The legal nature of the Brazilian impeachment*

Natureza jurídica do impeachment brasileiro

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ABSTRACT

This article will analyse the legal nature of the Brazilian impeachment, considering the Brazilian constitutions from 1824 to 1988, as well as the legislation governing it. In this sense, the study seeks to present the historical differences between the constitutional texts until the current scenario. Nowadays, the Federal Constitution of 1988 and the Law n. 1.079/50 are the bases of the process and judgment of the so-called crimes of responsibility. Furthermore, the impeachment will be analysed in three

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essential dimensions for its understanding: the history of this institute; the nature of the norms that typify the crimes of responsibility; the mode of prosecution of the crimes of responsibility. Based on these three dimensions, the objective is to clarify the legal-political nature of impeachment in the Brazilian legal system.

KEYWORDS

Impeachment — crimes of responsibility — Constitution — Federal Senate — president

RESUMO

O artigo analisará a natureza jurídica do impeachment, tendo em consideração as constituições brasileiras desde 1824 até 1988, bem como a legislação infraconstitucional de regência. Nesse sentido, o estudo busca apresentar as diferenças históricas entre os textos constitucionais até o cenário atual, Constituição Federal de 1988 e a recepção da Lei nº 1.079/1950, como bases do processo e julgamento dos denominados crimes de responsabilidade. Assim, o impeachment será analisado em três dimensões essenciais para sua compreensão: o histórico deste instituto; a natureza das normas que tipificam os crimes de responsabilidade; o modo de julgamento dos crime de responsabilidade. Com fundamento nessas três dimensões, objetiva-se esclarecer a natureza jurídico-política do impeachment no ordenamento jurídico brasileiro.

PALAVRAS-CHAVE

Impeachment — crimes de responsabilidade — Constituição — Senado Federal — presidente da República

Introduction

Just over 30 years since the promulgation of the Federal Constitution of 1988, Brazil has already experienced two impeachments of presidents of the Republic. In this regard, coalitional presidentialism provides an unstable institutional relationship between the Executive and the Legislative Powers, as governability depends on fragile agreements among the Powers. From this

perspective, impeachment functioned as a convenient means of supplanting Presidents Fernando Collor de Mello and Dilma Rousseff, who enjoyed little support from the Legislative Power and low popularity in society.

However, the legitimacy of the use of impeachment in this way is questionable as a political-legal instrument to revoke the elective mandate of the President.

The purpose of this investigation is to verify whether impeachment, in the Brazilian context, may in fact have a criminal or political-administrative character. The definition of its nature has a significant impact on the interpretation of norms, rules and principles that regulate the processing of crimes of responsibility. Thus, analysis of three central elements will be presented: the international and Brazilian history of the relative norms of impeachment; conduct established as a crime of responsibility; and the judging body responsible for the impeachment process and trial.

1. Historical aspects of impeachment

The first record of impeachment comes from the United Kingdom in the 14th century,[1] where the British Parliament had the power to prosecute public officials in cases of treason and other, more minor, infractions. This phenomenon, therefore, existed before the creation of political parties or the inclusion of crimes of responsibility in the texts of the constitutions. Although centuries have passed, the procedures adopted by the British Parliament at that time do not differ from what was applied for many years in cases of so-called "crimes of responsibility".

A member of the House of Commons[2] could denounce an individual for certain violations, but it would be up to the House to decide whether or not to proceed with the trial. If the House of Commons identified enough arguments to support the complaint, the case would be referred for judgment by the House of Lords,[3] after the denunciating member of the House of Commons

1 PLUCKNETT, Theodore. The origin of impeachment. In: SPICER, Andrew; TOYE, Richard. *Transactions of the Royal Historical Society*. Cambridge: Cambridge University Press, 1942. v. 24, p. 47-71.

2 The House of Commons is the lower house of the British Parliament, made up of 650 representatives elected by the British public in a district majority voting system.

3 The House of Lords is the upper house of the British Parliament, with a variable number of members, composed in 2018 of 792 individuals, among which are Church of England bishops, hereditary members of the nobility and royal appointees.

and his colleagues had prepared the details of the indictment. The accused had their right of defense guaranteed by the House of Lords.

Although many of these elements can be seen in the Brazilian system, the main features of impeachment in Brazil originated in the United States and France, where the constitutional texts were in force when the institute was incorporated by the Brazilian legislation. Notably, the current Constitution of the United States of America (1787), in section 3, establishes the basic elements of impeachment.[4]

The American constitutional text already predicted, in 1787, that impeachment proceedings would be trials by the Senate, chaired by the president of Supreme Court, as with current Brazilian legislation, as will be seen. In addition to procedural compliance, the US Constitution provides that the trial shall be limited to political aspects, i.e., removal from power and inability to exercise public office, as is also stated in the 1988 Constitution of the Federative Republic of Brazil.

The French Constitutional Charter of 1814, meanwhile, shares similarities with the British model, and with the system adopted by Brazil at the time of the Empire, in that there was no possibility of holding the king responsible for acts against the constitution.[5] In imperial Brazil, the then emperor was also absent from the list of possible culprits.[6] In addition, the French Constitutional Charter established general rules for the trial and judgment.[7]

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[4] Only the Senate can judge *impeachments*. To this end, senators shall swear an oath or pledge. Judgment of the President United is presided over by the Chief Justice of the Supreme Court: And no person shall be condemned except by a vote of two-thirds of the members present. 7. Judgment in cases of *impeachment* shall not exceed removal from office and inability to exercise any public service, honorary or paid, in the United States. The condemned is subject, however, to prosecution and judgement, in accordance with the Law."

[5] FRANCE. Charte constitutionnelle, June 1814. Available at: www.conseil-constitutionnel.

[f]r/les-constitutions-dans-l-histoire/charte-constitutionnelle-du-4-juin-1814. Accessed on: 8 Aug. 2019. The Constitutional Charter provided in article 13 that: "The person of the King is inviolable and sacred.

[H]is ministers are responsible. Only the executive power belongs to the King."

[6] BRAZIL. *Constituição Política do Império do Brasil*, March 25, 1824. Available at:

[w]ww.planalto.gov.br/ccivil_03/constituicao/constituicao24.htm. Accessed on: 8 Aug. 2019. The Political Constitution of the Empire in its article 99 established: "The person of the Emperor is inviolable, and Sacred: He is not subject to any responsibility".

[7] France, *Charte constitutionnelle du 4 juin 1814*, op. cit. Articles 55 and 56 of the Constitutional Charter proclaimed, respectively, that: "The Chamber of Deputies has the right to accuse the ministers and to sue them before the Chamber of Peers, which alone has the right to judge." and "They cannot be accused except for acts of treason or bribery. Private laws specify the nature of the infringements and determine the process"

In the international context, the concept of impeachment in Brazil was first enshrined in the Law of October 15, 1827, which regulated arts. 133[8] and 134[9] of the Imperial Constitution of March 25, 1824 and established the responsibilities of ministers and secretaries of state, and of councilors of State, as well as the trial and judgment of these crimes. An essential feature of this legislation was the definition of the nature of liability, evidently criminal, with the attribution of sanctions including imprisonment. On this point, Paulo Brossard's highlights that the sanctions of the period concerned both the individual and the performance of their public duties.[10]

The debate over the character of crimes of responsibility and the impeachment process is a topic discussed later, but to grasps the arguments it is important to understand the relationship between the sanctions imposed and the nature of the concept. With the proclamation of the Republic on November 15, 1889 and the introduction of the constitutional text of 1891, the rules governing the process of impeachment underwent considerable changes, leading to the current Brazilian legal system

1.1 Constitution of the Republic of the United States of Brazil of 1891

The Constitution of February 24, 1891 appointed the Federal Senate as responsible for the trial of the President of the Republic,[11] and the President of the Federal Supreme Court (STF) to preside over it.[12] It was established

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8 Brazil, *Constituição Política do Império do Brasil*, March 25, 1824, op. cit. Article 133. The Ministers of State will be responsible: I. For treason. II. For graft, bribery, or extortion. III. For abuse of power. IV. For the lack of observance of the Law. V. For working against the Freedom, security, or property of Citizens. VI. For dissipation of public assets.

9 Ibid. Art. 134. A particular law will specify the nature of these crimes, and the manner to proceed against them.

10 In this sense, Paulo Brossard explains: "Actually, the sanctions that the Senate was competent to apply ranged from pecuniary penalties to exile, imprisonment, and even death, as well as the reparation of damages, which it was responsible for determining; its scope was not just to remove from office the authority incompatible with it, as in republican *impeachment*; at the same time, it attained authority to punish the man, his liberty and goods". (BROSSARD, Paulo. *O impeachment*: aspectos da responsabilidade política do presidente da república. 3. ed. São Paulo: Saraiva, 1992. p. 39.)

11 BRASIL. *Constituição da República dos Estados Unidos do Brasil*, de 24 de fevereiro de 1891. Available at: www.planalto.gov.br/ccivil_03/constituicao/constituicao91.htm. Accessed on: 8 Aug. 2019. Art. 33 —It is the exclusive responsibility of the Senate to judge the President of the Republic and other federal officials designated by the Constitution, under the terms and in the manner it prescribes.

12 Ibid. § 1 - The Senate, when deliberating as a Court of Justice, will be presided over by the President of the Federal Supreme Court. § 2 - It will not issue a conviction unless two-thirds of the members are

that the President of the Republic was subject to the jurisdiction of the STF, in cases of common crimes, and by the Federal Senate, for so-called crimes of responsibility.[13]

It is important to note that the Constitution of 1891, in the sole paragraph of art. 53, specified that, "when the indictment is proven, the president will remain suspended from his duties". This was one of the main issues faced by the STF in the judgment of *Arguição de Descumprimento de Preceito Fundamental* (ADPF) nº 378/DF, in the impeachment of President Dilma Rousseff, when the Court decided that only with upon receipt of the complaint by the Senate would suspension occur.

Subsequently, the constitutional text indicated the list of crimes of responsibility, as those against: 1) the political existence of the Unity; 2) the Constitution and the form of federal government; 3) free exercise of Political Powers; 4) the enjoyment and exercise of political or private law; 5) the internal security of the country; 6) the probity of administration; 7) the custody and constitutional use of public funds; 8) budget laws passed by Congress. In addition, the Constitution of 1891 determined that the offenses would be defined by a special law and that another law would regulate the prosecution and judgment of these crimes of responsibility.

As regulatory norms for constitutional guidelines, in January 1892, Decrees 27 and 30, established, respectively, the trial and judgement of the President of the Republic and the ministers of States for common crimes and the list of crimes of responsibility. In relation to Decree 30, it is important to note that its art. 2 defined the applicable sanctions, restricted to the political-administrative scope,[14] without criminal connotations.

In this regard, another issue may be highlighted in relation to the impeachment of President Dilma Rousseff, concerning the so-called "slicing up" of the vote and the possibility of imputation of only one sanction — loss of office and/or disqualification from public service —provided for in the

present. § 3 - It cannot impose other penalties than the loss of office and inability to exercise any other without prejudice to the action of ordinary Justice against the condemned.

13 Ibid. Art. 53 — The President of the United States of Brazil will be subject to full legal process and trial, after the Chamber has upheld the indictment, before the Supreme Court Federal, for common crimes, and in those of responsibility before the Senate.

14 BRASIL. Decreto No. 30, 8 January 1892. Art. 2º These crimes will be punished with the loss of office only or with this penalty and the inability to exercise any other, imposed by sentence of the Senate, without prejudice to the action of ordinary justice, which will judge the offender according to common procedural and criminal law.

Federal Constitution of 1988. The matter remains under discussion before the STF, especially in Writ of Mandamus no. 34.418/DF.[15]

While the 1891 Constitution and its regulatory Decrees were in force, the discretion of the Federal Senate to determine only the loss of power, and disqualification from public office, was evident.

1.2 Constitution of the Republic of the United States of Brazil, 1934

The 1934 Constitution presented a range of new aspects related to crimes of responsibility. Firstly, it included under prohibited conduct attempts against "the fulfillment of judiciary decisions" (art. 57, item *i*). However, the biggest change is the new model foreseen for the trial and judgment of the President of the Republic, enshrined in its art. 58.[16] The constitutional text significantly altered the instrument of impeachment, in that it ceased to be an integral element of a system of checks and balances between the Executive and the Legislative Power, now occupying the role of an ad hoc court, with the participation of the Judiciary. The president of the republic would be tried by a Special Court made up of four members of the Supreme Court, three from the Federal Senate and three members of the Chamber of Deputies. The investigation would be instructed by a Special Board of Investigation, with a member of the Supreme Court, the Federal Senate and the Chamber of Deputies. On completion, the report of the Special Board would be submitted to the House of Deputies, which would confirm the indictment or not. In the event of a judgment favorable to the prosecution, the president would be judged by the said Special Court.

In this way, the 1934 Constitution radically modified the rules of denunciation, prosecution and judgment of crimes of responsibility, adapting them to the mixed court system, with strong influence of the Supreme Court.

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[15] Medida Cautelar em Mandado de Segurança n. 34.418/DF. Supremo Tribunal Federal. Plenário. Min. rel. Rosa Weber. Judged on 16/9/2016. DJe, 20 Sep. 2016.

[16] BRASIL. *Constituição da República dos Estados Unidos do Brasil*, de 16 de julho de 1934. Available at: www.planalto.gov.br/ccivil_03/constituicao/constituicao34.htm. Accessed on: 8 Aug. 2019. Art. 58 — — The President of the Republic will be prosecuted and tried for common crimes, by the Supreme Court, and for those of responsibility, by a Special Court, whose president will be of the aforementioned Court composed of nine Judges, three of whom are Ministers of the Supreme Court, three the Federal Senate and three the Chamber of Deputies. The President will only have a casting vote.

1.3 Constitution of the Republic of the United States of Brazil, 1937

Due to new political circumstances, the 1937 Constitution reduced the range of crimes of responsibility to five acts, which violate: 1) the existence of the Union; 2) the Constitution; 3) the free exercise of political powers; 4) the probity of administration and the custody and use of public money; 5) the execution of court decisions. Although the constitutional text of 1937 provided in art. 85, § 2 for the provision of a special law on the question, this was not passed.

Note that the suppression of elements such as the attack on the form of federal government, enjoyment of political, social and individual rights, and security of the country and the budget laws are a reflection of the totalitarian state in place at that time.[17] With regard to the trial and judgment system, the Brazilian Constitution of 1937 adopted the previous model, which entailed provenance of the Chamber of Deputies and supervision of the trial by the members of the Federal Council (Senate).

1.4 Constitution of the Republic of the United States of Brazil, 1946

In 1946, with the promulgation of the new Constitution, the wording of articles on crimes of responsibility approximated current texts. The head paragraph of art. 89 consists of the exact terms of art. 85 of the Federal Constitution of 1988: "Acts of the President of the Republic which violate the Federal Constitution and especially oppose it:". From a normative point of view, we should note the wording change that inserts the possibility of an exemplary perspective to the list of infractions, expanding the hypotheses to include scenarios in which the President of the Republic demonstrably violates the Federal Constitution, without the need for conduct to be expressly contained in the paragraphs of said art. 89.

Although the following decades saw major changes in the analysis of crimes of responsibility by the Federal Constitution, the basis of the provisions

[17] GALLO, Carlos Alberto Provenciano. *Crimes de responsabilidade do impeachment*. Rio de Janeiro: Freitas Bastos, 1992. p. 40-41.

of the 1988 Constitution were in the Constitution of 1946. Of greater relevance to the institute of impeachment were the changes which occurred from 1937 to 1946, in comparison with 1946 to 1967, during the political context of the military regime in Brazil.

Regarding the trial process, there were more significant changes. The 1946 Constitution established, in art. 88, two procedural steps: the prosecution would be led by the Chamber of Deputies, with the need for an absolute majority vote by its members, and, if deemed responsible, the president of the Republic would be suspended from office; while the trial itself would be held within the Senate Federal.

While the Constitution of 1946 was in force Law 1.079/1950 was promulgated, defining crimes of responsibility, detailing the points of the Constitution and regulating the respective process of judgment. The STF, in the cases Fernando Collor and Dilma Roussef declared the non-receipt of some articles by the Federal Constitution of 1988, interpreting other articles according to the Constitution. Still, most of the normative elements of Law 1.079/1950 remain to this day.

1.5 Law No. 1079, of April 10, 1950

Law 1.079/1950 "defines crimes of responsibility and regulates the respective trial process", from the point of view of infra-constitutional impeachment. Thus, the first part of Law 1.079/190 aimed to broaden the hypotheses of crimes of responsibility, based on general constitutional provisions. The legal text dealt with the trial and judgment of the President of the Republic and of Ministers of State, while the third and fourth dealt with the trial and judgment of other political officials.

Under the aegis of the 1946 Constitution, the Impeachment trial and judgment consisted of three stages: denunciation, prosecution and trial. The first stage was an irregularity report, undertaken by any citizen against the President of the Republic, and formalized before the Chamber of Deputies. There is no prescription of this in Law 1079/1950, but it was up to the Chairman of the Chamber of Deputies to receive the complaint, with power to reject it in terms of inaccuracies or absence of just cause.[18]

[18] Subsequently, the STF consolidated this understanding, see: Mandado de Segurança n. 20.941/

The second stage of impeachment was the indictment, in the House of Deputies. At this point in the process, steps would be taken to instruct the prosecution, through the presentation of a technical defense by the President of the Republic, the addition of evidence to the complaint and taking testimony from witnesses. Once the evidentiary instruction was complete, the merit of the accusation would be voted on by the plenary of the Chamber.

In the event of legitimacy and the indictment of the President of the Republic, their duties be suspended and the matter forwarded to the Federal Senate for trial. The third stage was the trial itself by the Senate, where there would be a new defense opportunity for the President. Finally, the Federal Senate would pass the sentence, absolving or convicting the President.

1.6 Constitution of the Federative Republic of Brazil, 1967

During the military regime, a new Constitution was established, in 1967, whose main characteristics involved the increased influence of the Executive Power over the Legislative and Judiciary and a legitimation of the 1964 coup. The 1967 Constitution suffered changes as a result of Institutional Act 5 (1968) and Amendment 1 (1969). However, the definition of the responsibility of the President of the Republic was not modified by legislative changes.[19]

Although the 1967 Constitution was enacted during the military regime, the provisions on crimes of responsibility do not diametrically diverge from what had been set by constitutional texts previously. The only alteration was the quorum necessary for the origin of the accusation in the Chamber of Deputies, which changed from an absolute majority, provided for in the 1946

DF. Supremo Tribunal Federal. Plenário. Min. rel. Sepúlveda Pertence. Ruled on 9 Feb. 1990. *DJ*, 31 Aug. 1992.

[19] BRASIL. *Constituição da República Federativa do Brasil*, de 24 de janeiro de 1967. Available at: www.planalto.gov.br/ccivil_03/constituicao/constituicao67.htm. Accessed on: 8 Aug. 2019. Art. 84 — Crimes of responsibility are Presidential acts against the Federal Constitution and, especially: I — the existence of the Union; II - the free exercise of the Legislative, Judiciary and Constitutional Powers of the States; III – the exercise of political, individual and social rights; IV — the internal security of the nation; the probity of administration; VI — the budget law; VII - compliance with judiciary and legal decisions. Sole Paragraph - These crimes will be defined in a special law, which will establish the rules of trial and judgment.

[A]rt. 85 — The President, after the Chamber of Deputies has declared the accusation to be valid by the vote of two-thirds of its members, shall be submitted to trial before the Supreme Federal Court for common crimes, or, before the Federal Senate, for those of responsibility. § 1 - Once the accusation is declared valid, the President will be suspended from his duties. § 2 — After a period of sixty days, if the trial is not concluded, the process will be filed

Constitution, to two-thirds of its members in the 1967 Constitution. The same quorum is now required for sentencing in the Federal Senate, maintained by the Federal Constitution of 1988.

1.7 Constitution of the Federative Republic of Brazil of 1988

The *Constituição Cidadã* did not innovate much in terms of impeachment mentioning crimes of responsibility on four occasions. In its art. 52, items I and II, the Federal Constitution of 1988 determines that the Federal Senate prosecute and judge the President of the Republic and vice-president for crimes of responsibility, as well as the ministers of State and commanders of the Navy, Army and Air Force (item I); as well as the ministers of the Federal Supreme Court, members of the National Council of Justice and the National Council of the Public Prosecutor's Office, the Attorney General of the Republic and the Advocate General of the Union (item II). Furthermore, it assigns to the president of the STF responsibility to preside over the trials in the aforementioned cases.

A significant change from the 1988 Constitution is the inclusion of the expression "prosecute and judge" in the competences of the Federal Senate. Previous constitutions determined competence to "judge" exclusively. Furthermore, the sanction of disqualification of exercise of public office increased from five years (1967) to eight years, in the current legislation.[20]

In the head paragraph of art. 85, the Federal Constitution of 1988 reproduces the text of the Constitution of 1967, while establishing the hypotheses of crimes of responsibility in terms of acts against: 1) the existence of the Union; 2) free exercise of Legislative Power, the Judiciary, the Public Prosecutor's Office and the Constitutions of the Federal Unities; 3) the exercise

[20] BRASIL. *Constituição da República Federativa do Brasil*, de 05 de outubro de 1988. Available at: www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on: 8 Aug. 2019. Art. 52. The Federal Senate is exclusively responsible for: I — prosecuting the President and Vice-President of the Republic for crimes of responsibility, as well as the Ministers of State and the Commanders of the Navy, Army and Air Force in crimes of the same nature; II — to prosecute and judge the Justices of the Federal Supreme Court, the members of the National Council of Justice and the National Council of the Public Prosecutor's Office, the Attorney General of the Republic and the Attorney General of the Union for crimes of responsibility; [...] Sole paragraph. In the cases provided for in items I and II, the President of the Federal Supreme Court, limiting the sentence, handed down by two thirds of the votes of the Federal Senate, to the loss of office, with disqualification, for eight years, of the exercise of public office, without prejudice to other applicable legal sanctions.

of political, individual and social rights; 4) the internal security of the country; 5) administrative probity; 6) the budget law; 7) compliance with laws and judicial decisions.

Note, the inclusion of acts that violate the free exercise of the Public Prosecutor's Office, the main change, observed in art. 85. Thereafter, the third article cites crimes of responsibility also mentioned in the previous section (art. 86),[21] promoting more significant changes in the impeachment process, which led the Federal Supreme Court (STF) to interpret in accordance with the Constitution vis-a-vis various provisions of Law No. 1.079/1950, since the current constitutional provisions differ substantially from those put in place in 1946, when the special law was drawn up.

The Federal Constitution of 1988 postponed the moment of removal of the President of the Republic, as it establishes the suspension of duties from the receipt of the complaint in the STF or the initiation of the process in the Federal Senate, the preliminary judgment of the ruling body, rather than in the Chamber of Deputies.[22]

Finally, crimes of responsibility are again mentioned by the Constitution of the Federative Republic of Brazil of 1988 in art. 102, which provides for the powers of the STF to judge cases of other authorities when there is no connection with the presidency of the Republic.

2. The nature of Brazilian impeachment

Having tackled the preliminary historical analysis of the legal provisions involving impeachment and its insertion in the Brazilian legal system, we now

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[21] Ibid. The constitutional elements of the *impeachment* process are worded as follows: Art. 86. If the accusation against the President of the Republic is accepted, by two thirds of the Chamber of Deputies, he or she will be submitted to trial before the Federal Supreme Court, for common criminal offenses, or before the Federal Senate, for crimes of responsibility. § 1 The President shall be suspended from his/her functions: I — for common criminal offenses, vis-a-vis denunciation or criminal complaint by the Federal Supreme Court; II - for crimes of responsibility, after initiation of the process by the Federal Senate. § 2 If, after a period of one hundred and eighty days, the trial is not concluded, the removal of the President will cease, without prejudice to the regular continuation of the process. § 3º Where there is no conviction, for common offences, the President of the Republic shall not be subject to imprisonment. § 4 The President of the Republic, during their term, cannot be held responsible for acts foreign to the exercise of their power.

[22] In this light, the Federal Supreme Court consolidated the legislative change by determining non-receipt of the articles of Law nº 1.079/1950 that provided for suspension of the president after the prosecution was granted by the Chamber of Deputies, as demonstrated in ADPF judgment no. 378/DF.

move to the study of its legal nature, its main characteristics and discussions around this controversial instrument involving politics and the law.

According to Luís Roberto Barroso, "although it is not used in the Constitutional text or legislation, the English word "impeachment" is used, broadly, to identify the process of investigation and judgment of crimes of responsibility".[23] The STF, since the judgment of President Fernando Collor de Mello, has accepted the denomination of impeachment to deal with the removal provided for in the Constitution, regulated by Law No. 1079/1950, a term referenced in several judgments.[24]

More than the examination of crimes of responsibility, impeachment is an important element in the relationship between the Executive, Legislative and Judiciary. Ultimately, the impeachment process is transformed into a kind of Executive control, valued highly in the Federal Constitution. In view of the lack of other instruments, such as a motion of no confidence or the recall in the legal system, impeachment is isolated as a means of limiting excesses of the Chief Executive.

In the words of Paulo Brossard, "impeachment constitutes the instrument adopted by the Constitution to protect itself from offenses by the head of the Executive. The penalty applicable through it is not criminal; only political, related to a political offense, applied by political entities to political authorities."[25] From this same perspective, both the constituent and ordinary legislator indicated the importance of impeachment by linking it with matters inherent to sustaining the constitutional state of law.[26] Thus, it is must be handled with great caution, as it is intrinsically linked to the foundations of the constitutional system.

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23 BARROSO, Luís Roberto. Impeachment — crime de responsabilidade — exoneração do cargo. *Revista de Direito Administrativo*, Rio de Janeiro, v. 212, p. 163, abr./jun. 1998..

24 In this sense, we note the following Writs of Mandamus: 20.941/DF, 21.564/DF, 21.623/DF and 21.689/DF, referent to the judgment of President Fernando Collor de Mello.

25 BROSSARD, Paulo. *O impeachment*: aspectos da responsabilidade política do presidente da república. 3. ed. São Paulo: Saraiva, 1992. p. 128.

26 PRADO, Luiz Regis; SANTOS, Diego Prezzi. *Infração (crime) de responsabilidade* e *impeachment*. *Revista de Direito Constitucional e Internacional*, São Paulo, v. 95, p. 68, abr./jun. 2016.

2.1 Infractions of a political-legal nature

Although there is discussion on the subject, the majority opinion indicates that the so-called crimes of responsibility must not be analyzed as "crimes" themselves, from a criminal perspective, since the use of the *nomem iuris* "crimes" has no direct connection with the function of the instrument, (see Paulo Brossard).[27] José Cretella Júnior states that "there is no doubt that impeachment, an exceptional measure, is an instrument of a political nature, but attached to a process of legal excellence, in which the accused has the broadest defense, based on the contradictory premise".[28]

To justify this position, it should be noted that the sanction imposed for crimes of responsibility is restricted in scope to the political, not the criminal, law system.[29] Art. 3 of Law 1.079/1950 corroborates this position, since it leaves explicitly open the possibility of prosecution and trial for common crimes in the ordinary justice system, of any individual accused of crimes of responsibility.[30] Likewise, there is no direct relationship between the committing an offense considered a crime of responsibility and a criminal transgression, since, as Brossard puts it, "in other words, impeachment, a political process, is not coextensive with the indictment, a criminal process, because there is no necessary correspondence between political and criminal offenses".[31]

In addition to the political-legal nature of the infraction, part of the doctrine concerns limitation on the application of principles of other areas of law, as it is a constitutional-administrative infraction. In this sense, there should be preservation, as far as possible, of the application of the rules, instruments and principles of these two specific areas, to the detriment, for example, of criminal law and procedure.[32]

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27 Paulo Brossard, *O impeachment*, op. cit., p. 69..

28 CRETELLA JÚNIOR, José. *Do impeachment no direito brasileiro*. São Paulo: RT, 1992. p. 17.

29 The Federal Constitution of 1988 establishes two sanctions for crimes of responsibility: 1) loss of public office; 2) disqualification, for eight years, to exercise public office. In this respect, see the doctrinal position in FAVER, Marcus. *Considerações sobre a origem* e a natureza jurídica *do impeachment*. *Jurisprudência Mineira*, Belo Horizonte, n. 173, p. 32, abr./jun. 2005.

30 BRASIL. Lei n. 1.079, de 10 de abril de 1950. Available at: www.planalto.gov.br/ccivil_03/ leis/ l1079.htm. Accessed on: 8 Aug. 2019. Art. 3º. Imposition of the penalty referred to in the previous article does not exclude the prosecution of the accused for a common crime, in ordinary proceedings, in the terms of criminal law.

31 Paulo Brossard, *O Impeachment*, op. cit., p. 47

32 Luiz Regis Prado e Diego Prezzi Santos, *Infração (crime) de responsabilidade*, op. cit., p. 72).

In an opposite way, to some extent, Manoel Gonçalves Ferreira Filho cites crimes of responsibility as a mixed concept, encompassing elements of a political and also a criminal character.[33] In this respect, Ferreira Filho expresses perhaps one of the most relevant discussions on impeachment: its process and normative interpretation. It is questionable whether the facts described in the denunciation must be expressly listed by the constituent and specified by the ordinary legislator. In this sense, in summary, it must be clear whether the instrument is subject to the principle of criminal legality or indicates a broad conjuncture, respecting constitutional principles, but not necessarily the rigidity of criminal law procedure.

To resolve the problem, we turn to the approach to the rules and conduct related to the opening of Impeachment and how they relate to the various branches of law.

2.2 Nature of the rules relating to crimes of responsibility

To make sense of the position defended above - the legal-political character of crimes of responsibility and their constitutional and administrative links - and remove the association with criminal law, we note Benjamin Constant in his Cours de politique constitutionnelle:

> If each of the ways of harming the State were indicated and specified by law, liability would eventually amount to a treatise on history and politics, and yet its provisions would only attend to the past. Ministers would easily find new ways to escape the future.[34]

The object of political-administrative accountability is different from that approached by criminal law, because in this instrument of constitutional law

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[33] For a better understanding, a passage by Ferreira Filho is instructive: "Without a doubt, most of these figures exhibit politically undesirable behaviors and not antisocial conduct. They are, therefore, not crimes, in the sense criminal science describes. However, the occurrence of facts that fit the description of Law n. 1,079 is essential for *impeachment* to take place. Thus, its substance is political, but in its form it is a crime (formal sense)". (FERREIRA FILHO, Manoel Gonçalves. *Curso de direito constitucional*. São Paulo: Saraiva, 2012. p. 72).

[34] CONSTANT, Benjamin. *Cours de politique constitutionnelle*. Paris: Slatkine, 1982, p. 406. Original: *Si chacune de ces matières de nuire à l'État devait être indiquée et spécifiée par une loi, le code de la responsabilité deviendrait um traité d'histoire et de politique, et encore ses dispositions n'atteindraitent que le passé. Les ministres trouveraient facilement de nouveaux moyens de les éluder pour l'avenir*.

the main objective is to ensure the State maintains adequate functioning and that the principles of the Federal Constitution are duly fulfilled by the Chief Executive. Even if political rights have the quality of fundamental rights,[35] we must differentiate disqualification from public office, which partially mitigates the political rights of the agent, with the penal sanction of imprisonment, which, more onerously, restricts the fundamental right to liberty.[36]

In fact, impeachment in Brazilian law plays a key role in the reestablishment of public order, with the role of overseeing good governance, not the sole objective of sanctioning the head of the Executive; essentially, guaranteeing the functioning of the State.[37]

While Galdino Siqueira refers to the "mismanagement of public affairs", Marcus Faver mentions "non-compliance with governmental precepts, imposed on political agents as requirements of good administration".[38] In both cases, the nature of impeachment is present as a political element, distinct from criminal liability.

Finally, Brossard argues that the current wording of art. 85 entails that acts of the President of the Republic that violate the Constitution must be understood as crimes of responsibility. From this hermeneutic perspective, the inclusion of the phrase "especially" indicates that the paragraphs only constitute an exemplary list of conducts.[39] Minister Teori Zavaski's vote on the Precautionary Measure in Writ of Mandamus 34.371/DF[40] follows the aforementioned understanding of Paulo Brossard.

However, as mentioned earlier, this position is not unanimous in the doctrine. José Cretella Júnior, Paulo de Lacerda[41] and Carlos Alberto

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35 In this sense, regarding political rights as fundamental rights, see: BASTOS JUNIOR, Luiz Magno Pinto; SANTOS, Rodrigo Mioto dos. Levando a sério os direitos políticos fundamentais: inelegibilidade e controle de convencionalidade. *Revista Direito GV*, São Paulo, n. 21, p. 223-256, jan./jun. 2015.

36 Luiz Regis Prado e Diego Prezzi Santos, *Infração (crime) de responsabilidade*, op. cit., p. 73.

37 SIQUEIRA, Galdino. *O impeachment* no regimen constitucional brasileiro. *Revista de Direito Civil, Comercial e Criminal*, v. 27, p. 239-240, jan./mar. 1913.

38 Marcus Faver, *Considerações sobre a origem*, op. cit., p. 32.

39 Paulo Brossard, *O impeachment*, op. cit., p. 50-55.

40 "In the first place, because the role discerned in the sections of art. 85 of the CF, where legal assets protected by the provision of crimes of responsibility are listed, does not apply emphatically, since the head paragraph itself indicates 'especially' protected, but not exclusively, a conclusion shared by a significant part of the doctrine." In: Medida Cautelar em Mandado de Segurança n. 34.371/DF, Supremo Tribunal Federal. Julgamento: 8 set. 2016. DJe, 9 set. 2016.

41 LACERDA, Paulo. *Princípios de direito constitucional brasileiro*. Rio de Janeiro: Azevedo, 1929. p. 462

Provenciano Gallo[42] are some of the jurists who disagree with the position of Brossard. On this point, Cretella Júnior›s divergence is less than the others, as it recognizes the political-administrative nature, but states that crimes of responsibility must be fixed by law.[43]

Jurist Manoel Gonçalves Ferreira Filho also disagrees with Paulo Brossard: "The crime of responsibility is always a 'violation of the constitution' [...] It is, therefore, 'politically undesirable', although not necessarily antisocial conduct. Therefore, a crime of responsibility is not always a common crime."[44] Yet, Ferreira Filho is emphatic in stating that the infractions must be foreseen in law, making the *nulla crimem nulla poena sine lege* principle inescapable.

The jurist Paulo Brossard himself is noted for rebutting the questions raised by other scholars. In this sense, Brossard points out flaws in the argumentation of those cited, observing that, irrespective of the perspective of the legislation regarding crimes of responsibility, there would be no way to reach a conclusion different from that which defends its eminently political nature. Primarily, Brossard explains the abstract breadth of types described in the Constitution and regulatory laws.[45]

In this context, the possibility of impeachment proceedings is especially highlighted when the authority "proceeds in a way that is incompatible with the dignity, honor and decorum of the office" (art. 9, 7) or "dispatches orders or makes a request contrary to the express provisions of the Constitution" (art. 9, 4).

From a practical point of view, Paulo Brossard also addresses the contrary. From this perspective, if the objective of the constituent and the ordinary legislator is precisely to avoid abuses by Congress, "the choice is ineffective, because abuses can be committed by Congress in a thousand ways, including adulteration of facts and conviction without evidence, sovereign as it is with respect to the enactment of impeachment by the House and trial by the Senate."[46]

There is no way to demand a legal judgment of an eminently political judgement. If the legislator's true will was to avoid applying a political function of the instrument, competence should not have been handed over to

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42 Carlos Alberto Provenciano Gallo, *Crimes de responsabilidade*, op. cit., p. 49.
43 José Cretella Júnior, *Do impeachment*, op. cit., p. 18.
44 FERREIRA FILHO, Manoel Gonçalves. Presidente da república — *crimes de responsabilidade* — *impeachment*. *Revista de Direito Administrativo*, Rio de Janeiro, v. 189, p. 375, jul./set. 1992
45 Paulo Brossard, *O impeachment*, op. cit., p. 52-53.
46 Ibid., p. 53.

the Federal Senate, but to the STF, as in cases of common crimes practiced by the President of the Republic.

Although arguments persist tying crimes of responsibility to the sphere of criminal law, or to a mixed or sui generis area, the observations of Brossard seem sufficient to rule out the hypothesis. Where illicit acts suggest a broad semantic scope, or indeterminate legal concepts, which need interpretation by the judges, there is no way to proceed with strict legality, as this does not seem to have been the choice of the constituent or ordinary legislators throughout history.

Many of the terms introduced by Law 1.079/1950 which permeate impeachment are not compatible with the restrictive perspective of criminal law. On the other hand, they are very similar to the "breach of parliamentary decorum",[47] which also limits the exercise of a political right, vis-a-vis the mandate of a parliamentarian duly elected by the people, suggesting key terms such as "dignity, honor and decorum of office". Both deal with subjective analyses, whose political interpretation is clearly open.

2.3. Nature of the judgment of crimes of responsibility

As a last essential element for understanding the nature of impeachment in Brazil, we turn to issues involving the trial of crimes of responsibility. If the penalties are of a political-administrative nature — loss of power and disqualification from public office —, the "criminal type" has a political nature – whose wording is open and interpretation requires subjective judgment — and it remains to verify the conditions of its judgment.

In this sense, Michel Temer states that "the judgment of the Federal Senate is of a political nature. It is a judgment of convenience and opportunity. […] It may be that the Federal Senate considers it more convenient to maintain the President in office. To avoid, for example, the outbreak of civil unrest; to prevent internal strife".[48] Even in cases that do not deal with exclusively

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[47] Brasil, *Constituição da República Federativa do Brasil*, de 05 de outubro de 1988, op. cit. Art. 55. The Deputy or Senator will lose his mandate: [...]

[I] I — whose procedure is declared incompatible with parliamentary decorum; [...]

§ 1 - It is incompatible with parliamentary decorum, in addition to the cases defined in domestic law, abuse of the prerogatives granted to a member of the National Congress or the perception of undue advantages.

[48] TEMER, Michel. *Elementos de direito constitucional*. São Paulo: Malheiros, 2010, p. 172. 0

political conduct, Brossard points out the existence of convenience and usefulness of judgment by the Chamber of Deputies and the Federal Senate.[49]

Certainly, the constituent assembly could not have imagined the Brazilian political situation in the 21st century; but, it should be noted that, with more than 100 years of existence in the legal system, many jurists consider the instrument to be a dead letter, useless and obsolete, especially given the quorum required in the House of Deputies for admission of a complaint. However, perhaps the North American influence and Brazilian bipartisanship over many decades have deceived jurists who have looked into the matter. While a two-thirds majority in a two-party system is difficult to achieve, with exponential multipartyism and coalition presidentialism consecrated after 1988, this phenomenon has become part of the Brazilian reality. In the last 30 years, it has occurred on two occasions.

Finally, given the partisan element involved, one of the judicial reservations of impeachment is the heading of the trial session by the president of the STF, to guarantee compliance with the laws and constitutional principles. However, the participation of the president of the STF does not make it a strictly legal process, since judges remain members of the Federal Senate, with competence only to guarantee the regularity of the process, as established by the STF in Writ of Mandamus No. 20.941/DF.[50]

Although impeachment is a political process, it must respect constitutional principles such as ample defense, adversarial pleading, and due legal process, as well as the legislation contained in Law No. 1079/1950 and in other auxiliary normative instruments, such as the Internal Regulations of the Chamber of Deputies and the Federal Senate, in addition to the Code of Criminal Procedure, compatible with the specific norms.

3. Conclusion

Impeachment has emerged, historically, as an instrument of accountability for high-ranking officials, who previously could not be held responsible for their conduct. In Brazil, impeachment designation is not used in the governing legislation, but the crimes of responsibility have been treated by doctrine and

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[49] Paulo Brossard, *O impeachment*, op. cit., p. 140.

[50] Mandado de Segurança n. 20.941/DF. Supremo Tribunal Federal. Plenário. Min. rel. Sepúlveda Pertence. Julgado em 9/2/1990. *DJ*, 31 ago. 1992.

jurisprudence as impeachment since the moment of its introduction in the legal system. The legal frameworks of impeachment in Brazil are Law nº 1079/1950, partially approved by the Federal Constitution, and the constitutional text of 1988, which also outlines the instrument. As verified, the *nomen iuris* "crimes of responsibility" should not be confused with offences characteristic of criminal law, given that they correspond to political-administrative infractions. The sanctions imposed by impeachment are strictly political in nature: the loss of power and inability to exercise public office. From this same perspective, the infractions described as crimes of responsibility have broad semantic implications, such as the hypothesis of proceeding in a form incompatible with the dignity and decorum of office, which grants discretion to judges in the framing of different types of infractions. Finally, crimes of responsibility are judged by a strictly political body, the Federal Senate. Supervision of the trial session by the president of the Federal Supreme Court aims to guarantee due process and respect for the rules established in the Federal Constitution and legislation, but does not involve power to materially influence the judgment of the political body.

In this scenario, it is clear that Brazilian impeachment has a legal-political nature, dissociated from the framework given to conventional crimes of criminal law, since the types, sanctions and judgment are prescribed in the political arena. Although there is need for full respect for the constitutional principles of due process of law, adversarial pleading and broad defense, impeachment grants political discretion to the Federal Senate to analyze the incidence of crimes of responsibility in concrete cases.

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