

**Democratic constitutionalism in Brazil:  
Participation, polarization and opposition  
in a crisis context\***

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TABLE OF CONTENTS: 1. Introduction. – 2. Constitutional democracy in Brazil and the participatory turn. – 3. Polarization and its constitutional consequences. – 4. The guarantee of dissent as a constitutive element of constitutional democracy and resilience. – 5. Final remarks.

*1. Introduction*

The 1988 Constitution is the landmark of Brazilian democratic transition. This document is deeply engaged with re-democratizing republican institutions, recognizing plural subjectivities in socio-political context, by the entitlement of new rights, and guaranteeing democratic participation in a broad perspective. Indeed, there are several communities and groups that, for the very first time, found adequate constitutional representation not only regarding “fundamental rights”, but also in terms of guaranties, legal and political “mechanisms” for participation exercise, either by direct or indirect – representative – means, within the scope of decision-making processes.

In this regard, Brazil has become a global reference for participatory democracy in the 1990s and early 2000s, through initiatives such as the “participatory budget” from Porto Alegre, which has inspired several other similar movements all around the world. However, in recent years, the trend of *political polarization* – which is effectively fostered by a global movement based on misinformation methods and consequent dismantling of political representative struggles – has placed the constitutional provisions in constant tension. A deep political crisis has undergone since 2013, resulting in the Impeachment of the former President Dilma Rousseff and the election of the extreme right-wing party.

This development has placed Brazil at the *avant-garde* of new polarizations movements in the field of constitutional democracy, driven by a global trend that

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Milena Petters Melo - Thiago Burckhart

*Democratic constitutionalism in Brazil:  
Participation, polarization and opposition in a crisis context*

contrasts “moral” issues with “economic” issues. This trend triggers the reflection on the constitutional guarantee of opposition as both a “right” and a “duty”. The “constitutional crisis” arising from this context, which deepened between 2019 and 2022, had several constitutional consequences for political and legal institutions. This propels the revisiting of the foundational theories and doctrines of constitutional law on this subject, highlighting the role of various institutional actors and citizen participation in a context of multifaceted and multidimensional crises.

Taking this into consideration, this article aims to provide theoretical and empirical contributions, based on the Brazilian case, for a critical reflection on constitutional democracy in contemporary Brazil, focusing particularly in the years of acute polarization, between 2016-2023. The article is methodologically inscribed in the field of constitutional theory and Brazilian constitutional dogmatics, entrenched in the comprehension of law as constitutional policy<sup>1</sup>, and is divided into three parts: I. Constitutional democracy in Brazil and the participatory turn; II. Polarization and its constitutional consequences; III. The guarantee of dissent as a constitutive element of constitutional democracy and resilience.

## *2. Constitutional democracy in Brazil and the participatory turn*

Brazil’s 1988 Constitution is a legal milestone in the country’s democratic transition after 21 years of military dictatorship<sup>2</sup>. The result of a participatory National Constituent Assembly, it laid the foundations for a democratic rule of law, based on a new typography of fundamental rights, aimed at the social inclusion and political participation of groups and collectivities, including those historically excluded from the constitutional and democratic process, which is why it was nicknamed the “citizen constitution” (*Constituição Cidadã*)<sup>3</sup>.

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<sup>1</sup> In this regard, see: M. Petters Melo - M. Carducci (coords.), *Políticas Constitucionais Desafios Contemporâneos*, Florianópolis, 2021.

<sup>2</sup> L.R. Barroso, *Curso de Direito Constitucional Contemporâneo*, Belo Horizonte, 2024; L. Avritzer, *Democracy and Public Space in Latin America*, Princeton, 2002; D. McDonald, *Making the “Citizen Constitution”*: popular participation in Brazilian transition to democracy, 1985-1988, in *The Americas*, 2022, p. 619 ff.

<sup>3</sup> Founding, by the constitutional normativity, the comprehension of citizenship as social inclusion, political participation and cultural identity. For further analysis, see: M. Petters Melo, *Cidadania: subsídios teóricos para uma nova práxis*, in R. Pereira e Silva (ed.), *Direitos Humanos como educação para a justiça*, São Paulo, 1998, p. 77 ff.; M. Petters Melo, *Direitos Humanos e cidadania*, in G. Lunardi - M. Secco (eds.), *A fundamentação filosófica dos direitos humanos*, Florianópolis, 2010, p. 175 ff. In this perspective citizenship can be understood as an “universal right” to political participation, as states E. Balibar, *Les frontières de la démocratie*, Paris, 1992.

Milena Petters Melo - Thiago Burckhart

*Democratic constitutionalism in Brazil:  
Participation, polarization and opposition in a crisis context*

The Constitution lays down the foundations of the Federal Republic, which is based on the notion of social, plural and participatory democracy. The adjective “participatory” has taken on a special meaning, so that it characterizes democracy by the presence of institutes of representation (*indirect* democracy), by the participation of the people through plebiscites, referendums and popular initiatives (*direct* democracy), as well as other means of participation within a space in continuous use, renewal and creation of new forms of legitimization of power and effective action by society in the control, supervision and decision-making by the state<sup>4</sup>.

In this sense, the design of participatory democracy in the 1988 Constitution is not limited to “semi-direct” democracy, but has a broader spectrum. It encompasses universal participation, through a series of mechanisms and legal instruments created by the Constitution itself and implemented by general laws, expanding the space for civil society to participate in all powers: in political decisions, in legal decisions, in higher courts, in acts of public administration, as well as in the legislative process, within all spheres of the complex Brazilian federation, which includes not only the Union and federal states, but also municipalities, which enjoy full autonomy<sup>5</sup>.

This phenomenon is also marked by the emergence of new rights and new subjects of rights<sup>6</sup>. Indeed, the Constitution establishes a wide range of “fundamental rights” in Articles 5 and 6, but this is not restricted to this constitutional prescriptions, as various fundamental rights are scattered throughout the analytical constitutional text<sup>7</sup>. In the same way, new subjects of rights are recognized, such as indigenous

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<sup>4</sup> As L. Avritzer, *Participation in democratic Brazil: from popular hegemony to middle-class protest*, in *Opinião Pública*, 2017, p. 54.

<sup>5</sup> See F. Montambeault, *Uma Constituição Cidadã? Sucessos e limites da institucionalização de um sistema de participação cidadã no Brasil democrático*, in *Estudos Ibero-Americanos*, 2018, p. 261 ff.

<sup>6</sup> M. Petters Melo, *Cultural Heritage preservation and environmental sustainability: sustainable development, human rights and citizenship*, in K. Mathis (ed.), *Efficiency, sustainability and justice to future generations*, New York, 2011, p. 138 ff.; M. Petters Melo, *A concretização- efetividade dos direitos sociais, econômicos e culturais como elemento constitutivo fundamental para a cidadania no Brasil*, in *Revista do Instituto Interamericano de Derechos Humanos*, 2002, p. 211 ff.

<sup>7</sup> Fundamental rights out of the “cast”, J.J.G. Canotilho, *Direito Constitucional e Teoria da Constituição*, Coimbra, 2014, p. 234.

Milena Petters Melo - Thiago Burckhart

*Democratic constitutionalism in Brazil:  
Participation, polarization and opposition in a crisis context*

peoples<sup>8</sup> and quilombolas' peoples, characterizing a plural and intercultural constitutional democracy system<sup>9</sup>.

The formal recognition of these groups represents the first step in the process of empowerment in terms of their participation in a wide range of decision-making processes, especially decisions that directly influence certain social and cultural groups<sup>10</sup>. The "new social movements", such as the LGBT and feminist movements, have also recently obtained recognition of new rights through participation, especially within the constitutional jurisdiction<sup>11</sup>, through the use, for example, of instruments such as strategic litigation<sup>12</sup> and the inclusion as *amicus curie* in *public audiences*<sup>13</sup>.

The Constitution also enshrined a dialogue with international law, in particular international human rights law, by incorporating international instruments that encourage the participation of individuals and groups (such as the World Labor Organization Convention n. 69 in indigenous peoples), and new institutions, such as decision-making councils and committees, opening up the possibility of participation and representation in various areas of the state and local and national governance<sup>14</sup>.

The Brazilian Constitution provides for various innovative forms of participation by the society in state activities. The procedural instruments of constitutional democracy in Brazil can be divided into three types: a) instruments of representation, related to universal suffrage; b) classic instruments of direct democracy: plebiscite, referendum and popular initiative; c) innovative instruments of participatory

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<sup>8</sup> Indigenous peoples have a specific chapter between constitutional articles 231 and 232. For deeply information regarding the Brazilian constitutional core of indigenous people's rights, see: T. Burckhart, *Direitos dos povos indígenas e justiça constitucional no Brasil*, Florianópolis, 2023; M. Petters Melo - T. Burckhart, *Direitos de povos indígenas no Brasil: o "núcleo essencial de direitos" entre diversidade e integracionismo*, in *Revista do Curso de Direito UFSM*, 2020, p. 1 ff.

<sup>9</sup> M. Petters Melo, *Constitucionalismo e Democracia Plural na América Latina*, in F.A. Dias - I.F. Morcilo Lixa - M. Meleu (eds.), *Constitucionalismo, democracia e direitos fundamentais*, Blumenau, 2021, p. 95-98.

<sup>10</sup> See S. Benhabib, *Claims of Culture: equality and diversity in the global era*, Princeton, 2002; A. Touraine, *Pourrons-nous vivre ensemble? Égaux et différents*, Paris, Fayard, 1997.

<sup>11</sup> Participation has played a pivotal role in the recognition of same-sex marriage and the legalization of abortion in cases of anencephalic fetuses by the Brazilian Supreme Court, in the cases: ADPF 132/2011 and ADPF 54/2012. For further analysis, see: F.P. Püschel, *Same-sex marriage in the Brazilian Supreme Court*, in *Novos Estudos*, 2019, p. 652 ff.; D. Diniz - A.C. Gonzales Vélez, *Anencefalia e razão pública no Supremo Tribunal Federal*, in *Revista Brasileira de Ciências Criminas*, 2009, p. 219 ff.

<sup>12</sup> In this regard, see: R. Becak - J. Lima (eds.), *The Unwritten Brazilian Constitution: Human Rights in the Supremo Tribunal Federal*, São Paulo, 2020.

<sup>13</sup> For further information regarding the use of this mechanisms by the Brazilian Supreme Court (Supremo Tribunal Federal), see: F. Magalhaes Costa, *Amicus curie e audiências públicas no STF*, Belo Horizonte, 2023.

<sup>14</sup> See L. Avrizer, *Participatory Institutions in Democratic Brazil*, Baltimore, 2009.

Milena Petters Melo - Thiago Burckhart

*Democratic constitutionalism in Brazil:  
Participation, polarization and opposition in a crisis context*

democracy, which consist of different institutes and forms of participation by society, as a means of legitimizing power and exercising popular sovereignty.

These instruments include: the legitimacy of any citizen to file a *Popular Action*, in defense of a diffuse right, with the aim of annulling an act harmful to public property, to the administrative morality, the environment and the historical and cultural heritage (Art. 5 LXXIII); community participation in social security actions (Art. 194, VII); collaboration of associations representing the community in municipal urban planning (Art. 29, XII). These provisions have given impetus to participatory budgeting at municipal level in several Brazilian cities; the establishment of councils for administration and remuneration policy in the various spheres of the Federation (Art. 39); the holding of public hearings by legislative commissions with civil society organizations (Art. 58, II); public hearings have also become a practice in the activity of the courts, especially in constitutional matters analyzed by the Supreme Court; collaboration of society in the promotion and encouragement of education (Art. 205) and democratic management of education (Art. 206, VI); exercise, by the community, of the duty to preserve the environment for present and future generations (Art. 225), among others<sup>15</sup>.

It is important to point out that various instruments of participatory democracy are not directly and expressly provided for in the Constitution, but have been regulated by legislation. In this sense, the creation of Councils of Law; Councils managing public policies; Participatory Budgeting; Ombudsman's Offices; Participatory Legislation Commissions stand out. All inspired by the democratic system established by the 1988 Constitution, which opens up to the creation of new instruments, rights and guarantees to strengthen democracy<sup>16</sup>.

In this way, Brazilian participatory democracy turned to incorporate new and modern instruments of control and participation in power into democratic practice, with an emphasis on social control mechanisms<sup>17</sup>. The democratic system established in the Constitution is the result of a process that demanded not only democratization,

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<sup>15</sup> For example: the community's collaboration with the government to protect Brazil's cultural heritage (Art. 216, §1); the participation of non-governmental entities in programs to provide comprehensive health care to children and adolescents (Art. 227, §1); promoting the activities of the Guardianship Councils for children, also regulated by the Statute of Children and Adolescents (ECA, law n. 8.069/1990); the legitimacy of citizens to initiate laws (Art. 61, §2); society's access to administrative records and information on government acts, with due regard for the provisions of Art. 5, X and XXXIII (Art. 37, §3, II), and others.

<sup>16</sup> See B. Wampler, *Activating Democracy in Brazil: popular participation, social justice, and interlocking institutions*, Notre Dame, 2015.

<sup>17</sup> E.K.M. Carrion, *About participatory democracy*, in G. Eros (ed.), *Direito constitucional: estudos em homenagem a Paulo Bonavides*, São Paulo, 2001, p. 49 ff.

Milena Petters Melo - Thiago Burckhart

*Democratic constitutionalism in Brazil:  
Participation, polarization and opposition in a crisis context*

but also the publicization of the state acts, and the opening for social control in five dimensions: formulation, deliberation, monitoring, evaluation and financing of public policies.

This process gave rise to innovative experiences, such as the “participatory budget” in Porto Alegre in the 1990s and early 2000s, which became a reference for several other countries around the world<sup>18</sup>. This has therefore contributed to what Boaventura de Sousa Santos and Leonardo Avritzer call the “*democratization of democracy*”, insofar as democracy is understood as a “continuous process” that develops through a daily political-institutional practice of openness to participation, especially with regard to the dynamics of citizen participation in institutions<sup>19</sup>.

The development of these experiences takes place in parallel with a political system that has various idiosyncrasies and problems<sup>20</sup>. Several authors point to the fact that the Constitution did little to innovate in the power structures deriving from the dictatorial period, despite the formal recognition of rights in its text<sup>21</sup>. In a complex political system, characterized by multi-party politics and *presidencialismo de coalizão*<sup>22</sup>, the precarious relations between civilians and the military in a country that did not undergo through Transitional Justice<sup>23</sup>, in a social and political context deeply marked by inequalities, in which participation encounters overlapping problems due to under-integration and over-integration<sup>24</sup> dynamics, which are obstacles to the democratization of democracy in the country.

Despite the problems of governance and governability related to citizen effective social inclusion and political participation, it can be said that the 1988

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<sup>18</sup> See B.S. Santos, *Orçamento participativo em Porto Alegre: para uma democracia redistributiva*, in Id. (ed.), *Democratizar a democracia: os caminhos da democracia participativa*, Rio de Janeiro, 2002, p. 455 ff.

<sup>19</sup> B.S. Santos - L. Avritzer, *Introduction: opening the canon of democracy*, in B.S. Santos (ed.), *Democratizar a democracia: os caminhos da democracia participativa*, cit., p. XXXIV ff.

<sup>20</sup> For more details, see: D. de Fontaine - T. Stehnen (eds.), *The Political System of Brazil*, London, 2016.

<sup>21</sup> V.K. De Chueiri - E. Bockmann Moreira - H. Fernandes Câmara - M. Gualano De Godoy, *Fundamentos do Direito Constitucional: novos horizontes brasileiros*, Salvador, 2022; J.Z. Benvindo, *The Rule of Law in Brazil: the legal construction of inequality*, Oxford, 2022.

<sup>22</sup> The term “*presidencialismo de coalizão*”, which can be loosely translated into English as “coalition presidentialism”, seeks to describe the fragile balance of power between the branches of government in Brazil. In this system, the Executive branch is often constrained by the excessive fragmentation of the Legislative branch and must build a broad majority, frequently at odds with its government program – a practice typically associated with parliamentary systems. For further analysis, see the seminal text: S. Abranches, *Presidencialismo de coalizão: o dilema institucional brasileiro*, in *Dados – Revista de Ciências Sociais*, 1988, p. 5 ff.

<sup>23</sup> V.K. Chueiri (ed.), *Erosão Constitucional*, Belo Horizonte, 2022.

<sup>24</sup> M. Neves, *Entre subintegração e sobreintegração: a cidadania inexistente*, in *Dados Revista de Ciências Sociais*, 1994, p. 253 ff.

Milena Petters Melo - Thiago Burckhart

*Democratic constitutionalism in Brazil:  
Participation, polarization and opposition in a crisis context*

Constitution, at least in theory or in prospective, provided for a “participatory turn”, by disposing several instruments for citizen participation, which have been implemented throughout its more than 35 years of life, building a peculiar multifaced constitutional identity based on the “will of Constitution” [*Wille zur Verfassung*]<sup>25</sup> and the will of democracy.

### 3. *Polarization and its constitutional consequences*

In recent years, however, the Brazilian public sphere has experienced a significant process of “polarization”<sup>26</sup>. This process began in 2013, marked by protests that initially intensified due to the increase in bus fares in the city of São Paulo, but which, due to repeated episodes of repression and police violence, took on broader contours and historic dimensions, also turning against the policies of the federal government, headed at the time by Dilma Rousseff<sup>27</sup>. This led to a troubled presidential election in 2014, with Rousseff being re-elected by a very small margin and the opposition contesting the result of the polls<sup>28</sup>.

Since then, the political crisis has deepened with the hypertrophy of polarization, leading to Rousseff’s questionable impeachment process in 2016<sup>29</sup> and the election of Jair Bolsonaro in 2018. This process is marked by various idiosyncrasies and contradictions and is related to the emergence of a “new right” politics in Brazil<sup>30</sup> – as well as in several parts of the world. Political science and ethnographic studies in Brazil point to various reasons for the birth of this movement, from discontent with the economic policies of the last years of the Rousseff government, through hatred of the figure of Lula, who was associated by the media with major corruption scandals, to the coalition of social segments resentful of changes in customs and the identity agenda in various parts of society<sup>31</sup>.

<sup>25</sup> K. Hesse, *Die normative Kraft der Verfassung: Freiburger Antrittsvorlesung*, Tübingen, 2019.

<sup>26</sup> L.F. Miguel, *O colapso da democracia no Brasil: da Constituição ao golpe de 2016*, São Paulo, 2016.

<sup>27</sup> For a political-ethnographical analysis of these movements, see: R.P. Machado, *Amanhã vai ser maior: o que aconteceu com o Brasil e possíveis rotas de fuga para a crise atual*, São Paulo, 2019.

<sup>28</sup> S. Fausto, *Brazil after the 2014 Elections: a bumpy road ahead*, in *Policy Brief*, 2015, p. 1 ff.

<sup>29</sup> For a critical analysis on the subject, see: A. G. Bahia - D. Bacha e Silva - M. A. Cattoni de Oliveira, *O impeachment e o Supremo Tribunal Federal: história e teoria constitucional brasileira*, Florianópolis, 2018.

<sup>30</sup> R.P. Machado - T. Vargas-Maia (eds.), *The Rise of the Radical Right in the Global South*, London, 2023.

<sup>31</sup> R.P. Machado - A. Freixo (eds.), *Brasil em transe: bolsonarismo, novas direitas e desdemocratização*, Rio de Janeiro, 2019. On the political crisis in Brazil, see also: B. Bianchi - J. Chaloub - P. Rangel - F.O.

Milena Petters Melo - Thiago Burckhart

*Democratic constitutionalism in Brazil:  
Participation, polarization and opposition in a crisis context*

This “new right”, or “*cabocla right-wing*”, to play with the pun in Portuguese, is difficult to designate because it is driven more by specific, particular, economic interests of certain groups, in a schizophrenic partisan conjunction, which have been coalescing in support of Bolsonaro. Under the umbrella of the *Bolsonarismo*, different groups have come together for different reasons, and they do not necessarily identify Bolsonaro as a true “leader”<sup>32</sup>. In this sense, Bolsonaro can be identified as a new clown mask, in which the different political positions have projected intentions and passions, and as a clown has brought joy to some and worked as a horror movie figure for others.

The *cabocla right-wing*, therefore, is heterogeneous in its organization and composition: neoliberal in the economy, neoreactionary in politics, which by adopting the politics of the enemy tends to undermine constitutionally guaranteed political pluralism at the grassroots. The new Brazilian right is contrasting in its internal and external limits because it involves agribusiness, landowners, the military, the evangelical churches (which are also different from each other), businesspeople who defend economic neoliberalism, and at the same time the country’s old economic elite, opposed to social and economic progress understood as the well-being of the population. In addition, there is the middle class resentful of the frustration of their consumer expectations, citizens critical of the Labour Party’s (*Partido dos Trabalhadores*) years in power and conservatives concerned about the change in customs, revisionist identity and political agendas. This new articulation gains force on a scenario of accelerated changes, many of which are incomprehensible and undermine the understanding of a “world in common” – which, as Hannah Arendt said<sup>33</sup> is the basis of politics –, detaching from reality the understanding of a public interest that comprehends this diversity of people and groups as a set of subjects with shared needs, rights and duties.

In this sense, the polarization of recent years is not so much a polarization between Lula and Bolsonaro, between progressives and conservatives, between right-wing and left-wing parties, but between the rule of law and the civilizing achievements of constitutionalism, on the one hand, and *barbarism* and *chaos*, on the other<sup>34</sup>.

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Wolf (eds.), *Democracy and Brazil: collapse and regression*, London, 2022; M. Nobre, *Limits of Democracy: from the June 2013 uprisings in Brazil to the Bolsonaro government*, New York, 2022; S. Mainwaring, *Democracy in Brazil: change, continuity, and crisis*, in *Latin American Research Review*, 2022, p. 936 ff.

<sup>32</sup> On *Bolsonarismo*, see: C. Rocha - E. Solano - J. Medeiros, *The Bolsonaro Paradox: the public sphere and right-wing counterpublicity in contemporary Brazil*, New York, 2021; L. Avritzer, *Política e antipolítica: a crise do governo Bolsonaro*, São Paulo, 2020.

<sup>33</sup> As H. Arendt, *O que é política?*, Rio de Janeiro, 2022.

<sup>34</sup> For further analysis of this kind of antipolitics, see: G. da Empoli, *Gli ingegneri del caos: teoria e tecnica dell'internazionale populista*, Venezia, 2019; M. Nobre, *O caos como método*, in *Revista Piauí*, April 2019.



Milena Petters Melo - Thiago Burckhart

*Democratic constitutionalism in Brazil:  
Participation, polarization and opposition in a crisis context*

It is in this context many analysts conceive that the political crisis, held by deep-seated polarization, takes on the characterization of a multifaceted “*constitutional crisis*”<sup>35</sup>. The idea of a “constitutional crisis” may sound contradictory, since stability is an important condition for the effectiveness of any constitution, while various constitutions also provide for instruments to manage periods of emergency and political instability<sup>36</sup>. However, the constitutional crisis in this perspective follows the path of processes of “deconstitutionalization”<sup>37</sup>, which are related at first to the rejection of the classic principles of constitutionalism, and at a second moment as a “reduction of the Constitution” to its selective application in certain contexts and its non-application in others<sup>38</sup>, deepening the conflict between garantism and judicial activism<sup>39</sup>.

In the Brazilian case, the constitutional tension by the political crisis has at least four main characteristics: 1) the emergence of processes that are contestable from a legal point of view; 2) the challenge to the authority of the Constitution and constitutional bodies; 3) the spread of disbelief in institutions through fake news and the challenge of the media<sup>40</sup>; and 4) the persecution of political opponents.

With regard to the first point, two emblematic cases can be cited: Rousseff's impeachment and Lula's imprisonment. Rousseff's impeachment was legally questionable due to the unclear presence of a crime of responsibility, as defined by Law 1079/1950, which is considered a prerequisite for political judgment by the National Congress<sup>41</sup>. Lula's arrest in 2018, in the midst of the electoral process, as part of the process known as “Car Wash”, was later reviewed and considered suspicious by the judge who tried him by the Federal Supreme Court<sup>42</sup>.

Regarding the second point, the challenge to the authority of the Constitution and constitutional bodies, such as the Supreme Court, has occurred several times at

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<sup>35</sup> S. Levinson - J. Balkin, *Constitutional crises*, in *University of Pennsylvania Law Review*, 2009, p. 707 ff.

<sup>36</sup> N.P. Sagüés, *La constitución bajo tensión*, Ciudad de México, 2016.

<sup>37</sup> Ivi, pp. 97-109.

<sup>38</sup> Ivi, p. 99.

<sup>39</sup> Ivi, p. 101.

<sup>40</sup> J.V.S. Ozawa - J. Lukito - T. Lee - A. Varma - R. Alves, *Attacks against journalists in Brazil: catalyzing effects and resilience during Jair Bolsonaro's government*, in *The International Journal of Press*, 2023.

<sup>41</sup> M.A. Cattoni de Oliveira, A. Melo Franco Bahia, D. Bacha e Silva, *(I)Legitimidade do impeachment da Presidente Dilma Rousseff*, in *Revista Jurídica Consulex*, 2016, p. 30 ff.

<sup>42</sup> The judge who sentenced Lula to prison was later considered suspicious by the Supreme Court in the HC n. 164.493.

Milena Petters Melo - Thiago Burckhart

*Democratic constitutionalism in Brazil:  
Participation, polarization and opposition in a crisis context*

the instigation of the former President himself, Bolsonaro<sup>43</sup>. This attitude led to the engagement of political movements and groups that supported him, who sometimes called for the “closure” of the Supreme Court<sup>44</sup>. This extends to the field of disbelief in constitutional bonds in various sectors, such as culture<sup>45</sup> and the environment<sup>46</sup>, which have suffered severe budget cuts and the dismantling of public policies, trying to give rise to the process of deconstitutionalization.

The third point is perhaps the most serious, and relates to the spread of disbelief in public institutions through fake news. This became very evident during the Covid-19 pandemic, in which former President Bolsonaro contributed to discrediting “scientific” solutions, such as the use of masks and the implementation of lockdowns, leading the country to record more than 700,000 deaths<sup>47</sup>. Fake news has played an important role in aggravating the psychology of polarization in various areas and topics, and has been the subject of a parliamentary inquiry, opened by the Supreme Court, to investigate crimes committed against the Supreme Court and other constitutional institutions in the country<sup>48</sup>. The fake news and recurring attacks on the traditional media led to disbelief in the electoral system as a whole and to Bolsonaro’s supporters contesting the result of the 2022 presidential elections, which he lost, paving the way for the antidemocratic acts of January 8, 2023, with the destruction of the structures of the three branches of government in Brasilia<sup>49</sup>.

Finally, the persecution of political opponents. In the period from 2018 to 2023, several public figures not necessarily linked to institutional politics, but also university professors and artists, had to go into self-exile due to the threat to their lives, which was largely committed by groups from the new radicalized right<sup>50</sup>. These emblematic

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<sup>43</sup> That is what the Special Rapporteur on the rights to freedom of peaceful assembly and of association of the United Nations has concluded. Human Rights Council, *A/HRC/53/38*, United Nations, 2023.

<sup>44</sup> G. Maia, ‘*Não vejo nada demais’ em pedir para fechar o Congresso e STF, diz Bolsonaro*, in *Revista Veja*, 23 August 2022.

<sup>45</sup> In this regards, see: S. Fleury (ed.), *Social Policy Dismantling and De-democratization in Brazil: citizenship in danger*, New York, 2023; T. Burckhart, *Constitutional degradation and the protection of cultural rights in Brazil: deconstitutionalization and institutional deregulation*, in T. Groppi - V. Carlino - G. Milani (eds.), *Framing and Diagnosing Constitutional Degradation: A Comparative Perspective*, Rome, 2022, p. 93 ff.

<sup>46</sup> Francesco Bonelli - A.S. Araújo Fernandes - P. Cavalcante., *The active dismantling of environmental policy in Brazil*, in *Sustainability in Debate*, 2023, p. 58 ff.

<sup>47</sup> According to the official data collected by the Coronavirus Resource Center of the John Hopkins University, available here <<https://coronavirus.jhu.edu/map.html>>.

<sup>48</sup> This is the case of Inquérito nº 4.828.

<sup>49</sup> B. Meyerfeld, *In Brazil, an ‘unprecedented’ attack on democracy*, in *Le Monde*, January 9, 2023.

<sup>50</sup> This is the case of Professor Débora Dinis, ex-politician Jean Wyllys, Professor and ex-politician Marcia Tiburi, among others.

Milena Petters Melo - Thiago Burckhart

*Democratic constitutionalism in Brazil:  
Participation, polarization and opposition in a crisis context*

cases represent the tip of the iceberg related to the rigging of the state structure for personal and party political ends, which was visible during the 2022 elections<sup>51</sup>, and the commission of mini-actions of persecution, practiced informally by various actors.

It can therefore be said that the polarization, as well as being a “new” fact on the Brazilian political scene, is the result of a political crisis that challenged the foundations of Brazilian democratic constitutionalism<sup>52</sup>, which has been arduously built up over the last few decades. The polarization, therefore, has produced constitutional consequences, which have resulted in a kind of constitutional identity crisis in the country, merging old and new problems in the order of the effectiveness of the Constitution.

#### 4. *The guarantee of dissent as a constitutive element of constitutional democracy and resilience*

In Brazilian constitutional democracy, the guarantee of dissent is understood as fundamental and constitutive elements, which is directly related to political participation. These elements guarantee citizens an active voice in participation, within the scope of participatory democracy, and the possibility of dissenting and forming groups – political parties, lobbies, and pressure groups – to defend and advance their ideals and interests.

The proper functioning of Brazilian constitutional democracy implies the guarantee of these mechanisms, which are given constitutional status in various articles of the Constitution, such as freedom of expression (Article 5), direct participation through plebiscites, referendums and popular initiatives (Article 14), and the free manifestation of thought, creation, expression and information, in any form, process or vehicle (Article 220).

Guaranteeing dissent, therefore, has important practical implications for political participation, especially with regard to social movements and the protection of the rights of ethnic, cultural and religious minorities. Likewise, it boosts the development and practice of social accountability mechanisms for the state and government, paving the way for the implementation of public transparency mechanisms and ensuring that

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<sup>51</sup> I. Camargo - M. Falcão, *PRF descumpre ordem do TSE e para pelo menos 610 ônibus de eleitores em blitz*, in *Portal G1*, October 30 2022, available here < <https://g1.globo.com/politica/eleicoes/2022/noticia/2022/10/30/prf-descumpre-ordem-do-tse-e-faz-pelo-menos-514-operacoes-de-fiscalizacao-contra-onibus-de-eleitores.ghtml> >.

<sup>52</sup> In this regard, see: E.P.N. Meyer, *Constitutional Erosion in Brazil: progresses and failures of a constitutional project*, Oxford, 2021.

Milena Petters Melo - Thiago Burckhart

*Democratic constitutionalism in Brazil:  
Participation, polarization and opposition in a crisis context*

citizens can demonstrate their (in)satisfaction with the policies implemented by a given political group and advocate for change.

The dynamics of the political crisis driven by polarization, however, put both participatory democracy and the guarantee of dissent in tension and exception threat. It has been exacerbated by the confrontation between branches of government and the exercise of *chaos governance*, based on “ideological bubbles”, an increase in political violence<sup>53</sup> and the delegitimization of the legislative process, which is reinforced by the isolation of individuals and groups, fracturing the bonds of social solidarity, and then seeking to bring them together in poles of political attraction, personalized in the figures of Bolsonaro or Lula.

The tension lies in the reduction of political debate to the logic of friend-enemy antagonism<sup>54</sup>. This is a political strategy that denies the opposition as a legitimate element of action in the democratic field, and sees it as an enemy to be fought. The greatest exponent of this theory is the German Carl Schmitt, whose theory is based on a vehement critique of political liberalism, and who understands the enemy as an existential threat to the political community, being the “other” whose presence and actions threaten the survival of a group<sup>55</sup>.

What is central to Schmittian theory is the notion of sovereignty, defined as the authority to decide on the state of exception. The sovereign is the one who can suspend the established legal regime and take extraordinary measures to defend his political community. This decision is precisely crucial for defining and delimiting the groups that make up friends and enemies. Therefore, in the Schmittian notion of the friend-enemy politics, the exception plays an important role, in other words, the moment of crisis. It is at this moment that it is defined who the sovereign is, in other words, who has the capacity to decide<sup>56</sup>.

The transposition of the notion of opposition into that of friend-enemy represents a break with the liberal principles of constitutionalism, precisely because it disregards fundamental rights and legal norms, even procedural ones, in favor of what Schmitt calls the “inevitable and existential nature of the political context”. In the Brazilian case, this logic was driven especially by the mobilization of social networks by various means, also through state apparatus – by what later came to be called the

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<sup>53</sup> J.C.C. Rocha, *Guerra Cultural e Retórica do Ódio*, Goiânia, 2021.

<sup>54</sup> C. Schmitt, *The concept of the political*, Chicago, 2007, p. 122.

<sup>55</sup> Ivi., p. 87.

<sup>56</sup> Ivi., p. 89.

Milena Petters Melo - Thiago Burckhart

*Democratic constitutionalism in Brazil:  
Participation, polarization and opposition in a crisis context*

“hate cabinet”, which has been the subject of investigations by the Brazilian Federal Police<sup>57</sup>.

These phenomena put the constitutional endurance and constitutional resilience of various countries in tension – and sometimes in check. The concept of constitutional endurance refers to the life expectancy of a constitution, i.e. how long it lasts between its adoption and its replacement by a new constitution<sup>58</sup>, and depends umbilically on “constitutional resilience”, which refers to the capacity of a constitutional system to absorb shocks, adapt to new circumstances and recover from crises, while maintaining its fundamental principles and functionality<sup>59</sup>. This concept is increasingly relevant in the context of modern challenges such as political polarization, economic crises and authoritarian tendencies<sup>60</sup>.

There are several factors that can contribute to “constitutional resilience”, such as the adaptability and flexibility of the constitutional system, strong and independent institutions, social and political cohesion regarding the principles of liberal constitutionalism – i.e. the political and legal culture aspect of a given people – and legal and normative procedures. Similarly, it can be said that economic stability is also a fundamental element<sup>61</sup>, in addition to the importance of maintaining “unwritten rules”<sup>62</sup>.

In this sense, Cass Sustein points out that constitutional design should promote deliberation and political and legal compromise, so as to be an instrument for confronting political polarization<sup>63</sup> – which is indeed a difficult, but not impossible, task within the democratic rule of law. Constitutional design must therefore drive and shape the political process, safeguarding rights and maintaining a satisfactory level of democratic governance through participation in this process. Constitutional design can boost the stability and resilience of constitutional and democratic systems.

The Brazilian case, despite its political and institutional fragility in some aspects, has shown itself to be a case of “success” in overcoming a context of acute polarization and the logic of friend-enemy in order to appease these political feelings and political

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<sup>57</sup> Which is currently under investigation by the Parliamentary Inquiry n. 4781, 4789, and 4828.

<sup>58</sup> J.Z. Benvindo, *Constitutional Endurance*, in R. Grote - F. Lachenmann - R. Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford, 2023.

<sup>59</sup> A. Jakab, *Constitutional Resilience*, in R. Grote - F. Lachenmann - R. Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law*, cit.

<sup>60</sup> In this sense, see: T. Ginsburg - A.Z. Huq, *How to save a Constitutional Democracy*, Chicago, 2018.

<sup>61</sup> A. Przeworski, *Democracy and Development: political institutions and well-being in the world, 1950-1990*, Cambridge, 2000.

<sup>62</sup> S. Levitsky – D. Ziblatt, *How democracies die*, New York, 2018.

<sup>63</sup> C.R. Sunstein, *Designing democracy: what constitutions do*, Oxford, 2002.

Milena Petters Melo - Thiago Burckhart

*Democratic constitutionalism in Brazil:  
Participation, polarization and opposition in a crisis context*

relations and consequently guarantee constitutional resilience and constitutional endurance. It achieved this by applying the Constitution itself, fundamental rights and the principles governing the democratic order. This was done in two areas: from a *macro* point of view and from a *micro point of view*.

From a *macro* point of view, three elements can be mentioned. The first is the formation of a broad front with traditional parties from the left, center-left, center-right and moderate right, which acted as a cordon sanitaire against the advance of the extreme right in the last presidential elections, with a slate headed by Lula<sup>64</sup>. This front was the result of in-depth dialogues between dissent groups and political leaders who saw the continuity of Bolsonaro's government as a serious danger to constitutional democracy and built a front precisely to defend it, having succeeded at the polls, albeit with a small margin of difference<sup>65</sup>.

The second refers to the punishment and accountability of the constant attacks on the Constitution and the Democratic Rule of Law. Several inquiries have been set up to deal with the acts that Bolsonaro or his government have carried out illegally – such as the “fake news inquiry”, n. 4.781, the “inquiry into anti-democratic acts” that took place on January 8, 2023, n. 4.828, the “inquiry into interference in the Federal Police”, n. 4.831, and the “inquiry into the spread of false information about the elections”, n. 600371, set up by the Superior Electoral Court.

Among these criminal investigative procedures, the anti-democratic acts inquiry, carried out by the Federal Supreme Court, was of great importance, resulting in temporary and preventive arrests, as well as search and seizure warrants<sup>66</sup>. These actions also led to a Joint Parliamentary Commission of Inquiry that investigated the involvement of a number of subjects and concluded in its final report, published in October 2023, by indicting more than 60 people directly involved in these acts<sup>67</sup>, and Bolsonaro is among them. Bolsonaro himself has been convicted three times with the

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<sup>64</sup> J.P. Struck, *Com frente ampla, Lula freia a extrema-direita*, in *Deutsche Welle Brasil*, October 31, 2022, available at <<https://www.dw.com/pt-br/com-frente-ampla-lula-freia-a-extrema-direita/a-63599505>>.

<sup>65</sup> According to the Superior Electoral Tribunal, Lula was elected with 50,90% of the votes. available at <<https://resultados.tse.jus.br/oficial/app/index.html#/eleicao/resultados>>.

<sup>66</sup> More than 700 people have been arrested, according to the official: data available at <<https://www.gov.br/pf/pt-br/assuntos/noticias/2023/01/prisoas-relacionadas-aos-atos-antidemocraticos>>.

<sup>67</sup> Câmara dos Deputados, CPMI do 8 de janeiro aprova relatório que pede o indiciamento de Bolsonaro, available at <<https://www.camara.leg.br/noticias/1008264-CPMI-DO-8-DE-JANEIRO-APROVA-RELATORIO-QUE-PEDE-O-INDICIAMENTO-DE-BOLSONARO>>.

Milena Petters Melo - Thiago Burckhart

*Democratic constitutionalism in Brazil:  
Participation, polarization and opposition in a crisis context*

penalty of ineligibility for the next eight years, for misuse of the media and abuse of power<sup>68</sup>.

The third element pertains to how constitutional design facilitated the preservation of democratic stability in specific areas and contexts during a period of intense polarization, particularly with respect to the role of the Supreme Federal Court (STF) and federalism. Regarding the STF, the Constitution assigns it the primary responsibility of safeguarding the Constitution, granting it jurisdiction over a range of actions for constitutional review (Article 102), especially in cases of profound disagreement concerning the constitutionality of a laws or administrative acts. This has led the STF to be frequently called upon to intervene in cases characterized by political conflict due to institutional instability, assuming a “protagonist” role—though not necessarily an “activist” one—in maintaining constitutional order<sup>69</sup>. Regarding federalism, it is noteworthy how the Brazilian system, with all its idiosyncrasies, ensured autonomy for states and municipalities, allowing federal entities to implement their own policies within their respective areas of competence. In some cases, these policies contrasted with those of the Bolsonaro administration. This strengthened political pluralism and prevented the excessive concentration of power in the federal executive<sup>70</sup>.

From a *micro* point of view, various actions have been taken by constitutional institutions with the aim of overcoming the aforementioned polarization. This is the case of the education and transparency campaigns carried out by the Superior Electoral Court<sup>71</sup>, awareness and education campaigns promoted by various organized civil society organizations, and the promotion of ethical journalism. These actions have gradually made it possible to “break the bubble” of the spread of fake news and unfair interference in the electoral and democratic process, providing the basis for consolidating a democratic political culture.

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<sup>68</sup> The last sentence came about in November 7, 2023, by the Superior Electoral Tribunal n. 0600814-85.2022.6.00.0000.

<sup>69</sup> On this argument, see: O.V. Vieira - R. Glezer - A.L. Pereira Barbosa, *A supremocracia e infralegalismo autoritário: o comportamento do Supremo Tribunal Federal durante o governo Bolsonaro*, in *Novos Estudos CEBRAP*, 2022, p. 591 ff.

<sup>70</sup> M.P. Melo - P.C.F.S. Macedo, *O federalismo sanitário cooperativo e a competência entre os entes federativos sobre as ações e serviços público de saúde no enfrentamento à pandemia de Covid-19: uma análise à luz das decisões do Supremo Tribunal Federal*, in F. Asensi - L. Manoel da Silva Cabral - N. Rúbia Zardin - R. Tremel (eds.), *Visões multidisciplinares em políticas públicas*, Rio de Janeiro, 2022.

<sup>71</sup> Such as the campaign “Stay by the side of democracy” (fique do lado da democracia), available at <<https://www.tse.jus.br/comunicacao/noticias/2020/Novembro/tse-lanca-campanha-201cfique-do-lado-da-democracia201d-pelo-voto-consciente-e-contra-a-polarizacao>>.

Milena Petters Melo - Thiago Burckhart

*Democratic constitutionalism in Brazil:  
Participation, polarization and opposition in a crisis context*

In this way despite the unprecedented political crisis that marked the Brazilian public sphere most emphatically between 2016 and 2023, it is possible to say that the acute moment of the crisis has passed, although reminiscences of this period in the political and constitutional system remain. It has been overcome by the application of the constitutional normativity, especially regarding participation and the guarantee of the right to opposition, and by demonstrating the shape of Brazil's political and legal institutions. It is, therefore, an interesting case for comparative constitutional law, moving from a context of constitutional erosion threats to another, marked by the affirmation of constitutional resilience and constitutional endurance.

#### 5. *Final remarks*

The political crisis that affected Brazil most acutely between 2016-2023 had a series of direct repercussions for the country's constitutional democracy. It erupted into processes that tested the limits of democratic institutions, as well as the endurance of the 1988 Constitution, the guarantee of democratic social participation and the right of opposition. However, it demonstrated that the Brazilian democratic and judicial system could guarantee constitutional resilience through the application of constitutional normativity, instigating the overcoming of a moment of acute political polarization.

The success in overcoming the threats of a constitutional crisis has seen the judiciary, and especially the Supreme Court, playing a key role, acting as a strong protagonist in guaranteeing constitutional prescriptions. For this success also had a fundamental role the democratic participation of various groups and the guarantee of dissent, boosting for the inversion of the friend-enemy rationality in the political field. This became evident with the formation of the Broad Front that led to Lula's victory in 2022, on a ticket made up of political groups that had been antagonistic at various times in Brazilian political history.

Lula's victory reveals that democratic institutions functioned effectively, ensuring the transparency and reliability of the election. This does not imply, however, that constitutional tensions and threats have been fully resolved. Rather, it demonstrates that they have been redirected to a different level, where the crisis once again reflects the inherent democratic tensions typical of complex democracies, instead of the illegalities of the previous government.



Milena Petters Melo - Thiago Burckhart

*Democratic constitutionalism in Brazil:  
Participation, polarization and opposition in a crisis context*

The Brazilian experience highlights an important prism of constitutional democracy as a system that requires permanent monitoring and attentive participation. Because while on the one hand the crisis seems to have been overcome, on the other hand there are remnants of anti-democratic positions committed to lobbies from specific sectors such as the evangelical caucus and ecologically irresponsible business, which continue to be active in the national Congress and at different levels of government.

Several challenges are still latent in this field, such as the concentration of the media in the hands of a few families, systematic disinformation, as well as the strong social inequality that implies significant obstacles for democratic inclusion and political participation. These are historical problems that afflict Brazilian constitutional democracy, and which have deepened with the excessive polarization of recent years. However, it can be said that, to a large extent, Brazilian institutions have succeeded in guaranteeing the hard core of rights and protecting the principles that guide democratic life set out in the 1988 Constitution.

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**Abstract:** Focusing political polarization and its constitutional consequences, this article aims to provide theoretical and empirical contributions, based on the Brazilian case, for a critical reflection on contemporary constitutional democracy. It is divided into three parts: I. Constitutional democracy in Brazil and the participatory turn; II. Polarization and its constitutional consequences; III. The guarantee of dissent as a constitutive element of constitutional democracy and resilience. The conclusion highlights the constitutional resilience, driven by the strengthening of constitutional and democratic institutions at both micro and macro levels of the political-legal system.

**Keywords:** Constitutional democracy - Participation - Political Polarization - Constitutional resilience - Brazil.

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