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CAN THE BRAZILIAN FEDERALIST CRISIS BE EXPLAINED BY ABUSIVE CONSTITUTIONALISM?

A CRISE FEDERATIVA BRASILEIRA PODE SER EXPLICADA POR CONSTITUTIONALISMO ABUSIVO?

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Abstract: David Landau's abusive constitutionalism is clearly a new and relevant category in constitutional law and constitutionalism. His pioneer work had inspirated a lot of research that target to identify regimes and governments that uses constitutionalism institutions to attack and reduce levels of democratization in new constitutional democracies. On the other hand, Economy Nobel Prize Roger Myerson, had demonstrated on empirical studies that new democracies are better served in federalist structure by reducing the central power. Brazilian recent events had showed some evidence that the federal government had accumulated through past years a lot of power to impose subnational governments their own agenda by a series of constitutional amendments. The phenomenon described above has been treated on mass media, and even on scholarships as a normal and regular democratic way to achieve political goals. The Brazilian's constitutional amendments examined as a whole show other thing: by weakening local and regional powers, by weakening local and regional leaderships.

Keywords: democracy, federalism, fundamental rights, public choices

Resumo: O constitucionalismo abusivo de David Landau é claramente uma nova e relevante categoria no direito constitucional e no constitucionalismo. Seu trabalho pioneiro tem inspirado muitas pesquisas cujo objetivo é identificar regimes e governos que se utilizam dos institutos do constitucionalismo para atacar e reduzir níveis de democratização nas recém instituídas democracias constitucionais. Por outro lado, o prêmio Nobel da Economia Roger Myerson, demonstrou em pesquisas empíricas que novas democracias se beneficiam ao se estruturarem sob a forma federativa de estado por reduzirem o poder central. Os recentes eventos ocorridos no Brasil, tem posto em evidência que o governo federal, ao longo dos anos, acumulou grande poder de imposição da sua agenda aos governos subnacionais pelo caminho de sucessivas emendas constitucionais. O fenômeno acima abordado é tratado tanto na grande mídia como nos círculos acadêmicos como um método democrático normal e regular de alcançar os resultados políticos. As emendas constitucionais examinadas em conjunto demonstram outro lado do problema: com enfraquecimento dos governos subnacionais e reduzindo o potencial de alternância e interferência no poder central mediante o enfraquecimento das lideranças regionais e locais.

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Palavras-chave: democracia, federalismo, direito fundamental, escolhas públicas.

1 INTRODUCTION

This paper encompasses a partial conclusion of a doctoral research developed in the scope of the Post Graduate Program in Law of the Universidade Estacio de Sá – PPGD UNESA. The subject is the federative distribution of financial resources in Brazil and its relationship with the formulation and planning of public policies in the fulfillment of fundamental rights analysis.

The text is the result of a survey and bibliographical research seeking a cross-sectional view of the process of increasing centralization of resources and attribution for public policy definition in favor of the federal government in the years following the promulgation of 1988's brazilian Constitution (CRFB).

The method is critical and analytical in which the various thesis are explained and stressed its contradictions and inconsistencies with regard to the characterization of an institutional normality regarding the losses of autonomy successively imposed on Brazilian states and municipalities over the last 30 years.

Some explanations along the article development, despite being unnecessary to Brazilian readers, were made to clarify to a foreign reader some particularities on legislative system and structure otherwise wouldn't be compreensible.

The text is developed in 5 parts: the first is this one was the content and premises are exposed in order to clarify the concepts, method and research's main objective.

The second part is a summary narrative of the gradual and continuous centralization of tax resources promoted by federal government trough successive constitution amendments and federal laws that reduced the partial entities capabilities as well as in the scope of public policies definition, to make them mere executors of the wills of the holders of federal power.

The next part presents David Landau's concept of abusive constitutionalism, and some Mark Tushnet aports with which the article intends to dialogue and to face critically the issue of

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the de-characterization of the Constitution and the weakening of democracy as a result of a process of successive regulatory changes.

The forth part compiles the literature that studied the Brazilian federation in a descriptive way, wich formulates as a theory to justify Union's centralization of funds and political decisions, based on historical, cultural and political arguments, not stressing the problem of successive states and municipalities fiscal crises, always dependent from Union's resources.

Finally, the fifth part presents an alternative view of the issue by criticizing the more conservative positions, especially in the recognition federalist's geographical distribution of power as an instrument for measuring the degree of democracy and, consequently, the applicability of the theory of abusive constitutionalism to centralized operation after the enactment of the CRFB. The last part is a summary on the paper bringing the main arguments that can possibly support that a successive and massive modification on brazilian constitution expresses a form of abusive constitutionalism.

The contribution of this work is to add to the premises above, beyond the functional distribution of power, and the protection of fundamental rights, the territorial distribution of the attributions regarding the exercise of this same state power. Thus, it is intended to affirm that the geographical distribution of state power in its founding text is a relevant and democratic component, of dispersion of the state force and closer approximation, in concrete physical terms, between the citizens and the government giving greater capacities of limitation and control.

2 A BRIEF HISTORY OF THE BRAZILIAN CONSTITUTIONAL TAX SYSTEM OF 1988 CONSTITUTION

The 1988 Brazilian Constitution was the result of a National Constituent Assembly that aimed to bring back democracy to brazilian state after a 24 years authoritarian ruling.

In its previous period many civil rights as freedom of information and expression were suppressed. People was killed for multiple reasons without trial, some of them for crimes of opinion. Newspapers were chut down by the regime without any kind of due process.

The presidential elections were made by an electoral college by the National Congress in wich one third of the Senate was nominated by the rulers. Some governors and mayors, from

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some, so called, strategic states and municipalities, were appointed by the federal rulers. There were also courts of exception, dismissal of congressmen and Supreme Courts judges, etc[2].

Obviously, the fiscal structure was heavily centralized on the Union, which had the role of distributing resources to subnational entities as ways to control policies.

In its original text, the Brazilian Constitution (CFRB) has brought a great expansion in the tax field for tax ownership of states and municipalities (the latter raised to the exceptional position of entities of the federation)[3].

Briefly, the States received tax on commerce called (ICMS, however, with the possibility to tax also communication services, interstate and inter-municipal transportation, and electric energy and natural gas); tax on vehicles ownership (IPVA), tax on heritage and donation (ITCMD) and the additional tax on income tax (under the same tax base of the IR of the Union).

The Municipalities maintained the tax on properties (IPTU) and the tax on local services (ISSQN), tax on real-state assets transfer (ITBI) and a new tax on liquid and gaseous fuels and on petroleum products commerce (IVVC).

The Federal District owns state and municipal competences in its territory.

The federal government had the power to institute and collect revenew tax (IR), and tax which regulation has a great influence on economic field such as tax on industries (IPI), tax on exportation (IE), tax on imports (II) and tax on financial and credit (IOF). The Union also maintained extraordinary jurisdiction for the imposition of other taxes not listed in the CFRB, and also for the institution of social contributions and intervention in the economic field.

However, the CFRB kept the ruling for the uniform application of tax law at the national level, giving the Union the power to issue complementary laws on general tax law and the essential elements for taxation, which quorum for approval is half plus one of the members of parliament, in which the fact that generates the taxes listed in the chapter that regulates the tax system must be detailed in a federal law.

[2] For a brief contact with the theme see ARAUJO, Maria Paula Nascimento. Lembranças do golpe - 1964. Topoi (Rio J.), Rio de Janeiro, v. 15, n. 28, p. 8-21, June 2014 . Available from <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S2237-101X2014000100008&lng=en&nrm=iso>. access on 22 July 2019. http://dx.doi.org/10.1590/2237-101X20140000100001. Last access 22/07/2019.

[3] See BARROSO, L.R. A derrota da federação: o colapso financeiro dos Estados e Municípios. In Revista de Direito da Procuradoria-Geral do Estado do Rio de Janeiro, n. 53, 2000, p. 109. Also ARAGÃO, A. S. Federalismo em crise: aspectos constitucionais dos contratos de empréstimo entre entes federativos. In: Revista Brasileira de Direito Público, n. 22, 2008, p. 75.

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The constituent, knowing the political interferences that could affect the rents of the political entities due to the delay in the edition of the norms defining the competences limits mentioned above, disposed in art. 24 of the political charter as to the effectiveness of the new tax system, granting States (and by interpretation to the Municipalities) the possibility of issue laws imposing new taxes until the Union regulates matters by means of the edition of those complementary laws. This would immediately give the possibility of access by the partial political entities to the revenues conferred on them by the constituent process.

The Union, however, did not use its powers to regulate the system, especially those "new" taxes, relegating the States, the Federal District and the thousands of Municipalities, the burden of the institution without the constitutional detailment of parameters of a national law.

The absence of federal regulation produced a wave of lawsuits adressing the validity of the States and municipalities laws. The Brazilian Supreme Court (STF) has issued decisions declaring those laws unconstitutional due to the federal regulatory vacuum. The omission in the regulation by a complementary law of the said taxes was the basis of these actions and the decisions of reception of the lawsuits.

The Union, which has showed no interest in ruling those taxes, approved Constitutional Amendment 3 (EC 3/1993) in which it creates for itself a new tax (on money transfer - IPMF) and, in the same normative text, extinguishes the additional tax to the tax of incomes and profits (IAIR) from States competence and the tax on fuels (IVVC), from Municipalities competence[4].

The art. 2nd paragraph 3 from the EC 3/1993, also removed the reciprocal tax immunity from taxes, the principle of anteriority and immunity in gold operations. That is, the new tax would also be levied on the income of States and Municipalities.

Its reasonable to say that the EC 3/1993, by abolishing the power to impose those taxes, was not the only blow to the autonomy of regional and local governments. Also occurred the first of many changes in the art. 167, subsection IV of the Constitution, as well as the introduction of paragraph 4 to the said article, increasing the Union's ability to withhold mandatory revenues from States and Municipalities and the use of taxes as collateral for credit operations in anticipation of revenues. This same mechanism was the subject of two other amendments by EC

[4] The EC 3/1993 entered the Brazilian jurisprudence history as the first case in wich our Supreme Cort enforces its power to review amendments constitutionality, declaring unconstitutional the aforementioned art. 2nd paragraph 3rd. However, no decision was made on partial entities revenue suppression.

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29/2000 and EC 42/2003, this last one currently in force, increasing the possibility of retention of revenues and blocking of resources by the federal government.

EC 17/1998 abolished transfers of revenues from the Municipal Participation Fund in relation to the portion of federal taxes earmarked for the Emergency Social Fund, by withdrawing these resources from the basis of the share of the municipalities, redirecting other percentages of you pass through.

EC 19/1998, specifically in the financial field, redrafted art. 167 of the Federal Constitution, adding section X that prohibits the use of resources of voluntary transfers and loans for the payment of active and inactive personnel, also modifying the content of art. 169 to create limitations on public expenditures with personnel.

The centralization of skills did not stop there. An immunity from the main state tax (ICMS) for foreign goods movement and services was granted (EC42/2003), with the promise of compensation to the exporting States for losses of collection. The Union payments ceased shortly after the first transfer[5].

3 A REMARK ON ABUSIVE CONSTITUTIONALISM

The use of constitutional law and the theory of constitution or constitutionalism institutes as an instrument of external legitimation of government actions is not exactly new.

As David Landau (2013, 198) recalls the Nazy party legitimately ascended to power in Germany through vote according to the Weimar Constitution rules and later installed its authoritarian regime.

The novelty of Landaus works in, so-called, abusive constitutionalism is to recognize that, after the strengthening of democracy in the international order as a value to be protected[6], the use of the instruments and institutions of the democratic constitutional political regime as a means of

[5] The combined loss amount from States is estimated on R$ 82,000,000,000.00 (eighty-two billion reais) over a 15 years time elapsed.

[6] A great deal of scholars support the existence of a fundamental right to democracy as a result of its positivation in international rights documents. The art. 21 of the Universal Declaration of Human Rights clearly sets out the basic elements of democracy (UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid /3ae6b3712c.html [accessed 8 February 2019]) and the United Nations Resolution on Promoting the Right to Democracy (UN Commission on Human Rights, Promotion of the Right to Democracy, 27 April 1999, E / CN.4 / RES / 1999/57, available at: https://www.refworld.org/docid/3b00f02e8.html [accessed 8 February 2019]).

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installing and/or strengthen authoritarian political regimes that seek to weaken democracy by presenting the formal, legal and democratic legitimacy of the international order.

The problem, however, is that not simple as Landau acknowledges. First, it is necessary to establish the point of departure of the problem. After all, the very concept of democracy is not unambiguous, since there is a great deal of doctrinal divergence in the field of law, political science and political philosophy[7].

Along with those technical problems, which can completely alter the way in which one interprets what would ultimately characterize the regression to democracy, Landau admits, that is the main core to seek the degree of intervention and regression. After all, as we shall see, the concept of abusive constitutionalism with which David Landau works is the use of constitutional mechanisms to impose a democratic setback. If this is so, it is a comparative concept: the degree of democratization already achieved, vis-a-vis, the new regime in operation.

A third point of difficulty immediately identifiable, which is interwoven with the second, is what might be the degree of democratization. The author points out that the spectrum of democratization is extremely broad, recognizing the existence of "varying degrees between hybrid types or competitive authoritarian regimes and completely democratic and completely authoritarian regimes" (LANDAU, 2013, 195). Therefore, the comparative imputation of a setback in the democratic environment, a factual and not just a juridical aspect, will depend on claiming the existence of an ideal type of democracy, for which regimes should tend, and the previous stage of the state examined.

Landau (2013, 195) conceptualizes abusive constitutionalism as the use of mechanisms of constitutional change, through formal processes (constitutional amendment and/or constitutional substitution) and informal changes of the founding text itself, with the objective of making a particular state meaningful less democratic.

[7] GOYARD-FABRE, Simone. Os princípios políticos filosóficos do direito político moderno. Tradução Irene A. Partennot. São Paulo, Martins Fontes, 2002, pp. 343 a 345, the author explains the different conceptions of democracy and its crisis. Democracy under the scrutiny of sociological theories is the subject of analysis by HABERMAS, Jürgen. Direito e democracia: entre facticidade e validade. Volume II. Tradução Flávio Beno Siebeneichler. Rio de Janeiro: Tempo Brasileiro, 1997, p. 59 a 73. Também Bobbio (2000, 56), will treat democracy by its representative aspect. According to the author: "The term 'representative democracy' generically means that collective deliberations, that is, deliberations concerning the whole collectivity, are taken not directly by those who are part of it but by persons elected for this purpose. Sergio Costa (2001), traces a panorama of the meanings of expression in a complex world with recognized crises.

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Landau's concern and subject of study is what might be called comparative texts and, in a sense, governmental status, having as main subject of analysis changes that have occurred or are in progress in the experiences, mainly of Colombia (LANDAU, 2013, 200), Venezuela (LANDAU, 2013, 203) and Hungary (LANDAU, 2013, 208), pointing out some examples in Latin America (LANDAU, 2013, 207) as Honduras and Ecuador.

The relevance of the work is to show the limitations of the tool available to international institutions for the renewal of internal democratic order, harmed by the use of abusive constitutionalism, mainly due to the formal legitimacy for those modifications occurred in the constitution itself or in the interpretation of domestic law.

The author also warns about a degree of political opportunism that significantly interferes with the decision to change the constitution with an example of a situation in an unsuspecting country regarding democratic culture and degree of democratization. The example is Japan, whose constitution is relatively simple to be modified and in which the then Prime Minister, taking advantage of the formation of an eventual majority to modify the Founding Text, establishes greater powers to keep his party ruling (LANDAU, 2013, 192).

David Landau's work sustains that a way to prevent the abusive constitutionalism is to entrench in constitucions with rules that protects fundamental wrights and democratic features by forbiding amendments in such matters (2013, 228).

Another example on the use of abusive constitutionalism is described in a Mark Tushnet's empirical research on Singapore's constitution (2015, 391) that claims some of the same points.

Tushnets study, however, adresses another aspect: the fact that, even authoritarian regimes, manage to approve constitutions. On that research the author seeks to understand why the rulers had the concern to constitutionalize rules precisely in countries where the limitation of state's power vis the citizens is not a real concern.

Making a methodological remark the author, points out that, the great majority of academic research in political science that deals with constitutional systems is merely descriptive but not prescriptive (TUSHNET, 2015, 421), although written under an eminently normative background. So, in his work he tries to bring some prescriptive conclusions. Tushnet (2015, 422) also states that it is important to critically analyze the texts of countries with hybrid regimes to gauge the true degree of democratic institutionalization.

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Tushnet also, points out that in Ginsburg and Simpser works one of the possible causes for constitutionalize authoritarian regimes. That would be the use of the constitution as a manual of conduct to ease the relation within the dominant authoritarian group and not exactly like contention of the power of the leaders.

In addition, according to him, constitutionalisation, by conferring some degree of independence on the courts and, consequently, controllability of certain conducts, would be used to confer legitimacy on authoritarian groups because the costs of violating constitutional norms are higher, the authoritarian rulers proposes commitments to his subjects in order to broaden their legitimation (TUSHNET, 2015, 422).

Realizing the relevance of Landau's work, Tushnet (2015, 433) also offers his contribution, totally pertinent to what is supported in the present work, in describing abusive constitutionalism and its characteristics:

> Abusive constitutionalism has several features. First, it involves, the use of constitutionally permissible methods to modify an existing constitution. Second, it involves the adoption of numerous amendments to the existing constitution. Third, taken individually, the amendments may not be inconsistent with normative constitutionalism. But, finally, considered as a package, the amendments threaten normative constitutionalism.

Although in Brazil it is very escarce, this very subject is already treated, with some particular approaches, especially in the context of the recent political polarization[8]. However, it is important to recognize the relevance of the idea of using ways of constitutionalism as a mechanism to legitimize actions against the democratic institution.

A brazilian view on the matter of constitutional amendments limits, dispite the provision intrenched on CFRB's article 60, paragraph 4th that forbids constitutional emendments on separation of powers, federalist State's form and fundamental wrights, it has been stablished on brazilian's majoritarian scholars that this is a exceptional ruling that can not be interpreted in a radical manner[9]. So they agree that CRFB can and shall be modiffied as a democratic principle, and only a clear violation on those sensible principles can be caracterised as null and void.

[8] As exemples I quote : BENVINDO e ESTORILIO (2017), NUNES (2017, 37-62), ACUNHA (2017) and CAPECHI NUNES (2018).

[9] As exemples can be quoted BARROSO, L.R. (**Curso de Direito Constiticional Contemporâneo.** Os conceitos fundamentais e a construção do novo modelo. São Paulo: Saraiva, 2009, p. 169) and VIERA, O. V. **A Constituição e sua reserva de justiça.** São Paulo: Malheiros, 1999, p. 247.

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Therefore, the concept of abusive constitutionalism, with the development added by Tushnet above transcribed, would have as characteristics, in addition to the instrumental use of constitutionalism, in particular, the regular exercise of political power formally conferred on the holders of this power, to extend its degree of influence and permanence of the group in the government, the care to do it in a way to alter the character of the constitutional project not through a sudden change and immediately noticeable, but a set of successive changes that have, as a final result, the reduction of the degree democratization of the country or regime examined, threatening the integrity of the constitution.

4 DECENTRALIZED STATE IN BRAZIL AND PARTIAL LOSS OF COMPETENCES

The scholarchip on federation and federalism following the promulgation of the 1988 Constitution is extensive, showing concern on it. The referred literature, in general, tends to be descriptive using an approach to point out the historical and cultural characteristics on brazilian federation structuration, often dating back to the colonial period.

However, alongside this extensive production, the law and political science studies shows more concern with the functional distribution of power than is the characteristic of political regimes that establish the rule of law, with the existence of a system of reciprocal controls between the functions of administering, legislating and judging. Geographical distribution of competencies is often presented only as a form of state organization, a simple means to an and approach.

It implies, therefore, to recognize, first, that the association among the geographic distribution of state's power and democracy is a very controversial question, and it can not be affirmed with a precise and absolute degree that the federative form of state is a sine qua non for the recognition of the presence or absence of a democratic regime in a given sovereign country. The federated form is not numerically the most frequent in the world, let alone in the set of countries recognized as democratic states.

Therefore, the premise of territorial subdivision not immediately allow theoretical construction's of abusive constitutionalism application only by simple regard to constitutional or infraconstitutional changes that reduces or limits partial entities powers in federal states.

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In addition, however, there is still the question of the existence or not in the Brazilian constitutional text of institutional figures that reinforce the veto players, in order to prevent CFRB modifications to weaken States and Municipalities powers.

Arretche (2009, 411; 2013, 70), who has an extensive work on brazilian federation analysis on the capabilities or attributes of partial entities, points out precisely to this specific factor, namely: the ease of constitutional amendment in Brazil majority of 3/5) in 2-round votes in the same legislative session, as an evidence of constitutional (at least formal) compatibility with the historical process of partial bodies gradual and deeper limitations of powers.

The mencioned author points out, with graphical and statistical analysis, how the representative body in brazilian Congress vote for successive constitutional amendments and complementary[10] and ordinary statutes, restricting the powers of States and Municipalities, whether in the specific field of taxation and also on public policies (ARRETCHE, 2013, 80-83).

Therefore, it is not possible, at least from the strictly formal and normative point of view, to affirm that there is a CFRB's frank and open violation. After all, according to the author, the CFRB legislative due process was observed. The parliament approved by means of the quorum envisaged, and established the restrictions of financial autonomy, or even in public policies metters, imposing to States and Municipalities only the execution of structured policies sized in the central government.

However, part of the political philosophy recognizes the reciprocal influence that the geographical distribution of power is capable of exerting in the creation of instruments and mechanisms of veto to the central political power limiting and controlling both the concentration and the prolonged permanence of a specific political group in the control of the State.

Bobbio (1999, 22) argues that the geographical distribution of power as means to identify a despotic government from a non-despotic government. As he says:

> One of the traditional ways to distinguish a despotic government from a non-despotic government is to observe the greater or lesser presence of so-called intermediate bodies, and more precisely, the greater or lesser distribution of territorial and functional power between rulers and ruled.

[10] In brazilian constitutional system there is a special kind of statute called lei complementar (complementary statute), that is used to normatize some special themes that demands a more extensive agreement. The complemenatry statute has a special kind of legislative process and must be approved by a majority of 50% of the congressman plus one.

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Bobbio, Matteuci and Pasquino (2000, 479), describe the existence of two conceptions of federalism. The first, in the well-known sense of territorial organization of political power. The authors, however, affirm the existence of another ideological conception of federalism as an ideal of a society without frontiers and without conflicts between political entities, such as that defended by Kant of perpetual peace. According to this concept, federalism, implies the ideal of peace among peoples.

Later, the same authors, in the development of the entry, in their Dictionary of Politics, explain how competency sharing (BOBBIO, MATTEUCI and PASQUINO, 2000, 482):

> The distribution of territorial base power is, in fact, far more effective than the functional basis for securing a divided control of power, the main guarantee of political freedom, since both the Federal Government and the Member States, can base their independence on a distinct social basis. Hamilton in fact stated that the federal regime allows "to expand area of popular government".

The axiological character of federalist distribution, as stated above by Bobbio, also brings reflexes in the reduction of the concentration of power, minimizes conflicts and, consequently, brings peace.

It is the Italian philosopher himself (BOBBIO, 1999, 22), however, who, examining the problem of power sharing in the abstract, warns against the risks of excessive dispersion that would not be in any way compatible with the ideal of political pluralism, but, on the contrary can represent the complete loss of state function "by the prevalence of particular, sectoral, and group interests over the general interest, of centrifugal tendencies over centripetals, of the fragmentation of the social body instead of its beneficial disarticulation."

Arend Lijphart (2019) also adopts as criterion of distinction of degrees of democracy the geographical dispersion of power. For the author, although not entirely satisfactory for the explanation of democracy, the federal-unitary dimension is relevant in assessing the degree of democratization due to the diffusion of power from the center to the extremities, and to independent institutions (LIJPHART, 2019, 27).

Finally, it should be noted that all the above-mentioned works, especially those that oppose the correlation between democracy and federalism, have adopted methods of analysis that may undergo the methodological critique presented by Tushnet (2015, 421) as to its eminently descriptive character a reality.

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To be clearer, although the reality of the political-partisan practice described by Marta Arretche (2013) showing the mechanism that was adopted over the years in brazilian's legislature, including, to the exercise authorized constituent power, to extend the tax imposition and the for public policies, due the detriment of the powers of intermediary bodies, and reversing the original design of the Constitution, the simple argument of veto powers to those changes is not enough to avoid constructing another reading of reality.

Firstly, once again, remarking Tushnet's approach (2015, 433) the search for the opposition to the said conclusions regarding the Brazilian case is sought.

The use of constitutional amendments and other legislative instruments to change the commitment of competences to partial entities was a process of successive changes in the normative and factual frameworks.

After all, the simple approval of an amendment with punctual changes in the distribution of incomes, re-equating the access of states and municipalities wouldn't be enough to make it null and void. But the frequency and the extent of those sucessive changes, had turn the previous system completely distorted[11].

In a comparative study on federal tax distribution before and after 1988's CFBR, Afonso e Junqueira (2008, 5), stresses that brazillian States incomes are been massively reduced and that the central governmente increases it's revenew in the process, as they show in the Table 1:

TABLE 1

COMPOSIÇÃO FEDERATIVA DA RECEITA TRIBUTÁRIA

em %

Conceito	Carga	Central	Estadual	Local	Total
	% PIB	Composição – % do Total			
ARRECADAÇÃO DIRETA					
1960	17,41	64,0	31,3	4,7	100,0

[11] Celina Souza points out that 35% of constitutional emendments in Brazil, from 1988 to 2008 encompasses tax fiscal law themes. SOUZA, C. Regras e contexto: as reformas da Constituição de 1988. In **Dados**: Revista de Ciências Sociais, Rio de Janeiro, v. 51, n. 4, 2008, p. 802. In the same sense, see VALLE, V. L.. Transição política e construtivismo constitucional: Uma análise empírica das emendas constitucionais brasileiras. In CAMARGO, Margarida Maria Lacom; LOIS, Cecília Caballero; MARQUES, Gabriel Lima. (Org.). **Democracia e jurisdição: novas configurações brasileiras.** 1 ed. Rio de Janeiro: Imo's Graf. e Ed., 2013, v. , p. 355) who shows that the proportion in 2013 was 22%, from total of 82 constitutional emendments.

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1980	24,52	74,7	21,6	3,7	100,0
1988	22,43	71,7	25,6	2,7	100,0
1994	29,75	67,8	27,1	5,1	100,0
2007	36,42	69,2	25,3	5,4	100,0
RECEITA DISPONÍVEL					
1960	17,41	59,5	34,1	6,4	100,0
1980	24,52	68,2	23,3	8,6	100,0
1988	22,43	60,1	26,6	13,3	100,0
1994	29,75	59,3	25,1	15,6	100,0
2007	35,50	58,0	24,7	17,3	100,0

Source: STN, SRF, IBGE, Ministério da Previdência, CEF, Confaz e Balanços.

The National Tax Methodology (Metodologia das Contas Nacionais) includes all taxes presents in Brazilian System (impostos, taxas e contribuições, inclusive FGTS, Sistema "S", juros da dívida ativa).

Total reveneu including all constitutional and legal transfers received and concided.

A most recent number is presented by José Roberto Afonso. On a recent interview to Valor Economico's journalist Marta Watanabe (2019), Afonso points out that the reduction had met the mark of 22%, with a prognosis of achieving 20% at the and of current year.

It means that from 1988 to 2018, States incomes had been drasticlly reduced to 80% from the original constitutional provision[12], and pretty close to only 70% from the original constitutional proposal.

Obviously, despite all previous objections on the subject, specially the brazilian's scholars points of view, it is correct to say that a 30% decrease on States budget, causes a broad impact on its capabilities to provide services and law enforcement.

5 CONCLUSIONS

There is not a absolute pattern to be applied nor to federalist states neither to democracies. It will always depend on what each constitution provision and how it is interpreted by its institution.

[12] Notice that CFRB was promulgated in october 5th, so the first real valid statistical number for brazilian tax distribution is 1994's one. Therefore, from 1994's total income on 27,1 %, to 20%, is a 7% reduction.

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That been said, is to say that the regular and normal institutions of democracy like, free, just and regular elections, freedom of speech, partisenship, alternation of access to ruling, will be premises to look for.

Federalistic organizational government, on the other hand, has many and broad is shown in many ways, and to stablish an ideal type would br arbitrary.

Dispite these initial remarks, we can not possibly forget to remark that CFRB had entrenched in its article 60, paragraph 4th, an absolute prohibition the approval of amendments that can harm the federal organization.

David Landau's abusive constitutionalism, that stresses the problem on the use of constitutional instruments to harm democracy, can be read in brazilian context, as it is completed by Mark Tushnet's remarks, that sustains the possibility of a progressive inconstitutionality by the sucessive use of constitutional emendments that completely alters the original constitutional ruling, altering the core dispositions of constitutions.

That been said, I believe that, despite all sutil dificulties above mentioned, it is problable that the progressive way in wich the brazilian congress had alter States and Municipalities atributions, specially on tax law and public policies agenda, may caracterize a form of abusive constitucionalism, in the way Tushnet caracterizes it, by descaractrization of original terms intrenched in Brazilian Constitution little by little, putting States subjeted to Union's power.

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