

Strained politics in democracy and its implications for the research on law, politics, and the Judiciary in Brazil

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*Introduction*¹

The Brazilian political crisis that erupted in 2013 gave rise to serious violations of the rule of law, representative government, and public liberties, and prompted a strained political situation that curtailed the rights of the political opposition and constrained social contestation. Each day, the incumbent government attacks the country's democratic institutions in actions and words that threaten the continuity of the 1988 democratic constitutional order.

Jurists² were key actors in triggering the political crisis. A number of them allied with conservative leaders and parties, actively manipulated constitutional rules, and strained the democratic institutions. Yet they proved weak when the rights of progressive leaders were violated, and now omit themselves in face of the attacks against the Constitution.

The Brazilian political landscape is still very polarized, as manifest in different ac-

ademic inquiries into the theme and as will be referred to later. Nevertheless, it is undeniable that democracy and the rule of law have been seriously eroded in the process, the implications of which, for the research agenda, are discussed in this article against the background of a prospective stable constitutional democracy. This article does not analyze the actions of the jurists or the role of judicial institutions in the Brazilian political process, as this has been done in other articles³. The article presents the implications of the new political situation for the historical and sociopolitical research agenda on law and judicial institutions in Brazil. The crisis occurred when this field of research, new among us, was about to be fully consolidated, yet there were still significant gaps in the reflection about the historical dimension of the theme. The article has two parts: The first part reviews the political science and socio-legal studies field of research on politics, law, and the Judiciary in Brazil, while the second part discusses the theoretical and methodolog-

ical implications of the present political situation.

*Political Science and socio-legal research on the Judiciary in Brazil*⁴

The development of a field of research focused on politics, law, and the Judiciary in Brazil can be traced back to the late 1980s, and takes place simultaneously within several disciplines, in Brazil and other countries. The Brazilian academic production in political science and related disciplines on law and the Judiciary is quite diversified and, therefore, any general presentation is selective and partial⁵. The current research shows that the situation is different from the 1990s, when the remark was common that «judicial courts and their role in democracy have been little studied by the Brazilian Political Science»⁶. The central problem has been the relations between the Judiciary, the law, and democracy, that is, the manner whereby judicial institutions, their practices, agents, theories, and techniques foster or constitute obstacles to democratization. Research at various levels of generality comprises from global analyses of trends in Brazilian politics and international comparisons to analyses of the dynamics between and among the branches of State, the relations between the organizations of the Judiciary, to the interactions between STF (Supreme Federal Court) justices and their behavior, or case studies of judicial decisions on specific themes. Some of the themes that stand out are the reform of the Judiciary, access to justice and the rights to citizenship, the historical trajectory of the Judiciary, and the research into

the elites, professions, and the juridical⁷.

There is a marked contrast between research that assumes disciplinary, theoretical, and methodological monism and research that is open to pluralism and reciprocal influences in these dimensions. Building on this contrast, we may counterpose two perspectives: On one side, systemic social theories, normative doctrines or models based on microeconomics that take up the position of external observer of objective processes, positive institutions, and actors with a rational and utilitarian behavior. These theories tend to value a clear separation of social, political, and juridical subsystems, of institutions, or of the action of the powers of the State, including the actors' behavior, and to negatively assess the interferences, overlaps, and 'confusions' between them. On the other side, hermeneutic or discourse theories that are focused on the subjectivity, experience, and dialogue dimensions regard institutions and actors in the context of the building of meaning, underscoring the deliberative dimension of decision-making processes that tend to value interactions between society, politics, and law, as well as their translation into complex institutional arrangements. The contrast is crystal clear in the research on the STF and constitutional jurisdiction, as we shall see ahead.

This contrast has been drawing closer to positions on the judiciary reform and the protagonism of jurists since the 1990s. The debate on the judiciary reform in Brazil has been marked by the contrast between pro-market reform streams and those advocating the democratization of justice at the international level. On the one hand, neoinstitutionalism and public choice theories are adopted to criticize the so-called

judicialization of politics and judicial activism on account of procedural inadequacy, technical incompetence of judges, and the costs of judicial processes⁸. The challenge to the reform would consist in counterbalancing the power of the Judiciary, by reintroducing accountability mechanisms to increase its efficiency. The other position is that of those who, in line with the movement for access to Justice and democratization of the Judiciary, contended that the juridical would be the realm wherein citizenship rights would be made effective and new forms of political participation would be introduced⁹. This debate was present for a long time in analyses carried out by political scientists, economists, and jurists of the STF, the organization and powers of judicial institutions in the 1988 Constitution, the protagonism of the Judiciary in public policies, and access to the Judiciary and the rights to citizenship¹⁰.

Over this period, and on the sidelines of the political debate, research showed that the quest for the effectiveness of citizens' rights entailed complex problems, given the ambivalences of the judicial realm and the ambiguous effects of the courts' institutional innovations. Worthy of reference are monographic works that have combined institutional analysis, socio-legal research, and ethnographic methods to research small claims courts¹¹, labor justice¹², precincts, and criminal courts¹³, and other everyday practices of courts. This evidenced the persistence of discrimination practices, denial of opportunities for speaking, thus underscoring the effects of resource inequality between litigants, and the recurrence of conciliation as a form of social relationship that dismisses conflict, suppresses litigation, and produces acquiescence,

reproducing social inequalities and the ineffectiveness of citizenship rights. These practices are not exclusive of the small claims courts, as they are intertwined with the judicial institutions and their reproduction is a key factor of the social power of jurists. The positions taken by jurists against external controls and against policies designed to foster citizenship and citizens' participation are informed by those practices. Even though it cannot be affirmed that their goal is the perpetuation of those practices, this is at least an outcome of their action. In this regard, studies advocating that the courts are spaces open to participation and dialogue¹⁴ have not been confirmed by the evidence. Conversely, public choice approaches, which orient analyses on the basis of the performance of the institutions and inform policies aimed at the rationalization of management, advocating, more markedly, procedural informality, imply more precarious protection of rights in courts and further strengthen the reproduction of inequalities. The judiciary reforms of the past years have followed precisely that line, while institutional, socio-legal, and ethnographic research studies are likely to keep on showing their negative effects on the effectiveness of citizens' rights, in that the precariousness of the population's living conditions is accentuated by the economic recession and the degradation of social conditions beginning in 2015¹⁵.

Research driven from the perspective of historical institutionalism or the history of institutions have shown the trajectories and specificities of sectors of the Judiciary, including labor justice¹⁶, electoral justice¹⁷, the Public Prosecutor's Office¹⁸, the Brazilian Bar Association (OAB)¹⁹, and the National Council of Justice (CNJ)²⁰. The com-

bination of political science and sociology, history, and law proved fruitful to learning not only about institutional frames and the behavior of actors, but also about their practices, their conceptions of law and society, their relations with other actors, and their political and juridical impacts.

Another thematic area is that of the elites, professions, and mutations of the juridical field. Common sense used to criticize the elitism of jurists and the off-limits nature of their professions to individuals lacking social or cultural capital, in addition to the jurists' cooperation with the political elites. Empirical studies in sociology of the elites, and of professions, showed a relative social openness resulting from meritocratic recruiting and the production of common references as outcomes of professional training, strengthening the contrasts between jurists and politicians or the symbolic borders between the juridical and the political fields²¹. Research informed by Bourdieu's works have relevant contributions by relativizing the effects of professionalization, showing the specificities of the juridical field in Brazil, as well as the changes brought about by processes of internationalization/Americanization of juridical normative production and law firms, and international cooperation between judicial institutions²².

The limitations of approaches focused on the constitutional judge and the autonomy of law, or on the legal instrumentalism, have been discussed by constitutional history. Narratives were criticized that attributed to Brazil's 1988 Constitution an inaugural moment, either as a result of the evolution of constitutionalism in Brazil²³, or as a turning point in relation to a past of ineffectiveness²⁴. To critics, these inter-

pretations overlook the historical process of political and intellectual disputes as well as moments of institutional disruption or innovation²⁵, or attribute inauthenticity to the constitutional tradition for lack of commitment of the elites to the constitutional program due to their class interests, patrimonialism, or political and legal culture²⁶. By privileging the constitutional judge to carry out the constitutional commitment, those narratives take on an elitist or technocratic perspective by attributing to jurists the condition of privileged interpreters of the nation's destiny. Instead, critics propose the adoption of perspectives based on linguistic contextualism, the new political history, the culturalist approach to law as an experience, or political analysis of legal thought²⁷. Finally, another perspective assumes a macrohistorical approach to criticize the inevitable inauthenticity of the constitutional project because of its commitment to the European colonial paradigm and the structural condition of a society in the periphery of capitalism²⁸.

Research on the STF and the constitutional jurisdiction was mostly conducted through the prism of the judicialization of politics and its correlates, such as the politicization of justice, judicial activism, or the juridification of politics²⁹. This focus was set in motion by the debate in comparative politics on constitutional courts in democracy³⁰, and ended up dominating the analysis of and the debates on the changes in constitutional jurisdiction introduced by the 1988 Constitution. In the Brazilian academic production in political science and related disciplines³¹, it is through the theme of judicialization that the performance of judicial institutions and jurists is evaluated, followed by the discussion as to

which institutional model and role would be most appropriate for the post-1988 Brazilian politics³². The main approaches to the STF follow the aforementioned contrast between monism and pluralism. They placed themselves within the framework of judicialization and were followed by research that adopted different perspectives. The first approach adopts a positive perspective, which relies on data on the institutions or the norms, and on the actors, with their identities, preferences, and resources. In this approach, constitutionalists or sociologists of law focus on the norms of the juridical systems, whereas political scientists analyze the behaviors of judges and political actors, equating the courts to any other institutional arena wherein actors exercise delegated powers as they seek to promote their preferences. The balance between the internal dynamic and the broader institutional arrangement occurs if the arena fulfills its functions and if there is an adequate combination of decision-making autonomy and controls. These disciplinary views are complementary, in that, on the one hand, there is analysis of norms and decision-making processes in which actors perform their juridical roles; and, on the other, analysis of strategic interactions in which the production of norms does not appear as a relevant analytical dimension. Thus, the STF is assumed either as the guardian of the Constitution, with its justices imbued with their constitutional roles, or as a decision-making arena in which actors promote their preferences.

The predominant tendency in this perspective is to take American constitutionalism as a model for the constitutional order of 1988. Its main aspects are the separation of powers, the tribunal as a Supreme Court

with added powers, and the justices as enforcing or interpreting the law, limited to the use of more traditional legal techniques.

In the Brazilian case, the 1988 Constitution would have kept a relation of continuity with the previous Constitutions, while its innovations and subsequent judicial reforms are considered from a mostly critical angle. The courts would have been endowed with excessive powers and independence, with no control and accountability instruments applying to judges. They stress the risks the imbalance between the branches of the State would pose for the government of laws and democracy, further increased by the tactical use of judicial instruments by political actors, the activism of judges, the voluntarism of prosecutors, or the juridification of social spheres³³.

The second approach adopts the hermeneutic perspective, or that of the theory of discourse that favors the symbolic or dialogic dimension of social relations, in which institutions are meant as spaces for deliberation and participation, and are open to civil society. Here, too, there are two views, in that constitutionalists and sociologists of law elect communitarian constitutionalism as a model and discuss potential and actual decisions by the jurisdiction both from the standpoint of their procedural conditions for exercising political autonomy and of the substantive aspects of the constitutional jurisdiction in its relations with the other institutions, internal processes, and relations with society. Sociologists and political scientists, in turn, discuss the effects of the constitutional model for the coordination of the powers and the new collective instruments for political participation of actors. The constitutional model has a normative character from the standpoint of research,

because it is adopted as the standard for analyses of judicial cases and political processes, thus highlighting obstacles, deviations, insufficiency of empirical events in relation to the standard³⁴.

This approach tends to take up as its model the post-World War II western European constitutionalism and the Welfare State. The STF would be a constitutional tribunal, albeit with shortcomings, and the justices seen as coparticipants in the production of norms, in coordination with the other powers of the State and civil society, leveraging various and innovative techniques for interpreting and deciding on the implicit or potential meanings of the law. The approach highlights the discontinuity of the 1988 Constitution in the constitutional history of Brazil, and the judicial reforms since then would have afforded greater clarity and potential to the new model. It is critical of the attachments of justices to previous conceptions of their role, which would prompt jurisprudential hesitations and inconsistencies or imbalances in the relations with the powers – with risks for democracy – and distortions in the use of deliberative procedures.

Throughout the 1990s and up to the beginning of the Lula administration, the judicialization of politics was considered as having been the effect of institutional frames that provided the opportunity for jurists and interest groups to block the will of the majority, or for the common good represented by the neoliberal program to reform the State. Given that the STF jurisprudence had a limited role in blocking pro-market reforms and in promoting the cornerstones of the 1988 constitutional commitment, the judicialization key was applied to other moments than the de-

cision. Attention has been given to how actors filed their cases with the courts to the effects they sought to cause on other spheres. It was something as judicialization by reflex, because it was characterized by the leveraging of judicial tools by political parties or grassroots movements. It was no longer evaluated on the basis of the resulting rulings and their juridical effects, but of the political tactics and symbolic effects that the court filing could trigger³⁵.

In the second half of the 2000s, a positive assessment of judicialization started to prevail, now seen as a beneficial and progressive phenomenon, through the dissemination of the idea that courts and law resources would lead to and provide opportunities for participation. There prevailed 'communitarianist' and Habermasian theses in praise of democratic constitutionalism and judicial activism, with the STF as the space for deliberation over cultural matters of great import to Brazilian society³⁶. Nowadays, the judicialization-of-politics theme has gained new momentum in public speeches and academic analyses, but now it exhibits a new facet, that of the politicization of justice, as we will see further on.

These approaches share a general theoretical model based on which they analyze law and the Judiciary in Brazil as part of a global phenomenon, a case among the world's democracies. They adopt an analytical-conceptual scheme and far-reaching propositions regarding their subject, and conduct empirical research to validate their hypotheses. Their findings are intended as prescriptive, for they are geared toward gathering elements for assessing, diagnosing, and proposing institutional changes. Yet they elect as their data the attributes of their subject or realm of analysis by as-

suming a constitutional democracy model in which subsystems, institutions, or actors would exhibit certain characteristics and stable relations. This way, and as shall be discussed below, they exclude the specificities of the country's constitutional trajectory not only in relation to the characteristics of the juridical realm and its ambivalent relations with the political, but also as regards contingency of processes, variety of practices, and reversibility of discourses. Law remains outside politics because it is taken as a standard for validation or a set of juridical norms, or because it does not appear as a key dimension for the research. In other words, the analysis neither incorporates the historicity of institutional, identity, and jurist resource building, nor, most importantly, the production of law through its practice, in conflictual social processes.

The theme of the judicialization of politics, and its correlated themes, poses a conceptual 'obstacle' for research in political science and socio-legal studies, in spite of the critical works in constitutional history and sociology cited above. Relations between and among courts, law, and politics are oversimplified when the data, both at the theoretical and empirical levels, is assumed to be a given set of attributes that characterizes law and the Judiciary. The standard adopted is that of a constitutional court, judicial processes, judges' performances and rulings, assuming these are directly applicable to Brazil. They omit research on and critical analysis of the modalities on which those institutions and practices were built throughout Brazil's historical and social making, as well as the way they operate presently. The theme presupposes the alternative between, on the one hand, neutrality of judicial institutions and im-

partiality of judges, whose correlate would be the objectivity of the judicial/juridical judgment and, on the other, the politicization of judges as actors seeking to advance their own interests or those of their allies. This opposition imposes a choice between two extremes: Self-restraint or activism, neutrality or politicization, legitimacy or usurpation, preservation of borders or invasion. Either jurists are faithful promoters of legality, or they use their resources for other purposes. That is to expect too little or to ask too much from the production of law, thus weakening the political analysis of the juridical practice, since what is expected are impeccably designed juridical solutions, purportedly predetermined by legislation and univocal, while mistrusting any reasoning or nuance as rationalizations of underlying/hidden interests. Or, conversely, the practice of law is idealized as a field apart, one in which law is enforced on the basis of logical subsumption reasoning, consideration of principles, or rational discussion in which there is, or should be, no room for political tactics, strategic calculations, alliances with the political leadership, expectations regarding the public opinion, coalescence with interest groups, in addition to entrenchment in governmental regimes or in overall schemes for social domination.

The challenge is to bring together strategic analysis and normative production in courts in a type of research that may comprise institutional processes, the interplay between the juridical and political fields, as well as their relations with more general schemes of government for the multiplicity of Brazilian society.

*The present challenge: Researching the production of law in strained politics*³⁷

From a historical perspective, the antecedents to the alliance of judges with politicians are countless and not so old, and one gets the feeling the 'spectacle' is déjà vu³⁸. It is like a cycle, set off with investment in juridical resources, in which the discredit of politics is combined with voluntaristic outbursts by jurists engaged in reforming the republic, who denounce their peers' accommodation to routine. Then follow divisions among jurists, who become aligned with the political forces themselves, followed by multiplication and dispersion of their actions, in whose plays they come to adopt disparate doctrines, make tactical use of techniques and concepts, cause or drive the fragmentation of jurisprudence, ultimately increasing uncertainty as to the outcomes. Gibberish and opportunistic actions increase, along with more serious showdowns both among jurists and between these and the politicians. The outcome is the fragmentation or standstill of the courts and the silence of jurists, whose identity succumbs or, rather, immerses in politics, followed by a defensive stance advocating the return to the former prudence and moderation. The lasting effect is incongruence of the rulings, of the juridical techniques and concepts produced throughout the cycle, and the disconnection of these discourses from any notion one might have of law and justice³⁹.

There are different interpretations of an ongoing political process that are somewhat aligned with researchers' political positions or theoretical assumptions. Some interpret the process as expressing the independence and good functioning of polit-

ical institutions⁴⁰. Others, as confirmation of their macro theories. For instance, the crisis would be revealing of the structural truth of law in the capitalist State and of the effects of the international financial crisis on peripheral capitalism⁴¹. Others recognize shortcomings in the relations between jurists and courts, on one side, and politics, on the other, but attribute them to the Brazilian institutional conundrum, meaning that the Judiciary is to arbitrate conflicts between government branches⁴², or to the outcome of tensions between coalition presidentialism and more stringent juridical institutions⁴³, such that "supreme-crazy"⁴⁴ degrades into "justices-crazy"⁴⁵. In another line, excesses committed by jurists are attributed to factors internal to the juridical field, as the extreme judicialization of politics⁴⁶, the tactical use by jurists of the promotion of public goods to increase their own resources and for political objectives⁴⁷, like judicial praetorianism⁴⁸ or "tenentismo in robe"⁴⁹. The revelations by the site *Intercept Brasil*⁵⁰ are evidence of the Car Wash operators' partiality and their alliances with conservative forces to attack Lula's leadership, Dilma Rousseff's government, and the government coalition led by the Workers' Party (PT)⁵¹.

The judges' and jurists' actions in today's politics are not self-bred, driven by their prejudices and corporatist interests, for in them lies the evidence of their ties with the conservative sectors with whom they share political doctrines and conceptions of society. The process is broader, as can be seen by the jurists' enthusiastic adherence to the demonstrations for ethics in politics over this decade, even if bypassing or violating the rule of law, and by their support for the selective use of judicial instruments.

This orientation on the jurists' part is confirmed by the mitigated reactions of the authorities to the "Vaza-Jato" leaks, with the orchestration of a "hush-hush operation" by jurists and their associations, supported by members of external control bodies and justices in higher courts. In this situation of strained political game, STF Justices, just like other jurists and political actors, run the institutions in a way that departs sharply from the principles and norms of the rule of law and constitutional democracy. In the thirty years of the Constitution, constitutional law practice is not the same anymore, and we, jurists and democrats, will have a lot to do to recuperate its normative sense.

The commemoration of the thirtieth anniversary of the 1988 Constitution in the context of a political crisis was the opportunity to reassess it in a historical perspective by discussing constitutionalism and constitutional jurisdiction vis-à-vis politics and the Brazilian society. The political crisis was thus assumed to be the result of the gradual irrelevance of the constitutional text, the betrayal of the constitutional project, or of the adverse conditions in which it was implemented. Some have proposed to seriously consider the potentialities and limitations of the Constituent Assembly moment, as well as the impasses and disputes that unfolded since then⁵². Others, that in order to overcome the present situation, it would be necessary to refound the Constitution on the basis of a new, national and people-led, democratic project⁵³ or of the new Latin American constitutionalism⁵⁴. These discussions are relevant for diagnosing the current situation, but I consider it necessary to analyze the very intellectual cadres, concepts, and methods that we, researchers, have adopted to reflect

upon Brazilian politics and constitutional history.

We are experiencing an uncertain, conflictual, and perverse situation of production of norms. Political crises produce law both by formally replacing legal texts and through informal changes, assigning new meaning to norms in effect. A change may be the key to overcoming a crisis, a resource necessary to defuse it. But there are other changes, more insidious ones, that are solutions engendered to create concepts or to produce extensions or distortions in the meaning of legal texts, those that come up with cases designed to allow partial uses of the norm, those that find exceptions to justify an omission or the intervention of a court in a case.

The political crisis has morphed into a strained politics, a succession of crises or quasi-crises that have lasted so far for five years, whose meaning and implications for research studies must be addressed. This period has been prolific in ingenious solutions designed to create irreversible situations, or the application of norms to unique cases.

How to research constitutional history in times of instability and moments of crisis? It is imperative to review our intellectual models and our research agenda. In my research I have tried to associate long trajectories and changes in the rationality of law with the singularities of the Brazilian social making and political history. Today we must think above all about the production of law in times of strained politics.

The elements rendered visible in the past years are neither unprecedented nor a surprise for observers and field actors. The 1988 Constitution resulted from a combination of long trajectories and critical

inflections, both intentional and happenstance, during the political process. These are expressed in the charter's characteristics themselves, such as the distribution of powers between the President and Congress, the powers of judicial institutions, the provisions left for later regulation, and those that never came into effect.

Historical parallels may seem derisory in face of the urgency and uncertainties of the present situation, but the historical perspective allows us to understand the past years' process by placing the present days in a longer trajectory. At the same time, reflecting about our present-day experience makes us reconsider our ways of seeing the past and consider our premises and how they were not problematized vis-à-vis the democratic constitutionalism project.

The ambivalences of the juridical in strained politics can be better understood in view of its characteristics in our historical trajectory. Initially, it is imperative to bear in mind that, for the historical analysis of the social shaping of the juridical in Brazil, the notions of law and Constitution habitually used to represent the State and politics, and which are present in the public scene, in institutional practices, and in the speeches of jurists, are the *subject* of our research and that these speeches and practices constitute the *materials* to be researched. They do not lend themselves to providing us with theoretical references and variables or dimensions for the analysis. The crafting of the meanings of law is socially achieved, from the notion of Constitution to the movements demanding its enlargement and enforcement, to the courts' liturgy, with their robes, protocols, and gestures.

Representations of the 1988 Constitution, the STF, and constitutional juris-

diction models are contested, while the research should not be premised on conceptual assumptions, given that the field of signification of these terms will be determined by it. We have seen that, in political science and related sciences, the recurring theme of the judicialization of politics has been a real conceptual 'obstacle', in that it is premised on certain representations of the Constitution, democracy, the rule of law, and constitutional courts⁵⁵. In history of law too much attention has been given to aspects that are internal to the juridical, such as representations of law, of the Constitution, and of politics as drawn by jurists, as well as constitutional history interpretations by those acting as its protagonists, and the sources prepared by them, without researching other archives. Thereby, and unlike what we learned from other times, the literature of the period ushered in by the democratic transition has overlooked the relations of jurists with the political and social forces that were determinant in the production of the Constitution's meaning. We, social scientists and historians of law, know little, for example, about the relations between judicial agents and institutions with political leaders, parties, and interest groups, as well as the relations between the decision-making rationale of the courts and the forms of governmental rationality, on one side, and the production of social hegemony, on the other.

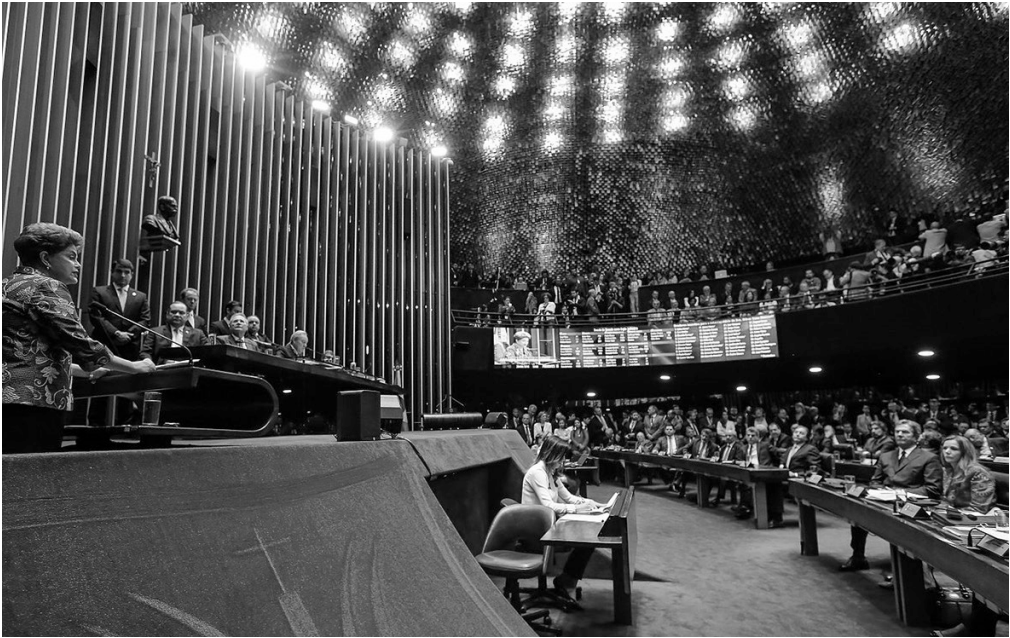
Another point is that of the characteristics of the juridical and its relations with other fields or social sectors. As referred to earlier, sociological and historical research has shown the singularities of how the juridical field was shaped in Brazil, as well as its relations with politics⁵⁶. For example, the late specialization and institu-

tionalization of the juridical field or sector has had a corporatist character, one under the aegis of instrumental models of legality. Interlinkages between juridical careers and political appointments were kept and, still today, are determinant for the hierarchies within the juridical field. We must incorporate in our research studies all the implications of these characteristics of the juridical for normative production.

The singularities of the constitutional trajectory and the characteristics of the juridical field are in line with today's questions and paradoxes concerning the relations between the juridical, the political, and other fields or social sectors. This situation further strengthens the point that it is not theoretically appropriate to take as a given certain attributes that would be the definers of the juridical in Brazil. Therefore, if we think of the juridical as the sphere for the enunciation of law, the performances being carried out in its name do not regard law as the exclusive – perhaps not even the most important – reference, while judicial enunciations lose those attributes associated with the juridical discourse, such as impersonality, generality, and stability. If we define the juridical as the ordering of norms of conduct and of the organizations endowed with competences and procedures required to produce them, those norms are far from determining the behavioral pattern of agents and decisions of state and judicial organizations. If we define the juridical as a set of institutions guided by a triadic model of decision-making by an impartial third party hierarchically superior to two other parties and in compliance with the law, thus the opposite of the two-party adversarial model, the decisions and practices barely fit the definition. If we

characterize it as a state agency for the production of norms that build on conflictual truth-production procedures, its probative practices and the results actually produced are quite far from this model. If we configure the juridical as a system of conflicting interactions geared toward a specific goal, as a field endowed with its own logic, or as a group of professionals who have specific performance patterns, we must relativize these differentiations, on account of the bonds between jurists and politicians, of court decisions oriented towards the production of political and media hype effects, and of judges' actions resembling that of 'vigilantes' who fail to comply with the law, or are blatantly against the law.

This enumeration of paradoxical relationships between definitions and attributes allows us to indicate, 'cross-cuttingly' as regards the theories, some formal elements of what we are able to see as the juridical: It is the realm of enunciation that takes on the name of law; it is endowed with presumption of validity for having been instated by juridical norms and being in effect globally; it organizes itself in 'judicial' decision-making forms; its agents control organizations, resources, have their own interests, and can act together or in conflict with elected representatives; its agents possess know-how, competences, and signs of distinction that they tacitly use in their practices to achieve their strategic interests, thus actually taking part in the normative production; their discourse and practices of truth yield effects that depart from the 'rational' probative procedures. With these formal elements, substantive attributes and stable relations are not assumed, or are weakly so, nor are the practical implications they are usually associated with.



President Dilma Rousseff at the Senate on 29 August 2016, during the impeachment assessment

For researching the production of constitutional thinking in the present situation, one may adopt the sociology of political crises, as proposed by Michel Dobry⁵⁷, as a general analytical framework, in association with changing scales of analysis (*jeu d'échelles*), thus combining macro and microanalyses⁵⁸. Dobry presents notions as 'dedifferentiation' of spheres, fluid conjuncture, and imperfect strained games; while his key focus is the interest in what is at stake in the very process of the crisis, whose factors are homogeneous to those at play in normal periods. The political crisis would be caused by intersectoral mobilizations and characterized as a fluid conjuncture, a transformation in the state of complex societies, with differentiated fields or sectors, that affects the properties

of the relations between them and the interactions within each of them. Among the various properties, the imperfect strained game can be characterized as a reduction in institutional mediations, the broadening of the interdependence of moves in several sectors, and the lesser capacity of actors to learn about the situation, assess resources, and calculate the outcomes of their actions and those of other players. Islands of strained game are formed in which there is a loss of internal institutional mediations and stability of relations with the environment. The players' moves have broader and unexpected repercussions in other societal sectors, with the establishment of co-occurrence networks between them.

Strained politics can be viewed as the manner whereby interactions occur in a

complex society in which differentiation between sectors, and their interactions, remains unaltered yet in a state of instability. Constitutional forms and the rules of the democratic game are upheld, while their meaning and effectiveness are challenged, for ideological polarization, political fragmentation, and intersectoral alliances combine to trigger a succession of periods of instability and settings of crisis or quasi-crisis⁵⁹. Moments of high and low occurrence of attempts at decisive plays alternate with miscalculations and reversals, in addition to unusual forms of actions and normative production. The implications of strained politics for the STF, along with other institutional arenas, are a redefinition of its political role, its way of acting, and its relations with the other sectors of society. In this situation we can analyze the relations between distinct institutional spaces, rationales of action, and modalities of normative production⁶⁰.

Analysis of the STF and other juridical themes in strained politics is carried out from an enlarged perspective that embodies strategic, normative, and cognitive elements, so as to keep track of what is at stake in each setting. We may adopt macro and micro scales of analysis in order to, as the focus changes, change the form and the mesh of the subject⁶¹. Macroanalysis can be used to observe trends, decision-making patterns, and to compare different societal states. Microanalysis does not serve to illustrate or confirm the data aggregated, but to get closer to the experience of agents, render more visible the connection between events, and to broaden or redefine explanatory factors.

In order to understand inconsistent events and actions in the juridical field, we

must build research subjects that go beyond those habitually thought of when considering rationalized images of law. We ought to consider short timespans, with their contingencies, discontinuities, and reversibilities, conjunctures with tense and fragile balances. We will have to widen our field of observation in order to consider the events in a given situation, and to intensify analysis of the bonds between the juridical and other social spheres and decision-making sites, pluralizing research tools and sources. To consider jurists as agents with scanty defined identities and ambiguous purposes, whose actions go far beyond the juridical field. To analyze their speeches and silences, their use of varied models and arguments, semantic slips, rhetorical and visibility-seeking effects. To think of their tactical calculations, but also of the role of emotions. To take into account that affections, aggressiveness, hypocrisy, mistakes, and failures are also part of the historical production of law.

The way these relations take place in practice, as well as their outcomes, cannot be predefined. If there is any guideline, we may take as reference the works by O'Donnell⁶² on the un-rule of law in Latin America to think of the combination of areas of citizenship effectiveness and areas of overlapping deprivation of rights, or the differential management of illegalities. This notion makes reference to the theme of governmental rationality as proposed by Foucault, that is, the configuration, in our society, of relations between government, production of truth, and constitution of subjectivity.

Thus, the notions of rule of law, liberal Constitution, or democratic order serve, as mentioned above, as elements of the order

of discourse and of the State's institutional forms. Juridical practices, decision-making rationales, and their social effects configure a sort of nebula of immunities in which are combined cumulative privileges, differentiated meanings of rights, and unequal effectiveness of citizen rights. It comprises prerogatives and privileges embedded in the State, the selection of rulers through electoral processes with broad suffrage, yet with restrictions on political competition, with state-controlled institutions and social relations oriented by a neoliberal governmental rationality in a capitalist, semi-periphery social formation in which a broad swath of the population is not entitled to effective rights. This polemic characterization can serve to make us think not only about the present days, as its elements may guide our understanding of the recent past and the historical making of the juridical among us. And may help us think about antecedents, trends, and possible reconfigurations of the juridical and its relations with the political and society over the coming years.

Finally, we must rethink the expectations of the democratic constitutionalism program, in which we invested in the rationalization of power through law to achieve political stabilization and progressiveness of history. The Brazilian situation can be placed against the background of the international financial crisis, a new neoliberal offensive against the Welfare State, cultural wars waged by neoconservative movements, the ascent of populist leaders, as well as geopolitical tensions arising from the competition between the United States and China in Latin America, and the reprogramming of social normativities by digital technologies based on Big Data and artifi-

cial intelligence. At present, strained politics, extravagant juridical practices, and a nebula of immunities reinforce each other and find favorable conditions to expand.

Conclusion

The political crisis ushered in a long-lasting period of constitutional and political instability in Brazil. With the centrality of the Constitution as normative reference at stake, the investment of the political forces in the independence and impartiality of judges and jurists is being called into question, a situation that has paved the way for extravagant creations in law. Is the democratic and social course that guided the commitments of the constitutional delegates being changed, or has the crisis brought about a constitutional mutation? The political Constitution that will virtually emerge from this mutation keeps no identity with the one agreed upon, voted, and sworn to in 1988.

Academic research on Brazilian law and the Judiciary Branch is contemporaneous with the democratic transition and the establishment of the constitutional order of 1988. The current strained politics is not the demise of the Constitution, but its calling into question and challenging by actors who have always had ambiguous or contesting attitudes toward democracy. Thus, we, researchers, need to rethink our theoretical models and research agenda to understand the present situation, its roots, processes, and trends so that we may actively defend and (re)build constitutional democracy in our country.

This article adopted an agnostic assessment of juridical concepts of constitutional democracy and rule of law to reflect upon Brazilian constitutionalism. I also proposed a sociology of political crises approach and changing scales by combining macro and microanalyses in historical research for analyzing the production of constitutional law in strained politics.

¹ This article reviews and develops points presented in A. Koerner, F. Tomio, *Política e direito no STF – resultados de pesquisa e problemas para a análise sobre a jurisdição constitucional no Brasil*, in E. Ribeiro, M.B. Silva, R. Arantes (eds.), *As teorias e o caso*, Curitiba, Ed UFPR, 2020 (in press); A. Koerner, *A Constituição de 1988 faz trinta anos?*, in S. Barbosa (ed.), *Os tempos do direito - Anais do X Congresso do IBHD*, 2020 (in press); A. Koerner, C. Inatomi, *Tribunais, política e direito no Brasil. Tendências e questões para a ciência política*, in «Mediações - Revista de Ciências Sociais», n. 21, 2016, 1, pp. 13–21.

² The term designates law practitioners in general and not only doctrinaires and theorists.

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Política e direito, cit.

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reflection and practice regarding the best way to attain the objectivity of judging oneself and the others, establishing a relation of equality between individuals in keeping with a common measure, so that the judgment is not only accepted but claimed by the individuals, thus ensuring the maintenance of a community of judgment.

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