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The Rule of Law in Brazil

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I. Introduction

The rule of law was originally associated with the liberal state, for it represented the consolidation of a new emerging class, the bourgeoisie, against the privileged estates of the Ancien Régime *(Novelino 357).*

Subsequently, the concepts of welfare and democratic state were associated with the rule of law in order to adapt it to new historical and social realities.

Concerning the democratic state, Celso Ribeiro Bastos explains that "political movements in the late 19th, early 20th century, transformed the old and formal rule of law into a democratic state, where beyond the mere obedience to the law there should be a submission to the will of the people and the purposes proposed by the citizens" (Ribeiro Bastos 157).

Regardless of whether social or democratic, the rule of law is built upon three cornerstones: legality, the division of powers and fundamental rights, and judicial review.

However, "distorted notions" (Silva 117) of the concept of rule of law may exist, if it is understood only from a formal point of view. A "formal rule of law" may also serve absolute and dictatorial interests if its only limitation stems from the law, regardless of whether the legislative power has acted independently in its elaboration. In this case, a formal prediction of fundamental rights in the constitution may even exist, even though the fundamental rights

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are not respected and guaranteed in practice by the absolutist or dictatorial state.

The principle of separation of powers, even if it is provided by the constitution, may equally be disobeyed in reality, because usually in dictatorial regimes there is a strengthening of the pronounced intervention of the executive over the two other powers.

In this sense, one can say that in the history of Brazilian constitutional law there was, in the Constitutions of 1824, 1937 and 1967 and in the constitutional amendment of 1969, a distortion of the concept of rule of law, by virtue of an absolutist regime, in the case of the first constitution, and by virtue of a dictatorial regime, in the case of the last two ones. Although these constitutions legitimized non-democratic regimes, they manifested, also from the formal point of view, liberal or social characteristics in their texts.

According to most Brazilian legal scholars (e.g. José Afonso da Silva, Paulo Bonavides, Marcelo Novelino) the rule of law must always be based on democracy. Joaquim José Gomes Canotilho, a renowned Portuguese constitutional theoretician, teaches in this regard:

> *The constitutional State also answers other requirements not fully met by the liberal-formal conception of rule of law. It has to structure itself as a democratic state founded on the rule of law, that is, as a domain order legitimized by the people. Therefore, the articulation of law and power in the constitutional state means that state's power should be organized and exercised in democratic terms.*

Based on this assumption, we intend to address in the present paper the rule of law in the historical evolution of constitutionalism at national level, identifying how it was handled by each constitution.

II. Background of the Rule of Law in Brazilian Constitutionalism

After the independence from Portugal a constituent assembly was set up in Brazil. However, unable to reconcile its liberal ideals with the interests of the Emperor Pedro I, the Constituent Assembly of 1823 was dissolved by him. The following year the Emperor imposed on the country the first constitution of Brazil. With the creation of the moderating ("neutral") power, the Constitution of 1824 vested the monarch with the competence to intervene in the other three powers in order to resolve any incompatibility between them. This has been named a "constitutionalization of absolutism" (Bonavides 96).

Thus, despite having been influenced by the French Constitution of 1791 with respect to fundamental rights, the first constitution of Brazil was characterized by a centralizing and authoritarian political power exercised by an absolutist monarch. Accordingly, the liberal ideology,

that was formally introduced into that constitution, remained restricted to matters relating to fundamental rights. There is no doubt that the prediction of such rights has influenced the bills of rights of the following constitutions.

In the Constitution of 1824 the idea of rule of law was present only in its formal sense, because besides the prevalence of the moderating power over the other branches, the constitutional text itself was not compatible with the economic and social reality of the time. Such contradiction becomes evident, for instance, in the constitutional provision of right to liberty while the economy of the country was driven by slavery. Despite the claim of being a liberal constitution, there was actually no rule of law. Accordingly, we can affirm that there was a "deformation" of the rule of law.

The second Brazilian constitution, promulgated in 1891, was inspired by the U.S. Constitution of 1787. The balance of power shifted from a strong, centralized unitary system to a federal one. The first republican constitution of the country contained the main fundamental rights of liberal ideology, namely the right to liberty, security, property and equality before the law, and like the previous one, it did not provide for social rights. The moderating power was dissolved and the division of powers was then reestablished in accordance with the classical theory of Montesquieu. The Supreme Federal Court was created pursuant to the model of the U.S. Supreme Court, an institution with the ability to declare the unconstitutionality of the acts of political power (Bonavides *Curso de Direito Constitucional* 365). The English conception of "rule of law", a state limited by law, was therefore established in Brazilian legal system, i.e. the idea that the ruler is above the law was consequently abandoned.

As for the exercise of the right to vote, the first paragraph of Article 70 limited the universal suffrage to male citizens (with exceptions, such as illiterates, beggars and members of monastic orders). Furthermore, the death penalty was abolished, and the constitution of 1891 was the first one to include the rule of *habeas corpus*. Likewise, the rights to inviolability of domicile, legal defense and the individualization of punishment were comprised by the constitutional text.

These fundamental guarantees were maintained in the next Constitution of 1934. In the title referring to individual rights and guarantees the right to property was restricted to the collective interest. Furthermore, the writ of mandamus was inscribed under article 113, paragraph 33.

Yet, innovation resulted from the prediction of social rights. Under German influence (Weimar Constitution of 1919) the Constitutional

Charter of 1934 opened the country to the idea of welfare state based on the rule of law. Under the titles "The Economic and Social Order" and "Family, Education and Culture" the constitution promulgated in 1934 was imbued with a conception that state intervenes in economy and other sectors of society to ensure its citizens that equality should not be only formal. In this sense, the constitution provided workers with extensive rights, predicted the right to education for all Brazilians and foreigners domiciled in the country as well as family assistance. Despite the provision of women's suffrage (Article 108 Constitution of 1934), the right to vote was not, however, universal, since it was not extended to illiterates and beggars (Article 108, sole paragraph Constitution of 1934).

Three years after the promulgation of the Constitution of 1934, a *coup d'état* for President Getúlio Vargas' maintenance in power resulted in the granting of a new constitution: the Constitution of 1937. The new document was called "Polaca (Polish) Constitution" because it was inspired by the Polish April Constitution of 1935 (Bonavides 339). Of authoritarian and anti-democratic character that centralized power into the political head of the executive branch, the constitution limited the actions of legislative and judiciary. There was no provision for the election of the executive offices and there was indirect election to the legislative.

Despite the provisions for individual and social rights, the exercise of individual rights was restricted due to predictions on censorship of the press, capital punishment and prohibition to form political parties. Furthermore, the freedom of expression was conditioned by the limits imposed by law. The writ of mandamus was also excluded from the list of individual guarantees. Given such dictatorial aspects we can again state that the constitutional history of Brazil shows a deforming conception of the rule of law in different periods.

With the entry of Brazil in the Second World War on the Allied side, the government of President Getúlio Vargas went into crisis. It was a paradoxical to fight against Nazi-Fascism abroad while the country was still under an authoritarian constitution. As a consequence another constitutional charter was enacted in 1946. It brought back democracy to the country and the plurality of political parties became guaranteed by the constitution (Article 141 paragraph 13 Constitution of 1946).

Still, the illiterate together with those who could not express themselves in the national language and those who were deprived of political rights could not enlist as voters (Article 132 Constitution of 1946).

The Constitution of 1946, in its declaration of rights, tried to reconcile the individual rights of liberal thought with the guarantees which

promote the well being of community, again bringing up the idea of a welfare state based on the rule of law (Bonavides 414).

The state's power was constitutionally limited by individual rights, e.g. any breach of an individual right was under judicial control (Article 141, paragraph 4 Constitution of 1946) and any form of exceptional tribunal was forbidden (Article 141, paragraph 26 Constitution of 1946). The right to expression of thought became free of censorship, except when relating to public spectacles and entertainment (Art. 141, paragraph 5 Constitution of 1946), the institution of writ of mandamus was again foreseen (Article 141, paragraph 24 Constitution of 1946) and perpetual arrests and capital punishment were prohibited (Art. 141, paragraph 31 Constitution of 1946). As for social rights the right to education, culture and work that "allows dignified existence" (Article 145, paragraph one Constitution of 1946) were provided to all. With regard to the rights of workers, the novelty was the recognition of the right to strike (Article 158 Constitution of 1946).

Years later, in 1964, Brazil suffered again a *coup* that came to install the military dictatorship that lasted over twenty years. In order to legitimize the government a new constitution was granted in 1967. With authoritarian provisions, the Constitution of 1967 strengthened the executive over the legislative and the judicial branches.

Article 76 introduced indirect elections to the presidential office. For the offices belonging to the legislative direct and secret voting was established (Articles 41 and 43 Constitution of 1967).

Although the Constitution of 1967 contains a chapter on fundamental rights and guarantees throughout the dictatorship, rules were created, called "institutional acts", which, besides providing for the election process and the organization of powers, suspended fundamental rights under the constitution. All these institutional acts were excluded from judicial review. For instance, the suspension of political rights and *habeas corpus*, and the change of electoral process occurred according to such acts.

In 1969 a Constitutional Amendment, which amended the Constitution of 1967, was bestowed by the military regime. It comprised the institutional acts enacted by the executive branch.

Thus, it can be concluded that in practice the idea of the rule of law, i.e., the idea of a state bound by law and individual rights was absent during the years of military dictatorship.

In 1984 a process of resumption of democracy initiated in the country. The convening of a constituent assembly, which came to pass in 1988 the current Brazilian constitution, was a result of that process.

From this point on, we can speak of a democratic state founded on the rule of law.

III. The Rule of Law in the Federal Constitution of 1988

Article 1 of the Constitution of 1988 states that the Federative Republic of Brazil is a democratic state founded on the rule of law. José Afonso da Silva considers that in the expression of "democratic state of law", the "democratic" characterizes the state that radiates the values of democracy over all its constitutive elements and therefore also over the entire legal order (Silva 123). Paragraph 1, Article 1 Constitution of 1988 provides the principle of popular sovereignty. The legitimation of the exercise of power emanates from the people directly or through the election of political representatives.

Moreover, political pluralism, introduced as one of the foundations of the Federative Republic of Brazil, ensures the diversity of ideas and opinions, allowing the free creation of political parties and the multiparty system (Article 17, *caput* Constitution of 1988), which are rights that did not exist under the previous regime. The chapter dealing with political rights also introduced universal suffrage, direct and secret, and the plebiscite, *referendum* and popular initiative (Novelino 364).

The principles of legality and separation of powers, both inherent to the concept of rule of law, are also treated as basic principles in a democratic state. The first guarantees the exercise of popular sovereignty, insofar as it prevents the exercise of arbitrary power by rulers, and the second establishes the organization of political power, where no power overlaps the other, as it happened during the dictatorial period when there was a strengthening of the executive over the other political branches.

The Constitution of 1988 established a state based on law and separation of powers (Article 2). It also stipulates the non-exclusion of review by the judiciary of injury or threat to a right (Article 5, XXXV (principle of judicial review), the due process of law (Article 5, LIV), that no one will be forced to do or refrain from doing something except by virtue of law (Article 5, II). It also prescribes legal security by protecting the institutes of vested right, the *res judicata* and the perfect legal act (Art. 5, XXXVI), and that there is no crime without a previous law which defines it, nor a punishment without prior legal sanction (Article 5, XXXIX).

Another feature of the Brazilian democratic state is the legislative concern with the effectiveness and material dimension of human rights. In the Constitution of 1988 individual, collective and social rights are

listed extensively in the title concerning fundamental rights and guarantees.

As inviolable rights Article 5 determines the rights to life, liberty, equality, security and property, the latter should meet its social function. In terms of constitutional process the collective writ of mandamus, the writ of injunction and *habeas data* were stipulated. The principle of human dignity appears in Article 1, III and disseminates throughout Article 5, with the prescriptions of the rights to privacy, honor, image, the inviolability of domicile, freedom of expression, and the classification of crimes of racism and torture as non-bailable.

Article 6 provides, as social rights, education, health, work, housing, leisure, security, social security, protection of motherhood and childhood and assistance to the destitute. Right after this, in Article 7, there follows a broad prediction of labor rights, such as unemployment insurance, severance-pay fund and paid weekly leave. Article 8 establishes free professional or union association.

According to the constitutional charter, the principle of equality comprises no longer the formal equality of the liberal state only, for the construction of a free, fair, national development, the eradication of poverty and reduction of social and regional inequalities are provided as fundamental objectives of the Brazilian state (Article 3).

Therefore, the Brazilian Constitution of 1988 is an example of a welfare state constitution, founded on the Weimar Constitution of 1919 – which has influenced the Brazilian constitutionalism from the elaboration of the Constitution of 1934 on in relation to the provision of social rights – and the Basic Law of 1949.

Brazil is thus a social State based on the rule of law and legitimized by the people, who exercise democratic power.

IV. Assessment

In the Constitutions of 1824 and 1891, the concept of rule of law was linked to liberal thought. The Constitution of 1934, by providing social rights, which were ignored by the previous constitutions, initiated in Brazilian constitutionalism a new way to provide for fundamental rights. Concerning the Constitutions of 1934, 1937, 1946, 1967/1969 and 1988, we can then speak of a social state founded on the rule of law.

However, in the Constitutions of 1824, 1937 and 1967/69, there was actually a distorted conception of the rule of law, since, although in theory there was a legal limitation of political power, in practice the basic principles that compound the rule of law – the separation of powers, legality and fundamental rights – were not respected.

With regard to popular participation in the exercise of power, the Constitutions of 1934 and 1946 only tended to a democratic system, since the vote was not in fact universal.

The Constitution of 1988, currently in force, reaffirmed the principle of popular sovereignty inherent to a democratic state. In contrast to the democratic constitutions mentioned above, it is absolutely clear about the principles and rights comprised by the rule of law.

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