Public administration's ruling in the 1988 Brazilian Constitution. Thirty years by now: disputes, defeats and achievements*

A administração pública na Constituição de 1988. Trinta anos depois: disputas, derrotas e conquistas

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ABSTRACT

Thirty years after the promulgation of the1988 Constitution of the Federative Republic of Brazil, the article examines the trajectory of the constitutional chapter dedicated to rule the Public Administration. It investigates the chapter's historic origin, the contexts in which it is applied and some of the main dispute episodes concerning its application. At last, the article discusses the achievements and failures in its enforcement, from a realistic perspective and, at the same time, critical to the normative-rhetorical speech about the Constitution, which has hitherto prevailed in the academy and in the courts.

KEYWORDS

Constitutional law — administrative law — public administration — 1988 Constitution of the Federative Republic of Brazil

RESUMO

Passados 30 anos de vigência do capítulo dedicado à disciplina da administração pública na Constituição de 1988, o artigo passa em revista sua trajetória. Investiga a origem histórica do capítulo, o contexto de sua aplicação e alguns dos principais processos de disputa que o marcaram. Discorre sobre êxitos e fracassos em sua efetivação, a partir de uma perspectiva realista e, ao mesmo tempo, critica o discurso retórico-normativista da Constituição, até aqui predominante na academia e nos tribunais.

PALAVRAS-CHAVE

Direito administrativo — direito constitucional — administração pública — Constituição de 1988

1. Three cycles in the life of the 1988 Constitution of the Federative Republic of Brazil

For the first 10 years under the aegis of the 1988 Constitution of the Federative Republic of Brazil , no effort was spared in the attempt to ensure its effectiveness. At that time, the idea was to avoid the risk of repeating the tragic fate of Brazil's previous constitutions. Each in its own way and in its

own time, they had failed the mission of marrying the actual exercise of power and institutional life to their prescriptions, thus worsening the institutional instability that had previously marked the documents of the 'Empire' and 'Republic' periods'.[1]

In the effort to consolidate the normative force of the 1988 Constitution of the Federative Republic of Brazil [2] — which basically came from academia, the judiciary and other legal corporations — one of the most important developments was that all infraconstitutional normativity was drawn into the sphere of influence of the constitutional order to such a degree that the existing legal system then had to be reinterpreted to fit the commandments of the new constitution. Anything that could not be adapted would have to be discarded; or in proper legalese, be revoked.[3]

Trust us dear reader, this was not easy: it was a time-consuming mission and obviously met with pushback. But at the same time there were many new people eager for change (in academia, the institutions and the courts) and willing to fight for the hard-won draft of the constitution.

Almost every branch of public and private law was being subjected to *constitutional filtering*[4], all the more so in the case of the former, which was by its very nature situated closer to constitutional matters. The outcome was a far-reaching process of *constitutionalization* of law in Brazil, which is still one of the hallmarks of the post-1988 constitutional order, particularly in comparison to its predecessors (for which this trend was not operative).

To ensure the success of the draft, the first decade of the 1988 Constitution of the Federative Republic of Brazil was supposedly a period of praising its

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1 On the trajectory of Brazil's constitution see TÁCITO, Caio. *Constituições republicanas.* Brasília: Senado Federal, 1999; BARROSO, Luís Roberto. *O direito constitucional e a efetividade de suas Normas.* 9th ed. Rio de Janeiro: Renovar, 2009. pg. 7-45; SARMENTO, Daniel; PEREIRA NETO, Cláudio de Souza. *Direito constitucional:* teoria, história e métodos de trabalho. Belo Horizonte: Fórum, 2013. pg. 95-154; and VILLA, Marco Antônio. *A história das Constituições brasileiras.* São Paulo: Leya, 2012.

2 This theory was also a rather recent highlight of European constitutional law theory, particularly in Germany, so Brazilian constitutional law scholars found a copious supply of literature to support their efforts.

3 The "revocation" category is used here because it has been repeatedly accepted by the Supreme Court (*e.g.* ADI 02 and ADI 07) and in the literature. Strictly speaking, the difficulty of adapting pre-constitutional norms to the 1988 Constitution of the Federative Republic of Brazil would be a case of supervening unconstitutionality. Since the hierarchical criterion prevails over the chronological one, the norms would not technically be revoked but invalidated under the new constitutional order.

4 This expression was in the title of a book on the subject: SCHIER, Paulo Ricardo. *Filtragem constitucional:* construindo uma nova dogmática jurídica. Porto Alegre: Sérgio Fabris, 1999.

virtues and its ability to transform institutions, public life and even private life. Constitutional law was embodied in the 1988 document with the elements required to act as driving forces for a changed Brazil. It was the period of the 'citizen constitution'; the mood was one of boastful pride in our constitution.

Over the next 10 years, these ideas consolidated and fed into a vicious circle as constitutional jurisdiction ballooned in both numerical and qualitative terms[5]. Federal Supreme Court (STF) statistics show approximately 1.080 'direct actions for declaration of unconstitutionality' (ADIs)[6] filed in the 9 years from 1990 through 1998. Over the next nine-year period from 1999 to 2007, the number almost doubled to 2,037 ADIs, not counting declaratory actions for constitutionality, actions for unconstitutionality by omission, and actions against violation of constitutional fundamental rights — all of them instruments of constitutional jurisdiction that had emerged or materialized in the second decade, by which time the Federal Supreme Court had more sophisticated means of control at its disposal.[7]

The most eloquent pointer to the key role acquired by the constitutional order in Brazil's legal life was the flood of extraordinary appeals (local acronym REs): The purpose of an RE is to defend the constitutional order in ordinary cases as vehicles for the exercise of diffuse control over constitutionality. From 1990 to 1998, 12,642 REs were filed. But from 1998 to 2007, the number reached the astonishing total of 326,225 appeals — about 25 times the previous periods. In 2006 alone, 60,020 REs were filed (not counting even more overwhelming numbers filed against orders dismissing special appeals).[8-9]

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5 The enactment of laws 9.868/1999 and 9.882/1999 concerning the constitutional validity of laws being challenged (by filing 'direct actions') in cases brought before the STF was a milestone in this process of enhancing and extending instruments of constitutional jurisdiction.

6 Online statistical data as of 1990 are available.

7 Between 2008 and 2017, 1.810 ADIs were filed with the Federal Supreme Court, thus showing a slight decline in the number of actions compared to the previous decade, which may be in line with a more mature reading of the federal and state legislature in relation to the Constitution, or with a certain discussion among those legitimated in relation to the slowness of the exercise of constitutional jurisdiction (thus preferring, therefore, the debate in other instances). Available at: <www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=adi>. Accessed on: 29 Mar. 2018.

8 From 2008 to 2017, there was a drastic fall in the number of REs assigned to courts to 126.778 after 'generalized repercussion' became an added requirement for their admissibility in Constitutional Amendment No. 45/2004. This condition was then required by the Federal Supreme Court as of May 2007, once regulated by Federal Law 11.418/2006. Available at: <www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=adi>. Accessed on: March 29, 2018.

9 It may well be that the rapid growth in the number of extraordinary appeals over the years 1990-2000 has been much more due to an explosion of litigation around public servants and their pensions rather than constitutional discourse reaching ordinary litigation between

The numbers are the external facade of the presence and force that constitutional arguments gained in Brazil's legal discourse in the course of the first decade of the 2000s. To the point of recognizing, to use the happy expression of Daniel Sarmento, a true constitutional ubiquity[10]. Not only were major issues and relevant political and social conflicts being addressed normatively based on the Constitution, but even life's minor events, everyday and even trivial controversies started to challenge constitutional debate. The Constitution was seeping into every nook and cranny of the nation's life.[11]

But there is another side to this story. Before long, fast-expanding constitutional discourse was to reveal its defects and limits. A more critical perspective in relation to the constitutionalism practiced then developed as Brazil reached the third decade of the Constitution's validity. Out went the "citizen's" constitution; in came the "official limousine" constitution.[12]

In the new context — the 1988 document had been in effect for almost 20 years — observers began to point to the risk of the subjective interpretation and application of an over-extended constitution noted for its many vague norms, especially those of a principled nature.[13] Adding to this risk was a fragmented constitutional control system in which each of the country's 18,000 or more judges could morph into a constitutional court.

In the same way, the conjunction of an overly analytic constitution with hypertrophied constitutional discourse eventually over-juridicized life itself,

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individuals (in this respect, see item 3, below). So, there would have been an appropriation of the Constitution's normative discourse by vested interest. Empirical evidence for this argument — at least with regard to extraordinary appeals — would depend on searching a specific subject index. However, the publicly available Federal Supreme Court database for the period does not facilitate searching, so although this is a plausible suggestion, basic evidence is missing.

10 SARMENTO, Daniel. Ubiqüidade constitucional: os dois lados da moeda. *Revista de Direito do Estado,* n. 2, pg. 83-118, Apr./Jun. 2006.

11 For an examination of the effects in the sphere of administrative law in an article written for the Constitution's 20th anniversary, see BAPTISTA, Patrícia. Retrospectiva 2008. *Revista de Direito do Estado,* v. 13, pg. 36-37, 2009.

12 Carlos Ari Sundfeld coined this expression on arguing that rather than guaranteeing citizens' rights, the content of the 1988 Constitution of the Federative Republic of Brazil ensured continuity for powerful positions held by public and private sector interest groups that influenced its drafting. O fenômeno constitucional e suas três forças. *Revista de Direito do Estado,* v. 3, n. 11, pg. 209-216, Jul./Sep. 2008. In a similarly critical vein, Lenio Streck used the term *Constituição pan principio lógica* to refer to the exacerbated use of constitutional principles, technique and rhetoric. *Verdade e consenso:* Constituição, hermenêutica e teorias discursivas da possibilidade à necessidade de respostas corretas em direito. Rio de Janeiro: Lumen Juris, 2009.

13 SILVA, Virgílio Afonso da. Ponderação e objetividade na interpretação constitucional. In: MACEDO JR., Ronaldo Porto; BARBIERI, Catarina Helena (Org.). *Direito e interpretação:* racionalidade e instituições. São Paulo: Saraiva, 2011.

leaving little room for actors to use the ordinary mechanisms of democracy. At the same time, an inflamed rhetoric that prioritizes upholding (or 'guaranteeing') rights is developing; but it is disconnected from reality and has no chance of being put into effect by the State and society, this eventually producing a constant sensation of the constitution's failings.[14] The natural euphoria of its early years has increasingly been replaced by a critical approach.[15]

From this contemporary point of view — with more criticism than applause — as the 30th anniversary of the 1988 Constitution of the Federative Republic of Brazil of the Federative Republic of Brazil looms, we shall proceed to review Title III's Chapter VII. This entirely new chapter in Brazilian constitutional history focuses on the institutionalization of the public administration. Until 1988, few norms addressed the subject, especially for public servants.[16] However, although a landmark in the development of Brazilian administrative law — profoundly affected by constitutionalization — Article 37 et seq has had an accident-stricken history, as shown by the weaknesses of exclusively normativist constitutional discourse.

Readers should be aware that this study does not pretend to address the contents of the public administration chapter from a legal 'dogma' point of view: nor does it demarcate the scope or the meaning of its provisions. There will be a different focus, somewhat historical and sociological with the use of political science for interdisciplinary interpretation, very much on the lines of current trends in academia.

Firstly, we shall inquire as to why the Constitution's Title III, Chapter VII, having made some important improvements for the life of Brazil's public administration, prescribes norms that have been disputed or defeated over the last 30 years (e.g. Article 37-XI on civil service pay ceilings, now into its third version but still lacking any prospect of actually being obeyed).

The normativist discourse that predominates in Brazilian law has little to add to this diagnosis of the successes and failures of constitutional norms. Hence the need for a brief historical overview of the constitution followed

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[14] VILHENA, Oscar Vieira. Supremocracia. *Revista Direito GV,* São Paulo, v. 8, pg. 441-464, 2008. Available at: <www.scielo.br/pdf/rdgv/v4n2/a05v4n2.pdf >. Accessed on: Mar. 30, 2018; VERISSIMO, Marcos Paulo. A Constituição de 1988, vinte anos depois: Suprema Corte e ativismo judicial "à brasileira". *Revista Direito GV,* São Paulo, v. 4, n. 2, pg. 407-440, Jul /Dec. 2008.

[15] See LYNCH, Christian; MENDONÇA, José Vicente. Por uma história constitucional brasileira: uma crítica pontual à doutrina da efetividade. *Revista Direito e Práxis,* v. 8, pg. 957-1007, 2017.

[16] The 1967 Constitution had only one "public servants" section (articles 95 — 106). See BAPTISTA, Patrícia. *Transformações do direito administrativo.* Rio de Janeiro: Renovar, 2003. pg. 70-73.

by an attempt to diagnose some of the problems of the chapter from the abovementioned point of view.

2. History of the public administration's constitutional statute

2.1 Brazil's public administration before the 1988 Constitution of the Federative Republic of Brazil

Of all the legal disciplines, administrative law may be one with the most fluid boundaries between norm, doctrine and institutional practice. This phenomenon may be explained not only by the prominent role played by the literature,[17] but also by the fact of administrative lawyers having held senior posts in the state bureaucracy ever since the Empire, hence their influence in both normative production and the public administration's practices.[18] Therefore doctrine, norms and practices have often shared the same formulators and been developed accordingly.

In the period prior to the 1988 Constitution of the Federative Republic of Brazil, the main characteristic of Brazilian administrative law was its authoritarianism. With few exceptions or critiques, the subject matter was dominated by an organicist approach — which supercharged the State to the detriment of citizens — and a (rhetorically) legalistic tradition that conceived law as the discipline's first and last source of wisdom.[19]

On the normative level, as mentioned above, with the exception of very few provisions related to public servants,[20] the previous Constitutions did

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[17] Administrative law's 'doctrine' is not only limited to exercising a strong rulemaking role but aspires to be paradigmatic for formal lawmaking. CAMARA, Jacintho Arruda. Autorizações administrativas vinculadas: o exemplo do setor de telecomunicações. In: ARAGÃO, Alexandre Santos de; MARQUES NETO, Floriano de Azevedo (Coord.). *Direito administrativo e seus novos paradigmas.* Belo Horizonte: Fórum, 2008. pg. 622. On this subject, see: MENDONÇA, José Vicente Santos de. Direito administrativo e inovação: limites e possibilidades. *A&C — Revista de Direito Administrativo &Constitucional,* v. 17, pg. 169-189, 2017.

[18] For an in-depth analysis of the phenomenon, see: ENGELMANN, F.; BENTO, J. S.; PENNA, L. R. Doutrinadores, políticos e "direito administrativo" no Brasil. *Política & Sociedade,* v. 16, n. 37, pg. 286-314, 2017. Available at: <https://periodicos.ufsc.br/index.php/politica/article/view/2175-7984.2017v16n37p286/35978>. Accessed on: Mar 7, 2018.

[19] Given the case-law origin of the discipline and the highly creative use of jurists' opinions, legalistic discourse has always been flawed or insincere.

[20] Articles regulating public servants had featured in all Brazil's constitutions: 1824, Article 179, XIV and XXIX; 1891, articles 73-75; 1937, articles 156 to 159 (no section number); 1946 (Title VIII), articles 184-194; 1967 (Chapter VII, Section VII), articles 95 to 106.

not address the administration. In the infra-legal legal system, concepts such as the "known truth"[21] and civil-law arrest of public servants[22] reflected the fragile nature of the democratic state and rule of law in Brazil.

The Administration's practices were explicitly anti-republican in many aspects: competitive examinations for public-sector jobs were exceptional; information concerning public affairs was largely inaccessible; the administration had no means of consulting civil society, nor did it seek less intrusive and vertical means of acting.

In relation to legal theorists, most influential specialists in public law had connections with authoritarian governments. The Viscount of Uruguay — who wrote an acclaimed essay on administrative law (*Ensaio sobre o direito administrativo)* — was the Conservative Party's leading policymaker and one of the most outstanding figures of the Second Empire period. During the 'Old Republic' period, prominent jurists included Judge Viveiros de Castro, a member of the nationalist League of National Defense, and Alcides Cruz from Rio Grande do Sul, who had been a National Guard officer.

From the Vargas period to the military dictatorship, the leading exponents of Brazilian public law were Themistocles Brandão Cavalcanti and Francisco Campos. The former held several prominent positions, such as general-counsel to the Republic (1945-46) and attorney general (1946-47), before President Costa e Silva (1967) appointed him to the Supreme Court. Francisco Campos, from the state of Minas Gerais, was minister of Justice for Vargas and the intellectual author of the 1937 constitution. He also helped draft the first two pieces of legislation passed during the military regime known as Institutional Acts (AI-1 and AI-2) and influenced the drafting of the 1967 constitution.

Hely Lopes Meirelles was Brazil's leading administrative law specialist from the late 1960s until his death in 1990. On retiring from the judiciary, he was appointed as the state of São Paulo's secretary for Justice (1969-71), Public Safety (1968-69) and State Affairs (1967-68). He had a hand in drafting some of the period's main laws (such as Decree-Law No. 2.300/1986).[23]

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[21] Civil service statutes customarily stipulated the possibility of applying disciplinary sanctions without the need for administrative process. Administrative penalties were decided unilaterally by hierarchical superiors or competent authorities on the grounds of well-known "facts" or these agents' personal knowledge.

[22] This measure was permitted under current federal legislation until Federal Law No. 8.112 was enacted in 1990.

[23] Hely Lopes Meirelles delivered a lecture at Brazil's Higher School of War on July 1, 1975 in keeping with the prevailing discourse at that time: "Police power is the braking mechanism available to the Public Administration to curb abuses of individual rights. [...] Any activity that

In general terms, Brazilian administrative law prior to the 1988 Constitution of the Federative Republic of Brazil was largely formalist and supportive of authoritarian interpretations, with a concern to confer powers that favored a self-centered Administration, thus furthering interests that were collective in name only and conceived as necessarily antagonistic to individual rights.

2.2 Public administration enters the Constitution: reconstituting an accident-stricken and little-known history

There was no public administration chapter in the Afonso Arinos[24] preliminary draft. Following Brazil's constitutional tradition, there was merely an extensive section on public servants toward the end of the document (articles 252 — 266).

This preliminary draft was dropped, and the Constituent Assembly produced a chapter whose intellectual authors apparently were public-law specialists from the state of São Paulo, especially academics associated with Pontifícia Universidade Católica (PUC-SP), whose ideas reflected the influence of the Portuguese[25] and Spanish[26] constitutions. When the Constituent Assembly started drafting, São Paulo's Governor Orestes Quércia asked Celso Antônio Bandeira de Mello, Adilson Dallari, Geraldo Ataliba and Eros Grau to advise the state's congressional group. José Afonso da Silva acted as advisor to Mario Covas, the PMDB group's leader in the Assembly.[27]

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compromises or threatens national security can and should be restrained by administrative police power, based on national power, which in this school's doctrine *is* the integrated expression of all means available to the Nation to internally and externally reach and maintain its national objectives." O poder de polícia, o desenvolvimento e a segurança nacional. *Revista de Direito Administrativo,* Rio de Janeiro, v. 125, pg. 1-14, Dec. 1976. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/41826/40519>. Accessed on: Mar 7, 2018. Another well-known jurist from this period was Marcelo Caetano, Salazar's political heir, who was exiled in Brazil after Portugal's 1974 revolution.

[24] Available at: <www.senado.leg.br/publicacoes/anais/constituinte/AfonsoArinos.pdf>. Accessed on: Feb. 2, 2018.

[25] Title IX's articles 226 — 272 of Portugal's 1974 Constitution address constitutional regulation of public administration.

[26] Title IV's articles 97 — 107 of Spain's 1978 Constitution address constitutional regulation of "*Government and Administration*".

[27] F. Engelmann, J. S. Bento e L. R. Penna, Doutrinadores, políticos e "direito administrativo" no Brasil, op. cit., pg. 302.

Carlos Ari Sundfeld's comments on the Article 37 chapter quite rightly pointed to "the noticeable influence of terminology used by public-law jurists, the ideas they have historically been advocating and the debates that have involved them in the previous decades."[28]

Formally, the chapter resulted from amendments submitted by constituent assembly member Fernando Henrique Cardoso. But the subcommission for the Executive Branch rejected the first proposal (Amendment No. 300973-3), which was worded as follows:

> Art. — Sufficient reason is required for the validity of any act of the direct or indirect administration.
>
> Art. — Reasonability is a requirement for the legitimacy of acts practiced in the exercise of administrative discretionary power.
>
> Art. — Administered parties have the right to publicity and transparency for acts of the administration that are subject to the duties of neutrality, impartiality, loyalty and good faith.
>
> Art. — Concessions, authorizations, permits, licenses or economic privileges of any nature granted to a private entity by the Public Power shall in all cases be supported by public process and all directly or indirectly interested parties will be heard.

Cardoso's amendment to the preliminary draft moved by the rapporteur was submitted to the Commission on Organization of Powers and System of Government to add further reflections on its contents. Amendment 3S0679-7[29] was eventually accepted by the commission's rapporteur[30] with the following wording:

> Include a 'Public administration' chapter with the following articles:

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[28] SUNDFELD, Carlos Ari. *Direito administrativo para céticos*. 2nd ed. São Paulo: Malheiros, 2014. pg. 104.

[29] Amendments moved to Substitute/III — Commission of Organization of Powers and Government System. pg. 179-180. Available at: <www.camara.gov.br/internet/constituicao20anos/DocumentosAvulsos/vol-102.pdf>.

[30] The rapporteur's opinion was the following: "Approved due to the significance of the objective". Opinion on Amendments Submitted to the Substitute, pg. 26. Organization of Governmental Powers and System commission. Chaired by: Oscar Correia. Rapporteur: Constituent Assembly member Egídio Ferreira Lima. Available at: <www.camara.gov.br/internet/constituicao20anos/DocumentosAvulsos/vol-103.pdf>.

> Art. — The Public Administration shall be organized in accordance with the principles of legality and morality and shall act in strict respect of citizen rights.
>
> Art. — Sufficient reason is a requirement for the validity of any acts of the direct or indirect administration.
>
> Art. — Reasonability is a requirement for legitimacy of acts practiced in the exercise of administrative discretionary power.
>
> Art. — Administered parties have the right to publicity and transparency for the acts of the administration that are subject to the duties of neutrality, impartiality, loyalty and good faith.
>
> Art. — No act of the Administration shall impose limitations, restrictions or constraints that are more intensive or extensive than those indispensable for the legal purpose it should serve.
>
> Art. — Concessions, authorizations, permits, licenses or economic privileges of any nature granted to a private entity by the Public Power shall in all cases be supported by public process and all directly or indirectly interested parties will be heard.

The systematizing stage produced four different versions for this chapter: the commission's preliminary draft[31], its own draft constitution[32] and the rapporteur's first[33] and second[34] substitute drafts.

In preliminary stages of thematic committees and subcommittees, or compositing sessions, but their discussions were rarely minuted. Many proposals were discussed informally, in some cases at the home of representative Bernardo Cabral,[35] before being directly incorporated by the respective rapporteurs.

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31 Available at: <www.camara.gov.br/internet/constituicao20anos/DocumentosAvulsos/vol-219.pdf>.
32 Available at: <www.camara.gov.br/internet/constituicao20anos/DocumentosAvulsos/vol-226.pdf>.
33 Available at: <www.camara.gov.br/internet/constituicao20anos/DocumentosAvulsos/vol-235.pdf>.
34 Available at: <www.camara.gov.br/internet/constituicao20anos/DocumentosAvulsos/vol-242.pdf>.
35 CARVALHO, Luiz Maklouf. *1988: segredos da Constituinte.* Os vinte meses que agitaram e mudaram o Brasil. Rio de Janeiro: Record, 2017. pg. 313-314.

Significant alterations were made during plenary sessions that discussed three drafts labelled A[36], B[37] and C[38]. The document, as enacted, is equivalent to Draft D[39], in which the only amendments were made for editing purposes.

Amendments moved by the *Centrão*[40] during the plenary stage deleted some of the chapter's most avant-garde provisions, e.g. Amendment 2P02039-9[41] which reformulated much of the *Organization of the State* title, deleting a key section from the original wording of Article 37:

> Article 44. [sic]The direct or indirect public administration of any of the Branches of Power shall obey the principles of lawfulness, impersonality, morality and publicity as a condition for the validity of administrative acts ~~shall require sufficient grounds and reasonability as requirement for their legitimacy.~~
>
> ~~§ 1 No act of public administration shall impose limitation, restriction or constraint, unless indispensable to serve the purpose of the law~~[42]

Amendment 2P00225-1 moved by constituent assembly member Vinícius Cansanção (PFL-AL) sought to delete a provision that expressly prohibited nepotism:

> ~~§ 9 Except through public competitive procedure, no spouse or relative to the second degree in direct or collateral line, consanguineous or by affinity, of any authority, not occupy a position or be appointed to a~~

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[36] Available at: <www.camara.gov.br/internet/constituicao20anos/DocumentosAvulsos/vol-253.pdf>.

[37] Available at: <www.camara.gov.br/internet/constituicao20anos/DocumentosAvulsos/vol-298.pdf>.

[38] Available at: <www.camara.gov.br/internet/constituicao20anos/DocumentosAvulsos/vol-314.pdf>.

[39] Available at: <www.camara.gov.br/internet/constituicao20anos/DocumentosAvulsos/vol-316.pdf>.

[40] "Centrão" referred to a basically conservative multi-party and circumstantially effective grouping of representatives that significantly amended the draft during the Constituent Assembly's plenary sessions. On this subject, see: FREITAS, R.; MEDEIROS, D.; MOURA, S. Procurando o Centrão: direita e esquerda na Assembléia Nacional Constituinte (1987-1988). In: CARVALHO, Maria Alice Rezende de; ARAÚJO, Cícero; SIMÕES, Júlio Assis (Org.). *A Constituição de 1988:* passado e futuro. São Paulo: Anpocsg, 2009. pg. 101-135.

[41] Moved by 303 representatives, see <www2.camara.leg.br/atividade-legislativa/legislacao/Constituicoes_Brasileiras/constituicao-cidada/o-processo-constituinte/plenario/vol255_centrao_aprovadas.pdf>

[42] No explanation was given for the removal of the highlighted section when introducing this amendment.

~~position of trust, even under contract, in organizations subordinated to the Public Administration.~~

Explaining the reasons for his amendment, the representative from the state of Alagoas argued: "the prohibition is unfair. We see no immorality or exploitation [in the fact of] direct or collateral bloodline relatives holding seconded or politically appointed [special-advisor type] positions."[43]

The abovementioned examples show that the final wording retained many progressive aspects but was eventually stripped of some of its most modern proposals — while including far too many provisions for public servants, many of them obviously reflecting the biased views of interest groups.

Thus, the public administration's constitutional statute was born: its conception had not been planned and it could have been better; nevertheless, it was a milestone on the way to re-founding Brazil's administrative law.

2.2.1 Regulating beyond the chapter

The constitution's regulating of public administration does not end with the above chapter since there are more provisions scattered throughout the document. Some of them affect the public administration specifically, others indirectly, due to the development of constitutional theory.

One of the norms that most affect public administration concerns the guarantee of due process of law in the Constitution's Art. 5 section LV. Its mention of administrative proceedings — which grounded the theory of administrative due process of law in Brazil — arose from a suggestion made by Professor Sérgio Ferraz, who was an advisor to the Constituent Assembly's rapporteur Bernardo Cabral.[44]

More instances of off-screen norms affecting public administration may be found in articles 173 — 178, which address issues such as state-owned enterprises, economic planning, public services and monopolies.[45]

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[43] Available at: <www.camara.gov.br/internet/constituicao20anos/DocumentosAvulsos/vol-254.pdf>.

[44] Luiz Maklouf Carvalho, *1988: segredos da Constituinte*, op. cit., pg. 315.

[45] There are more cases. In several subparagraphs of Article 7, through Article 37's express provision, the protection afforded to workers in general is extended to public servants in order to enlarge the sphere of the latter's specific entitlements. Yet another case of the logic of the "official limousine " (chapa branca) constitution in action.

2.3 Constitutionalization of administrative law: norms, theories and institutions of the State and society

The relationship between norms and reality is one of mutual dependence. On paper, rules are all very well, but in real life their application will depend on material conditions. While legislators (constituent assembly members included) may draft articles and paragraphs that go beyond mere description of the reality underlying them, normative initiatives will be doomed to inefficacy if they are completely disconnected from real life.[46]

Legislatures — and constituent assemblies even more so — are battlefields on which antagonistic political forces and social movements clash over the constitution's contents. Once norms have been enacted, the issue becomes their intended effectiveness and enforcement as each side digs in to continue the struggle.

The process of concretizing constitutional norms and their meanings gives rise to constant disputes between institutional actors (executive, legislative, and judiciary), social actors (organized civil society and the press) and legal actors (jurists, lawyers and particularly constitutionalists).

In some cases, the State's bureaucracy, in many cases at front-office management level, will hold out against constitutional innovation. In others, there will be judges or jurists finding ways of getting around new provisions by means of retrospective interpretations.[47] In many other circumstances in which norms show limited efficacy,[48] legislators themselves refuse to concretize the constitution's dictates. Society too has a key role to play in this game: flouting the Constitution may be tolerated here, welcomed there, or opposed elsewhere.

How the meanings of norms are interpreted fuels quarrels, too. Actors resort to hermeneutic exegesis and formal alterations or even induce constitutional mutations in an attempt to have the Constitution construed in the manner deemed most convenient.

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[46] This is basically Konrad Hesse's argument against Ferdinand Lassalle's notion of a constitution having an exclusively sociological role. *Escritos de derecho constitucional* — selección. Madrid: Centro de Estudios Constitucionales, 1983. pg. 75.

[47] MOREIRA, José Carlos Barbosa. O poder judiciário e a efetividade da nova Constituição. In: *Revista Forense*, n. 304, pg. 152, 1988.

[48] SILVA, José Afonso da. *Aplicabilidade das normas constitucionais.* 3rd ed. São Paulo: Malheiros, 1999. pg. 83-85.

In this context of ongoing disputes, we shall now proceed to ask how the 1988 Constitution of the Federative Republic of Brazil has fared after 30 years, more particularly its regulations for the public administration.

3. To what extent do the Constitution's administrative provisions really matter? A story of struggles, resounding defeats and hard-fought victories

Reading the Constitution's public administration chapter, one sees — perhaps even more clearly than elsewhere — that there is a huge gap between the constitutional optimism of the 1988 document and the reality of the patrimonialist or spoils system. Despite attempts to narrow the gap over the last 30 years the State is still dominated by political groups and vested interests pushing back against republican mores and democracy.

As shown above, the idea of institutionalizing public administration as constitutional figure came from jurists. Its intellectual authors sought the institutionalization and rationalization of a modern bureaucratic state.[49] The norms enacted — at least those that have survived — were added to the chapter to act as catalysts (from outside the current politico-social reality) as a new constitutional-administrative order was being developed.[50] A different interpretation sees this process of constitutionalization for the purpose of consolidating a modern bureaucratic state in terms of jurists jockeying for position and advancing their own interests in the new order. The juridicization of public administration assures jurists privileged roles based on the State bureaucracy's appropriation of their expertise to apply and interpret norms. Without having to directly intervene in politics as such, jurists could acquire new political capital from closer relations with the bureaucratic State (through constitutionalization) — truly a re-invention or contemporary re-interpretation of the 19th-century's *bacharelismo* (social phenomenon

[49] CORREIA, José Manuel Sérvulo. Os grandes traços do direito administrativo no século XXI. *A&C — Revista de Direito Administrativo & Constitucional,* Belo Horizonte, yr. 16, n. 63, pg. 48, Jan./Mar. 2016. Available at: <www.revistaaec.com/index.php/revistaaec/article/viewFile/42/517>; SUNDFELD, Carlos Ari. *Direito administrativo para céticos.* 2nd ed. revised and expanded edition. São Paulo: Malheiros, 2014. pg. 106.

[50] GOLDONL Marco; WILKINSON, Michael A. The Material Constitution. *London School of Economics Working Papers,* n. 20, pg. 22, 2016.

reflecting the particularly prominent role of lawyers in the bureaucracies of strong absolutist states).[51]

From the outset, there were ongoing disputes over many of the norms in the chapter, which not only showed that the document bore no relation to the dominant tactical order, but also augured the enormous challenge of ensuring the effectiveness of its provisions. The problem has yet to be fully solved.

By the end of the constituent assembly, Chapter VII of Title III was down to seven articles, five of them exclusively dealing with public servants and their and pensions (Articles 38 to 42). It was a truly constitutional statute for public employees (of extension and content unmatched by previous documents or other constitutions). Its mainstay Article 37 now has 22 sub-paragraphs and 12 paragraphs (many subsequently amended or added through Constitutional Amendment No 19/1998). The latter's header is a general positive statement of the values on which all public actions would be based. In addition, there are provisions on access to public service and its exercise; at least six sections on civil service pay and provisions on matters of administrative law of scant import that have been elevated to constitutional status.[52] Few feature materially constitutional content.

Behind the constituent assembly's decision to constitutionalize an arsenal of tidbits for public servants, favoring their positions and paygrades, there were a number of factors. On the one hand — from the point of view of a Constitution for top officials entitled to their own limousines (*chapa brancas*) — there was an attempt to "entrench the privileges of certain sectors of the civil service."[53] On the other hand, in terms of pursuing modernization and republican morals, there was justifiable suspicion in relation to infra-constitutional legislators, particularly the local lawmakers who are usually more susceptible to pressure exerted by vested interests.

From either of these angles, however, behind the constitutionalization of matters pertaining to public servants and the functioning of the machinery of government there was an attempt to shield these issues from the to-and-

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[51] See ALMEIDA, Frederico de. Os juristas e a política no Brasil: permanências e reposicionamentos. *Lua Nova.* São Paulo, v. 97, pg. 214-217, 2016. Also see F. Engelmann, J. S. Bento and L. R. Penna, Doutrinadores, políticos e "direito administrativo" no Brasil, op. cit., pg. 287.

[52] Article 43 seems to differ from the general content of the chapter in its treatment of regional development measures that may be adopted by the federal authority.

[53] Diagnosis and expression from BINENBOJM, Gustavo. A constitucionalização do direito administrativo no Brasil: um inventário de avanços e retrocessos. *Revista Eletrônica sobre a Reforma do Estado (Rere),* Salvador, n. 13, pg. 33, Mar./Apr./May 2008. Available at: <www.direitodoestado.com>. Accessed on: Mar 28, 2018.

fro of ordinary politics and somehow ensure nationwide standards for their treatment. But this initiative led to two adverse outcomes: (i) the Constitution being vulgarized and its normative dignity undermined whenever conjuncture problems included in it are subjected to reformist pressures and (ii) a substantial democratic and federal deficit, since the constitutional entrenchment of ordinary political decisions and vested interests unjustifiably obstructs the infra-constitutional channels of majoritarian political decision-making procedures.[54]

Another related (negative) externality was that issues arising from the legal regime for public servants were elevated to the status of constitutional conflicts. Even a superficial perusal of the Supreme Court's docket shows that matters pertaining to civil service and public administration have generally predominated.[55] Especially in the context of [the court's] concentrated powers of control of constitutional validity, this thematic centralization may be the result of the profile of those legitimated to instigate it;[56] jurisprudential restrictions on filing actions in this respect; and even Supreme Court judges' backgrounds — many have held senior positions in the State's juridical bureaucracy.[57]

From January 2000 to April 15, 2018, the Supreme Court issued final decisions on 3,160 actions filed for abstract control of constitutionality (local acronyms *ADIs*, *ADPFs*, *ADCs* and *ADOs*). The Court's own dockets and decisions[58] shows that 1.878 (59.43% of the total) related to typically administrative-law matters, of which the great majority concerned civil-service interests.[59-60]

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[54] Daniel Sarmento, Cláudio de Souza Pereira Neto, *Direito constitucional*, op. cit., pg. 43.

[55] On the same lines see SUNDFELD, Carlos Ari; PINTO, Henrique Morta. Três desafios para melhorar a jurisdição constitucional brasileira. In: VOJVODIC, Adriana et al. (Org.). *Jurisdição constitucional no Brasil*. São Paulo: Malheiros, 2012. pg. 19-52. *Apud* BRANDÃO, Rodrigo; NUNES, Daniel Capecchi. O STF e as entidades de classe de âmbito nacional. *Revista de Direito da Cidade*, v. 10, n. 1, pg. 179, 2018. Available at: <www.e-publicacoes.uerj.br/index.php/rdc/article/view/29775>. Accessed on: April 30, 2018.

[56] COSTA, Alexandre; BENVINDO, Juliano Zaiden. *A quem interessa o controle concentrado de constitucionalidade?* — o descompasso entre teoria e prática na defesa dos direitos fundamentais. Universidade de Brasília, 2014. pg. 77. Available at: <http://ssrn.com/abstract=2509541>. Accessed on: Feb 7, 2018.

[57] All of the Court's current members have been — at least at some point in their professional lives — judges, public prosecutors or public defenders.

[58] Many of the Federal Supreme Court's records are inaccurate so may well be an even larger number of instances of the constitutional validity of administrative-law matters being challenged (by filing 'direct actions').

[59] The system from which data were extracted may be accessed at: <http://www.stf.jus.br/arquivo/cms/publicacaoBOInternet/anexo/estatistica/ControleConcentradoGeral/CC_Geral.mhtml>.

[60] Based on several data points, this diagnosis is also made by: FALCÃO, Joaquim; CERDEIRA, Pablo; ARGUELHES, Diego. *I Relatório Supremo em Números:* O Múltiplo Supremo. Rio

The ongoing disputes over the chapter's norms and writing the above-mentioned tidbits and conjunctural details into the document eventually led to nine formal amendments, some affecting substantial numbers of the norms prescribed therein. Nearly 10% of all constitutional amendments voted were moved to alter the chapter on the public administration.[61]

3.1 Three examples that speak for themselves

The public administration chapter was not the outcome of dominant groups reaching a consensus but rather reflected jurists wagering on the catalytic action of the constitution. From the outset there was much resistance to the effectiveness of most of its norms. Obeying its dictates would mean Brazilian society altering its deeply rooted expectations.

Taking only the provisions of Article 37 (a varied set of rules that include principles and a full constitutional statute for public servants), there are cases of both hard-fought successes and resounding failures in terms of constitutional aspirations being materialized. Contrary to the rhetorical euphoria of the first few years post-1988, some of this chapter's rules have never been implemented[62]. Others have been through series of disputes to be reasonably successful at shaping the legal-administrative system.[63] There are situations in which norms are ignored with the tacit assent of the three powers and instances of control, who often read meanings into the document that allow continuity of the status quo that existed before the Constitution.[64]

Precisely some of the rules governing civil service pay come under this heading. The rule that sets a limit to civil-service pay levels (so-called "ceiling")

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de Janeiro: FGV Direito Rio, 2011. pg. 21. Available at: <bibliotecadigitaLfgv.br/dspace/bitstream/handle/10438/10312/I%20Relatório%20Supremo%20em%20Números%20-%20O%20Múltiplo%20Supremo.pdf?sequence=5&isAllowed=y>.

61 EC 88/2015; EC 77/2014; EC 47/2005; EC 41/2003; EC 34/2001; EC 19/1998; EC 18/1998; EC 03/1993.

62 As example lacking even minimum efficacy, sub-paragraph V with the wording of EC No. 19/98 addresses quantitative limitations on secondments and political or discretionary appointments (such as special advisors) that had previously depended on infra-constitutional regulation.

63 At the other extreme there is subparagraph II, which made public competitive examinations the invariable means of access to direct and indirect public administration jobs. Although application of the rule is often judicialized, the courts have successfully enforced the constitutional dictate.

64 KOERNER, Andrei; FREITAS, Lígia Barros de. O Supremo na Constituinte e a Constituinte no Supremo. *Lua Nova,* v. 88, pg. 141-184, 2013.

is the most eloquent example of the dispute between constitutional aspiration and the forces acting in society.[65] Art. 37 — XI never reached full effectiveness despite being amended twice, resulting in one of the constitution's worst wordings. As it stands, the norm is almost unintelligible for anyone not initiated in its meanders and accident-stricken history.

In the year after the enactment of the constitution, the Federal Supreme Court itself led the way in undermining it when "remuneration in kind for whatever reason" (as published in 1988), was taken to mean that *advantages of a personal nature*[66] were excluded. These advantages — almost all of them above the stipulated ceiling — were not subject to the constitutional limit and thus could be paid without any cut-offs or reductions.

From this point of view, despite the efforts made — or at least publicly claimed — by the Executive and Legislative[67] — a series of legal interpretations and arguments followed in an attempt to block the effectiveness of the norm (irreducibility of salaries, indemnities, sub-ceilings and all sorts of those specifics objections the law is so good at producing). Nobody thereafter

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[65] Although the limits of this essay do not allow more detail, please note Article 37's subparagraphs XIII (prohibiting pay geared to parameters other than amounts duly legislated and equalized remuneration for public servants) and XIV (prohibiting "cascading" or domino effect if public servants' pay rises). Their application is fiercely disputed, hence its ineffectiveness. In the same way, there were longstanding arguments over the application of subparagraph IX on the possibility of using short-term contracts to meet temporary and exceptional needs. The intervention of the Public Prosecutor's Office and the Courts eventually led to a reasonable degree of success for this prescription. In this respect, see the Federal Supreme Court's decisions in ADI No. 3.237, Court plenum, reporting judge Joaquim Barbosa, legal gazette *DJe* 19/Aug/2014; and ADI no 3.721, Court plenum, reporting judge Teori Zawascki, decision date 9/Jun/2016.

[66] See Federal Supreme Court, Court plenum, ADI No. 14, reporting judge Célio Borja, legal gazette *DJ* 1/Dec/1989.

[67] The provision's subsequent wording in Constitutional Amendments Nos 19/1998 and 41/2003 was even more unequivocal and cautious in expressly alluding to "personal or other advantages". Nonetheless, so-called *indemnifying amounts* were excluded from the ceiling's reach. In an administrative session held on 24/Jun/1998, the Federal Supreme Court ruled that EC No 1998/41 provisions for the pay ceiling would not be self-applicable but would depend on the law of joint initiative of the three branches of powers to produce effects (which never happened, given the political difficulties of setting a single ceiling for the three branches). With the enactment of EC No. 41/2003, which expressly stipulated its self-applicability in relation to the point, a writ of mandamus was filed by former Supreme Court judges and the Court accepted the interpretation of guaranteed irreducibility of salaries as being a qualified modality of vested rights. Therefore, salaries paid at nominal levels above the ceiling before the enactment of EC No. 41/2003 could not be subjected to the corresponding cut-off. The Federal Supreme Court recently ruled that the remuneration ceiling does not apply to cases of lawfully holding multiple public positions, retirement payments or public pensions (see Extraordinary Appeals Nos. 602043 and 612975, DJe 8/Sep/2017). On this point too, see the analysis on BRANDÃO, Rodrigo. *Supremacia judicial versus diálogos constitucionais*. Rio de Janeiro: Lumen Juris, 2012. pg. 291-292.

succeeded in setting a real pay limit applying to career public servants in all three branches of power, and all relevant institutional actors showed complicity (albeit disguised) in this omission.

In fact, it may never be possible to do so, because treatment of the matter is lacking in normative sincerity, economic reality and transparency. Continuing to examine the problem exclusively in terms of rhetorical-normative discourse, which dominates the theory of constitutional law, means leaving a permanent smokescreen over it. From the angle of normative discourse, there seems to be nothing else that can be done in this respect. No amended wording or changed interpretation is capable of changing the scenario. Were the STF to close the existing door(s), others will surely be opened quite soon.

Any progress in this matter should therefore bring in extra-juridical arguments as elements of analysis and decision. In this respect, the economist Bruno Carazza's recent article for *Folha de S. Paulo* newspaper took examples from behavioral economics to show that Brazilian public sector's abusive remuneration originates from an institutional process fed by envy, jealousy and rivalry.[68] The existence of a pay ceiling actually instigates competition between occupational or professional groups who are constantly trying to reach the legally allowed ceiling. They all want as much protection: as possible, since the more pressure they can bring to bear, the higher their pay rise — hence the saying "celling tuned into a floor," for some legal careers at least.

Therefore, a more accurate diagnosis of the reasons for the low normativity of pay limits for civil servants depends on an interdisciplinary analysis that legal discourse does not usually incorporate. In this context, the traditional argument posed by legal theory around issues such as efficacy and effectiveness of constitutional norms adds little to our understanding of why certain normative aspects of the Constitution's Article 37 simply failed to materialize.[69]

Another example of a dispute over Article 37 that is worth mentioning — precisely because it led to the complete overthrow of the norm, which was eventually amended — is its subsection XVI on holding more than one public position or job.

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[68] CARAZZA, Bruno. O auxílio-moradia, a inveja e outras mumunhas mais. *Folha de S. Paulo,* Feb. 9, 2018. Available at: <http://oespiritodasleis.blogfolha.uol.com.br/02/02/09/o-auxilio-moradia-a-inveja-e-more-mumunhas-mais/?loggedpaywall>. Accessed on: Mar 26, 2018.

[69] On this point, see LAW, David S. Constitutions. In: CANE, Peter; KRITZER, Herbert M. (Org.). *The Oxford handbook of empirical legal research.* Reprinted. Oxford: Oxford University Press, 2013. pg. 380-384.

The 1967/69 Constitution allowed healthcare professionals in general to hold multiple public positions. The 1988 document's (Article 37, XVI, "c") expressly restricted this permission to physicians (leaving out other groups of health professionals). Under the transitional provisions, however, those who held more than one position pre-enactment were not affected. The reach of the norm was therefore clearly prospective. In effect the purpose of the constituent assembly legislators in restricting the number of public positions held was — among other purposes — to make sure more professionals would be able to obtain public employment.[70]

The Constitution came into effect on paper but in real life it was as if the norm had never existed. Health professionals (other than doctors) continued to enter competitive exams and be selected for more than one position regardless. Many said they had never heard of the norm — not all of them did so in good faith.

As soon as the administration's control bodies raised the matter and asked public servants to leave a position, the corporatist groups involved lobbied to vote a constitutional amendment to the norm. They wanted to go back to the pre-1988 rule allowing health professionals in general to hold multiple public employments, so after 10 years in dispute, wrangling Amendment Nº 31 was voted in 2001.

Some public administrations even used the amended rule retroactively to validate cases of public servants who had illicitly been allowed to hold multiple jobs despite the constitution's original wording. In this instance, the interest groups that mobilized against the constitutional rule were able to restore the previous arrangement.[71] The constitutional aim of broadening and rationalizing access to public positions remained unfulfilled. A constitution's ability to effectively change reality depended on more than just well-intentioned lawmakers in a constituent assembly.

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[70] Although the effect of doctors' organizations lobbying to preserve their status in the matter is not to be underestimated.

[71] A similar but somewhat longer and more time-consuming process concerned military doctors holding multiple positions. Art. 142, §3 of the 1988 Constitution of the Federative Republic of Brazil prohibited military doctors holding civilian public positions (as it does for all military personnel). Again, the constitution excepted cases prior to 1988 (Article 17, § 1, of the ADCT). After a lengthy dispute in which hundreds of cases of doctors holding multiple positions had been declared illicit, some involving STJ precedents, Congress enacted Constitutional Amendment No. 77 in 2014, which excepted military doctors from the prohibition stipulated for military personnel in general and reverted to the pre-1988 situation.

Art. 37 does not live on failings alone. Despite its precepts being open to all sorts of interpretation, the article's header was reasonably successful in shaping administrative action.[72] Nepotism was an emblematic example precisely because of the battle waged against it — one that is still ongoing in some ways. In October 2005, the CNJ's Resolution No. 7 stated that relatives of judges or appellate judges could not be appointed to commissioned (seconded or specially appointed) positions in the judicial sphere or earn extra for special duties or circumstances therein. Courts, judges' associations and public servants staged a near-revolt and brought pressure to bear through the Federal Supreme Court. But in February 2006 the latter's granted an injunction to 'Direct Action for Constitutionality' No. 12-6 in which the Federal Supreme Court recognized the normative force and immediate applicability of Article 37's constitutional principles — in particular the "impersonality" stipulation. The Court declared that the CNJ norm was constitutionally valid since it merely applied the constitution and did not introduce new legal provisions.[73] In August 2008, the Court's Precedent No 13 barred nepotism from all three branches of power.[74]

At this point, given the compromised nature of the three branches of power and their inability to repudiate appointments based on personal relations, the Constitutional Court's duty was to impose the rule directly. In doing so, the Federal Supreme Court grounded its decision precisely on the Constitution's normative theory. At last, with a delay of nearly 20 years, normativist constitutionalism was finally victorious.

However, as noted above, the spoils system or patrimonialism has deep roots in Brazil. Despite the Supreme Court's binding precedent, the issue of nepotism has never been absent from its agenda over the last 10 years or so. The Constitutional Court is still being asked to resolve all sorts of situations involving the application of Precedent No. 13. The possibility of hiring a

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[72] Nevertheless, for an important critical perspective on the role of the constitutional principles of administrative law, see Carlos Ari Sundfeld, *Direito administrativo paracéticos,* op. cit., pg. 179 e ss.

[73] Judge Joaquim Barbosa's vote on that occasion shows acute perception as to the nature of the disputes taking place around constitutional provisions:

"[the] Constitutional Court has the role of narrowing or eliminating the gap that sometimes exists between society and the legal microcosm, which, as we all know, sometimes forges its own realities, fosters hypocrisies and even a certain faltering morality, as we may routinely see." Available at: <http://redir.Federal Supreme Court.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=372910>.

[74] Federal Supreme Court, RE 570.392, reporting judge Carmen Lúcia, Tribunal Pleno, tried 11/Dec/2014.

relative as a political agent or appointing them to a public position, requiring an objective configuration of nepotism (i.e. whether or not the relative was able to influence an appointment of this type) etc. All of which shows that (i) 'impersonality' has no place in Brazilian culture (hiring relatives seems to be quite acceptable here) and (ii) enforcing the norm requires constant effort and vigilance.[75]

A review of disputes involving the Constitution's chapter on public administration shows that although there have been instances of almost complete failure to apply its content, the document was in fact a relevant actor in the process in almost all the situations reported. Their debates referred to its role more often than not. For this reason alone, the existence of Brazil's administrative constitution has been asserted, and although disputed, it sets conditions for debates, even if its purposes have at times been materially defeated. The Constitution matters, although it does not always have the appropriate force of normative theory and constitutional dogma.

4. Conclusion: normative theory's insufficiency for the challenges of constitutionalized administrative law in Brazil

Our overview of disputes involving the public administration chapter's norms over the last three decades seems to show that legal-normative discourse is incapable of determining whether the constitutional text is effective.[76] The mandatory force of the Constitution emerges, according to Chris Thornhill, "from practices that lie outside the law and cannot be established by a purely juridical analysis".[77] Thence the legal method is not a self-sustaining means of concretizing the constitution's normative expectations.[78]

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[75] In this regard, see Rel. 17.627 MC, reporting judge Roberto Barroso, individual decision, date 8/May/2014, *DJe* 15/May/2014; and Rcl 26.303, RJ, reporting judge Marco Aurelio.

[76] In this respect, see THORNHILL, Chris. The sociology of constitutions (October 2017). *Annual Review of Law and Social Science*, v. 13, pg. 495, 2017. Available at: <https://ssrn.com/abstract=3059656 or http://dx.doi.org/10.1146/annurev-lawsocsci-110316-113518THORNILL>. Accessed on: Mar. 10, 2018.

[77] Ibid.

[78] NEVES, Marcelo. Constitucionalização simbólica e desconstitucionalização fática: mudança simbólica da Constituição e permanência das estruturas reais de poder. *Revista de Informação Legislativa*, v. 33, n. 132, pg. 321-330, Oct./Dec. 1996; Marco Goldoni e Michael A. Wilkinson, The Material Constitution, op. cit., pg. 2.

The dominant normative discourse since 1988 in Brazilian constitutional law is showing signs of fatigue (an eloquent sign of which is the persistent ineffectiveness of some norms, as seen above).[79] If the constitution — particularly its public administration chapter — turns out to be a source of constant disputes, then the endeavor of materializing its aims must not be based on normativism alone. The Constitution is too important to be left to jurists alone.

Contemporary constitutional theory, with the development of modern studies of constitutional sociology and politics, has pointed in this direction. There is widespread recognition of the fact that implementing the constitution's aims depends on conditions and ideas that are beyond the law, namely political, economic, cultural and social factors.[80] The point argued here is that using analytic methods and models other than those confined to the legal framework requires a grasp of the causes and consequences of the constitution's effectiveness or otherwise.[81]

In the same way, Goldoni and Wilkinson note that mainstream constitutional theory (whether legal or political constitutionalist) has little to say about the most important challenges to current constitutional ordering.[82] The constitutional phenomenon — which they call a material constitution — may only be properly grasped in the deep social context in which it is inserted. Without political and social traction, a formal constitution remains a 'dead letter', a list of wishful auspices or even a 'sham'.[83] The contemporary constitutional order, therefore, should function as an element of the social-political order and be able to relate to society from within.

Heading in the same direction, but from the angle of economic analysis of law, the Spanish philosopher Albert Calsamiglia points to efficiency as a valuable means of reaching beyond what he calls *intuitionism* as method. On the pretext of materializing an ideal of justice, he argues, the science of legislation does not realize that "in many cases the results of law — social behavior — are not fit for the law's purposes." Real-world reactions to laws may be distinct

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79 Ibid.

80 Chris Thornhill, The sociology of constitutions, op. cit., pg. 495.

81 On the same lines, RODRIGUEZ, Daniel B. Administrative law. In: WHITTINGTON, Keith E.; KELEMEN, R. Daniel; CALDEIRA, Gregory A. *The Oxford handbook of law and politics.* Reprinted Oxford: Oxford University Press, 2013. pg. 356.

82 Marco Goldoni and Michael A. Wilkinson, The Material Constitution, op. cit., pg. 3-4.

83 CALSAMIGLIA, Albert. Eficiência y derecho. *Doxa: Cuadernos de Filosofia del Derecho,* Alicante, n. 4, pg. 267-287, 1987.

from or opposed to those purposes: *"a good law is not just one that points to just purposes, but one that accomplishes them.... Social behavior or the reactions of citizens may invalidate the legislator's good intentions. The importance of a law is not just what it intends to do, but what it is actually able to do." (convenience translation)*[84]

The problem of unreal or irrelevant normative initiatives in the constitutional domain is even more serious. Jurists should also be concerned with creating the right incentives to ensure that norms are enforced. After three decades of the 1988 Constitution of the Federative Republic of Brazil, the good intentions of lawmakers and normative rhetoric are not enough to ensure effectiveness. The study of public law has to (re)connect with politics and economics.[85]

David S. Law describes constitutions as "complex phenomena with a host of potential causes and effects". Their analysis poses methodological challenges beyond any contributions that normative theory has been able to provide. The 'public administration' chapter in 1988 Constitution of the Federative Republic of Brazil supplies some good examples showing the scale of these challenges. A grasp of their evolution over the last 30 years and their prospects presupposes that observers analyzing or applying them look to interpretations that normativism cannot supply. These approaches — multidisciplinary by nature — should be incorporated by juridical discourse, although this process is not risk-free.[86] The maturing of constitutionalism in Brazil and the 1988 document's survival will depend on these approaches being explored.

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[84] Ibid.

[85] Marco Goldoni and Michael A. Wilkinson, The Material Constitution, op. cit., pg. 9-4.

[86] Legal discourse being open to contributions from other social sciences — and particularly their use as criterion for judicial decisions — while seemingly an inevitable trend in contemporary studies, may well be quite problematic in practice. Due to their temporal and cognitive limitations, legal processes may not always allow for proper assimilation of elements from other sciences. Given the limits of this study, however, we are unable to progress the discussion here. Yet, instances of this type of debate may be found — among many other sources- in ARGUELHES, D. W.; LEAL, Fernando A. R. O argumento das capacidades institucionais entre a banalidade, a redundância e o absurdo. *Direito, Estado e Sociedade* (print), v. 38, pg. 6-50, 2012; BUCHANAN, James M. Good economics, bad law. *Virginia Law Review,* v. 60, n. 3, pg. 483-492, Mar. 1974.

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