

## **Brief adjustments to the contribution of historical sociology to Latin-American constitutionalism**

*Breves ajustes à contribuição da sociologia histórica ao constitucionalismo latino-americano*

**Roberta Camineiro Baggio<sup>1</sup>**

<sup>1</sup> Universidade Federal do Rio Grande do Sul, Porto Alegre, Rio Grande do Sul, Brasil. E-mail: roberta.baggio@ufrgs.br. ORCID: <https://orcid.org/0000-0003-4907-6105>.

**Paulo Eduardo Berni<sup>2</sup>**

<sup>2</sup> Universidade Federal do Rio Grande do Sul, Porto Alegre, Rio Grande do Sul. E-mail: pauloberni@gmail.com. ORCID: <https://orcid.org/0000-0002-2679-6743>.

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**Abstract**

The main objective of the article is to present the historical sociology as a method capable of generating innovative approaches to the field of Latin American constitutional law. Considering the logic of long term (*long durée*), the article problematizes the need to overcome the constituent dynamics only as a construction of the future to reach a strategy of unveiling continuities. Based on elements of the Brazilian reality, the article presents two cases in which the potential for applying the method of historical sociology to constitutionalism in the region is indicated. First, the permanence of authoritarian legality through the performance of courts after the democratization of the region. Second, the normative constitutional and infra-constitutional formation of the public administration in Brazil. The methodology used is the analytical essay and its foundation, for indicating the concrete historical problems presented, is the opening of the method of historical sociology to the hybridization of disciplines.

**Keywords:** Constitutional Law; Historical Sociology; Latin America.

**Resumo**

O objetivo principal do artigo é apresentar a sociologia histórica como método apto a gerar abordagens inovadoras para o campo do direito constitucional latino-americano. Considerando a lógica da longa duração (*long durée*), o artigo problematiza a necessidade de superação da dinâmica constituinte apenas como uma construção do futuro para alçar a uma estratégia de desvelamento de continuidades. A partir de elementos da realidade brasileira, o artigo apresenta dois casos em que são indicadas as potencialidades de aplicação do método da sociologia histórica para o constitucionalismo na região. O primeiro trata da permanência da legalidade autoritária a partir da atuação dos tribunais após a redemocratização da região. O segundo discorre sobre a formação normativa constitucional e infraconstitucional da administração pública brasileira. A metodologia utilizada é a do ensaio analítico e seu fundamento, para a indicação dos problemas históricos concretos apresentados, é a abertura do método da sociologia histórica à hibridação de disciplinas.

**Palavras-chave:** Direito Constitucional; Sociologia Histórica; América Latina.



## 1. Introduction

The study of constitutionalism takes place, in general, from the foundational experiences of the North, especially those resulting from the bourgeois revolutions (English, North American and French). On the other hand, the two hundred years of constitutionalism in Latin America are usually little considered and studied, for instance, in Brazilian Law Schools. Our foundational process tends to be ignored so naturally that most students reach the end of their courses without even having heard of the Constitution of Cádiz (1812) and all its constituent consequences for Latin America.

The Latin American constituent processes played a role different from that of the mentioned bourgeois revolutions. Effectively, instead of contributing to the establishment of a new order, the Latin American foundational moment occurred in order to prevent such ruptures, so that the existing oligarchic structures were maintained.<sup>1</sup> In fact, “la ruptura del orden [fue] producida desde el Estado mismo”.<sup>2</sup>

In countries like Brazil, for example, the “people” did not take part in the great institutional changes.<sup>3</sup> On the one hand, the creation of the State preceded the formation of civil society; on the other hand, the State acted to disaggregate any possibility of its formation. The social stratification existing at the time of state formation in Latin America was decisive for the political constitution of societies structured under the pre-modern logic, which differentiates the Latin American experience from that of the Northern States, where

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<sup>1</sup> Ansaldo y Giordano (2012a, t. I), pp. 683-726.

<sup>2</sup> Ansaldo y Giordano (2012a, t. I), p. 30.

<sup>3</sup> The independence process in Brazil was conducted by a representative of the Portuguese royal family. Highlights Marcelo Neves (2018, p. 169) that “constitutionalism” was not affirmed here, contrary to how it happened in Europe, in opposition to “absolutism”, but “above all [as] an expression of anti-colonialism”: “[...] contrary to that occurred in the North American experience, the Brazilian legal-political break with Portuguese domination (1822) in no way resulted in the formation of a “sovereign” State as a political system that reproduces itself autopoietically within certain territorial borders” (our translation). Schwartz and Starling (2015, p. 222) emphasize that “our emancipation did not stop being private and trivial. If the movement was liberal, because it broke with colonial domination, it proved to be conservative in maintaining the monarchy, the slave system, and the lordly domain. Moreover, if the process of emancipation was triggered by the coming of the court, what explains the final format is the internal movement of adjustment to pressures from inside and outside, and mainly a process of replacing metropolises: with the current reign right in the south-central region of the newly founded country. On the other hand, if a new political unit was implanted, the narrow notion of citizenship prevailed, which excluded from the exercise of politics a vast part of the population and even more the extensive contingent of enslaved people. With that, rather loose notions of representativeness of political institutions were imposed, showing how independence created a State but not a Nation” (our translation). Also, at the time of the Proclamation of the Republic, contradictions emerged. The person responsible for the proclamation and first president, Marshal Deodoro da Fonseca, was not notable for defending the republican ideal and supported the coup in D. Pedro II to some extent influenced by corporate aspects of the armed forces.



there was “explícita condensación o síntesis de la conflictividad de clases”.<sup>4</sup> Therefore, the analysis of Ansaldi and Giordano is that in Latin America the State was “un decisivo constructor de la sociedad. Más aun, dicho en otras palabras: en América Latina, la formación de la burguesía y la formación del Estado fueron un proceso simbiótico”.<sup>5</sup>

In recent decades, however, constitutionalism in Latin America has gained a little more notoriety and repercussion in the studies of the New Latin-American Constitutionalism. Nonetheless, without a sufficiently clear and systematized methodological proposition.

Even though sociological approaches in the field of constitutional law are not an innovation,<sup>6</sup> there is a sociological cut of constitutional processes that is even less explored than this important empirical strand: historical sociology. Such a perspective can bring a series of benefits to the study of constitutional law, especially of Latin American constitutionalism, mainly due to its vocation to allow large comparisons over considerable historical periods, replacing dichotomies such as past/present, universal/private, centralism/regionalism, by trying to understand the formation of state institutions and their relationship with human action over time as a continuous process in constant formation that unveils and identifies persistence, regularities, blocks and potentialities.<sup>7</sup>

The proposal to build a comparative methodology that integrates the analysis of the theme, deriving from historical sociology, may mean a first step towards the discovery of its own categories, still unexplored in this field, or even the creation of new forms of theoretical analysis of Latin American constitutional law, decisively impacting the current understanding of our crises, as well as the improvement of our diagnoses.

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<sup>4</sup> Ansaldi y Giordano (2012a, t. I), p. 56.

<sup>5</sup> Ansaldi y Giordano (2012a, t. I), p. 56.

<sup>6</sup> They can be seen since the very beginning of the formation of this discipline in classic works that begin with the famous *A essência da Constituição* by Ferdinand Lassalle (2001), in the 19th century, passing through a more common use in the 20th century, as in *Constitución y derecho constitucional* by Rudolf Smend (1985), *Teoría de la Constitución* by Karl Loewenstein (2018) and *A força normativa da Constituição* by Konrad Hesse (1991), until reaching, in the 21st century, more systematized and defining formulations of a constitutional sociology, such as those of Chris Thornhill in *A sociology of Constitutions* (2011).

In Brazil, constitutional sociology studies are still very incipient and tend to emphasize a specific empirical perspective. Such an approach elects as its focus the social repercussions arising from the application of constitutional law, that is, from the performance of institutions that manage the Constitution. The most common examples are those linked to important analyzes of the decisions of the Federal Supreme Court (STF). In Latin America, German José Bidart Campos, who dedicates one of the six volumes of his work *Tratado elemental de derecho constitucional argentino* to the debate on the *sociología del derecho constitucional* (1992), also works with a perspective of analysis of the consequences of the application of constitutional texts, being one of the great theoretical references of the subject.

<sup>7</sup> Ansaldi y Giordano (2012a, t. I), p.42.



The aim of this article, in this sense, is to present historical sociology as a methodology that can contribute to diversified and innovative approaches to research in law, proposing its application to Latin American constitutionalism based on the analysis of some specific situations.

To do so, the article is divided into two parts. In the first part, a historical review of the proposed methodology will be carried out, from its initial recognition in the 1950s, in the United States, through successive “waves” of development. In the second part, we will indicate the potential of contributions from historical sociology to constitutional law in concrete situations that point to possible paths to be followed: (1) the performance of the courts in relation to authoritarian legality and (2) the constitutional and infra-constitutional normative formation of the Brazilian public administration.

## 2. Notes on the method of historical sociology

Historical sociology<sup>8</sup> began to be recognized under this name in the late 1950s, in the United States, definitively consolidating itself in the 1970s, as an attempt to recover the classical authors of sociology in the analysis of large-scale political, social and economic transformations.<sup>9</sup>

In 2005, Julia Adams, Elisabeth Clemens and Ann Shola Orloff published a book entitled *Remaking modernity: politics and processes in historical sociology*<sup>10</sup> in which, in the introduction, they formulated an archaeology of historical sociology, dividing it into three phases which the authors called “waves”.<sup>11</sup> The first wave would be that constituted by the

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<sup>8</sup> There is a difference in nomenclature that seems to derive more from the origin field of knowledge of the analyst than from differences in practice. We refer to the terms “historical sociology” and “neoinstitutionalism” and, more specifically, to “historical neoinstitutionalism”. Indeed, sources from sociology tend to adopt the first name, while those from political science use the second. As an example of the above, it is verified that the authors representing the paradigm identified by each field are the same, as are the cases of Charles Tilly and Theda Skocpol, to mention just two references. Furthermore, according to the classification presented by Adams, Clemens and Orloff (2005), institutionalism is one of the strands of the third wave. Considering that the most important Latin American references (especially Waldo Ansaldi and Veronica Giordano) employ the expression “historical sociology”, it will be privileged in the present work, although the second term may eventually appear eventually in direct citation. In any case, we believe there is no prejudice to an adequate understanding of the central aspects of the methodology.

<sup>9</sup> Ansaldi y Giordano (2012a, t. I), p. 39.

<sup>10</sup> Adams y Clemens y Orloff (2005).

<sup>11</sup> The classification of the authors is not a consensus among scholars in the area, as Ansaldi and Giordano show: “A propósito de las ‘olas’ de sociología histórica que proponen Adams, Clemens y Orloff, hay que decir que varios académicos han rechazado la existencia de una ‘tercera ola’, aduciendo que los trabajos que supuestamente se



own "founding fathers" of sociology — in particular Karl Marx, Émile Durkheim and Max Weber — whose central questioning sought to understand the processes according to which the transition from "traditional" societies to recognized "modern" societies took place. The authors draw attention to two necessary observations: the first concerns the fact that the societies studied were, in general, European and, the second, that, of course, the meaning of what was understood as "modern" varied from author to author.<sup>12</sup>

After a period in which research in the social sciences was dominated by a-historical analyses, the second wave brought together, between the 1970s and 1980s, a group of theorists nourished by interdisciplinarity and by the dissemination of historical methods, which assumed a "comparative macrosociological" analysis of large state structures contextualized over a long period of time. This wave includes great names in historical sociology such as Barrington Moore Jr., Reinhard Bendix, Neil Smelser, Charles Tilly, and Theda Skocpol. Although not all authors were Marxists — the movement was eclectic — Marxism inspired the definition of research questions: "revolution", "industrialization", "state formation" and "class formation" (among others). Finally, although not all academics that joined this perspective of historical sociology have resorted to the comparative method, it has been consolidated as having great relevance and effectiveness for the purposes of historical sociology of this phase, as it presents alternatives to functionalist and structuralist analysis.<sup>13</sup>

Finally, the third wave, which does not have the same topical and theoretical coherence as the second. At least five "communities" of historical sociologists can be identified: institutionalists (concern about the formation and evolution of political and social institutions), theorists of rational choice (study of the strategic decisions of individuals in relation to the constraints of the political game; in other words, focus on the analysis of decision-making rules by individuals), culturalists (perception of institutions as cultural practices), feminists (inclusion of gender as a dimension of the analysis of institutions) and those linked to colonial and post-colonial studies (extrapolation of the European experience

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inscriben en ella no se diferencian sustantivamente de los producidos por la 'segunda ola', puesto que no se han acuñado conceptos propios y nuevos de historicidad, cambio histórico o causación" (Ansaldi y Giordano, 2012a, t. I, p. 44). However, we recognize the importance of this systematization. Even without consensus regarding the third wave, the existence of divergence in relation to such classification, together with the absence of another that could replace it, places it as a relevant item in the historical recovery of debates about the method.

<sup>12</sup> Adams y Clemens y Orloff (2005), p. 03.

<sup>13</sup> Adams y Clemens y Orloff (2005), pp. 05-08.



from the study of Latin America and the East).<sup>14</sup> Even given the recognition of all the differences that may exist in the adoption of a comparative methodological perspective such as that of historical sociology, there is a consensus that its choice allows one to escape from dichotomies such as past/present, nomothetic/ideographic, universal/private, structure/action.<sup>15</sup>

The methodological possibilities for the development of historical sociology can vary widely among scholars who adopt it. Theda Skocpol<sup>16</sup> discusses the three most recurrent strategies. The first uses comparison to validate a general theory by applying it to historical cases. Recurrent in the fifties and sixties of the last century — when sociology presumed to be able to formulate a universally applicable general theory of society and when sociologists assumed that history consisted of a group of researchers dedicated to compiling “facts” in the archives that occurred at different times and places in the past — “the application of a general model to one or more historical instances was the kind of historical sociology most likely to be recognized as empirically rigorous and theoretically relevant in mainstream disciplinary circles”.<sup>17</sup>

Skocpol uses as an example the book *Social change in the industrial revolution*, by Neil Smelser,<sup>18</sup> in which the author applies the assumptions of his general theory on social transformations to two concrete and distinct situations that occurred in 19th century England, so that, with the help of historiography, the empirical demonstration of its validity became possible. If, on the one hand, this strategy is interesting because it leads the researcher to specify and operationalize what would be, *a priori*, the adopted theoretical models of interpretation (set of concepts and abstract propositions), on the other hand, it does not rule out the risk that the choice of historical cases ends up being arbitrary and leaves aside important facts that could testify against the assumptions of the general theory put to the test.<sup>19</sup>

In societies with diversified historical processes, such as Latin America, the use of this strategy may neglect exactly what differs us in terms of generalizing theoretical concepts and

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<sup>14</sup> Adams y Clemens y Orloff (2005), pp. 32-63.

<sup>15</sup> Ansaldi y Giordano (2012a, t. I), p. 42.

<sup>16</sup> Skocpol (1984).

<sup>17</sup> Skocpol (1984), pp. 362-363.

<sup>18</sup> Smelser (2011).

<sup>19</sup> Skocpol (1984), p. 336.



brings us closer in terms of empirically situated historical experience, without this necessarily indicating a failure in applying theoretical models.

The second strategy is one that uses sociological concepts to develop a "meaningful" historical interpretation.<sup>20</sup> In general, interpretive historical sociologists are skeptical about the usefulness of applying general theoretical models to history or using a hypothesis-testing approach to establish causal generalizations about large-scale structures and patterns of change. Rather, these scholars seek two-way "meaningful" interpretations of history. First, special attention is given to cultural issues embodied by individual actors or those belonging to groups in the investigated historical configurations. Second, both the topic chosen for historical study and the types of arguments developed about it must have a cultural or political significance in the present; that is, they must be part of a common lexicon for the general public, they must be "meaningful". The aim is, therefore, to preserve as much as possible the sense of historical particularity.

The example used by Skocpol is the work of E. P. Thompson, *The Making of the English Working Class*,<sup>21</sup> in which the author consolidates the analysis of the concept of class as a historical phenomenon (in polemic opposition to the deterministic economic view) and, therefore, part of an active process of structural and cultural conditioning. Later, Thompson uses this concept to organize narratives and select events that occurred in the early 19th century in England, proceeding to a historical interpretation through a category that is already significant in the present.<sup>22</sup> The big criticism of this strategy is that it runs the risk of always becoming too deterministic.

Finally, the last strategy, which Skocpol takes as his own, along with Barrington Moore Jr., can be defined as the analysis of causal regularities in history. It is an analytical perspective in which researchers visit the past and present analysing historical cases, considering all available opportunities and assuming the validity of alternative hypotheses as a way of helping to recognize or not regularities. The main characteristic of this strategy, according to Skocpol, is that there is no effort to analyse historical facts from the perspective of general models: there is no commitment to one or another theory, but the effort to discover the concrete reasons that explain the relevant historical processes. Alternative

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<sup>20</sup> Skocpol (1984), p. 368.

<sup>21</sup> Thompson (2013).

<sup>22</sup> Skocpol (1984), p. 369.



hypotheses that contradict *a priori* the meaning of certain historical facts are always welcome to verify or not causal regularities, since the absence of regularities is also a valid result.

In this sense, one of the great contributions of this strategy is the confrontation that it makes in relation to the dogma of universality, since generalizations can present themselves as relative to some historical event. Unlike interpretive sociologists, concerned with knowing “what happened” (from a meaningful perspective), analytic sociologists, who use this third strategy, seek to know “why it happened”.<sup>23</sup> For Ansaldi and Giordano,<sup>24</sup> the great advantage of the last two strategies is that they return to analyses that manage to reconcile structure and action or structure and culture, allowing for interpretations not yet considered.<sup>25</sup>

In Latin America, the consolidation of debates on historical sociology has emerged with the innovative work of Cardoso and Faletto, *Dependência e desenvolvimento na América Latina*<sup>26</sup>, written in the mid-1960s. The first methodological novelty of the book was to combat the binarism of the concepts of “traditional” and “modern”. According to the authors, these concepts “[...] are not broad enough to precisely cover all existing social situations, nor do they allow us to distinguish between them the structural components that define the way of being of the analysed societies [...]”.<sup>27</sup> Very close to the second wave described by Adams, Clemens and Orloff,<sup>28</sup> Cardoso and Faletto brought as the great innovation for Latin American academia the proposition of a comparison that, far from adopting the functionalist and structuralist criteria in vogue, elected as unit of analysis the Nation-States.<sup>29</sup>

This type of comparative method was called “integrated comparison” and, according to Giordano, its importance lies in the fact that “la investigación comparativa integrada y reflexiva permite captar las especificidades nacionales a la vez que el cuadro de conjunto de América Latina en el mundo como problemas teóricos”,<sup>30</sup> this because “la comparación integrada supone que esta es parte inseparable de la selección del objeto de investigación.

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<sup>23</sup> Skocpol (1984), p. 376.

<sup>24</sup> Ansaldi y Giordano (2012a, t. I), p. 44.

<sup>25</sup> It is important to point out that the use of one or another strategy is not rigid, and creative combinations are common (Skocpol, 1984).

<sup>26</sup> Cardoso y Faletto (1975).

<sup>27</sup> Cardoso y Faletto (1975), p. 17 (our translation).

<sup>28</sup> Adams y Clemens y Orloff (2005).

<sup>29</sup> Giordano (2014), p. 24.

<sup>30</sup> Giordano (2014), p. 27.



No se trata de usar la comparación para ilustrar una teoría, sino de usar la comparación para resolver un problema teórico”.<sup>31</sup>

Currently, one of the main Latin American researchers dedicated to deepening the comparative method of historical sociology is the Argentinian Verónica Giordano, whose vast work is of fundamental relevance for the development of historical sociology in the region. Giordano tries to confront criticisms that have been made to the attempt to link sociology and history through what she calls an “intellectual project of hybridization of disciplines” inspired by Mattei Dogan and Robert Pahre, in *Las nuevas ciencias sociales: la marginalidad creadora*.<sup>32</sup> This project is in full development and, “[...] el estado actual de la sociología histórica, visto desde esta perspectiva, puede ser entonces leído como una incipiente hibridación de la sociología histórica (la de ‘segunda ola’) con otras áreas como historia cultural, estudios de género, etc”.<sup>33</sup>

As seen above, this comparison is not intended to demonstrate theoretical assumptions, but the existence of theoretical problems to be faced and solved. For this reason, “propone tomar como objeto de estudio a los procesos de cambio social en gran escala y estudiarlos a partir del planteo de problemas históricos concretos, analizando y documentando los hechos ‘en la menor escala posible’”.<sup>34</sup>

The approach strategy used by her is analytical, so that the historical analysis considers not only the result of a given social process, but also all the alternatives that were available and that, for some reason, were not successful. The verification of regular causes is permeated, in this sense, by an interpretation that includes non-victorious processes. The adoption of comparison is inevitable, above all, because the analytical strategy proposes to overcome the dichotomy structure and action, considering the two as part of the same process.

In the work of Giordano as a whole, the comparison elects social transformations as its main object and, for this very reason, it is nourished by sociological theories that are dedicated to identifying transformation processes in societies from the two articulating and enabling axes to overcome the dichotomy structure and action: the construction of power

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<sup>31</sup> Giordano (2014), p. 25.

<sup>32</sup> Dogan y Pahre (1993).

<sup>33</sup> Ansaldi y Giordano (2012a, t. I), p. 45.

<sup>34</sup> Giordano (2011), p. 44.



and the role of social classes. According to Ansaldi and Giordano, power is constituted in the form of order and

[...] el orden se organiza como Estado: el orden y su institucionalidad son los de los vencedores. Su capacidad de dejar abierto un espacio para canalizar los reclamos de los vencidos depende de condiciones históricas variadas y cambiantes, de la combinación de coerción y consenso, dominación y hegemonía. Ese proceso de construcción y conservación del orden, complejo, tortuoso y nunca del todo acabado, incluye tanto las confrontaciones entre bloques de clase dominante como las resistencias y oposiciones — y en algunos casos los proyectos alternativos — de las clases subalternas.<sup>35</sup>

As already mentioned, one of the characteristic aspects of historical sociology, especially in its Latin American strand, is the hybridization of disciplines, “recombining” their borders in order to launch a new look at the object of study. Indeed, historical sociology “guarda un compromiso con las particularidades teóricas y metodológicas de cada una de las disciplinas, pues comparar lleva siempre consigo un doble trabajo de conocimiento minucioso del hecho histórico concreto y de conceptualización a partir del material histórico”.<sup>36</sup>

Thus, to understand the actions of political actors and overcome the dichotomy between action and structure, it is necessary to identify the historical and cultural context in which the institution originated, maintained and adapted itself.<sup>37</sup> After all, “if men want to break the chains of the present, they will have to understand the forces that forged them”.<sup>38</sup> In our case, this means “remontarse en la historia al proceso mismo de formación de una peculiar modernidad latina, la modernidad del Sur”,<sup>39</sup> in which historical sociology allows them to identify “regularidades y singularidades históricas y, a partir de ellas, realizar diagnósticos que eventualmente sirven para decidir con mayor conocimiento de causa, y para orientar la acción colectiva de forma más reflexiva y crítica”.<sup>40</sup>

The methodological proposal presented here adds a third to the two aforementioned disciplines, the law – a *sociología histórica de lo jurídico*.<sup>41</sup> The aim is, therefore, to innovate in the field of study (Latin American constitutionalism), without failing, of course, to respect its own specificities. One does not want, for example, to abandon the analysis of

<sup>35</sup> Ansaldi y Giordano (2012a, t. I), p. 30.

<sup>36</sup> Giordano (2011), p. 44.

<sup>37</sup> Sanders (2006), p. 39.

<sup>38</sup> Moore Jr. (1957), p. 581.

<sup>39</sup> Álvarez-Uría (2015), p. 14.

<sup>40</sup> Álvarez-Uría (2015), p. 13.

<sup>41</sup> Giordano (2012), p. 15.



hermeneutics or the relationship between the norm and the implementation of the constitutional text, or even the functioning of constitutional jurisdiction, to think about approaches that have been widespread in recent decades. What we want is to try to do them considering the historical framework of transformations in Latin American States with all their regularities and persistence, in order to try to problematize the legal-constitutional field in a differentiated way, aimed at understanding the concrete reasons that explain the historical processes and, consequently, the constituents. The proposed challenges are, therefore, enormous, but the results can be worth the effort.

The perspective of historical sociology chosen here is the one that, based on the hybridization of disciplines, adopts as a strategy the analytical method of integrated comparison to investigate the processes of transformation of societies over time, having the Nation-State as the basic unit of comparison considered in its two relational axes: the structuring of power and human action (individual or collective). The study of the past not as an academic fetish, but as a process that makes it possible to better understand the shape of the present and the preparation for the future.

Given the picture presented and the understanding of historical sociology as an appropriate methodology to deal with the comparative analysis of large structures, such as that of Nation-States and their institutions, submitted to constant processes of social transformation over a long period of time (so in order to understand the relationship between human action and social organization as something that is built continuously over time), it is possible to make two assumptions for the use of this methodology in the context of Latin-American constitutionalism.

The first is the consideration of constitutionalism as a phenomenon that is not limited to the production of constitutions, but which expands into several other legal and sociological perspectives, presenting all the necessary theoretical conditions to be approached in an innovative way through the method of historical sociology.

The second would be the understanding of the constituent processes in Latin America not so much for their normative results in the strict sense, but for the conditions of production of these "pacts", that is, for the identification of the dynamics, articulations and oppositions of the forces and projects available throughout the process.

It is believed, therefore, that the adoption of the method in the field of Latin-American constitutionalism can contribute to a differentiated analysis of constitutions, conceiving



them no longer as *stricto sensu* institutions, but as a result of a social process that does not end in itself and opens up the possibility of building new research problems that have not yet been thought through or the replacement of old problems based on new questions.

### 3. Problematizations from the method of historical sociology

The first theme dealt with here in which the contribution of historical sociology in the analysis of constitutional law is glimpsed is the way in which courts deal with authoritarian legality and the impact of this relationship on institutional dynamics.

In general, a theoretical path taken on the impact of the relationship between democracy and authoritarianism on legal institutions presupposes the existence of an authoritarian culture as a mark that accompanies us historically. There is no doubt that the authoritarian experiences of the second half of the 20th century need to be analytically conceived, reflected and treated as the result of societies that were constituted during colonial domination as a hierarchically structured order, intolerant, and generator of authoritarianism throughout the 19th and 20th centuries.<sup>42</sup>

Considering the Latin American experiences of this period from the theoretical contributions of historical sociology means, for example, analysing such experiences as a whole and considering the roles of the courts in a comparative-integrated way, exploring a potential for more precise identification of possibilities of rupture or continuities (specific and common) between such experiences, rather than just considering as sufficient factual support the historical relations of cause and effect between past and present.

If it is true that the transitional processes implied changes in institutional restructuring, it is necessary to analyse how the higher courts underwent changes from the various experiences of transition to democracy without necessarily attributing a totalizing weight to these transformations so that other important elements remain obscure such as, for example, the non-victory processes that, in general, would indicate the need for an analysis of the disputes of transitional political projects, including for the courts.

If, on the one hand, the existence of different proposals for the composition of the courts, by the political forces in dispute, demonstrates the importance of these spaces for

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<sup>42</sup> Ansaldo y Giordano (2012a, t. I), p. 19.



the definitions of the institutional format of the State, and the analysis of the winning theses may indicate ruptures or permanencies, on the other hand, the absence of proposals and alternatives for change by some groups also says something.

The end of an authoritarian period does not necessarily occur with the transition to a democratic regime, understood here as the reestablishment of basic rules for the exercise of a formal democracy, in the sense developed by Anthony Pereira about the existence of constitutionally limited governments.<sup>43</sup> Some go further and others not so much. However, identifying political transitions in terms of facing authoritarian legacies with the institutional difficulties of the present in advancing a democratic agenda, both in the field of politics and in the field of guaranteeing rights, may represent a logically acceptable and partially true solution, but incomplete, because it is linked to a dichotomy between past and present that obliterates the processes of transformation as part of the same history. This means not establishing necessary presuppositions between the advances of political transitions in the different Latin American experiences and the level of democratic development of its institutions *a posteriori*.

An excellent research that analyses transitional processes in an integrative way, surpassing the historical relations of cause and effect, is the thesis of Diego Werneck Arguelhes, *Old Courts, new beginnings: judicial continuity and constitutional transformation in Argentina and Brazil*.<sup>44</sup> Based on the analysis of the transitional processes in Argentina and Brazil, the author concludes that despite the huge differences in the political transitions between the two countries, the courts did not advance in overcoming the historical legacies in a more or less similar way. The identification that Argentina had a much more fruitful transitional process with regard to confrontation of authoritarian ills, achieving important institutional transformations, such as the reformulation of the Supreme Court itself, was not enough to guarantee an action capable of overcoming previous institutional permanencies and regularities.

The transitional processes from authoritarian experiences to formal democratic regimes were decisive to the ways in which the power of the State was structured, which began to indicate the institutional conditions of rupture or continuity of authoritarian patterns. Judicial powers, especially higher courts, play a fundamental role in setting up these

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<sup>43</sup> Pereira (2010), p. 26.

<sup>44</sup> Arguelhes (2014).



new institutional mechanisms. However, the existence of new institutional mechanisms is not enough to determine a judicial action that will result in ruptures that indicate advances in the democratic process or in repetitions that, overshadowed by the handling of legal doctrines, could represent structures for the maintenance of practices that could threaten the success of the implementation of a constitutional democracy.

In this scenario, the treatment given by the courts in relation to the authoritarian norms produced before the transitions to democracy can further enrich the amount of elements brought to the analysis of the impact of the actions of the courts for the consolidation of democratization processes of institutions. Indeed, one of the main challenges for transitional experiences is how to deal with the production of legality prior to the establishment of constitutional consensus, since the continued application and submission to norms contrary to the constitutional text is a decisive factor for the weakening of the “normative force of the Constitution” and the cultural permanence of a *modus operandi* built on the foundations of an authoritarian government. Analysis of this type of action can say a lot about the maintenance of the authoritarian culture, since the choice of how to receive norms prior to redemocratization is an indication about the willingness of the courts to decide on the rupture or continuity of the previous experience.

In this sense, the use of interpretive strategy (the second identified by Skocpol and described in the first part of the text) could be successful in verifying whether the category of authoritarian legality itself has the potential to produce an interpretation that has a culturally relevant meaning (*significant interpretation*) for the social and institutional dynamics existing today.

Still on the construction of authoritarian legality, another possibility of applying the method that matters to constitutional issues, especially with regard to the execution of its organic part, refers to the study of the process of creation and consolidation of public administration institutions, considering the alternation between political normality and periods of exception. Or how authoritarian periods influenced the production of norms that govern the actions of the State, and what marks they left behind. This study deviates from the actions of the courts and focuses on the infra-constitutional legality that has the power to put into practice the presuppositions of the organization of the State, in addition to determining and consolidating important practices in the performance of the public administration that can boost or block the constitutional text.



Public administration matters directly in the governmental *modus operandi* that, throughout the 20th century, underwent a strong movement of constitutionalization, especially after the redemocratization of the region. Therefore, speaking of “public administration”, a theme traditionally in the field of administrative law, in a text that suggests the application of historical sociology in Latin American constitutionalism may indicate innovative keys to interpretation of the constitutional dynamics instituted in the region.

The focus here is Brazil, but the large number of Latin American countries that underwent authoritarian experiences throughout the 20th century, a period in which the modern bureaucracy model was consolidated, allows us to consider that it is not an isolated experience. To this end, for example, the use of the integrative comparative method would make it possible to understand the ways in which different countries faced the issue of handling mechanisms for maintaining or not maintaining historical regularities.

Ansaldi and Giordano,<sup>45</sup> in a work in which they address the "presupuestos teórico-metodológicos para el análisis socio-histórico del proceso de formación de los estados latinoamericanos", work with the interpretative model of Göran Therborn, which helps to delimit the study of Public Administration institutions from the analysis of the functions of the State and its respective structures: governmental, administrative, judicial and repressive.

The "governing" structure comprises what we could delimit as the organization of powers (in particular the relationship between the Legislative and the Executive, that is, the system of government — parliamentary or presidential) and the organization of the State (system of division of competences or form of the State — unitary or federal). The “administrative” structure is that constituted by the state bureaucracy and related to the previous one, but not entirely dependent on the government. Although its general lines can be traced in the constitution — in Brazil this is true, more so in relation to some structures than others —, its design is made by the constituted powers in an infra-constitutional scope. Third, the “judicial” structure is responsible for administering justice. Finally, the "repressive" structure is linked to the exercise of the monopoly of violence considered legitimate, which includes the formation of the armed forces, the police and the prison system.

Specifically in this article, it is interesting to approach the formation of the administrative structure,<sup>46</sup> considering the need to deepen the knowledge of the effects of

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<sup>45</sup> Ansaldi y Giordano (2012b), pp. 56-60

<sup>46</sup> It should be noted that studies on government, judicial and repressive structures are quite developed, especially in the fields of Sociology and Political Science, but also in Law.



constitutional and institutional designs on administrative bodies, since, as mentioned in the first part of this text, the order is organized as a State and its institutions reflect the winning theses. In relation to the case of Brazil, Gustavo Binenbojm<sup>47</sup> states that, at the same time that a paradigm shift in normativity is produced from the constitutionalization of administrative law, with the advent of the 1988 Constitution, the theory supporting this field continued to be permeated by what the author identified as three main characteristics: its (1) inconsistency, its (2) authoritarianism and its (3) inefficiency. One hypothesis is that such characteristics, considered here within a long-term analysis, directly affect the construction of the Brazilian administrative structure and are indicative of the permanencies of the legal culture that originated in the imperial period and that act contemporaneously as generators of blocks and processes of resistance to the current constitutional text.

The (1) inconsistency of the doctrine is linked to a logical-conceptual contradiction between the version of the origin of administrative law as a result of the subjection of bureaucracy to the law and the advent of the separation of powers, while its institutes are the result of the action of an administrative body — the French Council of State — and not a decision of the Legislative Power. The (2) authoritarianism refers to the monarchic root responsible for consolidating a “logic of authority”, and not a “citizen logic”, even though administrative law is also linked to the emergence of the liberal rule of law. Finally, the third characteristic — the (3) inefficiency — results from the low degree of rationality of the legal-administrative regime.

Brazil constitutes “un caso descollante de temprana constitución de un aparato administrativo poscolonial, como consecuencia de la continuidad entre la situación colonial y la proclamación del Imperio independiente”.<sup>48</sup> The model implemented following the French tradition was institutionalized and legitimized in line with a tradition that sees the relationship between administration and administered as essentially unequal, allowing the former the power of the law and a position of supremacy in relation to the individual rights of the latter.<sup>49</sup>

Although for a long-term analysis, the study of the administrative structure of the Empire may provide important interpretative keys, the transformations that occurred from the 1930s onwards are important for the problematization proposed here, a period in which

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<sup>47</sup> Binenbojm (2014), pp. 02-03.

<sup>48</sup> Ansaldi y Giordano (2012b), p. 59.

<sup>49</sup> Binenbojm (2014), p. 16-17.



the administrative doctrine identifies the consolidation of the bureaucratic model administration in the country. For that, two sets of events are important: (1) regime changes, marked by the publication of new constitutions in the republican period, and (2) the great administrative reforms that took place in Brazil.

Regarding (1) regime changes, a minimalist perspective of democracy is adopted, based on the observation of three rules: (a) the possibility for voters to freely choose the head of the Executive Power, (b) the possibility for voters to freely choose the members of the Legislative Power and (c) the existence of more than one political party. A fourth variable (4) is the fact that the regime, in addition to meeting the first three criteria positively, has undergone a change of government with the election of an opposition party.<sup>50</sup> The minimalist classification seems adequate for the purpose of identifying the periods of *democracy* and *non-democracy* in Brazil.<sup>51</sup> In this sense, the periods 1930-1945 and 1964-1988 are considered *non-democratic*, whereas 1946-1964 and after 1988, *democratic*.<sup>52</sup>

Inserted as an important marker of regime change in Brazilian history, the 1988 Constitution is an example of a legal framework that brings with it a promise of greater stabilization of the institutes of administrative law, as it is the first in our history to contain a chapter dedicated exclusively to public administration. Despite the relatively high number of amendments approved in the last thirty years, it is evident that the formal requirements provided for in Art. 60 make it difficult to modify the constitutional text.

It so happens that, counter intuitively, the constitutionalization of administrative law did not ensure a cultural change to the point of representing a rupture in the theory of administrative law, as highlighted by Binenbojm,<sup>53</sup> not necessarily converting the administered into a citizen. Understanding this process goes through a characteristic in Latin American history that goes back to a dynamic established in the processes of constitutionalization.

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<sup>50</sup> Alvarez et. al. (1996).

<sup>51</sup> The existence of other, more *substantive* conceptions of democracy, which may be relevant at other times in the research, is not ignored.

<sup>52</sup> These changes, since the Proclamation of the Republic, in a period of less than one hundred years, have produced "seven" constitutions (promulgated or granted): Constitution of 1891 (which consolidated the change in the form of government from monarchy to republic), Constitution of 1934 (promulgated during the Provisional Government of Getúlio Vargas), Constitution of 1937 (which established the *Estado Novo*), Constitution of 1946 (which marked the redemocratization of the country), Constitution of 1967 (post-coup of 1964, in the context of the Military Dictatorship), Constitution of 1969 (which deepened the dictatorial character of the regime) and finally the Constitution of 1988 (the "Citizen Constitution").

<sup>53</sup> Binenbojm (2014).



The concept of constitution comes from the political world. Since the famous Art. 16 of the Universal Declaration of Human and Citizen Rights of 1789, the constitutions have been defined based on two main elements: the political organization of the State, on the one hand; and the recognition of one set of fundamental rights, on the other. In the Latin American experience, while the organic part of constitutions (relating to the organization of the State) has been clearly conservative, the dogmatic part (relating to rights) has had greater liberal influence.<sup>54</sup>

Norms relating to the organization of political institutions work relatively well for maintaining the *status quo*, whereas norms defining fundamental rights have always been postponed to an indeterminate, distant and never-reached future. Indeed, the realization of these is usually blocked or distorted, fulfilling much more of a "symbolic-ideological" function.<sup>55</sup> Although we have an extensive list of fundamental rights, unquestionably placing our constitution as that of a social State of law, the organization of the State remains conservative and resistant to many of the constitutional advances.<sup>56</sup>

The second set of processes to be observed are (2) the three major Brazilian administrative reforms carried out from the 1930s onwards. Specialized doctrine usually represents each of these reforms based on the following normative frameworks: Decree-Law No. 579 of July 30, 1938 (bureaucratic reform<sup>57</sup>, whose symbol is the creation of the Administrative Department of the Public Service — Dasp)<sup>58</sup>, Decree-Law No. 200 of February 25, 1967 (which aimed to decentralize the performance of the Public Administration with the

<sup>54</sup> Gargarella (2014).

<sup>55</sup> Neves (2018), p. 196.

<sup>56</sup> "If observers were limited to reading the constitutional document, they could suggest the illusory notion of a democratic and social state under the law or, at least, of the "good intentions" of those in power. The observation of the respective constitutional reality would deeply disappoint them: there is no democracy as a circulation of power between politics, administration and the public, much less as the integration of a pluralist public sphere in the constitutional system. [...] So far there is no safe perspective for the realization of the democratic rule of law suggested in the constitutional document" (Neves, 2018, p. 208).

<sup>57</sup> The bureaucratic model of administration refers to the ideal type of rational-legal authority, whose legitimacy comes from the legal order (Weber, 1999). Among its attributes, we can highlight the functioning according to the domain of law (legality), the formal character of communications (impersonality), acting according to routines and procedures (formalism), the predictability of the functioning (of institutions), the existence of a body of professional servers (selected through public tenders and organized into careers), the division of labour (specialization) and the hierarchy of authority. Today, results of this model of administration are the constitutional principles of legality, impersonality, publicity and morality, expressly provided for in Art. 37 of the Federal Constitution.

<sup>58</sup> Although focused on the figure of Getúlio Vargas, the trilogy of Lira Neto (2012; 2013; 2014), especially the first volume — which covers the period from his childhood to his rise to the presidency in 1930 — well portrays the fragility of Brazilian administrative institutions in the First Republic, as well as the political and social framework marked by patrimonial and coronelist relations. Getúlio Vargas sought, based on a set of measures, such as the institution of the rule for the selection of personnel through public examinations and the structuring of positions in careers, to professionalize public administration.



expansion of indirect Public Administration)<sup>59</sup> and Constitutional Amendment No. 19 of June 4, 1998 (management reform with emphasis on the principle of efficiency).<sup>60</sup>

As it is possible to see, the first two reforms were carried out during authoritarian periods (*Estado Novo* and military dictatorship) and the last one was carried out during the New Republic — demarcated by the current Constitution — and had the most evident result (although it may be debated on the extension of its objectives) the weakening of the role of the State in relation to the realization of social justice — opposing, to some extent, the social pact conceived by the constituent in the Constitution.

As already seen in the previous analysis on the relationship between transitional processes and democratic advances, a deductive and logical inference to the topic would be that this dictatorial role in regulating the production of administrative regulations bequeathed a good dose of authoritarianism to the matter. After all, as Giordano<sup>61</sup> states, the Latin American pattern is “la institucionalización (y bien puede decirse, la política) fue burocrático-autoritaria, esto es, no democrática”.

However, there is something that can be perplexing in this analysis: the observation that the periods of exception in Brazilian republican history were especially fertile with regard to the creation and consolidation of many institutes of administrative law and institutions of public administration with a more “progressive” character.<sup>62</sup>

The fact that these norms were elaborated in authoritarian periods does not imply their automatic rejection. On the contrary, from a value perspective, it is curious to observe that relevant norms elaborated in non-democratic periods are as progressive or even more

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<sup>59</sup> It should be noted that Decree-Law No. 200/1967 still establishes some general parameters for the organization of public administration in Brazil.

<sup>60</sup>Nohara (2012). From the 1980s on, a movement emerged in countries such as England (under the government of Margareth Thatcher) and the United States of America (under the presidency of Ronald Reagan), in the sense of transferring to the private sector activities considered not essentially state-owned companies. The “movement receives different names” such as “State reform, reduction of the public sector, *denationalization*, *deregulation*, *privatization*” (Medauar, 2013, p. 108). There are several formulas applied, among which Odete Medauar (2013, p. 108) highlights the “breaking of state monopolies, the increase in the number of public service concessions and permissions and the sale of state-owned companies to the private sector”.

<sup>61</sup> Giordano (2011), p. 46.

<sup>62</sup> In this sense, one can quickly list Decree-Law No. 25 of November 30, 1937 (which organizes the protection of the national historical and artistic heritage), Decree-Law No. 3,365 of June 21, 1941 (General Law of Expropriations), Law No. 4,717 of June 29, 1965 (which regulates class action, being the basic rule for identifying the elements of the administrative act) and Law No. 7,347 of 24 of July 1985 (Public Civil Action Act). With the exception of the last norm — promulgated by the already President José Sarney, although still under the aegis of the authoritarian constitution — all the others were published during non-democratic periods. It is questionable to what extent authoritarianism is not impregnated, although, on the other hand, it is doubtful that, after the 1988 Constitution, the protection of historical heritage, for example, would deserve similar zeal from the legislator than granted it Getúlio Vargas.



so, in certain cases, than can be seen in periods of democracy. These have been more notable for the flexibilization of rights, as shown by privatizations and reforms such as those carried out in social security. Establishing reflections on findings of this nature is essential to understand the dynamics that have historically been established between the administration and the administered, and also in relation to the advances and setbacks in the process of constitutionalization of Brazilian administrative law.

The analysis of rejection or valorisation of these legislations, from the perspective of historical sociology, cannot fail to investigate all the proposals that have expired in each of the periods of legislative formulations in order to assess in depth their links with the dominant public administration project as a structure of order of the Brazilian State. That is to say, both the immediate rejection and the restricted consideration of the legislation approved do not contribute to explaining the reasons why these legislations were approved during these periods. The clarification of political disputes in each of the cases of normative change is essential as to whether or not they indicate ruptures and continuities or even originalities of the process.

Thus, the bureaucratic administration model was born in Brazil at a time when democracy was in abeyance. Its consolidation takes place again during a dictatorship. And, if the reform of the 1990s took place during a democratic period, the public administration model is the heir of the structure set up during the dictatorship, from which it has difficulties to disentangle itself. In any case, it would be expected that the democratization of the regime would contaminate the way in which the public administration was issued, causing significant changes in this area. On the contrary, the logic that permeated the dynamics of advances is that democracy is not necessary and can even “get in the way”, as shown by the elucidating statement of the then President-Dictator Getúlio Vargas:

The dictatorial period has been useful, allowing the realization of certain saving measures, which are difficult or belated to be carried out within the legal orbit. Most of the initiated and completed reforms could not be carried out in a regime in which the interest of political conveniences and party injunctions prevailed.<sup>63</sup>

Corroborating the above observation, the study evidenced in the doctoral thesis of Verónica Giordano<sup>64</sup> showcases a set of data related to the recognition of the full civil capacity of women in Latin America. In particular, the author draws attention to what

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<sup>63</sup> Neto (2013), p. 05.

<sup>64</sup> Giordano (2012).



happened in countries such as Argentina, Brazil, Chile and Uruguay: the enactment of rights that aimed at the autonomy and emancipation of women took place, to a large extent, during politically authoritarian periods (in her words, during “dictaduras institucionales”).

For Giordano, the aforementioned paradox can be explained by the observation that Latin American dictatorships, in order to legitimize themselves, needed to create institutions. This was due to the attempt to perpetuate these regimes in power, as well as due to the intended economic, political and ideological changes. She emphasizes that the expansion of civil rights during authoritarian regimes does not constitute any historical singularity, at least not on the continent, “donde la dictadura es una forma de dominación que atraviesa todo el proceso de construcción de un orden democrático”.<sup>65</sup> Indeed, the construction of the democratic order in Latin America, and in Brazil in particular, is permeated by authoritarian periods, whose effects have not been totally overcome.

Considering these data of historical regularities from the capture of evidence provided by historical sociology, the study of the formation and development of administrative institutions that govern the organization and functioning of public administration and regulate the relations between the Administration and the administered, also constitutes a privileged field to explore the connections between authoritarianism and the construction of the democratic order.

#### 4. Final considerations

The application of theoretical categories from historical sociology to Latin American constitutionalism requires the promotion of a combination of thematic frontiers. The advantage of using this method in different fields of investigation is the opening that it provides through the hybridity of disciplines. As we have seen from authors such as Tilly, Adams, Clemens, Orloff, Ansaldi and Giordano, the type of research does not need to be defined *a priori*, but during the research process, from the selected cases, using more than one method in the same research. The essence of the method indicates that the path to be followed must be defined by its research questions rather than by preconceived methodologies and epistemologies or those that represent a plastering of the possibilities of

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<sup>65</sup> Giordano (2011), p. 46.



analysis. This gives some freedom in the design of research, but it entails, on the other hand, a redoubled care in justifying the methodological choices made.

In this article, we seek to present some of the possibilities for using historical sociology in Latin American constitutionalism to point out, based on examples, paths for research that are still in progress and possibilities to be followed. The analysis were presented in order to demonstrate that the adoption of methodological strategies such as the integrated comparison between Latin American countries can, for example, reposition factual and theoretical presuppositions in a new way, opening up to differentiated and innovative approaches.

As we have seen, a methodological strategy of historical sociology is the comparison, situated in the framework of the great transformations of the Latin American States, and which has the power to put to the test situations that, *a priori*, appear to be ruptures when treated in an isolated way, but which can be identified with some regularities typical of the formation of States in the region. The comparison between the political transitions made in the second half of the 20th century is a good example of this situation.

In the case of Brazil, the timid political transition controlled by the military regime, when placed alongside the Argentine transitional process, easily leads us to seek in this historical fact the justification of our authoritarian ills. Indeed, our transitional process was determinant for the maintenance of a series of obvious historical regularities. However, in the case of Argentina, a transition with a broad confrontation of the violations committed by the dictatorial regime was not enough to overcome some practices consolidated before the collapse of the regime. When we include the behaviour of the courts in this analysis, we can see that there are many permanencies in the two transitions and, in this sense, the authoritarian culture can become a generic assumption and little explored. If the judiciary powers maintained many of their regularities in terms of institutional practices, how do we unveil such regularities in the daily lives of these courts? If, when considering certain specific institutional practices and actions, transitional processes do not fully explain or do not indicate the reach of a real rupture, what sustains this authoritarian culture so regularly?

Along the same lines, if some progressive themes in the administrative field have advanced, in terms of normative production, in authoritarian periods more than in periods of democratic regularity, there are some institutional dynamics that need to be understood within the context of complexity of the process of formation of the Brazilian State, distancing



itself from the presupposition that such legislations are authoritarian for the simple reason that they were produced in authoritarian periods. The inference that the existence of such legislations indicates that democratic regimes may be less favourable for the institutional construction of certain political projects also needs to be better investigated. What is the institutional effect of such ideas? If there are, in fact, difficulties in advancing the guarantees of rights in democratic periods, what institutional dynamics sustain this situation?

The end of this text with final considerations that formulate even more problematizations demonstrates the size of the challenge in taking on an analysis of hybrid disciplines. For the legal field, in particular, the maintenance of classic categories such as, for example, the difference between being and should-being cannot be disregarded. Constitutions will remain social pacts indicative of a place to be reached. And this indelible mark of the arrival of a new constitutional text is perhaps the greatest challenge to the application of a method such as that of historical sociology, since there is a tendency to conceive a new beginning for each new order. If the use of the categories of historical sociology serves at least to problematize this dichotomy between past and future, which seems to be the naturalized assumption as a starting point for constitutional studies, unveiling the continuous process in constant formation of the State and society, it will have already been a progress.

#### **Translator**

**João Pedro Werneck de Britto Pereira**, Universidade do Estado do Rio de Janeiro, Rio de Janeiro, Rio de Janeiro, Brasil. E-mail: [jpwerneckbp@gmail.com](mailto:jpwerneckbp@gmail.com)

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#### About the authors

##### **Roberta Camineiro Baggio**

Doutora em Direito pela Universidade Federal de Santa Catarina (UFSC). Professora Associada dos cursos de graduação e pós-graduação da Faculdade de Direito da Universidade Federal do Rio Grande do Sul (UFRGS). E-mail: roberta.baggio@ufrgs.br. ORCID: <https://orcid.org/0000-0003-4907-6105>.

##### **Paulo Eduardo Berni**

Doutorando em Direito pela Universidade Federal do Rio Grande do Sul (UFRGS). Mestre em Direito pela Universidade Federal de Santa Catarina (UFSC). Advogado e professor. E-mail: pauloberni@gmail.com. ORCID: <https://orcid.org/0000-0002-2679-6743>.

**The authors contributed equally for the writing of the article.**

