

Reflections about the rules of the impeachment and its impacts on democracy: Brazil, United States of America and England in comparative perspective

Reflexões sobre as regras do impedimento e seus impactos sobre a democracia: Brasil, Estados Unidos e Inglaterra em perspectiva comparada

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ABSTRACT This article aims to analyze the extent to which the institutional framework relative to the prosecution process and trial for crimes of responsibility facilitated the impeachment of Dilma Rousseff. In this regard, the development trajectory of the rules of the impeachment and their impacts on the Executive/Legislative relations in Brazil, the United States of America and England are compared. It is concluded that the combination of a law with a broad and flexible list about crimes of responsibility, a fragmented party system and the absence of a consistent position of the Supreme Federal Court about the issue produce a political-institutional framework that undermines the President of the Republic in front of the Congress and mischaracterizes presidentialism.

KEYWORDS Government. Legislative. Executive. Judiciary.

RESUMO Este ensaio busca analisar em que medida o arcabouço institucional brasileiro relativo ao processo de acusação e julgamento por crimes de responsabilidade facilitou o impedimento de Dilma Rousseff. Para isto, compara-se a trajetória de desenvolvimento das regras do impedimento e seus impactos sobre as relações Executivo/Legislativo no Brasil, nos Estados Unidos e na Inglaterra. Conclui-se que a combinação entre uma lei com um amplo e flexível rol de crimes de responsabilidade, um sistema partidário fragmentado e a ausência de posicionamento consistente do Supremo Tribunal Federal sobre o tema produzem um quadro político-institucional que fragiliza o Presidente da República frente ao Congresso e descaracteriza o presidencialismo.

PALAVRAS-CHAVE Governo. Poder legislativo. Poder executivo. Poder judiciário.

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Introduction

The speed and intensity that marked the political process that culminated in the interruption of the second term of Dilma Rousseff, and its replacement by the Vice president, Michel Temer, provided space for the emergence of a debate about the solidity of the Brazilian political institutions.

On the one hand, political analysts drew attention to the high levels of convergence observed in the speeches and decisions of a set of national institutions of the three Branches of Power, including the legislative houses, the Federal Supreme Court, the Public Federal Ministry and the Federal Court of Auditors, among others (AVRITZER, 2016; SANTOS, 2016).

On the other hand, the accusation arguments were widely questioned, including through organs such as the National Treasury Secretariat (STN), and there was a significant mobilization of social movements and unions in the organization of acts contrary to the impediment (or impeachment). Moreover, at no time there were quotes about Dilma Rousseff in the investigations of corruption conducted by the Federal Police, and international public opinion, expressed in media vehicles, for example, constantly manifested her distrust about the real motivations of the impediment process (NOBREGA, 2016).

Therefore, it seems not to have been exclusively the voice of the streets, not even the performance of organized civil society in the face of the certainty of an administrative crime, that consummated the impediment, but essentially the party-political articulation of the center-right – read Brazilian Social Democracy Party (PSDB)/Brazilian Democratic Movement Party (PMDB), plus pendular parties –, coupled with a limited and questionable, but precise and effective, convergence of specific institutional positions. The advance of the economic and fiscal crisis associated with the media campaigns of unison and explicit attack on the Workers

Party (PT) signaled to the PMDB and the other pendular parties that their chances of success in the local elections of 2016, and national elections of 2018, would be greater outside of the support base of the government.

In a presidential system, this framework should not lead to the replacement of the Chief of Executive, something that occurs only by direct elections, periodically. Therefore, how to explain that there has been no significant point of institutional veto, throughout the process of impediment, capable of producing significant spaces of resistance of the Dilma government and its allies? Are the present rules of the process of impediment inadequate and insufficient, from the point of view of safeguard mechanisms, which should guarantee ample defense and the contradictory? Are we facing national institutions permeable to momentary consensuses, between the party-political elite and leaders of the civil servants capable of disfiguring the dynamics of presidentialism? If so, what possible impacts can this institutional configuration have on the balance of relations between the Powers and the legitimacy of electoral processes in Brazil, essential foundations of democratic regimes?

This article searches for answers to these questions by analyzing the trajectory of the rules that regulate the processes of impediment and their relations with the balance between the Powers, from the perspective of the Historical Neo-institutionalism (NIH), comparing the English, American and Brazilian cases.

The approach of the NIH: institutions as reactive complexes of rules in power struggles of long-term

The role of institutions, such as the rules that regulate the game among actors in a political system, has been increasingly emphasized in the field of political science as a factor of

understanding the behavior and interaction dynamics between political and economic actors. The study of the emergence and development of the 'rules of the game' as an explanatory variable for social and political phenomena acquired special emphasis in historical-institutionalist studies, due to the dissatisfaction of some theorists in the 1970s, with the pluralist and structural-functionalists references as emphasis to the study of politics, and with the rational choice approach to the analysis of public policies.

Hall and Taylor (2003) argue that historical institutionalists, while agreeing with pluralists about the fact that an expressive part of political dynamics could be explained by competition between groups, by the appropriation of resources and spaces of power, do not attribute, to this variable, sufficient explanatory capacity to accomplish the differentiated and unique situations found in each country. Specific situations characterized by the distribution of power and resources as varied as possible can only be explained, in this logic, from the patterns of configuration of local institutions, which produce differentials in the distribution of decision-making capacity in favor of specific interests.

The historical institutionalists share with structuralists and functionalists the perception that there is a certain systemic organicity between the institutions that make up a political or economic system, but they disagree with the former about the determination of institutional dynamics by the socioeconomic characteristics of the context, and the latter, that attribute responsibility to functional requirements.

In the NIH approach, institutions are the major framework that demarcate regimes of access and exercise of power in a political or economic system and, therefore, act as contexts for shaping political strategies, establishing a range of options with singular configurations, that inform which

courses of action will have a greater chance of success at specific moments in history, considering the interests of a particular political actor. The institutions consist of the complex structures, laws, rules, regulations, norms, protocols and conventions of a formal nature that establish and delimit a set of prerogatives and responsibilities of the various actors that are members of a political community, such as those existing between the Powers of the Republic, levels of government, labor unions and employers, government and social movements, among others.

Therefore, the institutions form political spaces with selective capacities, which can both stimulate interests and amplify political projects of specific groups and provide barriers to their realization (HATTAM, 1992). An institution, be it the federal constitution, a forum, a complementary law, a decision-making regulation or federative regimes, has singular characteristics, intentional or not, that favor or hinder the expansion of specific political interests (IMMERGUT, 1992). Therefore, the institutions of a political community materialize spaces of mediation and updating of political relations, sufficient enough to propagate for a considerable period the power pact that originated them, by means of operational mechanisms that confer to these institutions certain political, legal, organizational and financial (HACKER, 1998).

The creation of a new institution, in general, contains contingent influences related to a broad spectrum of factors, such as the general scope of the political system (especially, the configuration of other existing institutions already related to the theme), the interests of power groups, the strength of prevailing ideological doctrines and the moment it was created, among others (IMMERGUT; ANDERSON, 2008).

Because it is connected to a wide range of factors, an institution interferes in the dynamics of various parts of the political

system, directly and indirectly, which gives it some inertial capacity for development, considering the risks brought about by a transformation. Thus, the institutions related to a specific issue of the political system – for example, the division of powers – may have, and usually have, unplanned consequences, a priori unintentional, about the political dynamics of public policies, such as those related to the definition of characteristics of a social protection system of a country (IMMERGUT, 1992).

This approach provides a perspective of understanding of the development of institutions, that emphasizes the nature of the choices made at unique moments in history and the legacy they project to future political and economic relations. In the conception of historical institutionalists, the opportunities for making choices that promote significant changes in the characteristics of institutions are rare, while their effects persist over a long period, forming trajectories of expressive stability, in which are recorded more incremental improvements than substantive changes.

These opportunities occur only at expressive moments of structural transformation of the society, denominated ‘critical conjunctures’, within which it is possible, for the most expressive political actors, to produce decisions that reduce the range of options of subsequent choices, leading to the formation of patterns that shape the governance dynamics of politics and make their trajectory linked to the initial momentum. A critical conjuncture consists of a special moment in history, triggered by external crises and/or a change in the correlation of forces, in which the trajectory of an institution can assume divergent orientations and the choices of the main actors involved acquire greater capacity of transformation about the trajectory above. At this point, opportunities and risks become amplified, and decisions and choices, even the smallest ones, are crucial and can leave

legacies difficult to reverse.

The fundamental characteristic of a critical conjuncture is the formation of a circumstance in which there are real possibilities of expressive changes (in the political framework, in the economic system, in the social protection regime etc.), due to the change in the correlation of political forces. The results of this conjuncture can be many, ranging from expressive and radical changes even to the resurgence of the current rules. Thus, the essential of a critical conjuncture is the opening of alternative routes with equal possibilities of occurrence, without it being possible to know, initially, which of these routes will prevail.

The legacy of transformations resulting from the choices and decisions made in a critical conjuncture is projected over a considerable period, in the form known in the literature, as a path dependence. The concept originates from studies of the economics of innovation, and the essential idea appropriated by the NIH is that the introduction of a technology in the market is related to a number of different factors (individual initiative, choices, contingencies etc.). However, once a certain trajectory is assumed, it blocks the other alternatives, since the relevant actors begin to adjust their strategies to conform to the new standard, and the costs of change become very high over time (DAVID, 1985; ARTHUR, 1989).

In the field of politics, Pierson (2000) argues that the dynamics of a dependency trajectory is based on institutional mechanisms of self-reproduction, capable of blocking, in large part, the action of actors who press for changes in the opposite direction. Moreover, such institutional mechanisms aim at introducing a logic of conformation in the political behavior of the actors, if they can pursue more efficient and desirable objectives, from the point of view of institutional consolidation, both in the short and the long term, if they are certain options from their menu of choices (PIERSON, 2000; MAHONEY, 2000).

Therefore, the sequences of self-reinforcement are therefore perpetuated because, in addition to having a cost estimate and benefits of actors, and the systemic role that an institution exercises, there are expressive elites that support them economically and politically, and the actors linked to them believe that their existence is morally just and appropriate (MAHONEY, 2000).

Page (2006) argues that this type of sequence of political events is produced by an articulated set of choices of distinct types, but that induce a single line of direction in the reproduction of a legacy. The existence of increasing returns means that, the more a choice is made or a course of action is taken by a larger set of people, the greater will be the benefits from them over time. A self-sustaining logic means that, once you have made the choices, there are a set of complementary forces or institutions that encourage and sustain this choice.

This logic, that establishes an inertial tendency in institutions, can produce, moreover, 'unintended consequences' in the long run, since these, when perpetuated, interact with different institutional orders, that conform to political, economic and cultural factors that occur in a country. This occurs because, even very intense and comprehensive critical situations, which may have an impact on a large part of a country's institutions, such as revolutions or constituencies, do not promote the complete replacement of the institutional framework.

In the same way, a new institutional order can bring, by dragging and under various conditions and circumstances, laws, regulations and administrative structures, among others, belonging to the old order. The conviviality between institutions of diverse times and purposes is, therefore, a characteristic of the dynamics of political systems and, moreover, may become the driving force of expressive transformations in the political game between actors with divergent interests. The coexistence of institutions created

at different historical moments can create unusual opportunities for certain actors, expanding their range of political action and the possibilities of success of their strategies, leading to significant changes in the correlation of forces of the political system.

Thus, even if that a particular institution has not been created specifically for a particular purpose, it may be used by new actors to produce originally unintended consequences, since its configuration is flexible for such an end (THELEN; STEINMO, 1992). Likewise, an institution created for a particular purpose in a specific institutional order, even if it has been emptied or lost its potential by virtue of the emergence of a new distinct order, can be reactivated by certain political groups, as long as they see in this movement an opportunity to expand its power space and strategic resource control.

The intensity with which institutions of the old order can be reactivated and adapted depends on a wide range of factors, such as the usefulness of this institution for the project of power of the groups that intend to reactivate it, the permanence of other institutions of the old order that be functional to it, the presence of institutions of the new order that can generate complementarity, the flexibility with which the institution can be successfully utilized in the new context and how the new institutional order imposes explicit barriers to its reactivation (CORTELL; PETERSON, 2001; MAHONEY; THELEN, 2010).

In this sense, the impediment, as a dispositive that has interacted with various political and legal orders in the last seven centuries, has become an institution that has so much influenced the reconfiguration of political systems as it has been shaped and adapted with different configurations to meet specific political objectives of the national political elites. In the present article, these situations were illustrated by comparing the Brazilian model with that of the England and the United States, classic cases of parliamentary and presidential systems, respectively.

The rules of impediment: institutional learning versus historical corrosion of presidentialism

The english case: the parliamentary route

The impeachment, in its original form, utilized in the United Kingdom between the 14th and 19th centuries, consisted of an institutional mechanism aimed at protecting the State and the public administration from commissive and fraudulent practices of crime of responsibility of managers of the thing public and political, among other authorities, and is, therefore, a procedure of criminal nature.

Instituted, in general, at the request of the House of Commons, the impeachment process was conducted and tried in the House of Lords, and could result in severe penalties, such as loss of goods and property, deprivation of liberty and exile, or even death row. In this format, it aimed, exclusively, at correcting and punishing the bad conduct of public agents and protecting the treasury, with the direct effect of dismissing the official of the position in which he was invested. Thus, although it affected the context of the relationship between the king, the nobility, the clergy (lords) and the representatives of counties and municipalities (the common ones), it had not political character, since it did not cover the prerogative to appreciate or judge the quality of the royal cabinet as a whole, much less, depose it.

However, gradually, in the process of transition to modernity, with the expansion of the power of the nobility and, especially, of the bourgeoisie towards kings, the impeachment began to be utilized to politically reach the real ministry, since it did not fulfill the pretensions of the groups installed in the two houses of parliament (House of Lords and

House of Commons). Its use, over time, came to have more and more, as targets, prominent politicians in the kingdom, being used, in several cases, as an imperfect and limited mechanism of political dispute in relations with the royal cabinet, to the extent that it reached only specific points of the ministry, personalizing the clashes and leading to expressive periods of political crisis, due to the long judgments in the House of Lords (HALLAM, 1850).

The same way, in this format, as a criminal statute, the impeachment opened margins to escalations of personal vengeance and political sabotage movements of various natures, between rival groups, leading to conjunctures of political and institutional instability. Such a mechanism, therefore, was not intended to be an institution aimed at structuring relations of power between the king, the nobility and the emerging bourgeoisie. On the contrary, it could aggravate the existing difficulties of governance.

In the context of absolutist state, where all powers were concentrated in the figure of the king, the *status* of the impeachment was adapted by the modernizing forces – in particular, by the emerging bourgeoisie – as a mechanism of pressure on the royal cabinet, allowing some displacement of power towards the houses of representation.

After the Glorious Revolution, in 1688, and the establishment of the parliamentarianism as a system of government, the formation of the government office began to reflect the composition of parliamentary forces. Therefore, the *status* of the impeachment was less and less utilized, until it was extinguished in the early 19th century, the same occurring in other parliamentary monarchies. In the parliamentarian logic, the change of Executive cabinet and ministerial policy occurs whenever there is a change in the composition of forces in the parliament, being an automatic and institutionalized movement

between the political forces, reducing the prolongation of crises and impasses in the relations between the Executive and the Legislative.

In this case, institutional learning can be considered along the historical trajectory in which the *status* of impeachment – inadequate to deal with the complexity of relations between the Powers – has given way to a more sophisticated set of institutions capable of producing better results in terms of institutional security and governability, centered on the statute of the parliament's confidence or censure motion.

The american case: the strong presidentialism

In the contemporary period, the impeachment was also incorporated by presidential regimes, notably in the american case, in which its incorporation occurred as a political statute, and no more criminal, with its use being inserted and regulated in the scope of the relations between the Executive and the Legislative, as part of the set of institutional mechanisms of breaks and counterbalances.

The impeachment was adopted in the 18th century, in the context of the process of independence against England, first in the constitution of the State of Virginia, in 1776 – where the episode of the Tea Party took place (Boston Tea Party) –, and then immediately in the USA Constitution itself, in 1787. And that being a time when the statute of impeachment was out of use in England, what reasons could lead the american political elite to reactivate an old institution? Probably the need to create an institutional engineering that could combine the presence of a central power capable of unifying the colonies (states), avoiding the recapture of some by the metropolis, and mobilizing the economic resources for the development of the country, with the preservation of the autonomy. The country's short driving

experience, from a confederate model in the post-independence decade, showed the limits that the absence of strong central instances could impose on american claims to consolidate its independence and expand its influence internationally.

The national government of the confederation established at the II Continental Congress, in 1777, had power to deal with more general matters, such as declaring war and establishing international diplomatic relations, but had no tax prerogatives, regulating trade or deploying federal administrative structures in the states. With no power to levy taxes and conduct nation-wide trade policies, the confederate government became unable to provide answers to the challenges of the economic recession of the period, being considered inadequate.

In this sense, the intention of the american legislators in the Constitution of 1787, was to establish a central power that would allow the unified conduct of the great questions related to the economy and the security of the country, which should be directly legitimized by the popular will. Political union was, in the political vision of the founders, the essential condition for guaranteeing independence and economic and cultural progress, as it would reinforce the nationalist feeling of sharing a destiny, as well as allowing a unified management of trade, taxation, military etc. (MADINSON; HAMILTON; JAY, 1840).

In that context, the adoption of presidentialism as a system of government, sustained on the principle of separation of powers and circumscribed by a charter of rights, has allowed the formation of national political bodies with sufficient centrality to unite the country politically and economically, which protected the autonomy of states and set limits to the power of the State over citizens. However, bearing in mind the monarchist and centralizing past of the english tradition, additional mechanisms

of limitation of central power, such as the statute of impeachment, have been added to prevent extreme cases of attempts at usurpation of power by politicians and civil servants, a possibility that was registered in many cases in the administration of the american colonies, throughout the 17th century (HOFFER; HULL; 1979).

Even so, the use of the impeachment was regulated to be used only in extreme cases and conducted according to specific procedural rites, with the purpose of stopping the impetus of hostile groups to the President of the Republic capable of generating political and institutional instability in the country. Thus, the Constitution of 1787, in its Article 2, Section 4 (USA, 2016A), establishes that the President of the Republic, the Vice and other public officials may only be removed from their functions through the practice of treason, bribery or crimes. In this sense, the american constitutional legislators, in defining a very specific set of undesirable acts as vulnerable to impeachment, conferred a certain independence to the President before Congress, reaffirming that their policy should be directed to the population and can be changed only by it, in the presidential elections. The public policies that make him unpopular before the parliamentarians, since they do not constitute serious crimes, cannot be objects of impeachment charges.

In addition, the Constitution also states that, after the acceptance of the denunciation by the Senate, there will only be the condemnation of the President if a quorum of 2/3 of the senators present is reached. This rule, practically, guarantees that no President will be removed from office unless a part of his own party votes against him, which is highly unlikely to occur in a political system structured on the basis of bipartisanship (EISGRUBER; SAGER; 1999). Between 1789 and 2017 (228 years), in only 28 of the 114 legislatures (24,6%), the minority party obtained no more than 1/3 of the seats in the

American Senate and, if we consider the most recent period, between 1877 and 2017 (140 years), this phenomenon occurred in only 6 of 70 legislatures (8,6%). Moreover, in these six legislatures, in which there was a more significant imbalance of representation between the two major parties, all american presidents were in the majority party, which means that, in nearly a century and a half, all american presidents had, at least, more than 1/3 of the seats in the Senate, counting on all the senators of their parties to be faithful to them (USA, 2016B).

These three coupled conditions – a reduced number of crimes of responsibility, a 2/3 rule in the Senate and bipartisanship – are sufficient to explain why, in almost 230 years, since the enactment of the 1787 Constitution, there have been only three episodes of prosecution of impeachment, two of which resulted in the acquittal of the President: Andrew Johnson, in 1868, and Bill Clinton, in 1998. Only in the case of Richard Nixon, in 1974, was the removal of the President, nevertheless, by resignation of the same. It is important to note that, even though there have been two cases of impeachment processes that have coincided with critical american conjunctures – the Civil Wars and Vietnam –, the rules of the process itself have not changed, which reinforces the preference for a strong President.

Therefore, american constitutional law-makers reserved a specific space for impeachment limited to an institutional design that safeguarded the prerogatives of the President of the Republic in the political system in the face of possible undesirable and excessive onslaughts of the american Congress, preserving the characteristics of presidentialism as a system of government. In this sense, also in the american case, there was an institutional learning in the trajectory of using the *status* of impeachment, since it was adapted to reinforce the characteristics of the presidential system of government of the country.

The Brazilian case: flexible legislation and fragmented party system – all power to Congress to ‘criminalize’ the President of the Republic

In Brazil, the *status* of the impediment became part of the national legal system shortly after the proclamation of the republic, being inserted in the Constitution of 1891, remaining in all other Brazilian constitutions, ever since. The model adopted in Brazil was inspired, largely, by the American framework, along with presidentialism as a system of government and federalism as a form of state. The impediment was incorporated as a political statute in the form of a scheme that allowed the removal of the President of the Republic and other public agents by means of judgment and condemnation, by the Legislative, for a set of crimes whose classification was already, since the Constitution of 1891, much more extensive than that provided for in the American constitution. The Constitution of 1892, in its Article 54, defined the following acts as crimes of responsibility of the President: 1º) the political existence of the Union; 2º) the Constitution and the form of the federal government; 3º) the free exercise of political powers; 4º) the enjoyment, and legal exercise of political or individual rights; 5º) the internal security of the Country; 6º) the probity of administration; 7º) the custody and constitutional use of public money.

The expansion of the range of acts that could be the object of processes of impediment of the President favored the political forces installed in the Brazilian Legislative at the time, especially, the agrarian elites of the states, that dominated the regional parties and the electoral machines in their territories. These elites sought to install a federative republic that was significantly decentralized in opposition to the current regime in the empire, and still different from what the military intended, that saw in centralization a requirement for national unity

and the progress of the Country. Thus, mechanisms of limitation of central power, as the impediment, were vital to the interests of these elites, in particular, because the early years of the republic were led by military presidents. The importance that these regional elites attributed to the impediment as a mechanism to restrain possible centralizing advances of the President of the Republic can be seen through the sense of urgency that moved the regulation of the subject in the post-constitutional period. At the beginning of the year 1892, were sanctioned the two laws regulating the trial process (BRASIL, 1892A) and that typified crimes that could be liable of prosecution (BRASIL, 1892B). The two laws, together, defined with expressive detail level, respectively, the process of judgment and the criminalization of crimes.

Insofar as the Coffee with Milk policy, expressed in the alliance led by the Republican Parties of São Paulo and Minas Gerais, supplanted the space of the military and established its hegemony in the following two decades, the *status* of the impediment did not even have to be employed, remaining, however, in force in the Brazilian legislation. Its model would influence the whole trajectory later, being revisited and revived in the following constitutional cycles.

Even in the first Vargas Government, from 1930 to 1945, marked by the concentration of powers in the President of the Republic, a significant part of the juridical foundations of this model was inscribed in the 1934 Constitution, included, already, in the preliminary draft submitted by the Provisional Government to the Constitutional Commission (POLETTI, 2012). Its maintenance is related to the suspicions of the constitutionalist forces, present in the winning coalition in 1930, regarding the extension of the Provisional Government, and the pressures that led to the Civil War of 1932. Much of the debate in the work of the constituent assembly took place around the centralizing character of the new institutional arrangement of

power, orientation that differed from the federalist prerogatives of the 1891 Constitution.

The main innovation brought by the new Charter, which reflected the influence that Vargas had in the constitutional process, was the displacement of the prerogatives of judgment to a Special Court, to the detriment of the role played by the Senate, since it had lost its representation functions, passing to act as an organ of coordination of powers. This court was composed of nine members (judges), three Supreme Court ministers, three members of the Federal Senate and three members of the Chamber of Deputies, and their presidency was exercised by the Supreme Court President, who had the casting vote. The concentration of the trial in this court, with the choice of the judges being held by lot, allowed an expressive shield to the government against the possible opposition forces installed in the Federal Chamber.

A similar model was inscribed in the Constitution of 1937, though more as a formal text than as a living institutional dispositive, because of the conjuncture of exception installed with the New State. The end of fascist and nazi dictatorial regimes in Europe and the expansion of opposition groups to the New State led to redemocratization, in 1946, and to the reactivation of party life and the role of the Legislative in the conduct of major national issues, providing space for review the centralizing model of power in the Presidency of the Republic. The reformulation of political institutions, however, had to deal with a much more complex context than that of the Old Republic, characterized by the diversification of the social and economic actors resulting from urbanization, and by the formation of political groups with national expression and significant relationships with the public machine.

A large part of these changes was forged and pushed between 1930 and 1945, and Getúlio Vargas and his main allies sustained expressive connections with this new world,

sufficient to be able to influence the course of the redemocratization process, in particular, the maintenance of the presidential system and the formation of parties that expressed the new rising forces in the Country. In response to the formation of the National Democratic Union (UDN), which brought together the conservative liberal forces of old oligarchies, besides part of the business and the media, and the small middle class in formation, Vargas articulated the Social Democratic Party (PSD) and the Brazilian Labor Party (PTB), which represented, respectively, the frameworks of the expanding state bureaucracy and regional government elites of Getúlio Vargas, and the growing contingent of urban workers.

In the elections for the Constituent Assembly of 1946, together, the PSD and PTB obtained 66,6% of the Senate seats and 60,3% of the Federal Chamber, forming a large majority, which allowed them to shape essential issues of the Constitution of 1964 and the corresponding infra-constitutional ordering (FREIRE, 2004). Thus, although concessions were made in favor of expanding the power of the Legislature, such as the presence of ministers in the Congress, the installation of parliamentary committees of inquiry by the initiative of 1/5 of the members of each House and the appointment of congressmen for ministers, without loss of the mandate, significant prerogatives were maintained for the President of the Republic. Thus, the Constitution of 1946 contained a more balanced design, in the relation between the Executive and the Legislative, than its precedents.

The possibility of removing the President of the Republic for crimes of responsibility was inscribed in the constitutional text of 1946 following the model of the Constitution of 1891, practically equal to the acts that may be opened in the parliamentary process. The Senate returned to be the political instance in which the trial would be carried out and the condemnation would occur by a quorum

of 2/3 of its members. In a conjuncture in which the parties of Getúlio Vargas that supported the government, PSD and PTB, held almost 2/3 of the Congress, the possibilities of a process of impediment were almost null. The weight of the PSD in Congress, in particular, had the same effect on the issue of impediment, as the american bipartisanship.

A complementary law should, also, be edited to regulate the main issues of operation of this statute, in particular, to detail the types of crimes and the prosecution and trial process of the President of the Republic, something that did not occur in 1947, the year of regional and local elections, and renewal of the House and the Senate. The subject, therefore, did not have great repercussion at the beginning of the Dutra Government. The Senate Bill nº 23 (PLS 23) began its proceedings only in June 1948, and was sent to the Federal Chamber in December of the same year and returned to the Senate in July 1949, to be sanctioned by the then President Dutra in April 1950 (BRAZIL, 1948).

In this period, the question of the relation between the Powers was even more highlighted with the proposal of a constitutional amendment of the parliamentarianism, authored by the gaucho politician Raul Pilla, then president of the Libertarian Party (PL), that launched a national campaign with the support of several UDN politicians, among others. The leaders of the PL had supported Getúlio in 1930, but they ruptured with him later. This intensification of the proposals of strengthening of the Legislative before the Executive, in the legislative agenda, was provoked by two concomitant factors: the initial movements of the Cold War and the articulations for the succession of Dutra.

The disruption of the agreements reached at the Yalta Conference by the conflicts between the Soviet Union, on the one hand, and the United States, France, and England on the other, from June 1948 to May 1949, led to the division of Germany and a scale of disputes that polarized the world,

intensifying the divisions already existing in the political systems of the countries. In this context, negotiations for the 1950 elections were initiated and, given the uncertainties of that moment, the attempts at agreement between PSD and UDN failed, eroding relations between the two parties and culminating in the latter's disruption with the Dutra Government, in December 1950. The UDN dragged with it the PL and the Popular Representation Party (PRP), forming an opposition block with own candidacy for the presidency. Getúlio maintained his ties with the regional leaders of the PSD, while he worked for the consolidation of the PTB, approaching the growing working class, which allowed him to articulate a wide candidacy, that also included sectors of the business community and the military elite (FAUSTO, 2007).

Thus, it was in the context of the consolidation of the return of Getúlio through democratic means that the opposition, articulated by the UDN, faced with the possibility of defeat at the polls, intensified efforts to change the model of relations between the Powers included in the Constitution of 1946 in favor of the Legislative, having as main strategy the change from the presidential system to the parliamentarian. In that year, the campaign of parliamentarianism in the Country advanced in a significant way, but not enough for the approval of a constitutional amendment in the Congress. Meanwhile, the alliance with Ademar de Barros, then Governor of São Paulo, at the end of 1949, sealed the candidacy of Getúlio for the Presidency of the Republic, formalizing the PTB/PSP (Social Progressive Party) coalition, in May 1950 (LAMARÃO, 2004).

At this juncture, in desperation, the UDN and its allies resumed PLS 23/48, which had run into the background, and intensified efforts for its approval at the beginning of the 1950 legislature, which was sanctioned in April of that year, by Dutra, with Law nº 1.079/50 (BRASIL, 1950). The motivation to edit

the law was to give the Legislature ample scope to criminalize the future President, which can be seen in its content, that presents an extensive set of more than 60 indictable acts. Faced with the consummation of the electoral defeat, in October 1950, the UDN sought, also, to prevent Getúlio from taking over, whichever way possible, trying to annul the elections before the Federal Supreme Court (STF) and mobilizing the military to intervene. He was unsuccessful in any attempt, moving to aggressive media use in the years to come and strengthening ties with conservative businessmen and anti-Getúlio military.

In this context, however, of little use was the law of crimes for the opposition forces, during the 1950s and 1960s, since the main parties linked to Getúlio Vargas, PSD and PTB, together, maintained a significant volume of seats in the scope of the Brazilian Legislative, which made it unlikely to obtain 2/3 in the two houses to implement the removal of the President of the Republic. Thus, the weight of the PSD and the PTB, in the Legislative, made the institutional route unhelpful to the scammers of the UDN and allies, which led them to the military route, in 1964. Ironically, this perception came from the episode of the preventive coup that allowed the takeover of Juscelino Kubitschek, in 1955, when Marechal Teixeira Lott used the interpretative flexibility of the crime roll of Law nº 1.079/50 to, in ten days, legally ratify the expulsion of Café Filho and Carlos Luz (WESTIN, 2016).

From 1964, with the military coup and the installation of the dictatorial regime, the crime law became a dead letter. However, its preservation in the Brazilian legal framework opened a permanent window for the political weakening of the President of the Republic in unfavorable economic conjunctures.

This framework of institutional fragility allowed by the law of crimes of responsibility has gained more intense contours with its

combination with the new party system that emerged at the end of the dictatorship, resulting from the final efforts of the military, to divide the political forces of redemocratization by the fragmentation of the party system. These maneuvers did not prevent political opening, but left as a legacy the formation of a political system in which the party of the President of the Republic has little chance of having a minimum amount of seats in the Legislature that allows him to defend it from the parliamentary coups.

The 1988 Constitution ratified the presidentialism as a system of government, but a new complementary law on crimes under the responsibility of the President of the Republic has not been issued since, and the STF did not expressly and consistently pronounce on how much of Law nº 1.079/50 (BRASIL, 1950) was or was not welcomed by the new constitutional order, leaving an institutional gap that favors the action of coup parliamentary groups.

This explosive combination of a law with a broad and flexible roll of acts applicable as crimes of responsibility, a fragmented partisan system, and the absence of consistent positioning of the STF could be seen clearly in the episode of Dilma Rousseff's impediment. Faced with the need to promote economic adjustment, due to the intensification of the international economic crisis combined with the reduction of the growth of China, the Dilma Government soon felt the impacts of the pendular dynamics of the parties without ideological and programmatic roots, that, gradually, were destroying the support base of the government in the Congress.

The expansion of movements of the opposition party was facilitated, of course, by the fertile ground provided by the government's low levels of popularity, denouncing media campaigns against the PT in a year of municipal elections, the political emergence of a reactionary middle class and the wear provoked by a decade and a half of the PT in power, all this in a conjuncture of capitalism's

economic crisis and the advance of an international conservative political consensus. Combined, these movements formed a powerful fuel for boosting the party articulation that sustained the parliamentary coup.

The organs and instances of the public administration, such as the Court of Audit of the Union (TCU), were only institutional channels that provided subsidies for parliamentary groups to activate the use of the Law nº 1.079/50 and trigger the formal opening procedure and judgment of the impediment process. Considering the fertility of motives inscribed in the text of this law – in budgetary matters, for example –, the annual analyzes of the provisions of accounts of the Executive Power point out, very frequently, extensive lists of reservations to budget execution in the three spheres of the federation. The non-compliance of appliances of spending limits in the Fiscal Responsibility Law or minimum percentages of application of health resources are current violations observed by the courts of law and have never led mayors, governors or presidents to be removed. Ultimately, the opinion of the courts of law is not binding and the final decision about the accounts of the Executive is the sole responsibility of the Legislature.

As the economic and fiscal crisis, the necessary and unpopular actions taken to manage it, along with the aggressive media campaign, collapsed the popularity of Dilma Rousseff, a chain reaction occurred, which quickly fed back and left no possibility of reversion, unless the government party had a minimum of seats in the Legislature that avoided the quorum of the impediment, which is impossible for any party in the current fragmented party system. Faced with this fragility, in the year of election, was enough the leaving of expressive members of the PMBD, who control the party machine, motivated by greater gains in an eventual fall of the government – read the central nucleus of the government and its budgets –, for that the government's coalition in Congress

would collapse. Formed the new hegemonic parliamentary block between PMDB and PSBD, that would stay with the economic nucleus – read National Bank of Economic and Social Development (BNDES), Central Bank (Bacen) and Petróleo Brasileiro SA (Petrobras) – and international government (Ministry of Foreign Affairs), the attraction of minor pendular parties occurred through the usual procedures of 'presidentialism of coalition', just as the prosecution and trial followed only the formal rites envisaged in the aforementioned law, aiming to consummate 'legally' the coup parliamentary.

Conclusion

It is possible to conclude that the regulation gap about the nature of the impediment, in the period after 1988, necessary to make it compatible with the conception of the new constitution, and the absence of pronouncement of the STF about the subject, as the instance responsible for the control of the constitutionality, have left a gap in the Brazilian legal system, which overly weakens the Presidency of the Republic before the Congress (QUEIROZ, 2015). This institutional gap allowed opposition political groups to reactivate the retrograde Law of Impediment, of 1950, and bring a new conservative consensus to power, in Brazil, indirectly.

Thus, a legislation created in haste in the early 1950s, by conservative liberal groups, specifically to prepare for a parliamentary coup against Getúlio Vargas, served as a glove for the pretensions of partisan articulations that led to the dismissal of Dilma Rousseff, in 2016. The scammers from the past facilitated the action of scammers of the present. The main implications of this event are the possibility of production of immediate abrupt ruptures in national policies of development and social inclusion, due to the absence of the need of mediation of the urns by the current government, and the

political instability of future governments, in the three spheres, in front of the breaking of presidential logic.

Therefore, while in the english and american cases, the changes made to the statute of the impediment were oriented to preserve the foundations of the system of government adopted in each country, generating an institutional learning, which contributed significantly to preserving the adopted patterns of relations between the Powers, essential to the consolidation of the democratic process, in the brazilian case, the insistence of the conservative elites to preserve for a long time a legislation with a wide range of acts that could be taken as crimes of responsibility of the President of the Republic, associated to more recent characteristics of the brazilian political system, resulted in a corrosion of the principles of presidentialism inscribed in the Constitution of 1988. This framework favors the action of political groups installed in the Legislative, interested in taking power indirectly, making constant the possibility of a third electoral turn.

This differential of prerogatives of self-preservation of the President of the Republic in the relations with the Legislative, in the

american and brazilian cases, in the issue of removals for crimes, originated in the orientation given by the respective ruling elites in two critical contexts of formation of these countries: post-independence contexts, in the USA, and post-proclamation of the republic, in Brazil. While in the american case, the founders sought greater centralization after a decade of frustrations stemming from a weak confederation, the brazilian regional coffee elites saw, in decentralization, a way to ensure their interests. Therefore, the old statute of the impediment was incorporated and adjusted according to the different interests of the two elites.

In the brazilian case, even the various existences of posterior constitutional orders were not sufficient to produce changes of conception about the flexible and permissive character of the law of crimes of responsibility. The permanence of this model, without the proper adjustments of legal reception made by the STF in the new constitutional order of 1988, resulted in two consolidated cases of impediment in less than three decades, whereas in the american case there were only three cases (two acquittals and one resignation), in more than two centuries.■

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