

A CONCEPT, SOME SHIFTS: CHANGING THE MEANINGS OF THE CONSTITUTIONAL GUARDIAN IN THE TWILIGHT OF THE BRAZILIAN EMPIRE (1860-1891)

*UM CONCEITO, ALGUMAS MUDANÇAS: ALTERANDO OS SIGNIFICADOS DO
GUARDIÃO DA CONSTITUIÇÃO NO OCASO DO IMPÉRIO BRASILEIRO (1860-
1891)*

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Resumo

A disputa pelo conceito de *guardião da Constituição* remonta às origens do constitucionalismo, mas frequentemente esse debate ainda fica, no campo do direito constitucional brasileiro, restrito às discussões ocorridas na Europa e Estados Unidos. O objetivo deste trabalho é fazer registro de algumas notas de pesquisa a respeito das mudanças no significado do conceito de *guardião da Constituição* nas últimas décadas do Império brasileiro, mais especificamente entre 1860 e 1891. De início, o trabalho é centrado no pensamento político-constitucional liberal, mas não perde de vista o debate com o pensamento conservador brasileiro, tampouco o processo de tradução ou transplante do conceito, a partir dos contextos europeu e estadunidense. A pesquisa, ainda em andamento, busca investigar, ao final, como as discussões em torno do conceito ajudaram na construção do Supremo Tribunal Federal como uma instituição da República brasileira. Para tanto, em relação ao referencial metodológico, são adotadas as categorias de Reinhart Koselleck relativas à história dos conceitos, especialmente quanto às antecipações

Abstract

The dispute over the concept of guardian of the Constitution dates back to the origins of constitutionalism but this debate often remains, in the field of Brazilian constitutional law, restricted to the discussions that happened in Europe and the United States. This work aims to document some research notes regarding the changes in the meaning of the concept of guardian of the Constitution during the last decades of the Brazilian Empire, specifically between 1860 and 1891. Initially, the work is centered on liberal political-constitutional thought, but without losing sight of the debate with Brazilian conservative thought, nor the process of translating or transplanting the concept from the European and American contexts. The research, still ongoing, seeks to ultimately investigate how discussions surrounding the concept have contributed to the construction of the Supreme Court as an institution of the Brazilian Republic. To this end, Reinhart Koselleck's categories related to the history of concepts are adopted as a methodological reference, especially regarding linguistics anticipations. Preliminary data indicate that the conceptual

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linguísticas. Os dados preliminares indicam que os debates mais conceituais do final do Império brasileiro aconteceram como uma antecipação do que viria a ocorrer ao nível do discurso liberal e também no processo constitucional de instauração da República brasileira, e ao longo da história do país.

Palavras-chave: Guardião da Constituição; pensamento político-constitucional liberal; história dos conceitos; Supremo Tribunal Federal.

debates at the end of the Brazilian Empire occurred as an anticipation of what would happen at the level of liberal discourse and the constitutional process of establishing the Brazilian Republic and throughout the country's history.

Keywords: guardian of the Constitution; liberal constitutional political thought; history of concepts; Brazilian Supreme Court.

1. Introduction

The concept of *guardian of the Constitution* is sometimes invoked through other words or expressions, such as *moderating power*, *fourth power*, or *neutral power*, all interchangeable depending on the context. For this paper, the choice fell on the term *guardian of the Constitution*, but consciousness of the choice of words to refer to the concept is still not unanimous among those dedicated to studying the subject. The focal objective of this paper is to underline a few notes about the changes in the concept of the *guardian of the Constitution* in Brazilian liberal thought at the turn from the Empire to the Republic, more specifically between 1860 and 1891.

This paper is based on the premise that it is necessary to revive the study of the history of Brazilian constitutional law, which is still very discredited given the privilege of narratives constructed in Europe and the United States, considered universal.² Due to this scenario, debates on the concept of *guardian of the Constitution*, which took place, for example, in Europe in the early 1930s between Hans Kelsen and Carl Schmitt, are still very usual in Brazil, while the Brazilian constitutional history is disregarded. This research thus seeks to revive the conceptual debate that occurred at the end of the Brazilian Empire, based on texts of constitutional thought, both foreign and national, and on sources related to the first Brazilian Constitutional Assemblies.

The work is focused on the liberal political-constitutional thought in Brazil, but it does not lose sight of the debate with Brazilian conservative thought and the process of translating and transplanting the concept of *guardian of the Constitution* from the contexts of Europe and the United States. Taking Reinhart Koselleck's categories related to the history of concepts as a methodological reference, especially regarding the linguistic anticipation that precedes changes in extralinguistic states of affairs,³ this research seeks to investigate, ultimately, how discussions surrounding the concept have sustained in the construction of the Supreme Court as an institution of the Brazilian Republic.

The paper is divided into four parts. The first one presents some notions of liberal

² GLEZER, Rubens; LYNCH, Christian Edward Cyril; VIEIRA, Oscar Vilhena (Coords). *Teoria Constitucional Brasileira: 200 anos de disputa*. Avaé, São Paulo: Editora Contracorrente, 2024.

³ KOSELLECK, Reinhart. *História de conceitos: estudos sobre a semântica e a pragmática da linguagem política e social*. Translation by Markus Hediger. Rio de Janeiro: Contraponto, 2020, p. 15-111.

theory regarding the division of powers from the 19th century and the (re)interpretations of Montesquieu's *The Spirit of the Laws*. In the second part, the paper makes some remarks on how this debate occurred in Imperial Brazil, considering the creation of the *Moderating Power* as an institution. The third one points out how the reception of Alexander Hamilton's reading of Montesquieu's work provoked a shift in the Brazilian debate regarding the concept. The final part outlines some elements of how, from the Empire to the Republic, the language and the state of affairs produced changes in the concept into Brazilian political-constitutional thought.

2. Some notions of liberal theory regarding the division of powers

There is a constitutional theory that served as a reference for the liberal notions of the concept of the *guardian of the Constitution*, from the 19th century ahead and it can be found in Montesquieu's *The Spirit of the Laws*.⁴ His theory was one of the main guiding threads of the attempts to establish moderation among the powers, whatever the form of government. In the liberal theory, from Benjamin Constant to Rui Barbosa, passing through Zacarias de Góis e Vasconcelos to Alexander Hamilton, all presented, to a greater or lesser degree, the influence of Montesquieu, including the perspective of looking at one country in particular: England.

But this did not simply mean copying the English archetype. It meant understanding and adapting it to local circumstances, whether in France, the United States, or Brazil. In Brazil's case, since Independence and, more particularly, since the first Constituent Assembly (1823)⁵, the direct reception of the constitutional theory of the division and moderation of powers occurred through the express embrace of another Frenchman's ideas: Benjamin Constant. Chronologically, there is not a significant distance between him and Montesquieu, but the acceleration of the historical events of the French Revolution opened an abyss between them. To understand the mobilization of the concept of the *guardian of the Constitution* by liberal constitutionalism, a central

⁴ MONTESQUIEU, Charles de Secondat. *O espírito das leis*. Translation by Cristina Murachco. São Paulo: Martins Fontes, 2000 [1748].

⁵ *Anais do Parlamento Brasileiro. Assembleia Constituinte de 1823* (tome 1 to 6). Rio de Janeiro: Typographia de Hyppolito José Pinto e Cia, 1876.

problem arises from Benjamin Constant's theory: how to maintain the balance between powers in the post-revolutionary context?

Looking across the English Channel, but with both feet in France, Benjamin Constant sought to update Montesquieu's theory for that new context. On one side, it was necessary to preserve the notion of popular sovereignty based on Rousseau's ideas that inspired the revolutionaries; on the other side, it was equally essential to limit it, with the elimination of any form of despotism including and especially that of popular assemblies such as during the Reign of Terror of the French Revolution.⁶ The revitalization of Montesquieu's theory renewed notions of balance and division of powers while preserving individual liberties, which had escaped Rousseau's theory of popular sovereignty or the interpretation of it made by the Jacobin Terror.⁷

For Constant, the best way to find this balance was already in the foundation of the constitutional monarchy in the English style: the king's power, as a neutral power, separate from Executive functions.⁸ In Constant's division of powers, royal power was placed in the middle and above the other powers, or, in his own words, "above human agitations", at the "top of the edifice".⁹ The authority of this royal power would be neutral and intermediary, aiming to maintain moderation among the powers, then they could act harmoniously.¹⁰ The update of Montesquieu's theory for a post-Revolution context consisted of selecting a political body other than the Legislative to be the balance wheel, considering the tyrannical potential of popular assemblies.

Looking at the English monarchy, Montesquieu had seen the House of Lords as the *puissance réglante*, in French, capable of moderating the relationship between powers.¹¹ Given the importance he attributed to intermediate bodies in a monarchy, the

⁶ CONSTANT, Benjamin. *Escritos de política*. Translation by Eduardo Brandão. São Paulo: Martins Fontes, 2005, p. 20. LYNCH, Christian Edward Cyril. O Poder Moderador na Constituição de 1824 e no anteprojeto Borges de Medeiros de 1933: Um estudo de direito comparado, *Revista de Informação Legislativa*, v. 47, n. 188, p. 93-111, out./dez. 2010, p. 95. FRELLER, Felipe. Madame de Staël, Benjamin Constant e a reavaliação do arbítrio após o golpe do 18 frutidor. *Revista Brasileira de Ciências Sociais (online)*, v. 34, 2019, p. 7.

⁷ CASSIMIRO, Paulo Henrique Paschoeto. A impossível liberdade dos antigos: Germaine de Staël, Benjamin Constant e o nascimento da cultura liberal pós-revolucionária na França, *Revista Estudos Políticos*, v. 7, 2016, p. 7.

⁸ CONSTANT, *op. cit.*, p. 18-30.

⁹ *Ibidem*, p. 22, 24.

¹⁰ *Ibidem*, p. 94.

¹¹ MONTESQUIEU, Charles de Secondat. *Oeuvres complètes de Montesquieu*. Nouvelle édition, mise en ordre et collationnée sur les textes originaux par J. Ravenel. Paris: L. de Bure, Libraire, 1834, p. 266.

election of the Upper Chamber, representing the nobility, seemed suitable to fulfill this purpose.¹² However, also looking at England, Benjamin Constant saw the king, not the House of Lords, as the figure able to moderate powers.

3. Brazilian reception

With the inherent implications of reception, Constant's idea about the neutral royal power was incorporated in Brazil after Independence and the enactment of the 1824 Constitution, with the creation of the *Moderating Power*, a fourth power explicitly inserted in the constitutional text. This power, inspired by Constant's royal power, was exercised directly by the Brazilian emperor and was responsible for maintaining independence, balance, and harmony among the other powers, according to Article 98 of the Imperial Constitution. That was essentially the conservative literal interpretation of the Constitution concerning the role of the *Moderating Power*.

But after some decades, it started a complex local process of re-signification of the *Moderating Power*.¹³ In the moderate liberal spectrum, one of the main re-significations occurred in 1860 with the publication of Zacarias de Góis e Vasconcelos' text, *On the Nature and Limits of the Moderating Power*. From the perspective of political goals and extralinguistic circumstances, Zacarias and Constant shared the same ideal: reducing the crown's powers.

Zacarias' conceptual definition generated debates and immediate responses. One of the most rapid and harsh came from the conservative Viscount of Uruguay in his book, *Essay on Administrative Law* from 1862. In Uruguay's book, Zacarias is accused of diminishing and even nullifying the constitutional conception of the *Moderating Power* as a political institution. In the liberal camp, Zacarias also faced criticism, as the friendly fire from radicals like Teófilo Otoni, who demanded the abolition of the *Moderating*

¹² *Id.*, 2000 [1748], p. 26-28, 168-175.

¹³ For a discussion of the *Moderating Power* before 1860, see the work: LYNCH, Christian Edward Cyril. *Fundações do Pensamento Político Brasileiro. A Construção Intelectual do Estado no Brasil*. Rio de Janeiro: Topbooks, 2024.

Power rather than just the limitation of its powers, as Zacarias wanted.^{14 15}

From then on, the concept of *guardian of the Constitution*, represented by the political institution of the *Moderating Power*, became more polysemic due to Brazilian ideological disputes. From the language, the divergences concentrated more on the relevant attributes of the concept, that is, its content, rather than on its referent. For constitutional reasons, the concept's referent was located in the figure of the emperor, specifically in that context, in d. Pedro II, as a *Moderating Power*.

Radical liberals like Teófilo Otoni sought, in the ideological-conceptual field, to empty the conservative and moderate liberal definition of the concept by abolishing its political-constitutional referent, the *Moderating Power*.¹⁶ Even more radical, but with the same agenda for its abolition, there were liberal politicians with a republican spirit, such as Borges da Fonseca, who had participated in the Praieira Revolution of 1848-1850 in Pernambuco province.¹⁷ Previously, resistance to that power in the same province had been voiced by Frei Caneca, who argued that the *Moderating Power* was the master key to the oppression of the Brazilian nation and the freedom of the people.¹⁸

Despite this, the challenge to the referent of the *guardian of the Constitution* did not eliminate it from the political-constitutional state of affairs. Indeed, the radical liberals' attempt to change the referent to allocate it in the General Assembly found no support in reality, despite Article 15 of the 1824 Constitution stipulating that it was the Assembly's duty to safeguard the Constitution. This is partly because there was relative dominance of the conservative and moderate liberal interpretation that the role of the arbiter of the regime belonged to the emperor, according to the constitutional text and political practice. At most, the radical liberals were able to mobilize the discourse that the *guardian of the Constitution* should be allocated in the General Assembly or, in a more progressive idea, in the people themselves, as Luiz Gama argued, protesting that the

¹⁴ VASCONCELOS, Zacarias de Góis e. *Da natureza e limites do poder moderador*. 2. ed. Rio de Janeiro: Typographia Universal de Laemmert, 1862, p. 224.

¹⁵ MELLO, Americo Brasiliense de Almeida e. *O Programa dos Partidos e o 2º Império*. São Paulo: Typographia de Jorge Seckler, 1878, p. 35-37.

¹⁶ OTONI, Teófilo Benedito. *Discursos parlamentares*. Brasília: Câmara dos Deputados, 1979 [1869], p. 1048.

¹⁷ FAUSTO, Boris. *História do Brasil*. 2. ed. São Paulo: Editora da Universidade de São Paulo; Fundação do Desenvolvimento da Educação, 1995, p. 178.

¹⁸ CANECA, Joaquim do Amor Divino Rabelo, o Frei. *Obras políticas e literárias*. Recife: Typographia Mercantil, 1875, p. 42.

Moderating Power, like all acts of society, should be exercised directly by it.¹⁹

4. The late influence of Alexander Hamilton

After 1860, Constant's reading about Montesquieu, with its division and balance between powers, began juxtaposed with Alexander Hamilton's reading about Montesquieu. More from a linguistic standpoint, concerning the conceptual anticipation starting to take place, Brazilian political-constitutional thought, both liberal and conservative, began to envision the linguistic possibility of changing the referent of the *guardian of the Constitution*. This change required the incorporation, at least in the language, of Alexander Hamilton's reading about Montesquieu.

Although still with little reception in Brazil then, Hamilton's theory was based on Montesquieu's ideas, updating them in one particular point, though not quite different from Benjamin Constant. Just as Constant mobilized the division of powers of Montesquieu to elevate royal power above the others in constitutional monarchy, Hamilton had contemplated in the *Federalist Papers* how to modify the relationship of forces within the division of powers, but to stand out one different power over the others in the presidential Republic of the United States.

Closer to Montesquieu's original conception, with an eye on England, Hamilton also saw the House of Lords, specifically in its role as the apex body of the English Judiciary, the entity responsible for guaranteeing freedoms.²⁰ However, there was something Hamilton deemed worthy of improvement. In England, the apex Judiciary body was in the legislative branch, in the Upper House. Given the possibility of factional spirit invading it, the *guardian of the Constitution* should be relocated to a more appropriate place: the Judiciary, with the creation of a Supreme Court²¹. Thus, it was necessary to read Montesquieu as if the Judiciary was the weakest among the three powers and subvert this assumption. In this Hamiltonian logic, the concept was more closely linked to strengthening the Judiciary, specifically its apex body.

¹⁹ GAMA, Luiz. *Democracia* (1866-1869). Obras completas (Org. Bruno Lima). São Paulo: Hedra, 4 v, 2021 [1868], p. 293.

²⁰ MADISON, James; HAMILTON, Alexander; JAY, John. *Os artigos federalistas, 1787-1788*. Translation by Maria Luiza X. de A. Borges. Rio de Janeiro: Nova Fronteira, 1993, p. 479-496.

²¹ *Ibidem*.

5. Changes in the concept from Empire to Republic

It was precisely the apex body of the Judiciary that Brazilian liberals adopted, especially following the Proclamation of the Republic, as the referent of the concept of *guardian of the Constitution*, in the context of the dispute of heritage from the imperial *Moderating Power*. Ultimately, Constant himself, although he denied that the Judiciary could perform the neutral power, had in mind that the royal power should work as a judge of the other powers.²²

Transferring the concept's referent from the emperor, at the discursive level, to the apex body of the Judiciary would have implications that were not merely conceptual or linguistic within Brazilian constitutionalism. From 1860 onwards, the referent began to be seen more broadly, when some liberals like Tavares Bastos²³ and conservatives like the Viscount of Uruguay²⁴ and Senator Cândido Mendes²⁵ began linguistically to allocate it to the apex of the United States Judiciary, to its Supreme Court. But more than that, the internal change in the concept in Brazil represented a linguistic anticipation of what would occur sometime later, throughout the Republic, when the apex body of the Judiciary starts its struggle to be the referent of the *guardian of the Constitution*.

The change in the concept's referent, from Empire to Republic, also introduced some complications regarding the idea of the representative system. The emperor, in the function of the *Moderating Power*, was the primary representative of the nation, according to Article 98 of the Constitution. For conservatives like the Marquis of Caravelas, the Constitution itself could not resign that initial will of the nation, which delegated the exercise of its sovereign powers to the emperor.²⁶ In the same conservative discourse, the Marquis of São Vicente asserted the representative nature of the concept was exercised directly by the emperor, as the *Moderating Power*, who was, in his own

²² CONSTANT, *op. cit.*, p. 207.

²³ BASTOS, José Tavares. *A província: estudo sobre a descentralização no Brasil*. Rio de Janeiro, Paris: H. Garnier, Livreiro-Editor, 1870.

²⁴ URUGUAI, Paulino José Soares de Souza, Visconde de. *Ensaio sobre o direito administrativo*. Rio de Janeiro: Typographia Nacional, 1862.

²⁵ MENDES DE ALMEIDA, Candido. *Pronunciamentos parlamentares 1871 a 1873*. Tomo I. Brasília: Senado Federal, 1982.

²⁶ LYNCH, Christian Edward Cyril. *Monarquia sem despotismo e liberdade sem anarquia: o pensamento político do marquês de Caravelas (1821-1836)*. Belo Horizonte: UFMG, 2014, p. 96.

words, “the supreme inspection of the nation or the high right that it would have, which it could not exercise by itself, to examine how the political powers were exercised”.²⁷

On the other political spectrum, some liberals considered the General Assembly as the *guardian of the Constitution* by exercising its functions as a direct result of the representative system. The transfer the referent, by other liberals, to the Supreme Court of the United States and then to the Brazilian Supreme Court would remove from the nation’s direct representatives – the *Moderating Power* and the General Assembly – the function of maintaining the balance of powers, making more pertinent the question posed by Zacarias about who should watch the watcher.²⁸

The modification in the conceptual referent also changed the correlation with its meaning. Supreme Court of the United States had the same general institutional function of cultivating harmony among the powers but possessed other relevant attributes that were not the same as those of the Brazilian Imperial *Moderating Power*. The constitutional jurisdiction, through the control of the constitutionality of laws, was the most important and most claimed responsibility of the United States Supreme Court, which had no precise equivalent in the functions of the Brazilian *Moderating Power*. The concept, although it did not change completely, experienced considerable disruption in terms of re-signification, with changes in its referent and consequently in its meaning.

Once again, from the Empire to the Republic, the concept felt substantial shifts, provoked by linguistics and especially by the state of affairs, which considerably affected its internal temporal structure. A new sense, also considering the change of government form and political constitution, would be added to the layer of meaning from the past, from the times of the Empire.

After all, the Proclamation of the Republic resulted in the extinction of the *Moderating Power* as a political institution. Once the referent to the concept was extinguished, liberals and conservatives began to dispute the imperial legacy. It was essential, in that tumultuous context, to seek another referent and other definitions for the concept of *guardian of the Constitution*.

²⁷ SÃO VICENTE, José Antônio Pimenta Bueno, Marquês de. *Direito Público Brasileiro e Análise da Constituição do Império*. Rio de Janeiro: Typographia Imp. e Const. de J. Villeneuve e C., 1857, p. 204.

²⁸ VASCONCELOS, *op. cit.*, p. 43.

6. Final considerations

From then on, it begins a long and complex process of re-signification of the concept. Until the promulgation of the 1891 Constitution, the linguistic arsenal was unable to handle the difficult task of re-signifying it. In that context, mainly in the Constituent Assembly (1890)²⁹, the mobilization of the historical experience of the *Moderating Power*, widely known and disseminated in the Brazilian imperial context, was used by some constituents to think about the future of the newly created Supreme Court.³⁰

The explicit and direct correspondence between the imperial *Moderating Power* and the Supreme Court during the Constituent Assembly (1890) should have occurred as an attempt to make a transfer of representation between the old and the new concepts, between the old and the new institutions.³¹ It seems that the correspondence was also a tool to escape the problem of conceptualizing the new institution, the Supreme Court, with new words. After all, although it is not a rule, and the French Revolution is a great example of this exception, much to the despair of historians, as Marc Bloch had already noted,³² men do not have the habit of changing vocabulary each time they change customs.

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²⁹ *Anais do Congresso Constituinte da República*, 1890 (vol. 1 to 3). 2. ed. Rio de Janeiro: Imprensa Nacional, 1924.

³⁰ WITTER, José Sebastião (Org). *Ideias políticas de Francisco Glicério: cronologia, introdução, notas bibliográficas e textos selecionados*. Rio de Janeiro, Fundação Casa de Rui Barbosa, 1981, p. 75-76.

³¹ LYNCH, Christian Edward Cyril. Entre o judiciarismo e o autoritarismo: O espectro do poder moderador no debate político republicano (1890-1945), *História do Direito: RHD*, Curitiba, v. 2, n. 3, p. 82-116, jul./dez. 2021.

³² BLOCH, Marc. *Apologia da história, ou, O ofício do historiador*. Preface of Jacques Le Goff, presentation to the Brazilian edition by Lilia Moritz Schwarcz; translation by André Telles. Rio de Janeiro: Zahar, 2001, p. 59.

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