



LEGALIDADE AUTORITÁRIA CONSTRUÍDA E DESMONTADA: DITADURA E REDEMOCRATIZAÇÃO NO BRASIL ATRAVÉS DA METÁFORA DO ENTULHO AUTORITÁRIO

CONSTRUCTING AND DISMANTLING AUTHORITARIAN LEGALITY:
DICTATORSHIP AND RE-DEMOCRATIZATION IN BRAZIL THROUGH
AUTHORITARIAN DEBRIS

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Resumo

A pesquisa identifica as categorias da legalidade autoritária construída, desmontada e reinventada na história constitucional brasileira, ao analisar a relação entre direito e autoritarismo. Analisa o papel do direito na ditadura militar (1964-1985), como foi construída a ordem constitucional do pós-1964, ou, conforme vocábulo que figurava nos atos institucionais, a “obra” autoritária. A legalidade autoritária é característica distintiva do regime repressivo brasileiro que buscou manipular a temporalidade autoritária por meio do direito. Em seguida, investiga como a legalidade autoritária foi desmontada. A expressão “entulho autoritário” populariza no debate público (imprensa e parlamentares), a partir da segunda metade da década de 1980, como referência às normas produzidas pela ditadura e que deveriam ser eliminadas. Consideramos o termo como conceito guia para a investigação. O caminho para eliminar o entulho autoritário estava relacionado à convocação da constituinte, inclusive, como uma de suas tarefas precípuas.

Abstract

This study identifies the categories of authoritarian legality that have been constructed, dismantled, and reinvented in Brazilian constitutional history by examining the relationship between law and authoritarianism. It analyzes the role of law in the civil-military dictatorship (1964-1985), how the post-1964 constitutional order was constructed, or, according to the word that appeared in the institutional acts, the authoritarian “work.” Authoritarian legality is a distinctive characteristic of this repressive Brazilian regime, which sought to manipulate authoritarian temporality through the use of law. It then investigates how authoritarian legality was dismantled. The expression “authoritarian debris” became popular in public debate (press and members of National Congress) in the second half of the 1980s to reference the norms produced by the dictatorship, which should be eliminated. We consider this term as a guiding concept in this research. The path to eliminating the

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Palavras-chave: Legalidade autoritária; ditadura; constitucionalismo; entulho autoritário

authoritarian debris involved convening the National Constituent Assembly as one of its main tasks.

Keywords: Authoritarian legality; dictatorship; constitutionalism; authoritarian debris



Introduction

This study identifies the categories of constructed, dismantled, and reinvented authoritarian legality in Brazilian constitutional history, focusing on the complex relationship between law and authoritarianism. This article examines the constructed and dismantled categories of authoritarian legality, situating them within the broader process through which the post-1964 authoritarian constitutional (dis)order was shaped.⁴ We use the term “authoritarian debris”⁵ as a guiding concept for this investigation. The objective of this study was to create a genealogy of the use of the metaphor of authoritarian debris in the pre-constituent and constituent periods, to understand the articulations and conflicts between legality, authoritarianism, democracy, and constitutionalism in Brazil.

The expression “authoritarian debris”, although not exclusive, is very relevant to the Brazilian political-legal scenario.⁶ Popularized in the latter half of the 1980s, the term continued to be used after the promulgation of the 1988 Constitution to refer to the norms produced by the civil-military dictatorship, which were to be eliminated during re-democratization.

The year in which the term became popular in Brazil demonstrates its intimate connection to the process of re-founding the Constitution. In 1985, the first civilian government after the 1964 military coup took office. The Constituent Assembly was convened through a constitutional amendment, and a special group was tasked with drafting a new constitution. Committees within the National Congress were established to analyze a multitude of proposals, many aimed at reforming the legal framework established by the military regime. There was also a return to direct elections beginning with municipal elections and followed by elections for governors and members of the constituent Assembly in the subsequent year.

⁴ CHUEIRI, Vera Karam de; CÂMARA, Heloísa Fernandes. (Des) ordem constitucional: engrenagens da máquina ditatorial no Brasil pós-64. **Lua Nova: Revista de Cultura e Política**, p. 259-288, 2015.

⁵ We use the translation of “entulho autoritário” as “authoritarian debris” or “authoritarian rubble”. The expression should carry the connotations of cleaning and disposal, even though it may also signify ruins.

⁶ In Chilean literature, for example, the expression “enclaves autoritários” appears in the context of the post-dictatorship period (1973-1990). See GARRETÓN, Manuel A. **La posibilidad democrática em Chile**. Chile: FLACSO, 1989, p. 51.



These institutional mobilizations formed part of a broader process of re-founding the constitution that was spreading across the country and thereby revealed temporalities of “constituent moments.”⁷ The uses of authoritarian debris indicate that its meanings were being constructed as a guideline for connecting the past, present, and future. In the beginning, its meaning was closely linked to the moment preceding the constituent assembly; that is, eliminating authoritarian rubble was a preliminary task before the installation of the assembly, and above all, a condition of its *sovereignty and freedom*. Initiatives focused on revising electoral and party norms were identified as those that would eliminate the authoritarian debris, at least in part. The National Constituent Assembly was subsequently established, leaving behind a significant part of what was considered the rubble of the previous authoritarian military government. The central conflict in the preliminary phase of the National Constituent Assembly (NCA, *Assembleia Nacional Constituinte*) stemmed from “draft decisions” included in the internal regulations, which had the power to modify the current order while the future constitution was being drafted.

The social scientist Florestan Fernandes deals with the relationship between the NCA and the remnants of the dictatorship in the following terms: “(...) the National Constituent Assembly was forced to live with the 'authoritarian rubbish' and to be conditioned by it. (...) The NCA became a key institution within the “New Republic” and was unable to free itself from this condition.”⁸

The fundamental question we face in this article is: What is the relationship between the construction of an authoritarian regime and its disarticulation or deconstruction? What is the role of law in these processes?

The Constitution was promulgated, and the authoritarian debris resisted, requiring sustained efforts to dismantle it. The most symbolic ones are the Strike Law, which was revoked by a provisional measure in 1989, the Press Law (*Lei de Imprensa*), which was declared unconstitutional by the Federal Supreme Court in 2009, and the National Security Law, which was revoked by the National Congress in 2021.⁹

⁷ PAIXÃO, Cristiano. Percursos da história constitucional: parâmetros, possibilidades e fontes. In: PAIXÃO, Cristiano; CARVALHO, Cláudia Paiva. **História Constitucional Brasileira: Da Primeira República à Constituição de 1988**. São Paulo: Almedina, 2023.

⁸ FERNANDES, Florestan. A Constituição da “transição democrática”. **Folha de S. Paulo**. 22.set.1987. Acervo da Folha.

⁹ VENTURINI, Anna Carolina; MENDES, Conrado Hubner (Coords.). **Diagnosis of the Current Application of the National Security Law**. Center for the Analysis of Freedom and Authoritarianism, May 20, 2021.



Not only the legislation but also the use of the term authoritarian debris was resistant to time. New layers of meaning were added, such as in 2023 when the Minister of Justice and Public Security, Flávio Dino, updated the term by considering the “Bolsonarist rubble” or the “new authoritarian debris” of the norms issued during Jair Bolsonaro’s term, especially the use of decrees.¹⁰

Conrado Hübner Mendes resonates the meaning that the expression reveals when moving through time: after all, “the authoritarian debris was not debris, but stock.”¹¹ This idea provokes reflection on the meanings and uses of the expression in Brazilian constitutional history regarding the continuity, rearticulation, and reconstruction of authoritarian elements in Brazilian democracy. Thus, it demonstrates the reformulation and readaptation of authoritarianism in new contexts.¹²

1. The authoritarian *work*: Constructed authoritarian legality

The Brazilian civil-military dictatorship was built on law and constitutionalism. Anthony W. Pereira mobilized the concept of authoritarian legality, based on a comparative study of dictatorships in the southern cone, to investigate how they related to the law and how this was reflected in the repressive pattern. The author does not present a defined concept of authoritarian legality, identifying it as the normative creation of the Brazilian dictatorial regime. Various normative types—such as institutional acts (*atos institucionais*), constitutions, complementary acts (*atos complementares*), and laws issued between 1964 and 1984 form the legal framework of the dictatorship. Furthermore, the regime also appropriated – and modified on a case-by-case basis – pre-1964 norms and institutions in a way that attempted to reconcile existing structures with those created by it.

Institutional acts¹³ represent the normative complexities of dictatorships. According to Cristiano Paixão, they were published in a *project* referencing the previous ones, making

Available at: <https://laut.org.br/diagnostico-da-aplicacao-da-lsn/>. Accessed on June 14, 2021. Overturned rubble. **Folha de S. Paulo**, July 23, 2020.

¹⁰ RODA VIVA. Entrevistado: Flávio Dino. December 19, 2022. Disponível em: <https://www.youtube.com/watch?v=Kg1U6j2f95U>. Accessed on December 20, 2022.

¹¹ MENDES, Conrado Hübner. O entulho autoritário era estoque. **Quatro cinco um**, 1 de março de 2020.

¹² BENVINDO, Zaiden Juliano. **The rule of law in Brazil**: the legal construction of inequality. Oxford: Hart publishing, 2022, pp. 68-69.

¹³ See translation by GUERCHON, C. W. Institutional acts of the Brazilian government—**International Journal of Politics**, v. 1, n. 2/3, p. 258-269, 1971.



them a “genealogy” or “affiliation” to the first institutional act.¹⁴ Therefore, there is a non-obvious characteristic in this idea of chaining. The project reveals the search for legitimation through “democratic constitutionalism,” as can be seen from the vocabulary used in these acts.¹⁵

A two-volume collection was prepared in 1969 by the Ministry of Aeronautics, which dealt with the “acts of the 1964 revolution.” The document was intended to provide a sense of *unity* to the normative framework produced by the exception regime. Since they considered the “revolution” victorious, the step forward would be more laborious, as it was about “taking advantage of success.” A summary of the first volume is divided into three sections. The first contains a complete reproduction of the normative acts published between April 9, 1964, and March 15, 1967. This period corresponds to the edition of the Institutional Act (1), and the end of the validity of Institutional Act No. 2. The second chapter contains the punitive acts applied because of these norms. In the third chapter, there is a list of those affected by the acts, which is organized in alphabetical order. The names are distributed in sequence, in order of origin; in other words, “their connection with the administrative sectors to which they belonged” (Executive, Legislative, Judiciary, others) is grouped in chronological order.¹⁶

The project construction was related to the military regime’s concerns regarding controlling the time. It sought to connect with the past to preserve the constitutional order that preceded it, while simultaneously aiming to “open up for Brazil a new perspective on its future.” This was what the first Institutional Act expressed.

The word *work (obra)* was reproduced in eight of the 17 institutional acts (from the first to the sixth, the tenth, and the fifteenth). The first Institutional Act was intended to

¹⁴ PAIXÃO, Cristiano. **A constituição em disputa**: transição ou ruptura. Seminário “Construção da estatalidade e linguagem jurídico-política”, PPGD-UFSC, sob a coordenação do Prof. Airton Seelaender, em outubro de 2011.

¹⁵ PAIXÃO, Cristiano. A constituição em disputa: transição ou ruptura? In: SEELAENDER, Airton (Org.) História do Direito e construção do Estado. São Paulo: Quartier Latin, 2012. no prelo; PAIXÃO, Cristiano. Direito, política, autoritarismo e democracia no Brasil: da Revolução de 30 à promulgação da Constituição da República de 1988. **Araucaria. Revista Iberoamericana de Filosofia, Política y Humanidades**, v. 13, n. 26, p. 146-169, 2011, p. 158.

¹⁶ BRAZIL. National Archives. **Atos da Revolução de 1964**. Ministry of Aeronautics, 1969 (BR DFANBSN V8). Available at: https://sian.an.gov.br/sianex/consulta/Pesquisa_Livre_Painel_Resultado.asp?v_CodReferencia_id=1899362&v_a_ba=1. Accessed on January 14, 2023.



“assure to the new government to be installed the means which are indispensable to the *work of (...) reconstruction.*”¹⁷

Cristiano Paixão summarized this characteristic of the dictatorship of building a *project* leave behind a *legacy*. The temporal articulation is explicit, as it relates the future and past to the project and the legacy. By paving the way for the “categories of democratic constitutionalism, the regime sought to legitimize its acts. The authors and those responsible for the acts knew they were speaking to future generations.”¹⁸

Paixão and Barbosa reflect on how the clause that prevented the judiciary from analyzing the regime's normative acts reveals the way in which the dictatorship attempted to achieve temporal capture through the scope and interpretation of the law it produced. This means extending control, especially over the future, by pre-empting and preventing the revision of norms.¹⁹ The immunization clause against judicial review was repeated in most institutional acts and was later confirmed by the Constitutions of 1967 and 1969.

2. The authoritarian debris: Dismantling authoritarian legality

The year 1985 began with the indirect election of Tancredo Neves as President of the Republic.²⁰ The government plan delivered by Ulysses Guimarães a week earlier was entitled the “New Republic.” Even though it was faced as a “dim light” (*meia-luz*) choice, as mentioned in an opinion article published in *Folha de S. Paulo*²¹, the year usually marks the end of the army regime. However, this milestone is disputed. For example, Adriano Codato indicated that the army regime effectively lasted until 1989.²² For Raymundo Faoro, the election was a “discontinuity,” after all, “the country was different, despite the intrinsic illegitimacy of the Electoral College.”²³

¹⁷ See translation by GUERCHON, C. W. Institutional acts of the Brazilian government—International **Journal of Politics**, v. 1, n. 2/3, p. 258-269, 1971.

¹⁸ PAIXÃO, Cristiano. A constituição em disputa: transição ou ruptura? In: SEELAENDER, Airton (Org.) *História do Direito e construção do Estado*. São Paulo: Quartier Latin, 2012. no prelo.

¹⁹ PAIXÃO, Cristiano; BARBOSA, Leonardo A. A memória do direito na ditadura militar: a cláusula de exclusão da apreciação judicial observada como um paradoxo. **Revista do Instituto de Hermenêutica Jurídica**, v. 1, n. 6, 2008.

²⁰ January 15 was the scheduled date for the indirect election, carried out by the Electoral College, according to art. 77, CF, 1967/1969.

²¹ ABRAMO, Claudio. Hoje a festa é nossa. **Folha de S. Paulo**. 15.01.1985. Acervo da Folha.

²² CODATO, Adriano. **Ditadura Militar**: nove ensaios sobre a política brasileira. São Paulo: Edições 70, 2023.

²³ FAORO, Raymundo. A democracia que teremos. **Lua Nova**. Available at: <<https://www.scielo.br/j/ln/a/4MZ6k57kSy6Y3gVZKmvBcdb/?format=pdf&lang=pt>>. Access on October 10th, 2022.



The conception of temporality(ies) arouses quite significant disputes, especially during the “transition.”²⁴ Senator Fernando Henrique Cardoso (PMDB-SP), still under the government of João Baptista Figueiredo, in October 1984, argued that “[t]here are two basic tasks to be fulfilled by the future government. The first, obvious and imperative, will consist of cleaning up the authoritarian debris, which must be initiated with impetus in the next legislative session to prepare the conditions of freedom for the convening of the Constituent Assembly.”²⁵ As reported by *Jornal do Brasil*: “1985 will be the year of cleaning up the authoritarian debris, discussing ideas, examining alternative political proposals, so that the 1986 general elections can be held around proposals.”²⁶

The FHC speeches summarized the issues to be investigated. What does “authoritarian debris” mean? Why was cleaning up the debris an essential task? Why should the Legislative Branch carry it out? How was the convening of the Constituent Assembly connected to this task?

The launch of the “Democratic Alliance”– articulating the candidacy of Tancredo and his vice, José Sarney – was signed on August 7th, 1984 with a letter entitled “Commitment to the Nation,” invoking the urgency for an “institutional reorganization of the country,” in the face of a “political pact” that would only be possible through “national cohesion.” Among other tasks were direct elections, convening a constituent, and reforming legislation.²⁷

From March 1985 onwards, the country began to witness daily agony due to the severe health conditions of the elected official²⁸, who died the following month. On Tiradentes Day in April, his fellow countryman, José Sarney, assumed the Presidency, intending to carry out Tancredo’s commitments, but it was not without controversy.²⁹ Sarney's political

²⁴ PAIXÃO, Cristiano. Percursos da história constitucional: parâmetros, possibilidades e fontes...

²⁵ CARDOSO, Fernando Henrique. Tarefas da Transição. **Folha de S. Paulo**. October 14, 1984. Folha collection. See: CARDOSO, Fernando Henrique. **Um intelectual na política**. São Paulo: Companhia das Letras, 2021, p. 185; Fernando Henrique Cardoso II (depoimento, 2007). Rio de Janeiro, CPDOC/Fundação Getúlio Vargas (FGV), 2010. 36 p. Available at: <https://www18.fgv.br/CPDOC/acervo/historia-oral/entrevista-tematica/fernando-henrique-cardoso-ii>. Access on January 28th. 2023.

²⁶ CARDOSO, Teresa. Ato nº 1 de Tancredo será pró-constituente. 16.12.1984. **Jornal do Brasil**. Hemeroteca.

²⁷ FOLHA DE S. PAULO. No programa da Aliança, a promessa das diretas. 7.8.1984. Folha Collection.

²⁸ Check out a compilation in Folha de S. Paulo about the headlines (*Folha, O Estado de São Paulo, Jornal do Brasil, O Globo*) from the first surgery until the eve of Tancredo's death. FOLHA DE S. PAULO. FOLHA DE S. PAULO. A morte do presidente eleito: as manchetes dos jornais desde a primeira cirurgia. 22.4.1985. Folha Collection.

²⁹ José Sarney was governor and senator for Arena. One of the founders of the PDS, a party in which he was a senator. He joined the PMDB to run for Tancredo's vice president. As Tancredo had not taken office, there were



trajectory, and his assumptions as the first civilian president after the dictatorial period, are one of the many points that reveal the ambiguity of the transition.³⁰

The death of Tancredo Neves was intensely felt in the country; the transition was “celebrated in a fog of magical expectations.”³¹ This fog soon dissipated due to the concrete challenges the country faced. The work ahead was enormous, starting with remaking institutions that had spent more than two decades dedicated to building the “revolutionary work.”

The vocabulary of the Democratic Alliance's commitment letter resonated with the Tancredo-Sarney government. The word *pact*³² appears recurrently, along with adjectives such as political, social³³, and national.

For Sarney, the political pact had a meaning closer to a government project. The Constituent Assembly was established as a government agenda, which could mean a lot of things. The article published in *Correio Braziliense*, on May 17th, 1985, entitled “Sarney explains what the political pact is,” reported that after a conversation with federal congressman Gastone Righi (PDT-RJ), when he presented the president with a proposal to call the Constituent Assembly, the congressman would have concluded, according to the newspaper, that “taking this concept to his [Sarney’s] broader conception would mean the non-existence of any challenge to the Presidency of the Republic.”³⁴ The congressman’s speech is a small example of Sarney’s relationship with the Constituent Assembly and how its convocation would take place.

With a view towards the political pact, Sarney tried to build a bridge with the National Congress. Ulysses Guimarães, President of the Chamber of Deputies, stated that the pact could not empty the Constituent Assembly, and attributed the use of the term to a creation of the press, since, after all, in political matters, everything could be a pact. Given the negative repercussions of the term, a demonstration was held to defend it.³⁵

doubts as to who would be the successor to the presidency.

³⁰ PEREIRA, Anthony W. **Ditadura e repressão**: o autoritarismo e o estado de direito no Brasil, no Chile e na Argentina. Rio de Janeiro: Paz e Terra, 2010.

³¹ FAORO, Raymundo. **A República em transição**: poder e direito no cotidiano da democratização brasileira (1982 a 1988). Organized by Joaquim Falcão and Paulo Augusto Franco. Rio de Janeiro: Record, 2018, p. 118.

³² The literal translation of *pacto* is *pact*. However, in the political context of Brazil’s redemocratization, the English term *compromise* may capture the nuance of negotiation and accommodation more accurately.

³³ FERNANDES, Florestan. **Que tipo de República?** São Paulo: Editora Brasiliense, 1986.

³⁴ CORREIO BRAZILIENSE. Sarney explica o que é o pacto político. 17.5.1985. Hemeroteca Digital.

³⁵ CARDOSO, Fernando Henrique. O pacto e os partidos. **Folha de S. Paulo**. 6.6.1985. Acervo da Folha Collection.



The vision of the Minister of Justice, Fernando Lyra, 32, on a political pact assimilated a reconfiguration of the country's institutionality. According to *Folha de S. Paulo*, the Minister said that the objective was “to place all legislation from the authoritarian period on the negotiating table.”³⁶

In fact, a lot was included in the pact. José Paulo Cavalcanti, who was Secretary General of the Ministry of Justice under Lyra's leadership, reported what the work was like. In a surreal account, the universe of norms that they had to deal with totaled more than 42,000, including the Constitution and its amendments, laws, decrees, and regulations. They started screening them using keywords, which led to a much smaller number, but the sample was still unmanageable.³⁷ It was the “inventory of debris” (*inventário do entulho*) as Raymundo Faoro called it.³⁸

“Institutional disorder”³⁹ was a recurring argument to point out the reasons for calling the Constituent Assembly. The revision of the Constitution, of the legislation, and the Constituent Assembly on the horizon, took place under the observation that “the authoritarian regime has not been overthrown. It is being dismantled.”⁴⁰ The “de-legislation work” was needed, as characterized by Dalmo de Abreu Dallari.⁴¹ The 1967 Constitution was at one point identified as a “patchwork” because of its amendments.⁴²

From the second half of the 1980s onwards, the term *authoritarian debris* became popular in public debate. As an expression referring to the remnants of the dictatorship, it summarizes *what* should be eliminated from the authoritarian regime to create a democratic one. It can be found both in newspapers of the time, as well as in parliamentary speeches and academic writing. Although it admits synonyms⁴³, an exact search for the expression

³⁶ FOLHA DE S. PAULO. Sarney quer um pacto político antes da constituinte: o objetivo é discutir tudo, afirma Lyra. 15.05.1985. Folha Collection.

³⁷ In José Paulo Cavalcanti's account for Fernando Lyra's book, he mentions 2,043 texts. In the note from *Correio Braziliense*, it mentions 2,048 acts. In Raymundo Faoro's book he reports 2,480 acts. LYRA, Fernando. **Daquilo que eu sei**: Tancredo e a transição democrática. São Paulo: Iluminuras, 2009; CORREIO BRAZILIENSE. ‘Entulho’ vai ser examinado pelo ministério. 20.6.1985. Hemeroteca Digital

³⁸ RAYMUNDO, Faoro. **A República em transição**: poder e direito no cotidiano da democratização brasileira (1982 a 1988). Organização de Joaquim Falcão e Paulo Augusto Franco. Rio de Janeiro: Record, 2018, p. 139.

³⁹ GARCIA, Marco Aurélio. A transição e a constituinte. **Lua Nova**, v. 1, p. 16-19, 1985.

⁴⁰ AFFONSO, Almino. Tempo de Plantar, tempo de colher. **Folha de S. Paulo**. 27.4.1985. Folha Collection. At the time, Almino Affonso was secretary of Metropolitan Business for the governor of São Paulo Franco Montoro. In 1963 he was Goulart's minister. Vice-governor of Orestes Quércia, in 1987.

⁴¹ DALLARI, Dalmo de Abreu. Constituição para o Brasil novo. In: Emir Sader (Org.). **Constituinte e Democracia no Brasil hoje**. São Paulo: Editora brasiliense, 1985, p. 116.

⁴² O GLOBO. Constituição é ‘colcha de retalhos’ com 25 emendas. 1.5.1985. Federal Senate Library.

⁴³ Among its variations, there are “entulho do autoritarismo”, “lixo autoritário”, “entulho do tempo ditatorial”, “entulho do arbítrio”.



authoritarian debris (*entulho autoritário*) between 1980 and 1989 revealed occurrences ranging from 204, in *Folha de S. Paulo*, 203 in *Correio Braziliense*, 156 in *Jornal do Brasil*, and 79 in *O Estado de S. Paulo*.⁴⁴ These results suggest that the term gained widespread use from 1985 onward.

The question was *how* to eliminate the debris. Yet another was *what* removing it meant. How did speeches about authoritarian debris come about? It involves understanding what the term achieves or does not achieve, identifying the uses of the term in the debate, what it refers to, how institutions and actors are organized around it, and when they do so. Essentially, it concerns looking at the context in which the term was mobilized. Thus, it is essential to understand who is speaking. An aspect that gives coherence to this combination of factors (who and how, especially) is considering the speeches within a “discursive series.”⁴⁵ What was said and written in the second half of the 1980s was centralized with reference to the term authoritarian debris. We chose a timeframe that covers the moment immediately preceding the Constituent Assembly and its preliminary phase.

A reference to the expression appears in another historical context, in which the Brazilian jurist Afonso Arinos used in the second edition of his *Curso de Direito Constitucional Brasileiro (Brazilian Constitutional Law Course)*, published in 1968. When announcing the antecedents of the 1946 Constituent Assembly, he indicated that “this new Provisional Government tried to remove some debris left by the Estado Novo.” The provisional government he referred to was the transitional government assumed by José Linhares in 1945. The statement comes after dealing with a “succession of episodes that marked the dismantling of the dictatorship.” The dictatorship was the Estado Novo.⁴⁶ This excerpt indicates that the so-called transitional periods, by honoring the chronological element,⁴⁷ highlight the tension between “old” law and “new” law and the relationship between law and authoritarianism and democracy.

⁴⁴ In the newspapers *Folha de S. Paulo* and *O Estado de S. Paulo*, the search was carried out in their own collections; in *Correio Braziliense* and *Jornal do Brasil*, in Hemeroteca Digital.

⁴⁵ PAIXÃO, Cristiano. A constituição em disputa: transição ou ruptura? In: SEELAENDER, Airton (Org.) História do Direito e construção do Estado. São Paulo: Quartier Latin, 2012. no prelo.

⁴⁶ FRANCO, Afonso Arinos de Melo. **Curso de Direito Constitucional brasileiro**. Coleção constitucionalismo brasileiro, 3ª edição. Rio de Janeiro: Forense, 2019. Originally published in 1968, 2nd edition in two volumes: **Teoria Geral e Formação Constitucional do Brasil**.

⁴⁷ VITULLO, Gabriel. Transitologia, consolidologia e democracia na periferia capitalista: revisão crítica. **Revista de Sociologia e política**, 17, p. 53-60, nov. 2001: <https://doi.org/10.1590/S0104-44782001000200006>.



The discussion about authoritarian debris in the 1980s in Brazil has, as its context, its insertion in the “political pact” as part of its schedule, in addition to being situated in the re-establishment of the prerogatives of the Legislative Branch. The broader scenario had the constituency in view. The most significant dispute regarding its characteristics was certainly about being exclusive or congressional. This clash reflected the concern about preserving the freedom and sovereignty of the Constituent Assembly. For this to happen, it would be necessary to set particular prerequisites; among them, the imperative was to remove authoritarian debris.

Therefore, the path to removing authoritarian debris and calling for a constituent assembly was intertwined. However, this relationship took its own path and was not necessarily convergent. Andrei Koerner and Lígia de Freitas point out that “in relation to the Constituent Assembly, the polarization occurred regarding the nature and powers of the Constituent Power: on the right, there was talk of amendments or revision of the current [Constitution] and on the left they defended the Constituent Assembly as a sovereign and exclusive assembly, in rupture with the existing order”.⁴⁸ The most precise synthesis is the tension regarding what a new constitution stretched between rupture and continuity would mean. This relationship forms a line of analysis to understand the context in which the 1988 Constitution was promulgated. The conflicts were between those who defended the new constitution as a new democratic order that would completely break with the authoritarian order, and among those to whom the new constitution did not mean a break with the previous order, but rather a conciliation and transition, as well as being a part of the “revolutionary cycle.”⁴⁹ Furthermore, but not necessarily, for this second group, at a certain point, there should be a “new constitution,” since reforms that adapt to the new political demands would be sufficient, marking a position of continuity.

Raymundo Faoro did not support the argument for removing the authoritarian debris scheduled before the Constituent Assembly. His criticism appeared in some articles, including the one entitled *A retórica dos lixeiros*, from February 1985:

Hidden behind these metaphors of dubious taste, they preach, recommend, and compromise the Constituent Assembly in 1986 (...). The current National Congress, suddenly converted

⁴⁸ KOERNER, Andrei; FREITAS, Lígia Barros de. O Supremo na Constituinte e a Constituinte no Supremo. **Lua Nova: Revista de cultura e política**, p. 141-184, 2013.

⁴⁹ PAIXÃO, Cristiano. A constituição em disputa: transição ou ruptura? In: SEELAENDER, Airton (Org.) *História do Direito e construção do Estado*. São Paulo: Quartier Latin, 2012. no prelo.



into a reformist body and power, can (...) more than will be the one elected in the coming year. According to the ongoing project, he will demolish the authoritarian structure – the rubble –, leaving it to the next person to build the house of democracy.”⁵⁰

It seems that Faoro was worried that the authoritarian debris argument would fall back on a reformist solution, as it could be that “the basis, the Constitution, was maintained, removing only its appendices from the scenario.”⁵¹ The jurist would also criticize the PMDB (Party of the Brazilian Democratic Movement) in an interview in December 1986, saying “there was a lot of talk about the expression ‘authoritarian debris.’ What has become of that expression today? Today, it is commonly stated that laws are made to be applied. Now, if laws are made to be applied, then there is no longer ‘authoritarian debris.’ Those laws that were seen as ‘authoritarian debris’ in the PMDB’s initial project must be applied.”⁵²

It is important to remember that, despite references to the post-85 period in the country being a “constituent situation,”⁵³ proposals for a new constitution were also made during the regime established by the 1964 coup. The 1970s marked the pro-constituent mobilization that had already infiltrated the country.

The leading role of the National Congress has been revealed when faced with the challenge of removing the authoritarian debris. If the expression contained varied and diffuse proposals, there was a direction in which this task gave prominence to the Legislative Branch. The repositioning of the Legislative Branch in the political game deserves further observation. After more than two decades of suffering the restrictions of the dictatorship, there seemed to be greater space for their actions, which represented an opening for democratic possibilities. However, the National Congress, which made significant changes, was elected in 1982, which was marked by authoritarian legislation. In the Federal Senate, the scenario was even more compromising, with the presence of two-thirds elected indirectly in 1978 as the “bionic”

⁵⁰ FAORO, Raymundo. **A República em transição**: poder e direito no cotidiano da democratização brasileira (1982 a 1988). Organization by Joaquim Falcão and Paulo Augusto Franco. Rio de Janeiro: Record, 2018, p. 133.

⁵¹ FAORO, Raymundo. **A República em transição**: poder e direito no cotidiano da democratização brasileira (1982 a 1988). Organization by Joaquim Falcão and Paulo Augusto Franco. Rio de Janeiro: Record, 2018, p. 133.

⁵² FAORO, Raymundo. **Democracia traída**: entrevistas. Organized by Maurício Dias. São Paulo: Globo, 2008, p. 77.

⁵³ ROCHA, Antônio Sérgio. Genealogia da Constituinte: do autoritarismo à democratização. **Lua Nova**, 88:29-87, 2013.



senators.⁵⁴ These nuances cannot go unnoticed in the face of a moment that, on the contrary, conveys an air of “discontinuity.”

In his inaugural speech on March 4, 1985, as President of the Chamber of Deputies, Ulysses Guimarães extolled the role of the Legislative Branch, whose functions he considered as invaded by the President of the Republic and supported by the Constitution in force at the time. He says, “History also addresses the challenge of change to the National Congress.” After advocating for changes that should be prioritized, including suffrage for illiterate individuals, he concluded that “[s]uch reforms and the extinction of the residues of authoritarianism are prerequisites for the authenticity of the National Constituent Assembly.”

⁵⁵In a speech by Federal Congressman Del Bosco Amaral (PMDB), an interesting position was revealed:

(...) Since the beginning of this week, I have heard the expression ‘removal of debris’ (...). Today, a journalist from one of the country's most respected news agencies asked me to clarify what I meant by debris. Well, I couldn't really answer what I would consider debris. But I even used a metaphor to say that **to remove the debris, you need an excavator. And I consider the National Congress to be the excavator.**⁵⁶

This convergence soon encountered setbacks along the way. It was no surprise that the Legislative Branch was the protagonist of such a task; however, a National Constituent Assembly coexisting with a Congress, in exercising its legislature, was part of one of the discussions regarding who was responsible for modifying the current legal order until a constitution was approved.

Much has been inserted into the metaphor of authoritarian debris: The National Security Law (Law No. 7,170, of December 14, 1983), the Strike Law (Law No. 4,330, of June 1, 1964), the Organic Law of Parties (Law No. 5,682 of 21 of July, 1971)⁵⁷, the Falcão Law (Law No. 1 of July 1976)⁵⁸, and the Press Law (Law No. 5,250, of February 9, 1967); this is in addition to decree-laws, emergency measures, legislative approval upon expiry of deadline, decrees, and ordinances. Finally, they said that the constitution of 1967, which was rewritten as Constitutional Amendment No. 1 of 1969, was the most substantial residue of the

⁵⁴ FREITAS, Galeno. Congresso muda de perfil e ganha poder na crise. **Folha de S. Paulo**. 21.4.1985.

⁵⁵ BRAZIL. Diário da Câmara dos Deputados. March 14, 1985, pp. 131-132.

⁵⁶ BRAZIL. Diário do Congresso Nacional. March 15, 1985, without highlights in the original.

⁵⁷ With the changes to the laws of 1972 and 1979, respectively Act nº 5,782 and Act nº 6,767, this is a result of Constitutional Amendment nº 11, of 1978.

⁵⁸ The falcon law modified the Electoral Law and the Organic Law of the Parties.



dictatorship itself. Florestan Fernandes, in his article for the *FSP (Folha de S. Paulo)*, stated that the term authoritarian debris “covers all illegal and illegitimate orders created and maintained by iron and fire by the institutional Republic.”⁵⁹

The National Security Law (LSN) is an emblematic example of this. It appears in the 1985 debate, following the example of Congressman José Genoíno's (PT) speech, as “rubble of rubble” when justifying one of the proposals to repeal the legislation.⁶⁰ Two LSN were published during the “political opening” period. This was modified by the Geisel government in 1978. The last LSN of the dictatorship was published on December 14, 1983, by the João Figueiredo government. It is no surprise that this law was widely criticized in 1985, as it had already been challenged at the time of its previous publication.⁶¹

Although its scope was broad, the expression was limited to acts from a specific period—those that emerged between 1964 and 1984. The focus was to eliminate norms created by the dictatorship that blocked or could block the path to the Constituent Assembly, and consequently, democracy. This temporal apprehension is vital for understanding how this term failed to assimilate an essential characteristic of the Brazilian exception regime because it not only used the creation of norms but also the appropriation of those in force to consolidate itself. More importantly, it consistently appropriated a framework of democratic constitutionalism, completely distorting it.⁶²

The regime maintained the 1946 Constitution for a specific period, coexisting with institutional and complementary acts. Subsequently, in the promulgation of the 1967 Constitution, they immediately made the regime of those acts prevail, in addition to reformulation with the granting of the 1969 Constitutional Amendment.

The debris comprised the entire legal arsenal constituted by the post-1964 authoritarian order. The rubble was authoritarian legality. It was necessary to overthrow the “revolutionary work.” Indeed, it had already been disrupted mainly by the end of the institutional acts, but even there, it was renewed.

⁵⁹ FERNANDES, Florestan. Evidências negativas? *Folha S. Paulo* 6.05.1985.

⁶⁰ BRAZIL. Diário do Congresso Nacional. March 20, 1985, p. 1328.

⁶¹ FRAGOSO, Heleno. *Lei de Segurança nacional: uma experiência antidemocrática*, Porto Alegre: Fabris, 1980.

⁶² On the tradition of Brazilian authoritarian constitutionalism in the different dictatorial periods, see: ROSENFELD, Luis. *Revolução conservadora: genealogia do constitucionalismo autoritário brasileiro (1930-1945)*. Porto Alegre: Editora da PUCRS, 2022; MARQUES, Raphael Peixoto de Paula. *Repressão política e usos da constituição no governo Vargas (1935-1937): a segurança nacional e o combate ao comunismo*. Curitiba: Prismas, 2016.



A temporal delineation from a constitutional point of view, which goes from the first Institutional Act to the Constituent Assembly's convocation, does not undo the normative-temporal tension that goes from February 1987 to October 1988. This implies that throughout the transitional period, the Constitution of 1967/69 was in force, along with the legal framework that gave it meaning. There was fear that this authoritarian constitutional order could disrupt the work of its parliamentarians. Hence, there was a movement to revoke many norms to protect the freedom and sovereignty of the Constituent Assembly. This movement consisted of several attempts, through different means, to purge what was considered the most authoritarian. It translated into a diffuse movement where any attempt in this direction was reflected in the removal of authoritarian debris. Some were not merely attempts; they also partially remade the country's institutions. Others, even if they could be considered innocuous, highlighted the tension, thus revealing the concerns of those involved. They generated in-depth debates and provided good working hours for parliamentarians.

With intertwined paths, it is possible to verify several episodes in which the removal of authoritarian debris is closely connected to the constituent process. In this study, three occasions were selected to demonstrate the use of the term authoritarian rubble in the context of this relationship. The results previously mentioned, regarding the search for the term in newspapers, served to map these situations. Therefore, it was possible to outline three moments in which the use of the term intertwines, especially in newspapers and the Legislative Branch.

The first two are inserted in a *pre-constituent moment*, in which removing the authoritarian debris represents a precondition of the Constituent Assembly. The first is revealed *before* the convening of the Constituent Assembly. As we saw, the idea finds refuge in the notion of a “political pact.” The choice to approach the Inter-Party Commission, which will be analyzed in the first point, was because of the way in which it was associated with the public debate, in general, as a “commission to remove authoritarian debris,” in addition to how it resulted in the approval of an important Constitutional Amendment for the country's institutional directions. Furthermore, as it was installed even before the elected government took office in 1985, it can be said that it had a certain “pioneerism” in the context of initiatives⁶³. The second is revealed at the moment of *convening* the Constituent Assembly

⁶³ When we started talking about the Inter-Party Commission discussed here, also mentioned another within the OAB (the Brazilian Bar Association) “composed of 11 lawyers formed at the request of the provisional



when Constitutional Amendment No. 26 was being processed. There was an opportunity in which the rapporteur's replacement allowed an attempt to end part of the authoritarian debris. The third one takes place with the constituent assembly already established, in its preliminary phase, a moment of concern that the work of the constituents could be interrupted by the prevailing authoritarian order, especially during the elaboration of the first internal regulations.

This analytical division does not mean a “staged” approach, that is, it only implies a succession of events in time. It aims to clarify that the demand to deal with the so-called authoritarian debris persisted, even during the installation of the NCA, although the public debate positioned it as a task scheduled before the establishment of the Constituent Assembly. Most importantly, it explains that the latent issue dealt with an authoritarian constitutional order that was in full force and challenged democratic aspirations. It also reveals that dismantling the authoritarian order was not part of the conciliatory “pact.”

2.1 Inter-Party Commission to Remove Authoritarian Debris

In his inaugural speech as president of the Chamber of Deputies on March 4th, 1985, Guimarães defended the leading role of the legislative branch in the country's changing phase. He argued for the creation of a commission for the task:

(...) Inter-Party Commission to prepare an Electoral and Party Reform Project to govern, later this year, the elections for the Mayors of the Municipalities that have recovered their autonomy, including the Capitals, if the respective Constitutional Amendment is approved, as well as the elections of 1986, including and especially for the National Constituent Assembly. **Such reforms and the extinction of the residues of authoritarianism are prerequisites for the authenticity of the National Constituent Assembly.**⁶⁴

Therefore, Guimarães is credited with suggesting the creation of an *Inter-Party Commission on electoral and party legislation*. It was called the “Commission to remove authoritarian debris” in journalistic and parliamentary discourse. This name shifted the focus to what was chosen for treatment and what was excluded. Interestingly, a commission on

pro-Constituent movement and appointed by the Federal Council”. JORNAL DO BRASIL. Congresso tenta remover o “lixo do autoritarismo”. 21.04.1985. Hemeroteca Digital.

⁶⁴ BRAZIL. Diário da Câmara dos Deputados. March 4th, 1985, pp. 131-132, without highlights in the original.



elections and parties was established for the initial commitment to dispel the authoritarian rubble.⁶⁵

Chaired by Senator Aloysio Chaves (*PDS*, Democratic Social Party), the Commission began its work in the National Congress on March 13th, 1985, with federal congressman João Gilberto Lucas Coelho (*PMDB*) as the rapporteur, before the elected government took office two days later. It was divided into two phases, the first concerning constitutional issues and the second on legislation, from which topics were distributed to members as sub-rapporteurs.⁶⁶

The Commission had two initial objectives: the first was to screen the reform that should be undertaken, and the second was to unify the deliberation on the proposals, given that there were many.⁶⁷ The aim was to “take the first steps towards a new democratic institutionality, through eliminating some of the main legal obstacles placed on public order by authoritarianism.”⁶⁸

Congressman Egídio Ferreira Lima (*PMDB*), one of the sub-rapporteurs, summarized how he saw the purpose of the Commission which intended to “find consensus on relevant matters, to resolve authoritarian legislation, electing new institutional instruments that can provide support for the opening process, on solid foundations, while creating, at the same time, a political atmosphere conducive to debate on the National Constituent Assembly.”⁶⁹

According to the commission, the reforms were limited to electoral and party issues. Even though Guimarães’ speech foreshadowed such a destination, it did not avoid disputes over the expansion of his agenda to reach other regulations, such as the National Security Law, which were vigorously discussed in public debate.

⁶⁵ FOLHA DE S. PAULO. Comissão vai rever “entulho autoritário”. 10.03.1985. Folha Collection. JORNAL DO BRASIL. Congresso tenta remover o “lixo do autoritarismo”. 21.04.1985. Hemeroteca Digital. CORREIO BRAZILIENSE. Em poucos dias, país começa a remover entulho. 14.4.1985. Federal Senate Library.

⁶⁶ FOLHA DE S. PAULO. 03/14/1985. Folha Collection. Constitutional: Roberto Cardoso Alves (*PMDB*); Flavio Marcílio (*PDS*) ; Alberto Goldman (*PMDB*); Jutahy Magalhães (*PSD*); Israel Pinheiro (*PFL*); Nelson Carneiro (*PTB*); Norton Macedo (*PDS*). Legislation: Ernane Sátiro (*PDS*); Jorge Medauade (*PMDB*); Fernando Henrique Cardoso (*PMDB*); Egidio Ferreira (*PMDB*); Gastão Müller (*PMDB*); Thomas Nono (*PFL*); Matheus Schmidt (*PDT*) ; Rondon Pacheco (*PDS*); José Genoíno (*PT*); Guido Moesch (*PDS*); Alfredo Campos (*PMDB*); Carlos Chicarelli (*PFL*).

⁶⁷ FOLHA DE S. PAULO. Comissão vai rever “entulho autoritário”. 10.03.1985. Folha Collection.

⁶⁸ ROCHA, Antônio Sérgio. Genealogia da Constituinte: do autoritarismo à democratização. *Lua Nova*, 88:29-87, 2013.

⁶⁹ BRAZIL. Diário do Congresso Nacional. Atas de Comissão. 11/30/1985. The speech was given at the 4th meeting, on March 28, 1985.



José Genoíno (*PT*, Worker's Party), another member, intended to expand the list of standards to be revised. The speech given in May 1985, in the plenary of the Chamber of Deputies, summarizes his vision of what he considered the purpose of the Commission:

When the Inter-Party Commission was installed, this Congressman, representing the Workers' Party bench, which is recorded in the Minutes of the Commission, presented a proposal that the Inter-Party Commission should not work only in relation to electoral law and party law. It should address legislation related to national security and presidential succession, specifically concerning direct elections. The proposal from the Workers' Party Bench was rejected by the leadership of the Democratic Alliance and the PDS, with only the support of the PDT leadership, with the argument that this could transform that Commission into a mini constituent [assembly].⁷⁰

The concern about transforming it into a “mini constituent assembly” illustrates the tension over what changes are necessary to pave the way for the Constituent Assembly and what would diminish its power. There was a question of whether the 1985 Congress would have powers equal to or greater than those of a future constituent assembly.⁷¹

Hélio Bicudo reinforced the claim made by Genoíno, “[for] the PT, the Constituent Assembly must be a step towards a new social order, and this will only be guaranteed with certain essential points to be achieved before the Constituent Assembly.”⁷² The PT had been born as a party opposing the dictatorship, but it also distanced itself from the “official” opposition, which bore the marks of conciliation.

The tone provided by the general rapporteur, João Gilberto, implied that it was urgently required. There was no other reason than the need to convene the constituent assembly as soon as possible, such as the forecast of municipal elections in November of that year. Hence, work should focus on the electoral and party aspects. There was a consensus that reorganizing electoral and party norms would ensure that people could choose their constituents as a condition of legitimacy. Gilberto conducted interviews during the Commission's operation. In one of them, he explained that the Commission, being the result of an agreement between leaders, did not take on the responsibility of reviewing the vast catalog that made up the authoritarian debris. This would only happen if the accords were

⁷⁰ BRAZIL. Diário do Congresso Nacional, 9.05.1985, p. 746.

⁷¹ Raymundo Faoro was critical of the idea of removing authoritarian debris, as he understood that it could compromise the constituent. FAORO, Raymundo. **A República em transição: poder e direito no cotidiano da democratização brasileira (1982 a 1988)**. Organization by Joaquim Falcão and Paulo Augusto Franco. Rio de Janeiro: Record, 2018, p. 133.

⁷² BICUDO, Hélio. O verdadeiro caminho da democracia. In.: Emir Sader (Org.). **Constituinte e Democracia no Brasil hoje**. São Paulo: Editora brasiliense, 1985, p. 177.



renewed.⁷³ For the Commission, the need to redo the electoral process outweighed the analysis of other topics, such as national security legislation and the press.

Congressman Egídio F. Lima (PMDB), when speaking about the changes in the organic law of the parties that he was responsible for, outlines the difficulty in his work of reviewing the legislation edited and modified by the exception regime, confessing that “perhaps, it would be better to start from nothing,” when referring to the re-democratized countries of the time. He noted that “at least, the designers of the new states with nascent rights, (...) did not find themselves embarrassed by deformed diplomas and cavils legal concepts”.⁷⁴ This perception is an example of how the authoritarian legality built during the Brazilian dictatorship left permanent marks, making the work of unraveling it more difficult.

The first meeting after the installation of the commission took place on March 19th, 1985. The minutes that covered the first to the twenty-second meeting, on September 17th, were found in the Diary of the National Congress of November 30, 1985, as a supplement.

The constitutional phase inaugurated the Commission’s work. Given the urgency, the approval of an amendment to the Constitution would require a greater political consensus, having originated in the interparty; that is, the objective was for members to take the agendas to their parties to facilitate voting in the plenary.

The most relevant work was the forwarding of the Proposal to Amend the Constitution, which gave rise to Constitutional Amendment No. 25, approved on May 15, 1985.⁷⁵ From Proposal to Amend the Constitution No. 2 (*PEC, Proposta de Emenda à Constituição*) of 1984⁷⁶, a replacement text was prepared and presented to the Plenary of the National Congress on May 7. Congressman João Gilberto was appointed as the rapporteur. Presenting a substitute in an ongoing amendment was thus a strategy for accelerating the process.

The proposal was discussed between the 7th and 9th of May. In the days leading up to the Proposal of Constitutional Amendment analysis, Coelho described the National

⁷³ CORREIO BRAZILIENSE. João Gilberto: ainda há muito entulho a remover. 20.5.1985. Hemeroteca Digital.

⁷⁴ BRAZIL. Diário do Congresso Nacional. Atas de Comissão. 30.11.1985. The speech was given at the 4th meeting, on March 28, 1985.

⁷⁵ Law 7,332, July 7, 1985, was also a Commission proposal, however, with the purpose of adapting to the modifications of EC n° 25/1985. See proceedings: Diary of the National Congress. 5.6.1985.

⁷⁶ BRAZIL. Proposta de Emenda à Constituição n° 2, 1984. Estabelece eleições diretas nos municípios considerados estâncias hidrominerais. Available at: <https://www25.senado.leg.br/web/atividade/materias/-/materia/17967>. Accessed on February 3, 2023.



Congress as “slow, heavy like a pachyderm.”⁷⁷ That’s because the Commission concluded its constitutional phase on April 9. The federal congressman envisioned the approval as a historic milestone, coinciding with the anniversary of the deliberation on the Dante de Oliveira amendment on April 25.

The text presented to the plenary addressed “three basic lines,” as explained by the congressman rapporteur. Recognizing the right to vote for everyone, the Commission discussed eligibility, which opened the possibility that at least the illiterate could run for counselor, a provision not included in the substitute text. It re-established the freedom of party organizations, including ending party loyalties. This amendment dealt with municipal autonomy and the elections of mayors and council members.

Regarding direct presidential elections, the substitute text incorporated a project that the president of the republic, José Sarney, had sent to the National Congress on the same day, indicating that the rapporteur was “a tribute to the author of the message.”⁷⁸

Representative José Genoíno considered it a political maneuver, referring to the fact that the Inter-Party Commission was in favor of the proposal, except for a position that came from the Democratic Alliance. “It was necessary for President José Sarney to make a great political performance to attract support for his government. We want to touch on these points under penalty of the National Congress being supervised in new ways.”⁷⁹ Genoíno, would also insist on the “timid and limited” action of the Commission.⁸⁰

With the freedom of party organization, illegal parties returned to the political scene, such as communist parties, PCB, and PC do B.

Therefore, the Commission fulfilled its purpose of reconfiguring a significant portion of the country's institutions. The *FSP* editorial recognized the commission’s success: “Without a doubt, Congress was responsible for most of the political decisions. These came through the work of the commission charged with removing authoritarian remnants of electoral and party legislation. (...) These are points that contribute to the construction of an authentic democracy in the country.”⁸¹

⁷⁷ FOLHA DE S. PAULO. Lentidão do Congresso irrita parlamentar. 2.05.1985. Folha Collection.

⁷⁸ BRAZIL. Diário do Congresso Nacional. 8.05.1985, p. 723.

⁷⁹ BRAZIL. Diário do Congresso Nacional. 8.05.1985, p. 718.

⁸⁰ NETO, José Genoíno. Entulho e desentulho. **Lua Nova: Revista de Cultura e Política**, v. 2, p. 09-12, 1985.

⁸¹ FOLHA DE S. PAULO. July, 1985. Folha collection.



Luis Felipe Miguel points out that “institutional construction is often seen as the most successful aspect of our political transition.”⁸² This can be perceived from the “building of the set of institutions characteristic of liberal democracies”⁸³, which he summarizes as “the meaning of transitions” worldwide.

The Commission was particularly responsible for reviving a less authoritarian electoral process, removing a portion of citizens from a second-class category, as in the case of a “half-baked right,” as illiterate people were able to vote but not be voted for. Following this global trend towards a still minimalist perception of democracy reveals that, to a certain extent, there is an attachment to a “strict division of political labor.”⁸⁴ The position of illiterate people was maintained in the 1988 Constitution. It is important to note that the Commission on the Electoral Organization, Party, and Guarantee of Institutions of the National Constituent Assembly was influenced by the work of the Inter-Party Commission. Research focusing on this information could generate interesting results to identify other roles played by the Commission, combining the period preceding the NCA with the work that took place within it.

2.2 The convocation of the Constituent Assembly: the project that tried to remove the debris

On June 28, the last day of the first legislative semester of 1985, President Sarney sent a message to the National Congress, containing the proposed amendment to the constitution that called for a constituent assembly.

This PEC contained three articles, among which it determined a Constituent-Congress; that is, it attributed constituent powers to the National Congress, which would be composed of those elected in 1986. It was necessary to send another message to Congress on July 5th, requesting an urgent analysis.⁸⁵ The message indicated a singularity in the commitment that was signed, which was that the constituent entity would have to live with the current legal order “whose empire will extend until the moment the new Constitution is

⁸² MIGUEL, Luis Felipe. **Democracia na periferia capitalista: impasses do brasil**. Belo Horizonte: Autêntica, 2022, p. 114.

⁸³ MIGUEL, Luis Felipe. **Democracia na periferia capitalista: impasses do brasil**. Belo Horizonte: Autêntica, 2022, p. 36.

⁸⁴ MIGUEL, Luis Felipe. **Democracia na periferia capitalista: impasses do brasil**. Belo Horizonte: Autêntica, 2022, p. 30.

⁸⁵ CORREIO BRAZILIENSE. Governo fará nova mensagem sobre constituinte: Planalto esqueceu de incluir no texto pedido de prioridade na tramitação. Há mais falhas. 3.7.1985.



promulgated.” Therefore, he called for respect for the law, “under penalty of regulatory chaos occurring.”

After the recess, the proposal was read on August 7 when a mixed commission was appointed to analyze PEC no. 43, formed by nine members from the PMDB, seven from the ⁸⁶ PDS⁸⁷, five from the PFL,⁸⁸ and one from the PDT⁸⁹. The proposed method was processed using the PECs Nos. 44 and 52. Parliamentarians were asked to speak and record, as this was a historical session.

The following day, the commission was established, and Congressman Flávio Bierrenbach (PMDB-SP) was chosen as the rapporteur. On August 21st, during the third meeting, the rapporteur identified a concern in his work on the committee. He presented parliamentarians with 17 points to analyze, which amounted to:

a list of suggestions for a constitutional review, designed to serve as an instrument for *neutralizing the existing authoritarian residue*. There is a preliminary question: should the National Constituent Assembly live with the authoritarian residue that exists in this Constitution or not? Could this Commission eventually present a substitute text removing numerous measures from the current Constitutional Charter that are undeniably authoritarian in nature?⁹⁰

This position soon aroused controversy among members of the committee. Representative Israel Pinheiro (PFL)⁹¹, mentioning the inter-party commission in which he had also participated, recalled that they tried to propose changes that would go beyond the electoral orbit and that the conclusion would be to establish criteria to conclude the works. Congressman João Gilberto then spoke, stating that it was necessary to filter the items proposed by the rapporteur, by focusing on the aspects that would really be prerequisites for the constituent assembly, since the reason for the call “to make a new constitution is a sign

⁸⁶ Senators Helio Gueiros, José Ignacio Ferreira, Alfredo Campos, Alcides Saldanha and deputies João Agripino, João Gilberto, Flavio Bierrenbach, Milton Reis and Luiz Henrique.

⁸⁷ Senators Aloysio Chaves, Helvidio Nunes, Lenoir Vargas, Octavio Cardoso and deputies Siqueira Campos, Bonifácio de Andrada and Gorgonio Neto.

⁸⁸ Senators Carlos Chiarelli (replaced by Marcondes Gadelha), Aderbal Jurema, Nivaldo Machado and deputies Israel Pinheiro and Oscar Correa Jr.

⁸⁹ Congressman Nadyr Rosseti (replaced by Nilton Alves).

⁹⁰ DCN. 12/30/1985.

⁹¹ Israel Pinheiro Filho would become, in 1987, the third member of his family to participate of a Constituent Assembly.. His grandfather, João Pinheiro, was a congressman of the first Constitution of the Republic. His father, Israel Pinheiro, was a representative in 1946. AVELLAR, Clotilde Teixeira (Org.). *Memórias de Israel Pinheiro Filho: 50 anos de história política*. Belo Horizonte: Historiarte, 2013; PINHEIRO FILHO, Israel. *Verbete*. CPDOC-FGV. Available at: <https://www18.fgv.br/CPDOC/acervo/dicionarios/verbete-biografico/pinheiro-filho-israel> . Accessed on January 31st. 2023.



that we think that everything that is there is bad.” The congressman appeared pragmatic, a characteristic that also appeared in his coordination as a rapporteur for that electoral commission. The speeches demonstrated that many practical concerns were to be faced, which several parliamentarians agreed on, including Domingos Leonelli, Bonifácio de Andrada, Alcides Saldanha, Octávio Cardoso, Gorgônio Neto. In other words, they were not directly opposed to the rapporteur's proposal but held that its scope should be revised.

In the first meeting, Gilberto suggested to the rapporteur that he draw up a list so that representatives of society could be heard, intending to contribute to the final opinion. During the proceedings of the committee in September, names such as Maria Benevides and Afonso Arinos (3rd), Luciano Mendes de Almeida and Raymundo Faoro (10th), and Fábio Konder Comparato and Hermann Assis Baeta (12th) were invited to lectures.⁹² Jair Meneghelli and Nelson Saldanha (17th), Henry Maksoud (19th), Dalmo de Abreu Dallari, and Carlos Eduardo Moreira (24th), Geraldo Ataliba (25th), Paulo Brossard, and Joaquim dos Santos Andrade (26th), except Afonso Arinos and Paulo Brossard, were recommended as exclusive constituents.

Arinos' presentations yielded complementary comments from some parliamentarians. Oscar Corrêa Júnior asked him a question about authoritarian debris, as to what the scope of the committee was in dealing with the issue. The jurist responded that the idea “that we have to discuss again facts that are deeply painful for the country, arising from a brutal dictatorship, sometimes unfortunate facts of memory, increpations that will be raised, investigations that will be attempted, all of this is not facilitating the march towards peace.” He concluded that “reviving all this would not just be removing the authoritarian debris. It would be the rebirth of passions that will not cooperate towards the confluence of the great estuary of national peace.”

Not all members shared such a flattering opinion. José Genoíno preferred to be more specific and asked about emergency measures, the state of emergency, and national security law, and whether they should remain. He took advantage of the opportunity to ask whether they ran the risk of transforming the Constituent Assembly into a “matter for lawyers and notables and preventing it from touching the streets.” Afonso Arinos said that the

⁹² During the lecture, the Professor and researcher Benevides received several interventions, especially from congressman Israel Pinheiro, so that President Helvidio Nunes had to state that “it is not the tradition of the House for the exhibitor to receive comments” nor would there be a rejoinder. Israel Pinheiro then continued speaking and finally apologized for his “impertinence” to the Professor.



congressman was pessimistic, and that if Sarney consulted him about the national security law, as he is a good friend of the president, he would ask to revoke it, as “this only serves for brilliant representatives of the Brazilian left to formulate reasons against it.” It is necessary to remember that the commission created by Sarney (the idea had been expressed since Tancredo, but he signed the decree) to draw up a “pre-project” of the constitution, headed by Arinos, was commented on as a “commission of notables,” in a pejorative way.

On September 10, they received Raymundo Faoro, who began his speech by discussing how the constituents would be convened. For him, the constitutional amendment initiative by the President of the Republic was a way of bringing Institutional Act No. 2 to life. The main thrust of his statement was the need for a rupture, having said on the occasion “I heard a few days ago a speech from the President of the Republic, who thanked God that there had been no rupture. I think he’s assuming disruption like a fire in the streets. I suppose you thank God sometimes for the wrong reasons. One should thank God precisely because there was a rupture.” He extensively considered the constituent and constituted powers. Faoro also declared his intention to vote for Congressman Flavio Bierrenbach.

The newspaper *Correio Braziliense* reported on October 13 that Sarney had recommended leaders of the Democratic Alliance not to accept changes to the amendment, so that they would form a majority to “function like a steamroller.”⁹³ On October 15th, Flavio Bierrenbach presented his opinion to the committee, where he prepared a substitute text and granted a collective request for a forty-eight-hour review. On October 18th, the rapporteur's replacement was considered. At the plenary of the committee, Bierrenbach was surprised by his replacement; rather, as he said in an interview with *Cedec*, that he had been removed. He reported that, in a previous dialogue with Ulysses Guimarães, he had suggested that “the formula coming from Planalto was consensual and majority”⁹⁴, which differed from his wording. The rapporteur said it was a text “produced in the dead of night.”

On that day, some members were replaced. Pimenta da Veiga, *PMDB* leader, clarified that one of the replacements was accompanied by a letter from the congressman who regretted not being able to participate. He was referring to João Gilberto, because, in a statement for a book published in 2017, he said that he had left the commission “in protest, with a letter.”⁹⁵

⁹³ CORREIO BRAZILIENSE. Sarney troca pacto por entendimento. 13.10.1985. Hemeroteca Digital.

⁹⁴ *Apud.* ROCHA, Antônio Sérgio. Genealogia da Constituinte: do autoritarismo à democratização. **Lua Nova: Revista de Cultura e Política**, p. 29-87, 2013.

⁹⁵ CARVALHO, Luiz Maklouf. **1988 – Segredos da constituinte**: os vintes meses que agitaram e mudaram o



Representative Giavarina was the “substitute rapporteur.” He was not in the initial composition of the commission and had replaced Congressman Milton Reis the night before. Practically, what happened was that the congressman presented a separate vote accompanying the substitute text. This was not known to many, including the president of the commission or, as already mentioned, to Bierrenbach. There was a request for the preference to discuss Giavarina’s project. Genoíno referred to it as a “regimental coup,” since the discussion had not even been closed and the proposal of the designated initially rapporteur had been voted on. The preference was approved. Then, Bierrenbach left the table, deciding to transfer the suitcases he was carrying, containing approximately seventy thousand letters he had received during his work. Regarding this luggage, Gilberto said, in a later statement, that Bierrenbach did it “in protest against the dismissal: it was full of correspondence from popular movements.”⁹⁶

Bierrenbach left courtesy aside and described the project as “technically mediocre and politically cowardly.” The original rapporteur considered the text coming from Planalto as far from representing society’s desires, since it preserved the “governmental establishment”. For him, that call “in a laconic amendment of just three articles, constitutes, in my opinion, the most serious point of rupture between the new government and the people, the State and the Nation.”⁹⁷

The substitute presented by Bierrenbach was more comprehensive. It was intended, among other aspects, to revoke emergency measures, the state of emergency, and the hypothesis that the Federal Attorney General could request that the Supreme Court suspend parliamentary mandates for crimes against national security. The project also provided for revoking Article 181 of the CF 1967/69, which approved institutional and complementary acts and removed them from judicial review, which, for the congressman, was the “(...) synthesis of the arrogance enshrined in a constitutional rule. Norm that is a symbol of the military dictatorship, which shames Brazilian constitutional law.”⁹⁸

Bierrenbach understood that these proposals aimed to create conditions for the freedom and sovereignty of the constituent. This is why he referred to the current need for

Brasil. Rio de Janeiro: Record, 2017, p. 286.

⁹⁶ CARVALHO, Luiz Maklouf. **1988 – Segredos da constituinte**: os vinte meses que agitaram e mudaram o Brasil. Rio de Janeiro: Record, 2017, p. 285.

⁹⁷ BIERRENBACH, Flavio. **Quem tem medo da Constituinte**. Rio de Janeiro: Paz e Terra, 1986, pp. 70-71.

⁹⁸ DCN. October 18, 1985. Anais da Câmara dos Deputados, p. 1973.



public debate, which was to “remove from the current legal system the residues of authoritarian legislation that could represent obstacles to the freedom of action of the constituent.” He understood that “among the countless remaining instruments of discretion,” it would be better to stick to the bare minimum “relative to the current constitutional text itself.”⁹⁹

Furthermore, the first article of the substitute text established that the population should decide, through a plebiscite on March 2, 1986, whether the constitution to be written should come from a constituent congress, with congressmen to be elected in November 1986, or from an exclusive assembly. There would also be a consultation on whether the “bionic” senators – elected in 1982, in accordance with the imposition of Constitutional Amendment N.8, of the “April package” of 1977 – should assume constituent powers.

Flavio Bierrenbach wrote “Who is Afraid of the Constituent Assembly” (*Quem tem medo da Constituinte*) motivated, among other things, “by an imperative to preserve memory,” inspired by his experience as rapporteur of the commission that analyzed the Proposal of Amendment that called for the Constituent Assembly. Published in 1986, it was prefaced by Raymundo Faoro, and presented by Goffredo Telles Junior. In his view, and in line with the public debate, “subsisting under the dictatorship, the country’s legal-institutional framework could not coexist with democracy, it should not coexist with the New Republic. (...) Hence the imperative need to urgently remove the ‘authoritarian debris,’ the legislative rubbish accumulated by the production of two decades of the abominable regime.” Based on this understanding, his effort in the broader alternative text explains the meaning of the proposals:

I added articles and paragraphs, seeking to eliminate, from the current constitutional text, the authoritarian provisions remaining in it, so that this would translate into greater freedom and sovereignty, in a climate, in short, more compatible with the democratic character expected from a new Constitution.

In the plenary session of the National Congress, Giavarina gave a speech in which he pointed out that the solution to that historical moment would have to be simultaneously legal and political. Essentially, the legal aspect proved to be decisive as he claimed, “the great

⁹⁹ DCN. October 18, 1985. Anais da Câmara dos Deputados, p. 1973.



Brazilian crisis, which is, before and above all, a crisis of law.” His vision also highlighted the role of legislative branch in this process.

For more than 20 years, this legal gap has been tried, in vain, to fill with many amendments to the constitutional texts of 1946 and 1967 and to the countless Institutional Acts and Complementary Acts. For this reason, Brazil does not have a Constitution; Brazil has a semblance of a Constitution. Since the movement that broke out in 64 (the so-called¹⁰⁰ re-democratization movement) did not do so, the “revolution” that inaugurated the New Republic will have to assume, with the National Congress, the great task that History has in store for it.¹⁰¹

Giavarina’s writings privileged those who came from Planalto. Its alternative text added a fourth article, with eight paragraphs, to Sarney's proposal to deal with the amnesty, and a fifth on deadlines for qualifying positions for (in)eligibility, modifying Article 151 of the 1967/69 CF. With the exception that even the “replicated” articles were not identical, so that significant expression was suppressed, it was “without prejudice to its constitutional attributions.”

Representative José Genoíno relentlessly argued against Giavarina's replacement, raised the point of order for it to be suspended and argued that it was illegal.

The final text was approved on November 27th. It is important to note that the promulgation of the amendment’s content, which largely coincided with Planalto’s proposal, reveals yet another point regarding Sarney’s interference in this process. This demonstrates an executive–legislative relationship. Carlos Chiarelli, leader of the *PFL* (Liberal Front Party) in the Senate, confirmed to the *FSP* that after one of the political council meetings, Sarney warned that he would not allow a “free riding” of controversial proposals to *his* amendment.”¹⁰²

2.3 *Untouchable authoritarian constitution?*

The NCA was installed on February 1st, 1987. The initial efforts consisted of drafting internal regulations that would guide the work of the Constituent Assembly, called the preliminary phase, which lasted more than a month, with the approval of Resolution nº 2/87 on March 19th. In the second session, after voting, it was determined that the senators

¹⁰⁰ The expression “so-called” did not appear in the copies distributed to members of the committee, which was highlighted by José Genoíno.

¹⁰¹ DCN. October 18, 1985. Anais da Câmara dos Deputados, p. 1971.

¹⁰² FOLHA DE S. PAULO. Congresso tenta mudar Constituinte. 10.ago.1985. Folha Collection.



elected in 1982 would have constituent powers, while also electing Congressman Ulysses Guimarães to the third presidency, which he assumed simultaneously with that of the Chamber of Deputies and his party. In fact, this data illustrates the leading role that the *PMDB* assumes in the transition as well as explains its connection to the Sarney government.¹⁰³

In the session on February 4th, Congressman Maurílio Ferreira Lima (*PMDB*) forwarded a proposal to be included in the draft resolution of the internal regulations, which gave the initiative to issue “constitutional resolutions”. It would be possible to change the 1967/1969 Constitution through this, since the sovereignty of the NCA would be threatened if it were “marked” by those constitutional norms.¹⁰⁴

On February 6th, *O Estado de S. Paulo* stated: “For Sarney, the Constitution is untouchable,” as it said that for the president, the congressman’s proposal was an “aberration,” arguing that sovereignty and freedom are for the new Constitution and not for the one that was in force. The Federal Attorney General (*Procurador-geral da República*), Sepúlveda Pertence, believed the NCA had “powers only to interpret the Constitution, but not to reform its text.”¹⁰⁵ The jurist Afonso Arinos also stated that constitutional resolutions did not exist and could not be created.¹⁰⁶ Sovereignty within that proposal meant being able to change the current order. This discussion was expanded throughout the debate on internal regulations.

Guimarães appointed Senator Fernando Henrique Cardoso as a rapporteur for the draft internal regulations. Until voting on the definitive rules of the procedure, the NCA worked on a preliminary document based on the rules of the 1945 Constituent Assembly.

On February 21st, the rapporteur issued an opinion after receiving 949 amendments to Draft Resolution No. 2 and decided to present a replacement with a new deadline for amendments. At the outset, the rapporteur stated, “we must not lose sight of the fact that the Assembly exercises its role in the course of a political transition, in which its powers, contrary to what would happen with a revolutionary Constituent Power, were established based on the order of the existing legal system.”¹⁰⁷ The number of suggestions it received shows that the

¹⁰³ PAIXÃO, Cristiano. **Constituição em disputa: transição ou ruptura?**...

¹⁰⁴ Diary of NCA. 4.02.1987.

¹⁰⁵ O ESTADO DE S. PAULO. 6.02.1987. Federal Senate Library.

¹⁰⁶ Correio *Braziliense* highlighted an excerpt said by Afonso Arinos on that occasion: “It is not reasonable that the Constituent Assembly, having come out of the mother's womb, which is the current Constitution, now considers it a prostitute”. 5.2.1987. Hemeroteca Digital.

¹⁰⁷ BRAZIL. Diary of NCA. 22.02.1987.



project changed significantly to the extent that, according to the rapporteur, approximately 600 amendments were accepted. In this substitute, a preamble was added in which FHC declared, “I did not excuse myself from the most delicate matter.” He was referring to the issue of sovereignty. He emphasized the need for concrete instruments for this purpose, stating, “I affirm that anything that could constrain the creation of this new Charter will have a *shield* in us so that we can overcome the measures.” A perception about the conflict of the validity of an authoritarian order in the Constituent Assembly was made explicit, “at the moment of transition, when we go to a new order, with the old order still existing, the path, the route, is important. And this is not just done with the objective far away. It is woven. I believe that here we have a few more stones to pave the road that will truly lead us to democracy.”¹⁰⁸

The project’s preamble contained the words: “the urgency required to complete the political transition with the promulgation of the future Constitution leads the Constituents to prioritize the drafting of the new Charter that will definitively bury the authoritarian debris.” This confirmed the notion that a constitution would serve to end the authoritarian rubble or residue once and for all.

In the final version of the Internal Regulations of the National Constituent Assembly, there was a change of terms, using the expression “anti-democratic legislation” instead of “authoritarian debris.”¹⁰⁹ Pompeu de Sousa (*PMDB*), who, in addition to being a senator, was a journalist, presented an amendment to the bill’s substitute to remove the term because “it does not seem appropriate to me, for a text intended to constitute a historical piece, the expression ‘authoritarian debris’ – applicable only in the circumstantial language, to a certain extent colloquial, of a transitory journalistic fad”.¹¹⁰ The amendment was approved in the rapporteur’s opinion, with the final wording “*will definitively bury the antidemocratic legislation of the authoritarian regime.*”¹¹¹

Still, in its preamble, it determined powers for the framers to “override measures” that could “threaten the work and sovereign decisions of the Assembly, in fulfilling the

¹⁰⁸ BRAZIL. Diary of NCA. 22.02.1987.

¹⁰⁹ BRAZIL. Assembleia Nacional Constituinte. Projeto de Resolução n. 2-A. Dispõe sobre o Regimento da Assembléia Nacional Constituinte, com emendas oferecidas em Plenário ao Substitutivo do Relator. 23 de fevereiro de 1987.

¹¹⁰ BRAZIL. Assembleia Nacional Constituinte. Projeto de Resolução n. 2-A. Dispõe sobre o Regimento da Assembléia Nacional Constituinte, com emendas oferecidas em Plenário ao Substitutivo do Relator. 23 de fevereiro de 1987.

¹¹¹ BRAZIL. Diário da Assembleia Nacional Constituinte.. February 25, 1987, p. 553.



historical mission conferred on them.”¹¹² The insertion of the text occurred during the debates, and, as the press portrayed, sealed an agreement to eliminate the fear of authoritarian debris.¹¹³

The rapporteur’s first substitute added the provision for “draft decisions” (*projetos de decisão*). Chapter V deals with the propositions that could be made during NCA’s work. Among them, Article 58, Item V, provided the possibility of proposing “draft decisions,” which, as explained in §7, “are intended to regulate matters of relevance to the National Constituent Assembly, not included in the other propositions.” A third of the framers would approve them if there was a favorable opinion from the Systematization Commission; otherwise, they would be archived.

This measure caused extreme controversy among framers and indicated that party alliances would take the direction of profound reformulations. *Folha de S. Paulo* reported on the “unease” that the change created among the *PMDB* members themselves, notably from the so-called “pro-sovereignty” wing, due to the possibility that the draft decision could be shelved if it received an unfavorable opinion.¹¹⁴

The *PFL* completely disagreed with this measure, joining the *PDS* to overturn both the preamble and the draft decisions. The proposal, reported *Folha de S. Paulo*, came from Planalto due to “the fear that the Constituent Assembly, armed with decision projects, would start to co-govern the country.”¹¹⁵ President Sarney called on the leader of the *PFL* party in the Senate, Carlos Chiarelli, to prevent approval. Much of his concern involved the duration of the President’s term. The entire impasse was concerned with the configuration of the Democratic Alliance and the executive-legislative relationship. For Cardoso, according to the *FSP*, it would be necessary to negotiate “to put back together the pieces of the party system shattered after the regimental battle.”¹¹⁶ However, PT congressman José Genoíno sought to facilitate the quorum for approving the draft decision.

¹¹² Resolution No. 2, 1987.

¹¹³ O GLOBO. Acordo afasta temor do entulho autoritário. 21.02.1987. Federal Senate Library.

¹¹⁴ FOLHA DE S. PAULO. Aprovado novo prazo para emendas ao substitutivo do Regimento Interno. 23.2.1987. Folha Collection.

¹¹⁵ FOLHA DE S. PAULO. PFL e PDS se unem para derrotar proposta de soberania. 23.2.1987. Folha Collection.

¹¹⁶ The regimental battle was just beginning. The dispute over internal regulations, during the NCA, is one of the causes associated with the emergence of *Centrão*. See: GOMES, Sandra. O impacto das regras de organização do processo legislativo no comportamento dos parlamentares. *Revista Dados*, 2006; ROCHA, Antônio. Genealogia da Constituinte: do autoritarismo à democratização. *Lua Nova: Revista de Cultura e Política*, 2013.



On February 24th, Cardoso presented a new opinion considering the suggestions presented in relation to the first substitute, which totaled 693. In his report, he stated that, given the complexity of negotiations, “we failed to consider – without going into their merits – amendments that propose changes to article 58, § 7º.” The suggestions ranged from complete suppression to partial restrictions and expanded the figure of the draft decision. Hence, the rapporteur concluded that “with such disparate amendments, it seemed better to leave the text as it was and wait for the Plenary to resolve this issue, which is eminently political.”¹¹⁷

The draft decision was approved; and relocated in the definitive version to Chapter V, Article 59, Item V, §7. It announced, replicating the preambular excerpt, that “they are intended to stop measures that could threaten the work and sovereign decisions” of the Assembly. With the support of a third of the framers, the draft decision was forwarded to the Systematization Committee, which could issue a favorable opinion, in which case it would go to the plenary, or, otherwise, it would be archived. If it went to the plenary, it would still have to be approved by an absolute majority in two rounds. The preamble was retained as part of the project¹¹⁸.

During this period, the functions of the Chamber of Deputies and the Federal Senate were also defined, with modifications to their respective internal regulations and common resolutions to adapt to the provisions of the NCA.¹¹⁹ The Chamber of Deputies and Senate scheduled their sessions to take place on Monday afternoons, and met extraordinarily only at times that did not coincide with those of the NCA.

What is another possible variable explanation for the existence of decision projects within a Constituent Assembly at the same time as the National Congress? According to one possible interpretation, the hypothesis is that there were two systems of constitutional change happening in parallel while the Constitution was in place.¹²⁰

¹¹⁷ Diary of NCA, 25.2.1987. At this stage, it was located in art. 57, V, §7º.

¹¹⁸ Resolution nº 2/1987.

¹¹⁹ Resolution nº 1/1987.

¹²⁰ “The implication of this provision meant that the assembly would have the power to amend the existing 1967 Constitution with an absolute majority of the assembly instead of the two thirds majority required by the existing constitution's rules.” MARTÍNEZ-LARA, Javier. **Building democracy in Brazil: the politics of constitutional change, 1985-95.** Springer, 2016, pp. 93-94.



Eighteen draft decisions were presented during the NCA, all of which were in progress when the Constitution was promulgated and remained archived at the end of the work of the Constituent Assembly.¹²¹

Draft Decision No. 7/1987¹²² intended to suspend the National Security Law during the work of the NCA. The legislation, which faced repeated criticism due to its connection to the logic of the authoritarian regime from which it originated, raised practical concerns, particularly regarding its potential impact on the framers' function. The Constitution of 1967/1969 indicated that the Federal Attorney General could request, in the case of crimes against national security, a suspension of the congressman's mandate, a provision inserted by Constitutional Amendment N. 11(1978) with wording modified by Constitutional Amendment N.22/ (982).¹²³ Both were amendments that took place in the "opening" process of dictatorship and were riddled with ambiguities. As previously stated, none of these proposed decision projects were approved.

The preservation of the sovereignty of the Constituent Assembly justified intervention in the current order, which made authoritarian legality come alive. The draft constitutional decision, even if not approved, expressed concerns that during the assembly, its work could be hindered or interrupted, which often proved to be a reality.

Conclusions

The analysis of moments of authoritarianism and the construction of democracy shows that the legal field is central to the structure of Brazilian political regimes. Hence, one of the demands for democratization was creating a new constituent intending to leave authoritarianism in the past. In this sense, the notion that the authoritarian regime was being gradually dismantled was part of many discourses, especially from the second half of the

¹²¹ Diário do Congresso Nacional. 16.09.1989. See: Ato Conjunto nº 1 de 1989. Determina o arquivamento das proposições apresentadas à Assembleia Nacional Constituinte, pp. 9574-75.

¹²² Projeto de decisão nº 7, de 1987: suspende a vigência da Lei de Segurança Nacional durante os trabalhos da Assembleia Nacional Constituinte. CPDOC FGV. Available at: <<https://www18.fgv.br/CPDOC/acervo/arquivo-pessoal/UG/impresso/projeto-de-decisao-n-7-de-1987-suspende-a-vigencia-da-lei-of-national-security-during-the-works-of-the-national-constituent-assembly>>. Accessed on Nov 17th. 2022.

¹²³ Art. 32, § 5º: "Nos crimes contra a Segurança Nacional, poderá o Procurador-Geral da República, recebida a denúncia e considerada a gravidade do delito, requerer a suspensão do exercício do mandato parlamentar, até a decisão final de sua representação pelo Supremo Tribunal Federal."



1980s. It is a perspective that can be seen in two ways: Was the dictatorship being dismantled, or was democracy being built?

The genealogy of the authoritarian debris metaphor, which traces its point of origin to public debate in the second half of the 1980s, contributes to the understanding of its varying use over time. In addition to understanding the uses of the term authoritarian debris, it revealed how much the Brazilian dictatorship used the legal framework to legitimize and consolidate itself over time, because it contained many demands and references to dictatorial normative production.

The use of the expression highlights the need for institutional reform to address the authoritarian norms that persist, both in the screening process and in handling revocations and established legal relationships. However, it was necessary to first examine the meaning of the term authoritarian debris in this study. It covered many pieces of legislation, including the 1967/1969 Constitution, and addressed almost all the norms of dictatorship. Thus, the term pointed to the authoritarian legality that was built from 1964 to 1985. Faced with a political moment that the public debate saw as “new,” those norms needed addressing from the institutional actors gaining strength in the political game. The impossibility of building an entirely new legal order led to conflicts and struggles in constituent projects, where some accommodations were tolerated and welcomed. This process generated an incorporation between the past and future, either by limiting the construction of the new or by maintaining and interpreting the new order through non-democratic practices.

The pre-constitutional and constituent debates show the challenges of reorganizing the legal order. They also show that every constitution is the result of the possibilities that exist in its temporal location. Therefore, even though the initial arrangements are important, the task of fighting for democracy must be constant and involves the demobilization of debris and authoritarian stocks.

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Individualização da Contribuição dos Coautores por Meio da Taxonomia CRediT

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