



THE PROBLEM OF CONSTITUTIONAL INSTABILITY IN EMERGING ECONOMIES: THE CASE OF BRAZIL

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Abstract: An investigation of issues of constitutional law often requires an interdisciplinary analysis. Constitutional law is also related to the economy, with constitutional stability depending on economic stability. Emerging economies face difficulties in remaining constitutionally stable. The Brazilian economic crisis generated a constitutional instability whose consequences are still unpredictable. The fragility of democracy in the country promotes the fragility of institutions and the Constitution itself. A purely normative discourse of the Constitution is insufficient, and it is necessary to rescue the politics and reorder the country politically.

Keywords: emerging economies, constitutional stability, Brazilian case, crisis of democracy

Introduction

An investigation of issues of constitutional law often requires an interdisciplinary analysis. The constitution as a representation of the legal status of politics – that is, as a set of legal rules governing political power – is open to various fields of knowledge. This is particularly true with regard to the constitution of the second half of the 20th century, which is committed not only to the protection of individual fundamental rights but also social ones. In this sense, the constitution deals with issues relating to areas of law including procedural, criminal, civil, administrative, environmental and social security law.

Constitutional law is also related to the economy, with social constitutionalism incorporating the regulation of state intervention in the economic domain as one of its main characteristics. The role of the state in the economy is a topic of great interest. In relation to this, classical economic liberalism required state abstention in economic matters, but 21st-century liberalism advocates state regulation that acts both for the proper functioning of the market and to avoid crises. Today, therefore, rather than the discussion being about the size of the state, it is now about its role.

This study examines the problem of constitutional instability from an economic perspective, looking into the question of how emerging economies contribute to constitutional instability. This approach presupposes the existence of a constitutional system that guarantees fundamental rights, because only in an environment of freedom can one perceive constitutional instability more clearly. It is also important to distinguish constitutional stability from political stability, because outside the spectrum of the constitutional state, political stability can exist under an authoritarian regime. This analysis focuses on the case of Brazil, but I have also included some ideas that may serve as a reflection for other countries in a similar situation.

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The paper has three parts: the first addresses the various types of economy, emphasising the concept of the emerging economy; the second looks into issues regarding political and constitutional instability, examining the role of the concept of a constitution in the context of its historical development; and the third analyses the Brazilian case under the country's 1988 Constitution, particularly in relation to the most recent political and economic events.

1. Understanding the various types of economy and the concept of an emerging economy

Until the Second World War, economies were essentially distinguished by their nature of being either industrialised or non-industrialised. The status of being non-industrialised did not strictly mean that such economies did not produce wealth. An example of a non-industrialised economy that produced a large amount of wealth in the early 20th century is Argentina, which experienced something of a golden age at that time. In the late 1920s, the country became the world's sixth largest economy, as an agricultural and livestock power that supplied Europe. The grandeur and elegance of its capital, Buenos Aires, symbolised prosperity. The economic success of Argentina between 1860 and 1930, known in the country's economic history as the period of "primary export economy", was broadly down to three factors that together characterised the integration of the world economy and greatly benefited the Latin American country: (i) the international movement of capital; (ii) migratory flows; and (iii) the expansion of world trade (Ferrer, 2006, p. 79).

After the Second World War, the idea of development came onto the international political agenda.² The effectiveness of human rights presupposed development, with a right to this arising as a condition for the effectiveness of other rights. Development referred to the industrialisation and diversification of peripheral national economies that had until then concentrated on agricultural activity for exports. A decline in world trade and the strengthening of domestic markets in these countries made possible the industrialisation of Latin America in nations such as Mexico, Argentina and Brazil. Meanwhile, companies based in developed countries started to install branches in underdeveloped ones in a bid to expand their consumer market and obtain greater profitability. By doing this, multinational companies benefited from cheap labour, tax incentives and an abundance of raw materials. At the same time, employment increased and imports reduced in underdeveloped countries to supply the domestic market (Ferrer, 2006, p. 143).

The distinction between "industrialised economies" and "non-industrialised economies" has been replaced by the concepts of "developed economies" and "underdeveloped economies", or "developing economies". The concepts of "first world" and "third world" also have an influence on the classification of economies between countries. The concept "third world" had military origins and initially referred to countries not linked to NATO and the Warsaw Pact. However, countries that came under this definition had a common economic condition, in that they tended to be poor countries with underdeveloped economies. The designation of being "third world" thus came to have an economic connotation.³

In Latin America, the so-called Theory of Economic Dependence developed after the Second World War. According to this theory, "the terms of trade for underdeveloped countries relative to the developed countries had deteriorated over time: the underdeveloped countries were able to purchase fewer and fewer manufactured goods from the developed countries in exchange for a given quantity of their raw materials exports" (Rahman,

² According to Carl Schmitt, among the main characteristics of the post-Second World War period was the industrial development of underdeveloped regions (Schmitt, 1995, p. 593).

³ The process of decolonisation from the 1960s gave new contours to the international political and economic game. According to Hüfner, developing countries formed a bloc in the 1960s and 1970s to force, within the limits of UN systems and given their numerical strength, a new world economic order amid the changes in the monetary and commercial system (Hüfner 1985, p. 349).

2016, p. 2). The best strategy for underdeveloped countries was viewed as import-substitution industrialisation (ISI) rather than an orientation towards trade and export.

The Theory of Dependence played a very important part in the economic model of industrialisation in Latin America, with the substitution of “trade and export orientation” for “import substitution”. This new orientation also arose because of the new economic reality. The purchasing power for goods exported from Latin America to other regions decreased considerably and an economy focused on domestic demand emerged as a possibility for development through economic diversification, the creation of good jobs and social inclusion. This period also marked the increase of social protection legislation for workers (Ferrer, 2006, p. 159-162).

With the economic crisis of the 1970s that ended the post-Second World War golden age and arrived with the end of the Cold War, the world economy resumed the liberalising ideas of the early 20th century. To distinguish this from the developmental period of the second half of the 20th century, a new classification for economies took shape – in which the “emerging economy concept” stands out (Benachenhou, 2013).

According to this classification, emerging countries display increasing economic development but depend on foreign currency and are subject to external problems in other countries. Emerging economies are vulnerable, due to a dependency on capital associated with external economic flow, and import and export rates (Benachenhou, 2013).

Although the distinction between central and peripheral countries in the international economy is a valid classification, the economic liberalisation at the end of the 20th century brought some emerging countries with significant economic and political importance in the new world order to the attention of the international economic arena (Benachenhou, 2013).

The world of today is characterised by economic interdependence: there is a kind of merging between national economies and a globalised economy, making national ones more and more sensitive to external events and policies. Central countries have better economic conditions to operate in this globalised economy, whereas emerging countries are more vulnerable to external crises – and this vulnerability has a direct impact on constitutional stability.

2. Political instability and constitutional instability, and the role of constitutions in the context of its historical development

A constitution is the main document in a political community, with its purpose being to guarantee freedom and equality for all. The historical development of the notion of a constitution first guaranteed the right to freedom and then the right to equality.

With regard to Brazil’s constitutional development, it can be observed that the Brazilian Constitution of 1824 was in force for a lengthy 65 years – making it the country’s longest in-force constitution. This stability resulted from the monarchical form of state. Under this, the related political system, which guaranteed the Emperor so-called “moderating power”, promoted political stability rather than specifically constitutional stability. Although the Constitution was in force for many years, it had mechanisms of constitutional exception (under the guise of moderating power) that removed it from the characteristics of normative constitution. In the 20th century, Brazil’s constitutional development was the opposite of that in the 19th century, being characterised by constant political and constitutional instability. While during the 19th century Brazil had two constitutions, in the 20th it had six (Maliska, 2012).

According to Karl Loewenstein, constitutions can be classified into normative, nominal and semantic types: normative ones are characterised by regulation of the political process, putting the conquest and maintenance of political power under its norms; in nominal constitutions, the factual situation does not allow the complete integration of constitutional norms into the dynamics of political life; finally, semantic constitutions are characterised as mere formalisations of the existing political situation (Loewenstein, 1979, p. 216-222).

With regard to the classification of constitutional instability in emerging economies, the nominal type is the most appropriate. This type of constitution aims to have a normative force, but this does not materialise because the factual situation does not allow it. The factual situation is also the economy of emerging countries. From an external perspective, emerging economies are subject to factors that are beyond the political, economic and institutional reach of the constitutional order. This external fragility has repercussions in relation to constitutional stability, because the volatility of the external market has an impact on the economy's performance, creating social tension that in turn impacts on political life.

From an internal perspective, emerging countries face the challenge of overcoming social and economic problems. Internal social pressure is significant in such countries because tensions surface in an environment of freedom. In such cases, constitutional stability arises because of the impossibility of dealing with social expectations due to the economy's volatility. Constitutions in emerging countries tend to be characterised as lying between the normative and nominal types. In some respects, they meet the criteria for being normative, but from a structural perspective are nominal because especially at the limit of the relation with the economy, they tend to be submitted to it (Farias, 1998).

Constitutional instability is provoked by economic crises generated by the demands of a globalised market and the need to confront internal social and economic problems. In such cases, a constitution can no longer regulate the political process because economic interests tend to prevail in the struggle for power. As Ferdinand Lassalle put it, a constitution becomes nothing more than a "piece of paper" that is subordinated to the real constitution – the so-called "real power factors" (Lassalle, 2000).

The recent economic and political events in Brazil demonstrate clearly how the constitution of this type of emerging country still has little autonomy in the face of economic interests.

3. Analysis of the Brazilian case under the 1988 Constitution

The question of constitutional stability – that is, the regular functioning of the political system according to the Constitution – is a problem when a nation has an unstable economy, relative predictability, subject to good and bad times over short periods.

The social and economic demands of a country such as Brazil, in which a large part of the population lives under conditions of social and economic exclusion, create a tension that the constitutional system has many difficulties in regulating.

The 1988 Constitution increased social spending by the government because it authorised public policies to reduce social inequalities. The Constitution was not the result of consensus, given that in the National Constituent Assembly the most conservative sectors of society refused to share the idea of increasing public spending. This lack of consensus has had consequences for the effectiveness of the Constitution (Maués and Santos, 2008).

In recent years, particularly in the second term of former president Fernando Henrique Cardoso, the government of former president Luiz Inácio Lula da Silva and in the first term of former president Dilma Rousseff, Brazil

seemed to have found a pathway to economic growth through the redistribution of income and opportunities for all cities. However, this period of economic prosperity was interrupted abruptly and the country entered a deep economic crisis from which it has not yet escaped (Salomão and Lima, 2018).

The division of economic thinking between orthodoxy and heterodoxy, and between liberals and developmentalists, has been at the centre of Brazil's economic crisis. The government of former president Dilma Rousseff, with its proposal for a "new economic matrix", aimed to promote a project for economic development in Brazil, entrusting the state to the role of protagonist. But this initiative, supported by so-called developmentalists, could ultimately not sustain itself economically. Liberal economists, who were always critical of this idea, subsequently assumed the economic policy of Michel Temer's government with a liberalising approach. To date, the policies implemented by Temer have not been sufficient to cause the resumption of economic growth and generate jobs. Orthodox economic measures did, however, reduce inflation (Campedelli, 2014).

However, in the context of the subject covered of this paper, I would like to look at the political processes of 2015 and 2016 that culminated in the impeachment of President Dilma Rousseff.

The Brazilian political crisis is complex, because it contains elements that go beyond economic problems. There is, however, a consensus that without the economic crisis, the president would not have been removed from office. The economy therefore played a key part in creating constitutional instability. The impeachment was a demonstration of such instability and of the supremacy of the economy over the constitution, because the arguments used to dismiss the president would never be accepted in times of institutional normalcy. The fragility of the Brazilian constitutional order was thus fully demonstrated in this process (Lutz and Maliska, 2018).

According to Barros (2018), "Brazil had another constitution in 2015-2016, and it was repealed after impeachment". During this period, the political goal of disrupting Dilma Rousseff's mandate was so strong that constitutional rules were suspended so that this aim could be achieved. A comparison of events that occurred in 2015 and 2016 with those in 2017 clearly demonstrates a temporary suspension of the Constitution (Barros, 2018).⁴

The impeachment of 2016 will have some long-lasting effects. As an editorial in the newspaper *Folha de São Paulo* commented at the time of the events, "Impeachment could leave resentments" (Nem Dilma nem Temer, 2016). And left. After 13 years in power, the Workers' Party (Partido dos Trabalhadores – PT) did not accept the way it left power. The Brazilian Social Democracy Party (PSDB) – the main articulator of Dilma Rousseff's fall – saw former presidential candidate Aécio Neves involved in corruption, which lowered public opinion of him. The corruption scandals that hit most of the political parties strengthened extreme positions to the right of the political spectrum that gained force in the elections that year.

⁴ In 2016, for instance, the Federal Supreme Court banned former president Dilma Rousseff from appointing former president Lula da Silva as Minister of State. The Court held that the president's act involved a "misuse of purpose" (*desvio de finalidade*) because its true purpose was to remove the former president from the investigations that were taking place in the case of corruption of Brazilian state oil company Petrobras. The Petrobras case was investigated in the first level of the Federal Court of the city of Curitiba. With the appointment, the former president could no longer be investigated in Curitiba, because the Federal Supreme Court would have original jurisdiction in the case. In 2017, after the impeachment of Rousseff, President Michel Temer named his political ally Moreira Franco as Minister of State. In this case, the Federal Supreme Court held that there was no irregularity in the appointment. Moreira Franco was investigated in the first level of the Federal Court of Rio de Janeiro. In 2016, former President Dilma Rousseff was removed from office on charges of "fiscal pedaling" (use of the public banks Caixa Econômica Federal and Banco do Brasil for financing social service programmes without official registration of these operations). In 2017, two requests from the Attorney General to prosecute President Michel Temer were not accepted by the Chamber of Deputies.

It is perhaps possible to affirm that constitutional normality is not completely restored in Brazil. Although former president Lula da Silva led the presidential race, Brazilian courts have refused to accept that he could be a candidate. The UN Human Rights Committee has recommended that the Brazilian state must guarantee the exercise of all political rights to the former president. The subject is highly controversial, but a criticism that can be made about the procedure of the Brazilian judiciary relates to the particular way in which it has dealt with the “Lula case”. In law, the justice of a decision is linked to equality of treatment, and if there is rigorous treatment for all, such rigour is not understood as unfair. However, this does not seem to be the case in Brazil. The judiciary will be able to demonstrate in the near future that the rigour with which the former president is being treated will be applied to all politicians, and that a new era of judicial treatment for misappropriation of public resources will be implemented in the country. The problem is that there is no consensus within the judiciary itself on the procedures that were used for the conviction of the former president, such as: (i) the jurisdiction of the court that is judging cases regarding potential irregularities in contracts signed between Brazilian state petroleum company Petrobras and other companies, and that expressly denied that the former president gained undue advantages from Petrobras contracts; (ii) the inexistence of an *ex officio* act of the former president in exchange for alleged improper advantages; (iii) a lack of evidence that the alleged apartment is owned by the former president; (iv) the use of plea deals for the cooperation of defendants arrested preventively. These issues turn judgments about the former president into a highly controversial case that promotes deep instability in the political system. The Brazilian judiciary faces the difficult choice of: (i) applying the procedures used with respect to the former president to other cases of corruption; (ii) reviewing the procedures used in the case of the former president; or (iii) not applying these procedures to other cases. Any of the three paths will have consequences for Brazilian constitutional stability.

The current situation in the world is very delicate with regard to democracy. There is a crisis in democratic institutions, largely due to the economic problems that followed the 2008 crisis. A political regime of freedom must guarantee economic freedom, but it must also seek the social well-being of citizens. Without fundamental social rights, the constitutional regime does not hold.⁵

According to Levitsky and Ziblatt (2008), democratic stability depends on “guardrails”. The way the Brazilian economic crisis has been treated politically has consequences that are still unpredictable. The protagonism of conservative ideas in Brazil is worrisome, given that these are connected to a conservative international movement, observable in several countries, that seeks to present other potential pathways in subjects such as human rights, minority rights and the relationship between politics and religion. The constitutional instability generated by the economic crisis is out of control.

Conclusion

The economy has always been an important factor in constitutional stability, and it is hard to imagine that a country can be politically stable with an unstable economy. The constitutional stability that is at issue here is democratic stability, in which a constitution fulfils the role of ordering the interests of a free and plural society. Outside this spectrum, it is possible to have constitutional stability even with economic instability. But in such cases, one would not be dealing with constitutional democracy, but with authoritarian regimes that have constitutions only in the semantic sense.

The Brazilian case analysed in this paper clearly demonstrates the country’s constitutional instability. Its difficulties in regulating the interests at stake means that the constitutional political system always ends up succumbing to hegemonic economic interests. Brazilian constitutional history clearly demonstrates this. The

⁵ Among the main results of his research on the economic data of 20 countries in the last 200 years, Piketty (2014, p. 27) maintains that “one should always be wary of any argument deriving from economic determinism when it comes to the distribution of wealth and income. The history of the distribution of wealth has never ceased to be deeply political, which precludes its restriction to purely economic mechanisms”.

diagnosis that Brazil had another constitution in 2015-2016 has serious implications, showing that the interpretation of the Constitution for similar cases was treated completely differently with the goal of achieving political objectives. The aim of this seems to have been undoubtedly about the instrumentalisation of the judiciary for political purposes, an action that removes the status of independent and impartial power from the judiciary.

The fragile Brazilian democracy provokes the fragility of institutions and of the Constitution. If in recent years it was thought that it would be possible to move forward democratically with the affirmation of rights expressed in the Constitution, the current reality shows that the constitutional order itself is in danger. A purely normative discourse of the Constitution is insufficient, and it is necessary to rescue the politics.

References

- Barros, C. R. de (2018) O Brasil e a Recessão Democrática. Como o Cenário Político Global Ajuda a Entender a Nossa Crise – e Vice-Versa. In. *Revista Piauí*. Vol. 139.
- Benachenhou, A. (2013) *Países emergentes*. Brasília: Funag.
- Campedelli, André Luis (2014) *O Regime de Metas de Inflação: o Debate entre Ortodoxos e Heterodoxos*. Master's Dissertation in Political Economy. São Paulo. Pontifical Catholic University.
- Nem Dilma nem Temer (2016) Folha de São Paulo Editorial.
- Farias, E. (1998) Direitos Fundamentais e Políticas Neoliberais. In. *Revista da Faculdade de Direito da UFPR*. Curitiba, y. 30, nº 30.
- Ferrer, A. (2006). *A Economia Argentina: De suas origens ao início do século XXI*. Rio de Janeiro: Elsevier.
- Hüfner, K. (1985) Die Vereinten Nationen als Forum der Dritten Welt. In Nuscheler, F. (ed.) *Dritte Welt-Forschung. Entwicklungstheorie und Entwicklungspolitik*. Opladen: Westdeutscher Verlag.
- Lassalle, F. (2000) *A Essência da Constituição*. Rio de Janeiro: Lumen Juris.
- Levitsky, S. and Ziblatt, D. (2018) *Como as democracias morrem*. Rio de Janeiro: Zahar.
- Loewenstein, K. (1979) *Teoría de la Constitución*. Barcelona: Ariel.
- Lutz, M. L. S. and Maliska, M. A. (2018) O Impeachment de Dilma – Estudo de Caso: Recall, Voto de Desconfiança ou Presidencialismo de Coalizão? In. *Direito e Justiça: Reflexões Sociojurídicas*, v. 18.
- Maliska, M. A. (2012) Brazilian Constitutional History. In. *Education and Science without Borders journal*, v. 6, p. 30-35.
- Maués, A. G. M. and Santos, É. L. de. (2008) Estabilidade Constitucional e Acordos Constitucionais: os Processos Constituintes de Brasil (1987-1988) e Espanha (1977-1978). In. *Revista Direito GV*. São Paulo, nº 4 (2).
- Piketty, T. (2014) *O Capital no Século XXI*. Rio de Janeiro: Intrínseca.
- Rahman, M. (2016) *Dependency Theory. Poverty: Concepts, Strategies and Development*. Available at: www.academia.edu/27237852/Dependency_Theory
- Salomão, A. and Lima, F. (2018) Análise de crises passadas indica que Brasil vive pior retomada da história. In. *Jornal Folha de São Paulo*. Available at: <https://www1.folha.uol.com.br/mercado/2018/05/analise-de-criises-passadas-indica-que-brasil-vive-pior-retomada-da-historia.shtml>
- Schmitt, C. (1995) Die Ordnung der Welt nach dem Zweiten Weltkrieg. In. *Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916-1969*. Berlin: Duncker & Humblot.

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