decision became the law. This means that the statutes drawn from the people's representatives should be enforceable law. This turning point in the relation between representatives and the king brings into the light the concept of rule of law, entailing the state ought to be governed within the bounds of the law given by the people's representatives, legitimized through elections. In order to rule, not only the passive representatives' accordance was required, but also their active participation by giving the law.[14] Once the law was handed, the one who governs was authorized to act accordingly as well as to enforce it (the executive branch of the state). There should be a body with the power to say whether the law had been violated or not, so the judiciary branch obtained the monopoly of the jurisdiction, as an independent function.

As the judiciary should only apply the law (even in common law systems the primacy of representatives was accepted), the government could not judge in its own cause. Governing became a joint activity, forcing the executive to work in coordination with the legislative, should it desire for its will to prevail. The separation of powers, in a checks and balances system, prevented the abuse of power and forced the need of harmonic relations between the law-making, the enforcing, and the organizing functions.

---

12 See MONTESQUIEU, Charles Louis de. *De l'esprit des lois*. Paris: Éditions Gallimard, 1995. (Electronic edition) and BECCARIA, Cesare. *Dos delitos e das penas*. Translated by: José Cretella Jr. and Agnes Cretella. 2. ed. São Paulo: Revista dos Tribunais, 1997.

13 See MORGAN, Edmund S. *La invención del pueblo*: el surgimiento de la soberanía popular en Inglaterra y Estados Unidos. Traducción: Julio Sierra. Buenos Aires: Siglo XXI Editores Argentina, 2006.

14 See ROSANVALLON, Pierre. *The demands of liberty*: civil society in France since the Revolution. Translated by: Arthur Goldhammer. Cambridge: Harvard University Press, 2007.

The two main systems of government that established the relation between legislative and executive branches were Presidentialism and Parliamentarism, and both emerged by chance. In continental Europe, however, there was enlightened despotism. Nevertheless, even in these cases, there were constitutional texts organizing the state and establishing the distinction between the three branches. Regardless of the constitutional text and the separation of the state functions, the last word was left to the king (or emperor, in some cases).

Once more England provided the constitutional model. With the Parliamentary victory in the Glorious Revolution, the new king (William of Orange) accepted the conditions imposed by the victors and became a limited and accountable monarch. With Parliament prevailing, constitutional monarchy emerged from this historical moment, whereby the king submitted to the Legislative, the people's representative branch in the government. The rule of law was established, there was no more room for the king to claim absolute power, the legitimacy was now drawn from the people, not from God, and the superiority of Parliament was settled.[15]

Following the curse of different events, in continental Europe absolutism carried on strong. Louis XIV was a model of monarch in European courts (BURKE, 1994). In addition, in spite of the Enlightenment, enlightened despotism emerged in Europe. The king maintained his image of a good father to his people. Thus, the law was enacted as the king's will and should prevail while it preserved the common good. The law ought not to limit the sovereignty but to organize it. This conception causes important differences between the idea of power and constitution within Anglo-Saxon constitutionalism and its Continental counterpart.

The English tradition of curtailing the king's power gives rise to the rule of law model. In this, the government, and with it the state, is seen as a power to organize society, but in a limited fashion. The power to rule is understood as accountable and it should respect a legal order that is prior to it. This can be seen in the English common law tradition and in the Lockean conception of the natural rights. In the former, the king is responsive to the Parliament, and the composition of the House of Commons, House of Lords (comprising spiritual and temporal lords) and the king is the figurehead for the whole of the kingdom, in which the king is only a part that is not above the others. In the latter, natural rights are above and prior to the government, which rules the people's life in a way of realizing their own choices.

Although the rise of constitutional movements is far more complex than the limits of this paper, it is possible to say that constitutional affirmation in Continental Europe has its paradigmatic reference in revolutionary France, but its stabilization comes only with Napoleon. Napoleon creates the model of the nation-state, in which

[15] See BIANCHI, Alberto B. *Historia constitucional inglesa*. Buenos Aires: Cathedra Jurídica, 2009.

the nation is mobilized for the greatness of the state. With huge popular mobilization and approval, the greatness of the state becomes the symbol of the capabilities of the people.[16] The state rules the public order and mobilization, the conditions for citizenship by public law (Constitutional, Criminal and Administrative Law), and the conditions for the free manifestation of the will in individual relations by private law (civil and commercial codes).

Therefore, contrary to the initial rule as to the conception of law, in which the state is restrained by the law, in the French model (the *état légal*) the state is the sole source of the law through the legislation. So, in the rule of law tradition, the main goal is to limit the state power, awarding space for individual choices and non-intervention. Yet in the *état légal* model, the state is the king's substitute to realize the common good, but it is still the sovereign.[17]

This quick draft of the differences between the continental (*état légal*) and Anglo-American (rule of law) models shows the importance of understanding parliamentary and presidential systems. The option for a constitution that does not allow the exercise of the sovereign within the state led to the necessity for a strive for agreement between Executive and Legislative branches and, accordingly, a more effective control of power.

As for Presidentialism, this model arose as an American attempt to establish the separation of powers in the way of English constitutional monarchy, but with the Executive branch as representative of the people's will, not a hereditary office. Within the logic of the separation of powers political action should be a concert of the two political powers, one with the right and duty to enact the law and the other with the right and duty to realize the people's needs, to organize the administration to ensure state action as effective and to command the Army.

As such, the United States became a republic because state powers rely on the body of citizens, but none of them can claim sovereignty. Each branch of sovereign power has its competences to which they are limited. The consequence is that no one power decides alone and the political decision depends on conjoint perspectives or on agreements to form a majoritarian support in Congress. Majoritarian rule emerges from the people's choice for congressmen and the President, and from the partisan need to establish a majority within congress to execute his agenda for the country.

Accordingly, distinct from their continental European counterparts, in the United States the constitution allowed no room for a power above the three branches of the State. Each should work within its limits and political decision was supposed

[16] See BOBBITT, Philip. *A guerra e a paz na história moderna*: o impacto dos grandes conflitos e de política na transformação das nações. Translated by: Cristiana Serra. Rio de Janeiro: Campus, 2003.

[17] See ROSENFELD, Michel. The rule of law and the legitimacy of constitutional democracy. *Southern California Law Review*, v. 74, p. 1.307-1.351, 2001.

to be taken in a coordinated act between the Executive and the Legislative. As both are elected by the people, thus representing its will, they have no responsibility towards one another, forcing the dispute for the partisan majority in Congress or the presidential seek for congressmen support to govern.

Another kind of equilibrium came from the English tradition. As seen above, following the Glorious Revolution, the parliamentary victory against the Crown initiated a kind of constitutional monarchy whose main characteristic was the limitation on the power of the king to enact law. The king was, thus, submitted to the Parliament - the institution that, through the House of the Commons, spoke for the people.

With the rising of the house of Hannover to the throne, a German speaking prince became king of England, and he required someone that could mediate communication between him and Parliament. Subsequently, representatives imposed the choice and, reuniting the old royal cabinet council, began to govern according to parliamentary majority. It was the beginning of the office of the Prime Minister.[18]

The foundation for Parliamentarism is, so to speak, to ensure a government in accordance with the majority present in the Parliament, a majority that supposedly represents the will of the majority of the people of England. Legitimacy emerges from the people who chose those who will make the general decisions for the common good and who will choose the person who will command the execution of these decisions.

In sum, there can be no rule of law if there is a power above the law, a power legitimized to act alone as sovereign. In a French *état légal* there is someone that can represent the people, as the synthesis of the people and the state. The partition of the powers is only a bureaucratic answer to rationalize the administration of the public machine. With popular legitimacy, the holder of state power or of the will of the people can do anything he or she understands as the popular will. Furthermore, in so doing, he or she can claim the right to decide in the name of the whole of the people or the majority, using instruments of direct partaking of the people, such as referendum, for instance. In a situation like this, there is no room for the opinions or beliefs of minorities. Then, not long after, that which at first seemed to be democratic support, mutates into a majoritarian autocracy.

As the idea of a rule of law allowed no space for the claim that the ultimate decision in the name of the popular will, neither a person or an institution (a political party, the Army, etc.) can play the role of the ruler alone. Even in a majority, there can be no concentration of power in a rule of law system. With two interdependent branches, there is a constant need for agreement, since one cannot act without the other. And, even when the primacy of the majority is working, there is room for

[18] See BIANCHI, Alberto B. *Historia constitucional inglesa*. Buenos Aires: Cathedra Jurídica, 2009.

the minority to express itself. It can struggle to become a majority and can try to block majoritarian decisions.

Notwithstanding, as each branch (Executive and Legislative) is limited within their own competences, they are also limited by the principle of legality (or, in the ultimate, the principle of constitutionality). This means that when one of the political branches surpasses its limits, or when there is a dispute between them, the Judiciary can act to stabilize the application and the expectations on the law. The Judiciary has the role not only of applying the law (included here the constitution), but it must also maintain the system as well as harmony between the powers.

Nevertheless, comparing the two main systems of government that guarantee the rule of law and avoid one political branch achieving greater sovereignty, Parliamentarism and Presidentialism came to develop important differences. Broadly speaking, the different ways of distributing the legislative and executive functions lead to different kinds of equilibrium. In the former, the checks and balances mechanism allows Parliament to dismiss the prime minister from office. But this is a two-way street. If the prime minister thinks he has the people's support, then he can dissolve the Parliament, calling for new elections to see whether he can obtain the majority of the new representatives.

This constitutional engineering strategy aims, in one hand, to gain governability (who has the majority rules) and control (none of the two institutions should impose itself on the other). On another hand, it can turn into instability when there is no clear majority and a dispute for the political agenda starts.[19]

In Presidentialism, however, things happen in an otherwise fashion. The system benefits stability in the offices, but can lead to ungovernability. The president cannot be removed from office, but he cannot dismiss the Congress to obtain a majority, either. So, governability relies on the deal-making capability of the President, or he or she will finish the term without accomplishing his or her promises e projects for the country.

These differences are of great relevance, because without an institutional branch that can decide alone (the sovereign that rules in times of crisis) there are four way-outs of the governmental paralysis: a) it will be necessary to enforce an agreement, what may lead to some sparsely transparent agreements; b) the Legislative branch imposes the political agenda against the Executive branch, but it depends on an overall majority and agility in decisions, which it is atypical of Legislative; c) the crisis proceeds incessantly; d) one branch of state functions (here included the Judiciary) will move to impose its agenda covertly (the branch will not make clear that their decisions and will are shaping the agenda, acting in the backstage,

[19] See SARTORI, G. *Engenharia constitucional*: como mudam as constituições. Brasília: Editora UnB, 1996.

mostly because it is taking positions against the law or beyond its competences, without taking any responsibility for these decisions, in a unaccountable fashion).

When it happens to be "c", the institutional relations are frayed, and an authoritarian option may emerge, or a political and social crisis can find its place in social life. When "d" is the case, there is a hidden ruler, exempt from the checks and balances system, covering up unlawful or illegitimate desires, neither responding to them or submitting to control by the public opinion or the other public institutions. In this case the government is a blurred and is neither Parliamentarism nor a Presidentialism.

3 The Brazilian impeachment case (1988-2016)

At this point, we have already highlighted the following general issue: the apparent distinction between Presidentialism and Parliamentarism conceals an important element on the relation between executive and legislative branches. Beneath this static dichotomy, both systems of government point towards the same dynamic premise: one cannot govern without the legislative majority.

The afore-mentioned dependence on majority representativeness in Parliament is an interesting approach to highlight the balance of powers as a complex tension, whose roots are, simultaneously, constitutional and institutional. This gray area is constitutional, on the one hand, because, in a specific normative context, the judicial and political boundaries of the balance of powers are prescriptively defined –or, at least, they should be– by the Constitution as an attempt to make the Political System more stable and the Judicial System more predictable. Such a phenomenon is also institutional, on the other hand, because actors, stakeholders and other social entities articulate political and juridical arrangements in order to try to influence conditions, opportunities and strategies with respect to the limits of checks and balances and the possibilities of policymaking in a specific State, organized by the principle of the rule of law.

In Brazilian constitutionalism, the impeachment corresponds to an experiment that illustrates one of the dimensions of this intricate and complex experience that reflects a critical moment concerning the balance of powers with peculiar repercussions in institutional and constitutional fields within this national tradition.[20]

[20] In respect of this experience under the United States Constitution, we suggest three interesting versions of historical origins of the impeachment: BERGER, Raoul. *Impeachment*: the constitutional problems. 5th ed. Cambridge: Harvard University Press, 1974; LURIE, Leonard. *The impeachment of Richard Nixon*. New York: Berkeley Medallion Books, 1973; McCALLISTER JD, J. Wilson. *The history, law, and politics of federal impeachment*. 2th ed. Mustang: Tate Publishing & Enterprises LLC., 2013. For an intriguing comparative view on the Latin America (Bolivia, Brazil –just about Collor's Case–, Colombia, Ecuador, Paraguay, and Venezuela), Pérez-Liñán suggests "that presidential impeachment has become the main instrument employed by civilian elites to depose unpopular rulers" (PEREZ-LINÁN, Aníbal. *Presidential impeachment*

At this extreme normative hypothesis, by way of some juridical conditions and political decisions, the President can eventually become constitutionally and institutionally accountable to legislature. More than an exceptional possibility, recent Brazilian constitutional history (1988-2016) twice registered relevant political facts related to this incident: the first was the Impeachment of Fernando Affonso Collor de Mello (who resigned one day before his trial, in 1992); and the second is the current process involving the, now, ex-President Dilma Vana Rousseff (her impeachment was determined on August 31, 2016).

The Brazilian impeachment, corresponds to an exceptional situation of political and legal accountability of the occupant of the Presidency's office. According to the current Brazilian Constitution, the President represents the body that brings together two cardinal duties in Brazil's presidential system: i) the head of government (the executive branch's summit at the Federal Union level); and ii) the head of State (representation, by internal and international perspective, of the "Federative Republic of Brazil" –official name of the Brazilian State). In Brazil's case, this fluid experience is not homogeneous through the seven constitutional texts that this country has adopted to date.

Except for a brief period (1961-1963),[21] the "impeachment" exists in Brazilian constitutionalism since the first Constitution of the Republic (1891). Currently, it is worth noting that the impeachment process also receives a specific treatment by Federal Statute 1.079 of April 10, 1950, which *"defines the 'impeachable crimes'*[22] *and regulates its trial process"*. This statute is, therefore, a normative text dated almost four decades before the promulgation of the present Brazilian Constitution (of October 5th, 1988).

Based on the foregoing, our presentation of *the Brazilian impeachment case* will focus on three main aspects: *a)* a brief comparison of the contexts of Cases Fernando Collor (1992) and Dilma Rousseff (2015/2016); *b)* the peculiar constitutional configuration of Impeachment in Brazil, and its different uses also as

and the new political instability in Latin America. First paperback edition. New York: Cambridge University Press, 2010).

21 The Constitutional Amendment 4, on September 2, 1961, has defined, under the name of "Additional Act", parliamentary system in Brazilian Republic. This situation lasted for less than one year and a half. Through a plebiscite, on January 6th, 1963, when Brazilian citizens chose the reestablishment of Presidentialism, and the constitutional amendment was published on 23 January 1963. For this reason, the literature argues a kind of "revalidation" of Federal Law No. 1,079/1950. Such interpretive hypothesis was legally fixed by the Supreme Court, as will be specified ahead, in the previous case relating to the impeachment of President Collor (1992).

22 Under the American Constitution the usual expression for the normative hypothesis that can start an impeachment is "impeachable offenses". There are some translators that use the term "crimes of malversation". Our translation option by the use of "impeachable crimes" is because in Brazilian Law, the constitutional literature registers a controversy about the penal content of the term "crime". So, our intention is to state that the *"crime de responsabilidade"* (in Portuguese) is a kind of qualified presidential "offense" –in another terms, it's not a common, or regular damage to the Constitutional System.

an *"institution"* under the Constitution of 1988; and *c)* the precedents of Brazilian Supreme Court about the scope of judicial review over the procedure and substantive issues concerning to legal aspects of the Impeachment's appreciation by each of the both houses of Brazilian Parliament.

3.1 A brief comparison of the cases Collor (1992) and Rousseff (2015/2016)

At first glance, the course of Dilma's impeachment process brings to mind, almost automatically, the episode involving Collor. The presentation of the Brazilian impeachment case in the period from 1988 to 2016, is marked by these two significant moments. Whereas both situations are historically separated by almost 24 years, it is appropriate to present some common and different contextual aspects that served as their "background".

After all, this was the only case in which this constitutional instrument was applied in Brazilian constitutional history. Moreover, its inaugural use was actually under the same constitutional legal framework: the text of the 1988 Constitution of Brazil. The similarities and differences between the two cases can provide a better understanding of whether the impeachment institute received different uses under the same constitution.

For this brief comparison, three points will be listed: i) the respective economic situation of Brazil;[23] ii) the weakening of parliamentary and popular support in Congress; and, finally, iii) low popularity of both Presidents.

Referring to the economic situation (item "i" above), the country began the 1990s with a series of crises that extended from the previous decade: high inflation rates; stagnation of economic growth; and high levels of external debt. As an alternative to face this unfavourable context, the Collor administration instituted economic plans in order to reduce inflation and to achieve Brazilian currency stability.

Due to the reduced effectiveness of economic plans, President Collor also adopted a subsidiary measure that caused an important impact on public opinion: he ordered the confiscation of the amounts deposited in the savings accounts. Such an attitude, insufficient to contain inflationary advance, received strong popular resistance.

In Rousseff's government, President Dilma refrained from adopting such specific and intensely intrusive actions of the lives of the general population. However, this

[23] For an analysis about the economic aspects of Rousseff's Government, and some observations on the political background of Brazil's party fragmented system, see LOURENÇO-PEREIRA, Alberto C. Anatomy of a parliamentary coup d'état. 2016. Available at: http://global.luskin.ucla.edu/anatomy-of-a-parliamentary-coup-detat/. Access on: August 8, 2022.

observation does not allow for a positive opinion on the Brazilian economy. Among the most controversial aspects of economic policy, in this second case, that stood out, among other things, were the maintenance of low interest rates, the reduction of electricity tariffs, the supply of subsidies to industry, loans to large companies and economic groups through state bank (National Development Bank – BNDES).

An unstable and unfavorable international setting, signs of recession and the adoption of austerity measures hindered the control of public accounts. Furthermore, the rise of inflation, the currency crisis and increased unemployment rates have lately compromised the economic and fiscal balance of Brazil. This framework –which was already troublesome– became increasingly critical with the reduction of economic growth (recession) to the point of jeopardizing the achievement of the primary surplus by the Brazilian state.

Regarding support in Congress and the population in general (item "ii" mentioned), Collor was elected by a Party with low representativeness –the Party of National Reconstruction (PRN). At first, his government won allies in some of the major parties in its legislature (1991-1995), such as Social Democratic Party (PDS), the Liberal Front Party (PFL), Liberal Party (PL) and the Brazilian Labour Party (PTB). But, with the disclosure of incriminating facts and accusations, only a small portion of parliamentarians remained in support of the President. Another factor that strengthened the political isolation of Fernando Collor were quite homogeneous manifestations of numerous segments of civil society organizations (student movements, trade unions, professional associations and other social movements) which expressed their grievances against the President in the most crucial moments of this process. During this period, the highlights were the National Bar Association (OAB) and the Brazilian Press Association (ABI) –two entities responsible for petitioning the impeachment. In addition, the National Union of Students (UNE) also became known for organizing the student movement of "painted-faces". In general, mobilizations were homogeneous and settled explicitly in favor of impeachment.

Spurred by the face-painted protesters, the progressive weakening of parliamentary support was visible. Before the plenary of the Chamber of Deputies, the deliberation reached 440 votes in favor of opening the impeachment process (with 38 deputies against, 23 absences and 1 abstention). In the judgment by the Senate, despite President Collor having resigned the mandate on 29 December 1992, the quorum was 76 votes for conviction (only 3 senators favored an acquittal).

At its onset, the Rousseff Government had a considerable allied base in the House of Representatives: estimates considered that more than 300 parliamentarians solely in this House (more than half of the 513 deputies who compose it). Moreover, the Workers Party (PT) still boasted the second largest party in the Congress. Nevertheless, on April 17th, 2016, at the time of the impeachment proceedings

admissibility, the Chamber of Deputies, with 367 votes, decided to open that accountability process (25 votes beyond the two-thirds quorum for this decision). This initial negative result was caused by the disintegration of the allied base to support the President. There was a political diaspora of the parties that, until then, were a representative part of the government, as the Party of the Brazilian Democratic Movement (PMDB), the Progressive Party (PP) and the Social Democratic Party (PSD).

Throughout the period of contestation towards the mandate of President Rousseff, many citizens' groups and social organizations took to the streets of major Brazilian cities demonstrating for and against Dilma's government. This social polarization –inexistent in the prior case of Collor– allows the interpretation that this second impeachment situation attained a broader impact, with diffuse and hybrid social movements.

President Dilma faced the persistent opposition of relevant entities of Brazilian business, such as the Federation of São Paulo State Industries (FIESP) and, as in the case Collor, the Bar Association of Brazil (OAB). Since the beginning of the second term, the protests were frequent, and on March 13th, 2016, there came to register one of the largest demonstrations of a political nature in the country (equivalent to the protests the campaign "Direct Elections Now" –in Portuguese *"Diretas Já"*– a campaign for direct vote in Brazil in the mid-1980s). Notwithstanding, on the other hand, numerous representative bodies such as the Workers' Central Confederation (CUT) and other unions were opposed to the impeachment process. There was also a defense of the government in the demonstrations that brought hundreds of thousands of people.

Unlike case Collor, Rousseff's removal was not a consensus in Brazilian society. Since then, numerous discussion forums were created to influence the impeachment outcome. In general, apparently, aside from the polarization of civil society, Rousseff would have had a better position to negotiate support than Collor, as she enjoyed the support of social movements historically linked to the PT, part of the artistic and intellectual class, as well as a portion of the electorate. The result of the trial, however, testified that negotiations were not very successful. On August 31st of the same year (2016), the Senate voted 61 to 20 to convict Rousseff (7 votes more than the necessary).

In both cases, unfavourable economic factors combined with the fall of popular and political support favoured the dissipation of votes obtained in the respective elections and were represented by low popularity of governments (as item "iii" indicated). At its worst, according to the *Datafolha Institute*, Collor reached approval rating of only 9% of the population, with disapproval by 68% of the electorate. The Dilma Government, in turn, according to a survey by the same institute, reached

even more discreditable indicators: rejection of 71% of the population; and approval by only 8%.

From this brief background, one can note that it is possible to establish approaches and oppositions to each of the comparative elements. In general, it is clear that both presidents were unable to suitably handle the scenario of economic crisis. A fundamental question that can hereinafter be made is: are these elements, according to the 1988 Constitution, enough to trigger an impeachment?

3.2 Presidentialism and uses of impeachment as an "institution" under the Brazil's Constitution of 1988

Initially, it is important to state that, by the time of its promulgation (October 5th, 1988), Brazil's current Constitution did not prescribe, automatically and indefinitely, the form and the system of government that should be enforced in Brazil. According to Article 2 of the Temporary Constitutional Provisions Act, Brazilian citizens should choose, on September 7th, 1993, "through a plebiscite, the form (republic or constitutional monarchy) and system of government (parliamentary or presidential)".

The definition of these relevant aspects of Brazilian State, thus, was addressed to popular sovereignty. Such popular deliberation was originally designed to be held at the fourth year of the first presidential term, after the promulgation of Brazil's Constitution of 1988, more precisely on September 7th, 1993.

This original constitutional intent, however, has been considerably changed. From June 1st to August 24 of 1992, an investigation led by a National Congress Parliamentary Inquiry Committee (CPMI) pointed to a series of suspicious acts. In short, the CPMI Final Report identified elements and documents that indicated the occurrence of a "parallel ministry" for the administration of private interests for the direct economic and political benefit of President Fernando Collor de Mello and his supporters.

This set of unlawful practices originated a couple of different, independent processes of constitutional accountability of Collor's government: *i)* a typical criminal case, presented before the Supreme Court (Criminal Action nº 307, in which, Collor was indicted for the crime of corruption); and *ii)* an impeachment petition that began its course in the legislative branch, specifically in the Chamber of Deputies.

On the matters of this paper –first, the case of Impeachment as an "institution" under the Brazil's Constitution of 1988–, the second complaint was initially filed with the alleged practice, by President Collor, of two types of *"impeachable crimes"* involving malversation of public resources in respect to: i) the internal security of the country; and ii) the probity in the administration. On September 1st, 1992 (*a little more than a year before the date mentioned by ADCT*), Collor was denounced

by Alexandre Barbosa Lima Sobrinho, President of the Brazilian Press Association (ABI), and Marcello Lavenère Machado, President of the Federal Council of the Bar Association of Brazil. According to the referred petitioners, Fernando Collor, by allying himself, personally, to this alleged corruption scheme, had allowed the violation of public order law and, also, had acted in a manner inconsistent with the dignity and decorum of presidential duties.

These accusations were admitted by the Chamber of Deputies on September 29, 1992, and, then, through a preliminary decision of the majority of the senators, President Collor was temporarily suspended from his mandate. After the resolution of various lawsuits concerning procedural aspects by the Supreme Court *("writs of mandamus"* that will be commented in the ensuing section) and on the day preceding the effective trial by the Senate, President Collor resigned on December 29th, 1992.

The brief political context above preceded the plebiscite that was anticipated to April 21st, 1993 (a change promoted by the *Constitutional Amendment 2 of 1992*). The plebiscite was carried out and Brazilian people chose Republic as form of state (86,6% of the computed votes) and Presidentialism as system of government (69,2% of the accounted votes). As one can see, despite this impending crisis, the impeachment process did not affect the final result of the plebiscite.

The initial crisis of the first presidential mandate, thus, was insufficient to shake public opinion on the maintenance of Presidentialism as the system of government that should be in force in Brazil. As such, following the plebiscite, legal scholars should conclude that the original openness of Brazilian Constitution apparently had come to a closure. The Brazilian State could be called, in consequence, a Presidential Republic.

Through this specific institutional set, the general rule of this presidential model should be based on the idea that the head of government is not politically accountable to the Legislative Branch. That concrete constitutional option is relevant, in the first place, because it contrasts with the theoretical premises of checks and balances in the Parliamentary model, where the accountability to the Legislative is engineered to restrict the independence of Executive Chief (in this case, the Prime Minister).

Thus far, anyone could ask: so, what? What is the singularity of Brazilian Presidentialism? The answer is not simple. To try to understand the Presidential role under the Brazilian Constitution of 1988, we should consider the institution of Brazilian Impeachment. Through the normative perspective, the Impeachment is regulated by a series of substantive and procedural rules.[24]

[24] The impeachment is regulated by two articles of Brazil's Constitution:
"*Article 85*. Those acts of the President of the Republic which attempt on the Federal Constitution and especially on the following, are crimes of malversation [*impeachable crimes*]:
I - the existence of the Union;

Despite the similarities in the outcomes of both processes (the removal of the Presidents), the uses of the impeachment were substantially different. There was no legal controversy regarding the "impeachable crimes" attributed to Collor. The accusation was based on his individual participation in a corruption scheme headed by Paulo Cesar Farias. Unlike Collor, Dilma was not involved directly in any complaint of corruption practices for personal gain. The offenses set out in its request for impeachment are from budgetary nature, such as the notorious *"pedaladas fiscais"* (tax pedalling) –fiscal law violations by bypassing the Congress and misleading public finances– and decrees that opened additional credit (in theory, the policies should have had also the approval of Congress).

Irrespective of the merit of the appropriateness of Senate reasons for the conviction of Rousseff for the charges of manipulating the federal budget in an effort to allegedly conceal the nation's mounting economic problems, the final outcome of this second process was quite anomalous. Dilma Rousseff was removed from office by the Senate and was replaced for the remaining two years and four months of her term by Michel Temer. However– and here is where we highlighted our argument for this second astonishing use of the Impeachment –, in a separate vote, the Senate voted (by a minimal difference, 42 to 39), not to bar Rousseff from public office for eight years. This second deliberation is odd because that punishment is an express sanction imposed by Brazilian Constitution.[25]

II - the free exercise of the Legislative Power, the Judicial Power, the Public Prosecution and the constitutional Powers of the units of the Federation;

III - the exercise of political, individual and social rights;

IV - the internal security of the country;

V - probity in the administration;

VI - the budgetary law;

VII - compliance with the laws and with court decisions.

Sole paragraph. These crimes shall be defined in a special law, which shall establish the rules of procedure and trial.

Article 86. If charges against the President of the Republic are accepted by two-thirds of the Chamber of Deputies, he shall be submitted to trial before the Supreme Federal Court for common criminal offenses or before the Federal Senate for crimes of malversation [*impeachable crimes*]. *Paragraph 1* - The President shall be suspended from his functions:

I - In common criminal offenses, if the accusation or the complaint is received by the Federal Supreme Court;

II - In the event of crimes of malversation [*impeachable crimes*], after the proceeding is instituted by the Federal Senate.

Paragraph 2 - If, after a period of one hundred and eighty days, the trial has not been concluded, the suspension of the President shall cease without prejudice to the normal progress of the proceeding.

Paragraph 3 - In the event of common offenses, the President of the Republic shall not be subject to arrest as long as no sentence is rendered.

Paragraph 4 - During his term of office, the President of the Republic may not be held liable to acts outside the performance of his functions".

[25] Article 52 of Brazilian Constitution:

"*Article 52*. It is exclusively the competence of the Federal Senate:

At this moment, we can firmly ask: is the Parliament sovereign enough to oust the President by any interpretation of *"impeachable crime"*? And if this is institutionally possible (as Rousseff Case indicates), is there a juridical sense to hold the occupant of the office of the Presidency responsible for such highest functional crimes without applying any other sanction besides the removal of the President? Is it a typical constitutional Impeachment or an underhanded case of a *"motion of a no confidence"*?

Our intuition is that, according to these constitutional and institutional elements, the Impeachment can be regarded as a kind of *"incongruous open clause"*. Thus, the different uses of this "institution" under the Brazilian Constitution of 1988 have been widely subjected to Parliamentary discretion. This institutional assumption could suggest the hypothesis if the Judiciary branch may impose, or not, by judicial review, any procedural and substantive criteria and limits to avoid abuse or misrepresentation of basic institutional prerogatives under a presidentialist model. In a brief exposition, we are going to present the landmark cases of Brazilian Supreme Court's precedents.

3.3 The precedents of Brazilian Supreme Court

Together, in the three main judicial cases processes related to case Collor (three writs of mandamus –in Portuguese, *"Mandados de Segurança"*– 21.564; 21.623 and 21.689), his defense presented, before the Brazilian Supreme Court, strictly procedural aspects. The central thesis was the definition of the phases of the trial by Congress.

The Court declared there would be a two-step procedure for the appreciation of Impeachment's process: i) first, the lower House could scrutinize the beginning of proceedings, through examination of the constitutional viability of the accusation; and ii) once authorized the process by the Chamber of Deputies, then, the trial should be carried through by the Senate (circumstance in which, firstly, the suspension, and s convicted, the definitive removal of the President of the Republic of his duties are possible to take place).

The first court case (MS 21.564) was presented to the Supreme Court before the suspension of Collor (determined on October 2, 1992, by way of a Senate resolution). This first mandamus referred specifically to the proceedings before

I - to perform the legal proceeding and trial of the President and Vice-President of the Republic for crime of malversation, as well as the Ministers of State and the Commanders of Navy, Army and Air Force for crimes of the same nature relating to those;

[...]

Sole paragraph - In the cases provided for in items I and II, the Chief Justice of the Supreme Federal Court shall act as President and the sentence, which may only be issued by two-thirds of the votes of the Federal Senate, shall be limited to the loss of office with disqualification to hold any public office for a period of eight years, without prejudice to other applicable judicial sanctions".

the Chamber of Deputies. In turn, the two other writs (21.623 and 21.689) were submitted after the initiation of impeachment proceedings before the Senate. Both petitions intended to preventively stabilize normative expectations regarding the procedural warranties of the accused. The conclusions of these judgments were then fixed by a Senate Resolution, published by the official press, that stated this upper house as the judicial organ.

More than two decades after these precedents, the most relevant judicial case of Rousseff's Case (ADPF 378) focused on the declaration of non-reception of proceedings fixed by the Federal Statute 1.079/1950. The petition argued the procedural rite applicable to the impeachment of President Rousseff. In summary, the Supreme Court was asked to establish, in place of abstract supervisory standards, a procedure capable of avoiding the permanence of regulatory interpretations and institutional practices deemed incompatible with the current constitutional text.

At the trial of thirteen writ of injunction requests, there were four main topics discussed by the Court: *(a)* the recognition of the right to prior defense by the accused; *(b)* the possibility of submitting independent candidatures for the formation of the Special Committee of the House of Representatives; *(c)* the legitimacy of secret voting for the formation of the said Special Commission; and *(d)* the definition of constitutional and institutional roles of the Chamber of Deputies, and the Senate on the procedural rite of Impeachment, with special regards to 3 (three) issues: *d.1)* the need for new resolution of the Senate to suspend the President; *d.2)* the possibility of the Senate deciding not to open the proceedings; and *d.3)* the definition of the applicable quorum to this decision.

At the onset of the trial, the Justice Luiz Edson Fachin voted based on the following reasoning: *(1)* absence of prior right to defense; *(2)* the admissibility of presentation of independent candidatures for the election of the Special Committee; *(3)* the constitutionality of secret voting for the composition of that committee; and *(4)* after the granting of authorization by the House (two-thirds quorum), a binding effect should impose, *ex officio*, the initiation of the Impeachment before the Senate.

In relation to the three latter aspects, however, the majority of Brazilian Supreme Court diverged from Justice Fachin. The prevailing theory, therefore, was *(i)* the possibility of vetoing independent candidatures for the composition of the special committee (7 votes to 4); *(ii)* the definition of the public voting (*not secret*) model for such parliamentary commission (6 votes to 5); and *(iii)* the powers of the Senate to decide autonomously and unbound to the mode of the Chamber of Deputies, on the establishment, or not, of the process of impeachment (8 votes to 3) by the relative majority (determination of quorum simple majority vote, in accordance with Article 47 of the Constitution).

Following the presentation of the Judiciary interpretation standards on the both impeachment processes, however, the initial assumption of the possibility of a consistent judicial review was not integrally confirmed, by the precedents of Brazilian Supreme Court –based on the precedents that were judged until this presentation moment (*we should alert that, there are some recent questions still pending before the Court*).

Much effort is not necessary to realize that, differently to what one might imagine, the Brazilian Supreme Court has adopted, in both cases, a strictly procedural posture. Given the institutional crisis provided by the Brazilian Impeachment case, therefore, we can identify a judicial legitimation of a wide sphere of Legislative branch's discretion to define, exclusively from circumstantial political decisions, the notion of *"impeachable crimes"*. This deduction has institutional and constitutional repercussions, as well as risks to the balance of power, that we now present as our concluding remarks.

4 Concluding remarks

The short reconstruction of constitutionalism's main characteristics enables the proposition that the major liberal problem is how to manage sovereignty, in a way to restrain abuse by its holder. Separation of powers in three state branches was the response to limit the king's inclination to tyranny and enable a rule of law. This was the Anglo-American constitutional feature.

In continental Europe, however, the rule of law became the French *état légal*, in which the state is still fully sovereign, in most cases with a king or emperor holding the power in the name of the people. The separation of powers is a mere bureaucratic scheme to rationalize state activities, but it left room for an office that held the ultimate word and sovereignty. The law was to realize the state mightiness, not to hold it down.

So, as a constitutional model for power restraint, the rule of law created an actual checks and balances system, with the two strictly political branches placed in an interdependent way. A fused-power system emerged in English development, with the Executive headed by a Prime Minister chosen by the parliamentary majority. In this model the head of the government depends on sustaining the parliamentary majority. In the absence of this majority, the holder loses office.

The United States evolved in a separation of power system, with the independence of the Executive against the Legislative, and with both branches holding popular legitimacy. In this system, the president is not politically accountable to the representatives, except for extreme cases legally provided by the constitution or a statute. Unless this is the case, the president should not lose office.

Emerging from a very specific institutional tradition, constitutional design could not suffice to make government work in its premises. The case of Brazilian impeachment is a helpful example of this problem and demonstrates how a presidential system can be turned into a majority-dependent Presidentialism.

From the presentation of the peculiar case of Brazilian impeachment (1988-2016), at least two emblematic hypotheses can be pointed out. First, the idea of *"impeachable crimes"* is subject to the absence of a definition, unlike the tradition in criminal case literature,[26] objective juridical criteria (*priority, certainty and strictness*) or the judicial adoption of merely formal accountability parameters. Second, even with the exclusion of any criminal content of the concept of *"impeachable crimes"*, the paradox emerges that the highest violation committed by the President might even be "punished" with the simple removal of the Chief Executive (*as occurred in Rousseff's Case –on August 31, 2016*).

In other words, despite all the apparent normative requirement for legal assessment of the occurrence of the *"impeachable crimes"*, the impeachment may end up confused with a typical motion of no confidence, in the Brazilian presidential system. Thus, the most recent peculiar Impeachment case subverts Brazilian constitutional choice of Presidentialism as the ideal and normative matrix of its system of government even more so.

Curiously, the mere absence of congressional support is enough for the effective removal of the Chief Executive to take place without any kind of emergency consultation of the population (as occurs, for example, in experiences with recalls –that became more common in Latin American cases). The "Brazilian style" impeachment, appears as a kind of magical artifact with nebulous effects capable enough to transmute a system of government centered on the President into a kind of Presidentialism in reverse, or, in other words, an opportunist and unpredictable way of Parliamentarism.

References

BECCARIA, Cesare. *Dos delitos e das penas*. Translated by: José Cretella Jr. and Agnes Cretella. 2. ed. São Paulo: Revista dos Tribunais, 1997.

BERGER, Raoul. *Impeachment*: the constitutional problems. 5th ed. Cambridge: Harvard University Press, 1974.

BIANCHI, Alberto B. *Historia constitucional inglesa*. Buenos Aires: Cathedra Jurídica, 2009.

[26] Bruno Galindo (2016) details this Brazilian literature, from the comparison of the criminal concept and the strictly political notion of "impeachable crimes". This general attempt of abstract conceptualization was deliberately abandoned in this paper. From the premise of the linguistic turn, the presentation of the uses of impeachment is more able and efficient to promote more concrete approaches for developing constitutional and institutional perspectives.

BOBBITT, Philip. *A guerra e a paz na história moderna*: o impacto dos grandes conflitos e de política na transformação das nações. Translated by: Cristiana Serra. Rio de Janeiro: Campus, 2003.

BOBBIO, Norberto. *Locke e o direito natural*. Translated by: Sérgio Bath. 2. ed. Brasília: Editora UnB, 1997.

BODIN, Jean. *On sovereignty*: four chapters from 'The Six Books of the Commonwealth'. Edition and translation by: Julian H. Franklin. Cambridge University Press, 1999.

BURKE, Peter. *A fabricação do rei*: a construção da imagem pública de Luis XIV. Rio de Janeiro: Jorge Zahar, 1994.

DIPPEL, Horst. *História do constitucionalismo moderno*. Lisbon: Calouste Gulbenkian, 2007.

ELIAS, Norbert. *O processo civilizador*. Vol. 2: Formação do estado e civilização. Translated by: Ruy Jungmann. Rio de Janeiro: Jorge Zahar, 1993.

FIORAVANTI, Maurizio. *Constitución*: de la antigüedad a nuestros días. Traducción: Manuel Martínez Neira: Editorial Trotta, 2001.

GALINDO, Bruno. *Impeachment à luz do constitucionalismo contemporâneo (incluindo análise dos casos Collor e Dilma)*. Curitiba: Juruá, 2016.

McCALLISTER JD, J. Wilson. *The history, law, and politics of federal impeachment*. 2th ed. Mustang: Tate Publishing & Enterprises LLC., 2013.

LOURENÇO-PEREIRA, Alberto C. Anatomy of a parliamentary coup d'état. 2016. Available at: http://global.luskin.ucla.edu/anatomy-of-a-parliamentary-coup-detat/. Access on: August 8, 2022.

LURIE, Leonard. *The impeachment of Richard Nixon*. New York: Berkeley Medallion Books, 1973.

MONTESQUIEU, Charles Louis de. *De l'esprit des lois*. Paris: Éditions Gallimard, 1995. (Electronic edition).

MORABITO, Marcel. *Histoire constitutionnelle de la France*: de 1789 à nos jours. 13e. éd. Paris: Lextenso éditions, 2014.

MORGAN, Edmund S. *La invención del pueblo*: el surgimiento de la soberanía popular en Inglaterra y Estados Unidos. Traducción: Julio Sierra. Buenos Aires: Siglo XXI Editores Argentina, 2006.

PEREZ-LINÁN, Aníbal. *Presidential impeachment and the new political instability in Latin America*. First paperback edition. New York: Cambridge University Press, 2010.

ROSANVALLON, Pierre. *The demands of liberty*: civil society in France since the Revolution. Translated by: Arthur Goldhammer. Cambridge: Harvard University Press, 2007.

ROSENFELD, Michel. The rule of law and the legitimacy of constitutional democracy. *Southern California Law Review*, v. 74, p. 1.307-1.351, 2001.

SARTORI, G. *Engenharia constitucional*: como mudam as constituições. Brasília: Editora UnB, 1996.

VAN CAENEGEN, R. C. *An historical introduction to Western constitutional law*. New York: Cambridge University Press, 1995.

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

VILA-NOVA G., Daniel Augusto; SIMON, Henrique Smidt. The differences between presidentialism and parliamentarism in perspective: the problem of majority support in Brazil. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 22, n. 88, p. 51-74, abr./jun. 2022. DOI: 10.21056/aec.v22i88.1595.