

THE CONSTITUENT POWER IN ADPF N.º 153: A READING FROM THE CRITICAL THEORY OF THE CONSTITUTION

O PODER CONSTITUINTE NA ADPF N.º 153: UMA LEITURA A PARTIR DA TEORIA CRÍTICA DA CONSTITUIÇÃO

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ABSTRACT: This article aims to reflect on the concept of original constituent power in two periods of the Brazilian constitutional experience, the outbreak and institutionalization of the military dictatorship of 1964-1985 and the judgment of ADPF n.º 153 by the Federal Supreme Court, in 2010. The methodology is the following. The first part of the text exposes how the military confused constituent power and popular sovereignty in order to legitimize the coup d'état. In the second, the judgment of ADPF n.º 153 is presented as a continuation of the legal narrative established by the autocratic regime that supposedly ended in 1988. The text concludes by pointing to the necessity to (re)think about the concept of constituent power in light of the Critical Theory of the Constitution.

Keywords: constitution; democracy; law; legitimacy; constituent power.

RESUMO: Este artigo visa a refletir sobre o conceito de poder constituinte originário em dois tempos da experiência constitucional brasileira, o da deflagração e institucionalização da ditadura militar de 1964–1985 e o do julgamento da ADPF n.º 153 pelo Supremo Tribunal Federal, em 2010. A metodologia é a seguinte: Na primeira parte do texto, expõe-se como os militares confundiram poder constituinte e soberania popular de modo a legitimar o golpe de Estado. Na segunda, o julgamento da ADPF n.º 153 é apresentado como uma continuação da narrativa jurídica estabelecida pelo regime autocrático que supostamente findara em 1988. O texto conclui apontando para a necessidade de se (re)pensar o conceito de poder constituinte à luz da Teoria Crítica da Constituição.

Palavras-chave: constituição; democracia; direito; legitimidade; poder constituinte.

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1 INTRODUCTION

The nature of constituent power, the authority to establish or modify a constitution, remains undefined, creating significant legal complications. While some jurists perceive it as an unbounded political force, others view it as a legal concept operating within existing legal frameworks.

This dichotomy results in a dangerous conflation of constituent power with sovereignty, leading to potential abuses of political authority and the erosion of legal constraints. If that is so, what kind of dangers are the concept of an unlimited original constituent power, and the idea that the constituted power can transform itself into the constituent power, into a stable legal system? That is the problem to be addressed in this essay.

This text aims to explore a specific constitutional event and subsequent legal decision to demonstrate the risks inherent in this conceptual ambiguity. To achieve this goal, the following methodology will be applied: a) exposition of what we will call a proto-Jacobin reading of constituent power; b) the handling of that reading in the military coup of 1964 in Brazil; c) the permanence of this reading in the Brazilian Supreme Court.

2 HANDLING A (PROTO)JACOBIN READING OF CONSTITUENT POWER

The original constituent power has no limits. Despite the criticisms against such a conception, this is a deeply rooted notion in the *theoretical common sense* of Brazilian jurists. In his *Curso de Direito Constitucional*, Paulo Bonavides (2004, p. 146), for example, defines original

constituent power as *political* or *extrajudicial power*, since it “is not bound by formal limits”¹. But there is another, minoritarian, conception of constituent power, according to which it is understood as a *legal concept*, a reading that goes back to nineteenth-century French constitutional theory, notably Raymond Carré De Malberg (2008) and Georges Vedel (1949).

In Brazil, a conception of this type is evident, for example, in the theses of Vera Karam de Chueiri (2013) about *radical constitutionalism*, according to which the Constitution would mediate/enable political action, not by being reduced to constituted power but retaining, in it, constituent power, which would radically constitute us as a political community. Another interesting example is found in the thought of Tércio Sampaio Ferraz Júnior. Making use of the cybernetic lexicon, Ferraz Júnior (2018, p. 201) speaks of original constituent power as a *calibration rule*, thanks to which “the [legal] system requires a change in its operating pattern”, which would occur “through the creation of a new original norm and, consequently, a new hierarchical series”.

To illustrate his thesis, Ferraz Júnior (2018, p. 203) takes what he considers to be a “concrete example of recent Brazilian history”: Constitutional Amendment No. 26/1985, which, based on the 1967 Constitution, would have conferred on Parliament “the power to meet unicamerally in a free and sovereign National Constituent Assembly, thus ending the period of the 1964 Revolution”. In this example, according to him, the change in the system's operating standard would have been “extremely subtle”, since the legality standard of the previous legal system would not have been “broken by the invocation of the Art. 48 of the Constitution then in force, which disciplined the mode of its alteration through amendments”.

By enacting “an amendment that alters the report of the norm that gives it competence”, the legislative power (constituted by the 1967 Constitution) would have acted no longer as a constituted power, but as a constituent one, creating a “new norm, an original norm” (Ferraz Júnior, 2018, p. 204). Thus, when Congress enacted an amendment aimed at the very abolition of the then-current legal system, “the constituted power already assumed the role of constituent” (Ferraz Júnior, 2018, p. 205).

It is interesting to note that these two readings of constituent power, despite appearing to be antagonistic, complement each other. The same Ferraz Júnior (2018, p. 203) who treats constituent power as a *calibration rule*, also states, in the same text, that original constituent power is “autonomous, initial and unconditional power”². Nor did Carré De Malberg and Georges Vedel deny that constituent power could be configured as a *de facto power*. What they asserted, in effect, is that, in the context of an already existing constitution, a “peaceful and constant” constituent power could exist: the power to create a new constitution from the then-current one. Finally, Chueiri would hardly be able to refute the existence of an *extra juridical* constituent power in the cases of the bourgeois revolutions of the eighteenth century.

Moreover, adhering to the criticisms of Joel Colón-Ríos (2020, p. 3), we can state that both conceptions (whether the constituent power as extrajudicial or legal power) constitute attempts to describe the nature of what is understood as a “substantively unlimited faculty of creating a constitution”. In both notions of constituent power (the *original* and the *derived or constituted*) one glimpses the:

ability to produce the same results: the radical transformation of the constitutional regime. They are instances of the same phenomenon, moments in which the same power is exercised even if in different contexts and by different means (Colón-Ríos, 2020, p. 9).

¹ This conception, which refers to a tradition of *political theology*, begins with Sieyès (1875) to be later appropriated by Schmitt (2017), widely influential authors in the *theoretical common sense* of Western jurists. Canotilho (2003, p. 65) does the same, stating that “in essence, constituent power is always revealed as a matter of 'power', 'strength' or political 'authority' that is in a position, in a given concrete situation, to create, guarantee or eliminate a Constitution understood as a fundamental law of the political community”.

² “Based on this, a distinction is made between original and derived constituent power, understanding the former as autonomous, initial and unconditioned power, recognized as a source-principle of law that, once its founding effect is exhausted, leaves to the constitutionally instituted authority (derived power) the establishment of subsequent subordination relationships” (Ferraz Júnior., 2018, p. 203).

Still, according to Cólón-Ríos (2020, p. 3), the two notions would not only be “almost identical in their most relevant traits” but would also represent “an equally dangerous threat to the established constitutional order”. There would be, in fact, “some reasons to think that derived constituent power and original constituent power can be understood as conceptualizations of the same constituent authority”. And these two readings could “be implemented to allow or limit the exercise of political power”. However, they can also serve as a justification for autocratic doctrines and procedures.

Ultimately, this distinction would tend “to confuse constituent power and sovereignty” and, as a result, would lose sight of “an important aspect of the legal nature of constituent authority” (Cólón-Ríos, 2020, p. 3). Reading the constituent power as a “non-sovereign” power could bring out a significant aspect of its legal character. Otherwise, when constituent power and sovereignty are confused, the discretion of the latter is dangerously increased. The present text aims to analyze a constitutional experience, and a judgment handed down more than ten years ago of the supposed end of such an experience, to glimpse the dangers of this confusion.

Unlike other South American countries, law was widely used by the Brazilian autocratic military regime between 1964 and 1985, which dedicated itself to producing legal norms, and legal concepts, which justified the arbitrary regime. In other words, legal language served as the basis for the legitimizing discourse of the dictatorship that began in Brazil in March/April 1964. (Lima, 2018; Paixão, 2020; Safatle, 2014). There were jurists of the regime (Del Negri, 2022), and there was a theory of law (public, constitutional, economic) of the regime (Campos, 2012, Lara; Silva, 2015). This is an almost exclusively Brazilian phenomenon. If we are to compare Chile, Argentina, or Uruguay and (in) their dictatorial and contemporary experiences, this *instrumentalization of law* occurred, but not so acutely, so profoundly, as in the Brazilian constitutional experience³. The Brazilian military regime was one that, by far, produced norms and mobilized legal categories.

The *normative dimension* of the Brazilian military regime is expressed in the seventeen institutional acts, with countless complements; in the fourteen constitutional amendments only up to the 1967 Constitution; in the 1967 Constitution itself, as well as in the amendment in 1969, seen by many as a “new” Constitution. The profusion of norms, concepts, and constitutional categories, articulated throughout the regime, signals the *uniqueness* that marks the experience of the Brazilian dictatorship of 1964. Initially, the civil-military regime that usurped political power at the turn of March to April 1964 was faced with a dilemma. The narrative constructed by the civil-military movement was based on the discourse of law and order. How, then, to break with the legal-political order of time? How to violate legality and the (Liberal) Rule of Law and, at the same time, “promote” them? In other words, how to seize power and establish an autocratic regime that was not identified, for example, with the Soviet one?

The solution chosen was the publication of an *Institutional Act*, granted on April 9, 1964, whose explanatory statement, written by Francisco Campos, began by *establishing the concept* of the “civil and military movement” that had just “opened to Brazil a new perspective on its future”. That is, the militaries represented the coup as an “authentic revolution”, with a view to the *future*. Such a “revolution” would be distinguished from other armed movements, since it would translate “the interest and will of the Nation”. Thus, the way was paved for reading it as legitimized “by itself” and, therefore, invested “in the exercise of Constituent Power”.

The concept of *constituent power* served as a theoretical justification for the “victorious revolution” to be able to edit “legal norms without being limited in this by the normativity prior to its victory”. The preamble of what would later be called the *Institutional Act No. 1* insisted on leaving.

It is quite clear that the revolution does not seek to legitimize itself through Congress. This is what receives from this Institutional Act, resulting from the

³ In the other Latin American experiences I mentioned, the law, obviously, was activated for certain exceptional acts. In Argentina, it was as if the law continued to be in force, but a whole paralegality was introduced in the regime's actions, as if it were a Dual State, by Fraenkel (2022). In the Uruguayan case, there was no change in the Constitution, it “simply” was not applied until redemocratization. See Rosignoli; Marin Suarez; Tejerizo-Garcia, 2020.

exercise of Constituent Power, inherent to all revolutions, its legitimization (Brasil, 1964).

This preamble is indispensable for understanding not only the entire dictatorial period but also redemocratization and post-1988 constitutional theory. The same idea will be repeated in other preambles of other *Institutional Acts* to come, constituting a *legal narrative*. The idea that the regime, being revolutionary, would express *popular and original constituent power*. It is (almost) a Jacobin reading of the concept of *original constituent power*, used to legitimize (even in the future) the military coup. It fuses *popular sovereignty* and *constituent power*.

The proto-Jacobin interpretation/use of the concept of *original and popular constituent power* was also responsible for a certain *ambivalence* or *ambiguity* between institutional acts and constitutional norms. The regime used both instruments interchangeably, on purpose, without any technical rigor. The confusion between institutional acts and constitutional norms opened the regime's discretionary space since those were indisputable. At the same time, it wove a legitimizing narrative.

Institutional Acts (AI) nº 1, 2, and 3 ended direct elections at all levels of the Federation. Between Act No. 1, and Act No. 2, the regime promoted a series of constitutional amendments, in which it revoked mandates to maintain its majority in parliament. In Act No. 4, the National Congress was given constituent powers, which drafted the 1967 Constitution. In the following year, the hardest institutional act of the regime, No. 5, was enacted, the first not to provide for its own validity. The 1967 Constitution was expressly amended three times, and implicitly several times, by the following 12 institutional acts through February, October 14, 1969. Three days later, Constitutional Amendment No. 1, granted by three military ministers while Congress was closed, invoking Institutional Acts No. 5 and 16, partially rewrote the 1967 Constitution.

AI n.º 5 was in force during most of the 1970s, along with the Constitution. Suffering successive legislative defeats, in 1977, President Geisel instituted Act n.º 5 to close the National Congress, under the justification that new constitutional amendments were necessary. In October 1978, Constitutional Amendment n.º 11 was edited, which revoked the institutional and complementary Acts, insofar as they contravened the Federal Constitution, “with the exception of the effects of the acts performed based on them”, which were “excluded from judicial review”. The amendment, however, provided that it would only come into effect the following year.

More than an ambiguity, what is evident between the years 1964 and 1979 is perhaps a *circularity* between institutional acts and constitutional norms. They were woven by referring to each other in order to sustain, simultaneously, a regime of extraordinary/authoritarian legality and a legal narrative of legitimation. The driving concept that gave dynamics to this circularity/interoperability, as we have seen, was that of *original constituent power*, read as a *sovereign revolutionary force*.

This cycle was not interrupted in 1979, when collapse had already appeared on the regime's horizon. The same amendment that put an end to the Institutional Acts altered Article 81 of the 1967 Constitution, authorizing the President to determine *emergency measures*, which could be indicated by parliament and the judiciary. Thus, another legal category was created to take the place of Institutional Acts in the narrative plot of the regime (Utzig, 2022), this time aiming to prepare a *transition* that was convenient for it. The emergency measures served as legal support for the violent containment of popular demands, among them, the struggle for *amnesty*.

The regime had been planning a democratic “opening” since its first parliamentary defeats in 1974. It was supposed to be *slow, gradual, and secure*. Conducting the terms of the *amnesty* was a key part of this project. Once again, the uniqueness of the Brazilian experience stands out. Unlike, for example, in Chile, where the amnesty was granted by a Pinochet decree, that is, it was a self-amnesty, the inclusion of the military in the scope of the Brazilian amnesty only occurred at the end of the processing of Law No. 6.683, of August 28, 1979.

At that moment, it meant the return of exiles but also democracy. The regime took this demand to its advantage. By a difference of seven votes, a device was inserted in the amnesty legislation that extended it to *crimes related* to political crimes, considered those “crimes of any nature related to political crimes or committed for political reasons” (Art. 1º, §1º).

This was how the Figueiredo government was able to meet popular demands, as well as safeguard the future of agents of the regime, which was considered so fundamental to control the terms of the amnesty, that it returned *ipsis litteris*, as it was in the legislation, in Constitutional Amendment n. 26, of November 25, 1985, which convened a new constituent. Thus, another nodal point of the legal narrative of legitimation was plotted. The transition, therefore, was initially a project of the regime itself, and its success or even duration (it ended) is an open question. The fact is that it was designed internally, even if it has changed over time. The emergency measures served the regime in order to maintain that gray area of discretion during the “redemocratization”.

The consolidation point of this democratic “opening”, initiated in 1979, according to Manoel Gonçalves Ferreira Filho (2010), would have been the elaboration of the current 1988 Constitution. According to the proto-Jacobin reading of constituent power handled by the regime, since the convening of a new constituent in 1986 would have been given by an amendment to the 1967 Constitution (Constitutional Amendment n.º 26), its constituent powers would be derived from “revolution” of 1964 (Ferreira Filho, 1974, p. 19-21). This reading of the constituent power will return, albeit with some changes, in the unfounded judgment of the Argumentation of Breach of Fundamental Precept n.º 153 by the Federal Supreme Court in April 2010, in which the court understood that it could not proceed with the revision of the Law of Amnesty (Law n.º 6.683/1979) sanctioned during the military dictatorship of 1964 – 1988.

3 ADPF N.º 153 AND THE RETURN FO THE (PROTO)JACOBIN READING OF CONSTITUENT POWER

The judgment of ADPF n.º 153 (Brasil, 2010) raises several questions dear to the theory of the constitution and Brazilian constitutionalism (Meyer, 2021, p. 26). On the occasion, the Federal Council of the Brazilian Bar Association (OAB) asked for the recognition of the non-reception of Law n.º 6.683/1979, that granted amnesty for crimes committed by agents of public power during the dictatorship.

As Meyer (2012, p. 22) notes, the path chosen by the arguer, that of concentrated control with binding effects, associated with the absence of an authentic judicial controversy on the subject at the time, suffocated “the debate that could occur in the diffuse control of the constitutionality of laws and normative acts”. Recognizing the admissibility of the argument, the majority of the plenary followed the vote of Minister Eros Grau, rapporteur of the trial.

It is not the scope of this text to evaluate the uses of history in winning or dissenting votes, nor to judge whether the decision was right or wrong, but to highlight the confusion between constituent power and sovereignty that exists there as a background not problematized until then by the critical fortune of this *judgment*. In this sense, it is important to highlight that the relationship between the uproar and the constituent power is already evident in the summary of the judgment⁴.

Of the arguments used by the vote of Minister Eros Grau and used by the votes that followed him, that the amnesty would be incorporated into the very norm that gave rise to the Constituent

⁴ “The amnesty of the 1979 law was reaffirmed, in the text of EC 26/85, by the Constituent Power of the 1988 Constitution. Hence, it makes no sense to question whether the amnesty, as defined by the law, was or was not received by the 1988 Constitution; the new Constitution [re]instated it in its original act. The Constitutional Amendment n. 26/85 inaugurates a new constitutional order, consubstantiating the rupture of the constitutional order that completely decayed with the advent of the Constitution of October 5, 1988; substantiates, in this sense, the white revolution that confers legitimacy on it. The reaffirmation of the amnesty of the 1979 law is integrated into the new order, it is composed at the origin of the new fundamental norm. In any case, if we do not have the precept of the 1979 law as abrogated by the new constitutional order, it will coexist with paragraph 1 of article 4 of EC 26/85, it will exist alongside it [...]. Having affirmed the integration of the 1979 amnesty in the new constitutional order, its adaptation to the 1988 Constitution is unquestionable. The new order comprises not only the text of the Constitution, but also the 'original norm'. Within this totality --- totality that the new normative system is --- it is understood that '[is] also granted amnesty to the perpetrators of political or related crimes' committed in the period between September 2, 1961 and August 15, 1979'. No antinomy of any magnitude can be discerned between the precept conveyed by paragraph 1 of article 4 of EC 26/85 and the 1988 Constitution”.

Assembly of 1988, the norm considered a manifestation of the original constituent power, figures as the crowning of the judgment. It is not the only argument that supports the judgment, but it is an important one, especially considering its effects in the field of constitutional theory.

About individual votes, Minister Eros Grau is the first to speak of constituent power. It does so through the lesson of Tércio Sampaio Ferraz Júnior, exposed elsewhere, according to which Constitutional Amendment n.º 26/85 would have worked as a *calibration rule*, responsible for the transition from one legal-political order to another, without major institutional upheavals. For Grau, this would have been precisely what had happened: Constitutional Amendment No. 86, a product of the original constituent power, would have constitutionalized the amnesty resulting from Law No. 6.683, integrating it into the new constitutional order, leaving, therefore, unquestionable its adequacy to the 1988 Constitution.

But the vote that most theoretically discusses constituent power is that of Minister Gilmar Mendes, which contains precisely a chapter entitled *Constituent power and constitutional commitments that found the new constitutional order*. For Mendes, the main justification for accompanying the rapporteur and dismissing the claim was the fact that the broad and general amnesty would represent “the result of a constitutional commitment” that would have enabled “the very foundation and construction of the 1988 constitutional order” (Brasil, 2010, p. 235).

At the outset, the minister points to a supposed decadence of the dualist paradigm that divides constituent power into *original* and *derivative*. This dichotomy reading would be overcome (at least, in practice) by “compromise solutions, which open space for political transactions that lead to a certain solution” (Brasil, 2010, p. 235). Insisting on the *compromise* nature of the 1988 Constitution, Mendes argues that “amnesty served as an instrument to the agreed Constitution, presenting itself as a means of overcoming the friend/enemy dichotomy that had been strengthened in the preceding crisis period” (Brasil, 2010, p. 242). Its openness and breadth would be inherent “to the contractual content of the [Constitution] text itself, not appearing to be incompatible with the current constitutional order” (Brasil, 2010, p. 243).

Later in his vote, Mendes will point out that Constitutional Amendment No. 26 constitutes “a peculiar constitutional act”, whose nature would not be a constitutional amendment, but a “political act that breaks with the previous Constitution”, bringing “the new bases for the construction of another constitutional order” (Brasil, 2010, p. 254). To understand it correctly, it would be necessary to “revolve concepts and conceptions of constitutional dogmatics regarding the process of revision of the Constitution” (Brasil, 2010, p. 254).

According to Mendes, the issue would have been seriously contemplated in Carl Schmitt's *Theory of the Constitution*, and in its (supposed) differentiation between *constituent* (the one who creates the Constitution) and *constituent legislator* (the one who modifies/revises it). The *constituent legislator* could never carry out a modification/revision that would somehow affect “the continuity and identity of the Constitution” (Brasil, 2010, p. 255).

Another author that Mendes resorts to is Otto Brun Bryde and his *theory of the material limits of the revision of the Constitution*, according to which the limits of the power to revise or modify the Constitution would not necessarily be restricted to “the cases expressly listed in the *guarantees of eternity*”, that is, in the immutable clauses. The material (or implicit) limits to constitutional revision would be the result of the very “distinction between the original and derived constituent powers”, which would also allow “affirming the legitimacy of establishing this prohibition” (Brasil, 2010, p. 258–259).

However, the limits of constitutional revision would not reside, “necessarily, on the frontier between legitimacy and revolution”. It would be possible to follow a third path: “proceeding with the transition from one Constitution to another in an orderly process and without breach of legitimacy”, in which case a *tertius genus*, the total revision of the Constitution, as an intermediate model, would make the dichotomy original/derived constituent power a trichotomy (Brasil, 2010, p. 261).

Mendes understood Constitutional Amendment (EC) No. 26 as something very close to the model of “total revision established by the constitutional order itself, without major ruptures from the historical-political point of view” (Brasil, 2010, p. 264). And, as such, any “act tending to revise or restrict” the amnesty incorporated therein would put into play “the very foundations of our constitutional order” (Brasil, 2010, p. 264).

Finally, EC n.º 26/85 incorporated amnesty as one of the foundations of the new constitutional order that was being built at the time, a fact that makes any modification of its original contours practically unthinkable that does not have repercussions on the very foundations of our constitution and, therefore, of all post-1988 political-institutional life (Brasil, 2010, p. 264).

The convergence of the votes of Grau and Mendes, winners in the judgment, makes the same assessment explicit. Firstly, the 1988 Constitution would not have been the result of a revolutionary rupture, but of a political negotiation process, in which amnesty would have figured as a decisive instrument. Therefore, secondly, Constitutional Amendment n.º 26 would be the expression of a form of transition from one constitutional order to another without ruptures, the so-called *total revision*, which would not remove the unlimited character typical of the original constituent power. And for that reason, in the last place, the amnesty, for being present in EC n.º 26, should be considered a material or *implicit clause*, whose review by the court would lead to the erosion of the entire constitutional order in force.

The judgment of ADPF n.º 153 is symptomatic regarding the persistence of reading regarding the *original constituent power* and its relationship with the future. Even though justices Eros Grau and Gilmar Mendes qualified EC n.º 26 as an original constituent power, and, as a result, unlimited, the *illocutionary effects* of their votes, that is, what they *did*, was to adhere to the “constituent project” idealized in 1964 and carefully developed during the dictatorship through that plot driven by the *circularity* between institutional acts and constitutional norms.

Assuming a perspective aligned with the Critical Theory of the Constitution, it is possible to perceive those ministers’ lacked attention regarding the *openness to the future* that every Constitution contains in itself. This openness to the future promotes a complete reformulation of the concept of *constituent power* that detaches it from the notion of sovereignty⁵.

According to Habermas (2020, p. 29), just as “there is no [at least from a normative point of view] the rule of law without radical democracy”, nor does the rule of law precede or result from the will of the sovereign, but “is inscribed in the political self-legislation” (Habermas, 2001, p. 779) of citizens. In this paradigm, it is necessary to overcome the notion of *unlimited original constituent power*⁶, and understand something that was already present in the US and French constitutions of the 18th century: the constituent power, in addition to elaborating “a text endowed with a greater difficulty in being altered”, expresses a constituent project (Oliveira, 2014, p. 125-126). It is also necessary to overcome the reading of *constituent power* “as something static, which marks its existence in time and disappears soon after”. Strategically speaking, this point has much to teach jurists committed to democracy.

The 1964 regime knew how to handle the concept of constituent power uniquely, in order to use it as a normative resource for the entire period, including the amnesty. This experience teaches us that the constituent moment is a “process that extends over time”, having “continuity in the daily practices in which each citizen and each social group” are constituted with reference to the “primary constituent act” (Oliveira, 2014, p. 129). An effectively democratic constituent project, however, must be understood as lacking in legitimacy, since it is not based on an ultimate and/or absolute foundation, contrary to what the regime did when it was founded in the 1964 “revolution”.

In a Democratic Rule of Law, the question of the legitimacy of the law (and governments) refers to the Kafka story *The construction of the Chinese Wall*, since it is a “permanent construction”⁷ (Oliveira, 2014, p. 130). This means that the break with the 1964 constituent project

⁵ About this, including the research by Lucia Rubinelli (2020), according to which in different historical moments, the constituent power offered an alternative understanding of the power of the people to that offered by the ideas of sovereignty.

⁶ “although there is no doubt that the constituent power is not limited, from a legal point of view, by the order with which it breaks, it is recognized that it is not fully unlimited, with ethical, cultural and social commitments that must be respected” (Oliveira, 2014, p. 128).

⁷ That occurs “through the realization in time of internal cohesion between the notions of self-government and equal individual rights of freedom, materializing a complex legal notion of autonomy. Thus, the normative demands placed

and its legal narrative does not require, as some think, a new Constituent Assembly. It's best to read the situation as a *dispute over constituent projects*. These projects dispute constitutional/legal texts and their interpretation, as well as categories, concepts, and argumentative methods. The judgment of ADPF n.º 153 is a clear sign of the presence and vigor of the autocratic project. It is up to us to think of another.

4 CONCLUSION

The ADPF n.º 153 ruling reveals a problematic approach to original constituent power and its enduring influence. While Justices Grau and Mendes deemed EC n.º 26 an unlimited original power, their actions effectively reinforced the "constituent project" shaped by the 1964 dictatorship.

From a Critical Theory perspective, the justices overlooked the inherent future-oriented nature of constitutions, a characteristic that should decouple constituent power from sovereignty. Drawing on Habermas, the passage argues that the rule of law emerges from citizens' political self-legislation, not sovereign will. This necessitates moving beyond the notion of unlimited constituent power and recognizing that constitutions embody ongoing constituent projects, as seen in 18th-century examples.

The 1964 regime strategically manipulated constituent power for prolonged control, including amnesty. This underscores that the constituent moment is a continuous process, embedded in daily civic practices. A genuinely democratic constituent project, however, lacks a fixed foundation, unlike the 1964 "revolution."

In a democratic state, legal legitimacy is an ongoing "construction," akin to Kafka's "Chinese Wall." Breaking with the 1964 project doesn't require a new constituent assembly but rather a contest between competing constituent projects, influencing legal texts, interpretations, and legal methodologies. The ADPF n.º 153 judgment signals the persistence of an autocratic project, demanding the development of an alternative democratic vision.

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on this constituent process, rather than barriers to it, are, in fact, a way of explaining its own performative meaning, the very complex notion of autonomy that underlies it" (Oliveira, 2014, p. 130).

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