

THE ENFORCEMENT OF THE 1937 CONSTITUTION AND ITS USE FOR THE COMPULSORY RETIREMENT OF CIVIL SERVANTS, MILITARY PERSONNEL, AND MAGISTRATES.

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Resumo: Este ensaio trata da Constituição de 1937 no que diz respeito à aposentação compulsória de funcionários públicos civis e militares, inclusive magistrados por parte dos chefes de governo, sem a necessidade de fundamentação fática por parte nos termos do ser art. 177. Dialoga sobre a existência prática e vigência da Constituição Brasileira de 1937 e sua aplicação durante o período do Estado Novo. Trata da sua aplicação jurídica e seu manejo para o afastamento de servidores públicos. Também sobre o entendimento do Supremo Tribunal Federal do Brasil sobre o tema na época. Conclui pela aplicação, vigência e importância prática da Constituição de 1937 e pela sua ampla utilização para a aposentadoria compulsória de funcionários públicos estáveis, inclusive magistrados, com a confirmação desses atos por parte do Supremo Tribunal Federal, que interpretou o dispositivo de maneira a dar a mais ampla aplicabilidade possível dessa faculdade ao poder executivo.

Palavras-chave: Constituição Brasileira de 1937; Aposentadoria compulsória de servidores públicos; Entendimento histórico do Supremo Tribunal Federal.

Abstract: This essay aims the 1937 Constitution with regard to the compulsory retirement of civil and military civil servants, including judges, by chief of government, without the need for factual justification under the terms of art. 177. Discusses the practical existence and effectiveness of the Brazilian Constitution of 1937 and its application during the Estado Novo period. It deals with its legal application and its management for the removal of public servants. Also on the understanding of the Federal Supreme Court of Brazil on the subject at the time. It concludes by the application, effectiveness and practical importance of the Constitution of 1937 and by its wide use for the compulsory retirement of stable civil servants, including magistrates, with the confirmation of these acts by the Federal Supreme Court, which interpreted the device in a way to give the widest possible applicability of this faculty to the executive power.

Keywords: Brazilian Constitution of 1937; Compulsory retirement of public servants; Historical understanding of the Federal Supreme Court.

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Introduction

It is well known that despite being a subject of great interest in the study of Brazilian History, the Estado Novo (New State) ends up not being extensively explored in Constitutional History studies, especially when it comes to Brazilian constitutionalism. However, the country still experiences various consequences of this period, including in terms of legislation, since several legal instruments from that era are still in force (the Consolidation of Labor Laws, the Penal Code, and the Code of Criminal Procedure, for example, despite having undergone reforms, still date from this period) or were created or reformed based on what was constructed during the period the 1937 Constitution was in force.

Little reflection is made on the 1937 Constitution, including questioning its very existence or receiving the designation of "non-Constitution," as we will see below. Nevertheless, its manipulation should be of interest regarding the way power was exercised in that dictatorial scenario. Notably, in the case of this essay, we ask whether and how the 1937 Constitution served as a legal instrument for the arbitrary dismissal of civil servants and military personnel. To this end, we will analyze bibliographic material on the subject and examine the understanding of the Federal Supreme Court at the time.

For this purpose, we will use some specific articles on the case as support and base material. But mainly we will rely on historical documents such as, notably, the 1937 Constitution itself, the publication of the Cohen Plan in the newspaper, and the National Security Laws.

To understand the jurisprudential position of the Federal Supreme Court on the subject, we analyzed all judgments based on Article 177 of the 1937 Constitution, according to the Federal Supreme Court's own artificial intelligence search system, even though some of these decisions were rendered after the 1937 Constitution ceased to be in force. With this, it is possible to verify whether the 1937 Constitution was actually used for the arbitrary dismissal of civil servants and military personnel and how the Judiciary positioned itself in relation to such facts.

We will verify that the 1937 Constitution had a centralizing, authoritarian, and autocratic character. That, going against the constitutionalist movement, it was granted with the

objective of facilitating the totalitarian exercise of power and that it effectively served this purpose.

Then we will address how Article 177 of the 1937 Constitution served to arbitrarily dismiss civil servants and military personnel and how this was treated in the legal universe, notably with regard to the understanding of the Federal Supreme Court.

Finally, we conclude that the 1937 Constitution served for the arbitrary exercise of the power to dismiss tenured civil servants without any factual basis and that the Federal Supreme Court lent itself to endorsing this practice, including interpreting the 1937 Constitution in the manner that most expanded the dictatorial powers of the President of the Republic and other heads of government as much as possible. In short, historical documents indicate that, at least with regard to the arbitrary dismissal of civil servants, contrary to what the bibliography indicates, the 1937 Constitution was indeed an effective legal instrument and was wielded for the persecution of political opponents.

1 The enforcement of the 1937 Constitution

In 1935, taking advantage of the revolts that became known as the *Intentona Comunista* (Communist Uprising), the Vargas government was able to expand its authoritarian powers to persecute opponents under the accusation of subversion.

The National Security Law, Law 38/1935, was enacted, establishing crimes against the political and social order. This law was filled with open-ended criminal provisions and vague expressions, a clear sign that any government opponent could be punished under it. Nevertheless, it still maintained some formal level of defense guarantees, specifying certain procedural guarantees, particularly in relation to foreigners and civil servants.

To concentrate more power and be able to persecute opponents more freely, the government needed a declaration of war, which would allow it to suspend rights such as the procedural guarantees of those it persecuted. However, this was not possible because, under Article 161 of the 1934 Constitution, the suspension of constitutional guarantees could only occur by virtue of a declaration of a state of war, and the Legislature understood this reference

to apply only to external war. To increase the level of authoritarianism, it was necessary to amend the Constitution.²

The idea was to allow for the suspension of constitutional guarantees in cases of "intestine commotion." But this posed several problems, beyond the obvious problem of seeking to prevent the Constitution from fulfilling its functions of limiting state power and preventing the arbitrary exercise of political power. First, the Constitution could not be amended during a state of siege, which was circumvented by means of a decree suspending the state of siege for two days (December 17 and 18, 1935) in a maneuver that clearly rendered the constitutional limitation meaningless.

But there was another issue imposed by the constitutional text. Article 178 of the 1934 Constitution distinguished between constitutional amendment and constitutional revision, the latter situation applying when the alteration has a substantive constitutional character with a qualified legislative procedure.³

² MARQUES, Raphael Peixoto de Paula. Repressão política e uso da constituição no governo Vargas: A segurança nacional e o combate ao comunismo. Dissertação, Universidade de Brasília, Faculdade de Direito, 2011. p. 97-136.

³ Art 178 - A Constituição poderá ser emendada, quando as alterações propostas não modificarem a estrutura política do Estado (arts. 1 a 14, 17 a 21); a organização ou a competência dos poderes da soberania (Capítulos II III e IV, do Título I; o Capítulo V, do Título I; o Título II; o Título III; e os arts. 175, 177, 181, este mesmo art. 178); e revista, no caso contrário.

§ 1º - Na primeira hipótese, a proposta deverá ser formulada de modo preciso, com indicação dos dispositivos a emendar e será de iniciativa:

- a) de uma quarta parte, pelo menos, dos membros da Câmara dos Deputados ou do Senado Federal;
- b) de mais de metade dos Estados, nos decurso de dois anos, manifestando-se cada uma das unidades federativas pela maioria da Assembléia respectiva.

Dar-se-á por aprovada a emenda que for aceita, em duas discussões, pela maioria absoluta da Câmara dos Deputados e do Senado Federal, em dois anos consecutivos.

Se a emenda obtiver o voto de dois terços dos membros componentes de um desses órgãos, deverá ser imediatamente submetida ao voto do outro, se estiver reunido, ou, em caso contrário na primeira sessão legislativa, entendendo-se aprovada, se lograr a mesma maioria.

§ 2º - Na segunda hipótese a proposta de revisão será apresentada na Câmara dos Deputados ou no Senado Federal, e apoiada, pelo menos, por dois quintos dos seus membros, ou submetida a qualquer desses órgãos por dois terços das Assembléias Legislativas, em virtude de deliberação da maioria absoluta de cada uma destas. Se ambos por maioria de votos aceitarem a revisão, proceder-se-á pela forma que determinarem, à elaboração do anteprojeto. Este será submetido, na Legislatura seguinte, a três discussões e votações em duas sessões legislativas, numa e noutra casa.

§ 3º - A revisão ou emenda será promulgada pelas Mesas da Câmara dos Deputados e do Senado Federal. A primeira será incorporada e a segunda anexada com o respectivo número de ordem, ao texto constitucional que, nesta conformidade, deverá ser publicado com as assinaturas dos membros das duas Mesas.

§ 4º - Não se procederá à reforma da Constituição na vigência do estado de sítio.

§ 5º - Não serão admitidos como objeto de deliberação, projetos tendentes a abolir a forma republicana federativa.

The draft already brought a valuable innovation to the constitutional amendment process, but the text of the Constitution was masterful, recreating an idea from the Imperial Constitution that restricted what should be considered constitutional.

Article 178 established the distinction between amendment and revision.

In the case of modification of the political structure of the State, the organization or competence of the powers of sovereignty, according to the provisions it mentioned, it would be a revision. Outside these cases, it would be an amendment.

For amendments, the procedure was simpler, including the initiative; for revision, there would be greater rigidity.

The idea was pertinent because it reconciled the length of the constitutional text, which invaded improper subject matters, with the possibility of greater or lesser rigidity, depending on the intrinsic nature of the provisions.⁴

Finally, even in violation of the procedure provided for in the Constitution itself for its revision, three amendments were approved and incorporated into the Constitution through Legislative Decree No. 6 of December 18, 1935. The first amendment equated a state of war with seriously intestinal commotion, the second amendment imposed the loss of rank on military personnel who participated in subversive acts or movements, and the third imposed dismissal on civil servants who engaged in subversion.⁵

In addition to authorizing the suspension of constitutional guarantees in cases of intestinal commotion, the amendment greatly aggravated these restrictions, since the President was required to specify in the decree of grave intestinal commotion which constitutional

⁴ “Já o anteprojeto trazia uma novidade valiosa para o processo de reforma constitucional, mas o texto da carta foi magistral, criando uma ideia da Constituição do Império que restringia o que devesse ser considerado constitucional.

O art. 178 estabeleceu a distinção entre emenda e revisão.

No caso de modificação da estrutura política do Estado, da organização ou competência dos poderes da soberania, segundo dispositivos que menciona, seria revisão. Fora essas hipóteses, seria emenda.

Para emenda, o procedimento mais simples, incluindo a iniciativa; na revista, haveria maior rigidez.

A ideia era pertinente porque compatibilizava a extensão do texto constitucional, invasor de matérias impróprias, com a possibilidade de maior ou menor rigidez, consoante a natureza intrínseca dos dispositivos.” POLETTI, Ronaldo. *Constituições Brasileiras: 1934*. Brasília: Senado Federal e Ministério da Ciência e Tecnologia, Centro de estudos Estratégicos, 2001. p. 54.

⁵ EMENDA N. 1 “A Camara dos Deputados, com a colaboração do Senado Federal, poderá autorizar o Presidente da Republica a declarar a commoção intestina grave, com finalidades subversivas das instituições politicas e sociaes, equiparada ao estado de guerra, em qualquer parto do territorio nacional, observando-se o disposto no artigo 175, n. 1, §§ 7º, 12 e 13, e devendo o decreto de declaração de equiparação indicar as garantias constitucionaes que não ficarão suspensas.”

EMENDA N. 2 “Perderá patente e posto, por decreto do Poder Executivo, sem prejuizo de outras penalidades e resalvados os efeitos da decisão judicial, que no caso couber, o official da activa, da reserva ou reformado, que praticar acto ou participar de movimento subversivo das instituições politicas e sociaes.”

EMENDA N. 3 “O funcionario civil, activo ou inactivo, que praticar acto ou participar de movimento subversivo das instituições politicas e sociaes, será demittido, por decreto de Poder Executivo, sem prejuizo de outras penalidades e resalvados os efeitos da decisão judicial que no caso couber.”

guarantees "would not be suspended." Thus, the decree would be suspending all constitutional guarantees of citizens when a state of war was declared due to intestinal commotion.

Unlike Art. 161 of the 1934 Constitution, which only authorized the suspension of constitutional guarantees detrimental to national security, after Constitutional Amendment No. 1, the suspension became applicable to all guarantees. It was left to the head of the Executive to indicate, if applicable, the fundamental rights that would not be suspended. The maneuver was unconstitutional, as a simple amendment indirectly altered the declaration of rights (Title III), a matter that could only be modified through a revision.⁶

Several successive decrees declaring a state of war against the intestinal commotion caused by subversive movements were put into practice with the arrest of numerous political opponents, including parliamentarians. Political opponents were held in prison without charge for an indefinite period.

The situation took on another dimension with the probable presidential succession scheduled for 1937 and the consequent decrease in support for the government. This then led to an attenuation in the persecution of government opponents.

Immediately, the Minister of Justice announced that he would humanize the repression of communism and personally visit "the political prisons to assess their hygienic and sanitary conditions and the treatment of the detainees".⁷

Some political prisoners were acquitted. Leaders of the armed forces called for the reestablishment of the state of war.⁸ Such a desire finally found a basis with the "discovery" of the Cohen Plan, which consisted of a series of instructions for the implementation of communism in Brazil.

⁶ "Ao contrário do Art. 161 da Constituição de 1934 que autorizava *apenas* a suspensão das garantias constitucionais prejudiciais à segurança nacional, após a EC nº 01, a suspensão passou a ser de *todas* as garantias. Restava ao chefe do Executivo indicar, se fosse o caso, os direitos fundamentais que *não* seriam suspensos. A manobra era inconstitucional, pois através de uma simples emenda alterava-se, de maneira reflexa, a declaração de direitos (Título III), matéria que somente poderia ser modificada por meio de revisão." MARQUES, Raphael Peixoto de Paula. Repressão política e uso da constituição no governo Vargas: A segurança nacional e o combate ao comunismo. Dissertação, Universidade de Brasília, Faculdade de Direito, 2011. p. 107.

⁷ "De imediato, o ministro da Justiça anunciou que iria *humanizar* a repressão ao comunismo e visitaria pessoalmente "os presídios políticos para inteirar-se das suas condições de higiene, salubridade do local e tratamento imposto aos detidos". MARQUES, Raphael Peixoto de Paula. Repressão política e uso da constituição no governo Vargas: A segurança nacional e o combate ao comunismo. Dissertação, Universidade de Brasília, Faculdade de Direito, 2011. p. 109.

⁸ MARQUES, Raphael Peixoto de Paula. Repressão política e uso da constituição no governo Vargas: A segurança nacional e o combate ao comunismo. Dissertação, Universidade de Brasília, Faculdade de Direito, 2011. p. 97-136.

The Army General Staff seized the action plans organized by the Comintern for the guidance of its agents in Brazil. It is a series of instructions intended to prepare and carry out a communist coup, as will be seen...⁹

Such a plan contained instructions for planning violence, the slaughter of military officers, the agitation of workers and students, freeing political prisoners, inciting intrigue with the Freemasonry, the burning of family homes, the wrecking of newspaper presses, looting, and the rape of women.¹⁰

The dissemination of such a plan terrorized the population and ultimately provided political backing for the resurgence of repression against opponents to a level that was impossible to reconcile, even minimally, with the constitutional text. However, it was later discovered to be a fraud organized by General Góes Monteiro to justify the declaration of a new state of war.

The 1934 Constitution, described by Pontes de Miranda as "the most complete of the American Constitutions at the time," was neither revised nor amended, but torn up by the 1937 coup.¹¹

In its long and gloomy preamble, the 1937 Constitution sought to justify the expansion of the President of the Republic's powers to an autocratic level, the elimination of constitutional guarantees and political freedoms, and the subordination of the judiciary. It explained that the previous institutions (in this case, as provided for in the 1934 Constitution) did not provide the State with "normal means of preserving and defending the peace, security, and well-being of the people," and that its imposition was necessary to meet the demand for "remedies of a radical and permanent character."¹²

⁹ "O Estado Maior do Exército apreendeu os planos de acção organizados pelo Komintern para a orientação de seus agentes no Brasil. Trata-se de uma série de instruções destinadas a preparar e levar a efeito um golpe comunista conforme se verá..." *Correio da Manhã*, sexta-feira, 1º de outubro de 1937.

¹⁰ *Correio da Manhã*, sexta-feira, 1º de outubro de 1937. p. 3

¹¹ POLETTI, Ronaldo. *Constituições Brasileiras: 1934*. Brasília: Senado Federal e Ministério da Ciência e Tecnologia, Centro de estudos Estratégicos, 2001. p. 48.

¹² ATENDENDO às legítimas aspirações do povo brasileiro à paz política e social, profundamente perturbada por conhecidos fatores de desordem, resultantes da crescente a gravação dos dissídios partidários, que, uma, notória propaganda demagógica procura desnaturar em luta de classes, e da extremação, de conflitos ideológicos, tendentes, pelo seu desenvolvimento natural, resolver-se em termos de violência, colocando a Nação sob a funesta iminência da guerra civil;

ATENDENDO ao estado de apreensão criado no País pela infiltração comunista, que se torna dia a dia mais extensa e mais profunda, exigindo remédios, de caráter radical e permanente;

ATENDENDO a que, sob as instituições anteriores, não dispunha, o Estado de meios normais de preservação e de defesa da paz, da segurança e do bem-estar do povo;

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The existence and effectiveness of the 1937 Constitution are questioned. On the occasion of his break with Getúlio Vargas, it was Francisco Campos himself, recognized as the main architect of the 1937 Constitution, who questioned its existence as a legal document, declaring that it had not even come into force.¹³

In fact, the text of the Constitution itself, in its final article, provides for a plebiscite that never took place, but the interpretation that, according to its own text, it never came into force does not seem correct.

Art. 187. This Constitution shall enter into force on its date and shall be submitted to a national plebiscite in the manner regulated by a decree of the President of the Republic.

Officers on active duty in the Armed Forces are considered, regardless of any formality, registered for the purposes of the plebiscite.¹⁴

The constitutional text, therefore, establishes its date as the starting point of its enforcement, and that it would subsequently be submitted to the plebiscite.

Reinforcing this argument is that Art. 175 provided that the president's term would only be extended if the plebiscite were favorable to the Constitution, and Art. 80 established the presidential term of six years. Thus,

since the plebiscite was not held within the timeframe stipulated by the Constitution itself, its enforcement—which, prior to the plebiscite, was of a provisional nature and would only become definitive upon plebiscitary approval—became non-existent.¹⁵

Such an argument, although well-constructed, stems from a false causal relationship. The constitution limits the term of the President of the Republic and conditions its continuation on the approval of the constitutional text by plebiscite, but it does not condition its own

Sem o apoio das forças armadas e cedendo às inspirações da opinião nacional, umas e outras justificadamente apreensivas diante dos perigos que ameaçam a nossa unidade e da rapidez com que se vem processando a decomposição das nossas instituições civis e políticas;

Resolve assegurar à Nação a sua unidade, o respeito à sua honra e à sua independência, e ao povo brasileiro, sob um regime de paz política e social, as condições necessárias à sua segurança, ao seu bem-estar e à sua prosperidade, decretando a seguinte Constituição, que se cumprirá desde hoje em todo o País

¹³ COSTA PORTO, Walter. *Constituições brasileiras: 1937*. Brasília: Ministério da Ciência e Tecnologia, Centro de Estudos Estratégicos, 2001. P. 17

¹⁴ Art. 187. Esta Constituição entre em vigor na sua data e será submetida ao plebiscito nacional na forma regulada em decreto do Presidente da República.

Os oficiais em serviço ativo das Forças Armadas são considerados independentemente de qualquer formalidade, alistados para efeitos do plebiscito.

¹⁵ “não se tendo realizado o plebiscito dentro do prazo estipulado pela própria Constituição, a vigência desta, que antes da realização do plebiscito seria de caráter provisório, só se tornando definitiva mediante aprovação plebiscitária, tornou-se inexistente” COSTA PORTO, Walter. *Constituições brasileiras: 1937*. Brasília: Ministério da Ciência e Tecnologia, Centro de Estudos Estratégicos, 2001. P. 18.

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enforcement on a specific timeframe for this plebiscite to be held. Thus, after the established period of six years from the imposition of the Constitution, without its approval in a plebiscite, the president's continued tenure becomes unconstitutional, but not the Constitution itself, whose invalidation could only occur on its own terms with its non-approval in a plebiscite. It seems curious to speak of the illegitimacy of the presidential term in a dictatorship, under the terms of an authoritarian Constitution imposed by the president himself, but that is the conclusion that can be reached.

Even so, there is a kind of consensus regarding the non-enforcement of the 1937 Constitution. In a recent study (SIQUEIRA, et al. 2020), which analyzed the 28 best-known Constitutional Law books in Brazil, it was found that the understanding explained by Francisco Campos in the aforementioned interview is followed when authors delve deeper into the subject. Most authors argue for the inapplication of the 1937 constitutional text, and some authors do not even write about it.¹⁶

Luciano Abreu, upon noting the lack of specific studies on the 1937 Constitution, highlights the importance of these studies for understanding the thinking of the conservatives of the time and its character as a non-Constitution.¹⁷ He even went so far as to state that it was never institutionalized and effectively applied.

But what the study demonstrates is that this was not quite the reality. Not only did the 1937 Constitution have its period of enforcement according to its own text, but it was also the legal document that regulated a significant part of political and state action during this period. Periodicals addressed the 1937 Constitution, explaining its points and discussing matters concerning the constitutional text. The jurisprudence of the time was largely based on the 1937 constitutional text, for both public and private law matters. And most importantly, the issuance

¹⁶ SIQUEIRA, Gustavo Silveira; AMANCIO, Guilherme Cundari de Oliveira; MARQUES, Francisca Maria Medeiros. A “Constituição esquecida”: O tratamento histórico da Constituição de 1937 nos livros de Direito Constitucional. *Revista Argumentum - RA*, Marília/SP, V. 21, n. 2, pp 531-559, mai-Ago. 2020.

¹⁷ “(...)de outro lado, ainda que ela própria jamais fosse institucionalizada e efetivamente aplicada do ponto de vista jurídico, a Constituição de 1937 representou também um importante momento de institucionalização política do Estado Novo. Nesse sentido, este estudo tem por objetivo analisar o caráter supostamente democrático e corporativo atribuído pelos intelectuais e juristas acima referidos ao Estado Novo e à sua Constituição e, em contraponto, enfatizar o caráter de exceção desse regime e definir a Carta de 1937 como uma não-Constituição, dada sua falta de institucionalidade jurídica.” ABREU, Luciano Arone de. O SENTIDO DEMOCRÁTICO E CORPORATIVO DA NÃO-CONSTITUIÇÃO DE 1937. *Estudos Históricos* (Rio J.) 29 (58) • May-Aug 2016. ISSN 1980 - 8860

of Decree-Laws was based on what was established in the Constitution, both to authorize them and to provide them with guidelines.

In short, the authors manage to refute the thesis of the absolute inapplicability of the 1937 Constitution, and the thesis that it was not in force due to the absence of the plebiscite is also untenable based on its own text.

Despite the denial by both Getúlio Vargas and Francisco Campos of the 1937 Constitution's fascist character, it is difficult to deny this quality. First, as can be inferred from the context and the preamble, it is a Constitution that emerges to concentrate and expand the powers of a central authority, to whom is attributed the messianic task of combating a threat used for this very purpose. It places the country in a permanent state of war and presents itself as necessary for the maintenance of the social structure and the values of society. It does not establish a single party, but it dissolves all parties or, at a minimum, reduces them to charitable associations, which amounts to the same thing.

Immediately, upon its imposition, it dissolves the Chamber of Deputies, the Federal Senate, the State Legislative Assemblies, and the Municipal Chambers (Art. 178¹⁸). It grants the President of the Republic broad legislative power (Art. 180¹⁹). It does not condition the declaration of a state of emergency or a state of war on legislative authorization (Art. 166).

Regarding the judiciary, the Federal Justice system was abolished and its employees were retired (Art. 182²⁰). The Federal Supreme Court, which had already had the majority of its members dismissed in 1931, lost its previous members by virtue of the reduction in the compulsory retirement age from 75 to 68 years (Art. 91, a). Ultimately, the Judiciary was also placed in a situation of subordination to the executive.

The notion of the essential enforcement of individual rights that exists today did not necessarily reflect the role and character of the Federal Supreme Court in the 1930s and 1940s (CONTINENTINO, 2018, p. 105). On the one hand, there was the defense of the Constitution's authority (and the concern with the enforcement of decisions issued by the Court), which was supposed to serve as a focus of legitimacy to quell moments of acute political crisis, preserving national unity and the Federation. The

¹⁸ Art 178 - São dissolvidos nesta data a Câmara dos Deputados, o Senado Federal, as Assembléias Legislativas dos Estados e as Câmaras Municipais. As eleições ao Parlamento nacional serão marcadas pelo Presidente da República, depois de realizado o plebiscito a que se refere o art. 187.

¹⁹ Art 180 - Enquanto não se reunir o Parlamento nacional, o Presidente da República terá o poder de expedir decretos-leis sobre todas as matérias da competência legislativa da União.

²⁰ Art 182 - Os funcionários da Justiça Federal, não admitidos na nova organização judiciária e que gozavam da garantia da vitaliciedade, serão aposentados com todos os vencimentos se contarem mais de trinta anos de serviço, e se contarem menos ficarão em disponibilidade com vencimentos proporcionais ao tempo de serviço até serem aproveitados em cargos de vantagens equivalentes.

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strength of the Federal Supreme Court, therefore, came from taking a stand within the difficult balance with the Executive and Legislative branches. The Supreme Court certainly represented, during the first half of the 20th century, the weakest and most incipient element among the three branches of government. With the dissolution of the Legislature, the STF's position was even more weakened, and it is not surprising that the Court played a role of subservience and omission during the *Estado Novo*.²¹

In this context, we also have Art. 177 of the 1937 Constitution, which provided for the possibility of arbitrary retirement of civil and military personnel "at the sole discretion of the Government,"²² and the question of how this was ultimately handled by the judiciary in this context.

2. Art. 177 of the 1937 Constitution and its legal treatment.

Art. 177. Within a period of sixty days from the date of this Constitution, civil and military personnel whose removal is deemed necessary may be retired in accordance with the legislation in force, at the sole discretion of the Government, in the interest of the public service or for the convenience of the regime.

The Constitution begins by limiting the "witch hunt" to a period of sixty days. This suggests that only opponents and the politically persecuted who were already previously listed would be arbitrarily dismissed.

However, that is not what happened. It seems that the ease of dismissing public servants without the need for a factual basis was very practical for removing and silencing opponents. Thus, in May of the following year, Constitutional Law No. 2 was decreed, which extended indefinitely the power provided for in Art. 177.

²¹ "A noção de imprescindível efetivação de direitos individuais que se tem hoje não necessariamente refletia o papel e a índole do Supremo Tribunal Federal nos anos 1930 e 1940 (CONTINENTINO, 2018, p. 105). Por um lado, tinha-se a defesa da autoridade da Constituição (e a preocupação com o cumprimento das decisões emanadas pela Corte), que deveria servir como foco de legitimidade para debelar momentos de crise política aguda, preservando a unidade nacional e a Federação. A força do Supremo Tribunal Federal advinha, portanto, de marcar posição dentro do difícil equilíbrio com Executivo e Legislativo. O Tribunal Supremo certamente representava, durante a primeira metade do século XX, o elemento mais fraco e insipiente dentre os três Poderes. Com a dissolução do Legislativo, restou ainda mais fragilizada a posição do STF, e não causa surpresa que a Corte tenha jogado papel de subserviência e omissão durante o Estado Novo." Rosenfield, L. (2020). As Encruzilhadas da Justiça no Estado Novo (1937-1945): O Supremo Tribunal Federal e a Idéia de Oligarquia da Toga. *Revista Da Faculdade De Direito Da Universidade Federal De Uberlândia*, 48(1), 134–155. <https://doi.org/10.14393/RFADIR-v48n1a2020-53672>

²² Art. 177. Dentro do prazo de sessenta dias a contar da data dessa Constituição, poderão ser aposentados ou reformados de acordo com a legislação em vigor os funcionários civis e militares cujo afastamento se impuser, a juízo exclusivo do Governo, no interesse do serviço público ou por conveniência do regime.

Constitutional Law, because the context of the 1937 Constitution and the autocratic regime that existed at the time created an entire normative structure in which the Dictator's normative acts could be assigned different positions in the hierarchy of norms, as seen in the example discussed in the Federal Supreme Court in a vote by Justice Goulart de Oliveira:

The appealed decision upholds the predominance of the Law, without considering the arguments of the dissenting opinion, which seeks to create an exception to the sound principle of distinction enshrined by the regime of the 1937 Constitution, by attributing in its Art. 180 to the dictator all the legislative power of the Union, in the absence of the Parliament. I have already had the opportunity to state my conviction here that this circumstance is not sufficient to determine the meaning of all norms emanating from the dictator; rather, it is essential to examine the nature and extent of these rules.²³

Thus, there were Regulations, Decrees, Decree-Laws, et cetera. Now, it is questionable whether, by accumulating the legislative power of the Union through Decree-Laws, the President of the Republic could also amend the Constitution with what would be a "Constitutional Law." The invention seems bizarre, but it is in accordance with the legal understanding of the time, as can be read in this 1952 vote:

There are many decisions by the Federal Supreme Court considering valid and applying the Constitutional Laws that emanated from the 1937 Charter. It is objected that these Laws were decreed by the President of the Republic using the power conferred upon him by Art. 180 of the 1937 Constitution, and that this article merely gave the Head of the Nation, while the Parliament was not assembled, the power to issue Decree-Laws on ordinary legislative matters. At first glance, the objection is impressive. But a close examination shows that it is unfounded. Art. 13 of the 1937 Charter, among the matters of legislative competence of the Union, expressly includes that pertaining to the "modification of the Constitution."²⁴

²³ "A decisão recorrida, sustenta a predominância da Lei, sem atender às considerações do voto vencido, que procura criar exceção ao sadio princípio da distinção consagrado, com o regime da Constituição de 1937, atribuindo no seu art. 180 ao ditador toda a competência legislativa da União, na ausência do Parlamento. Já tive oportunidade de manifestar aqui a minha convicção, no sentido que não basta essa circunstância para vincular o significado de todas as normas emanadas do ditador, mas se faz imprescindível o exame da natureza e extensão dessas regras." BRASIL. Supremo Tribunal Federal. RE 11.885, Rel. Min. Goulart de Oliveira, DF, 27/08/1948

²⁴ "São muitas as decisões do Supremo Tribunal Federal considerando válidas e aplicando as Leis Constitucionais que emanaram da Carta de 1937.

Objeta-se que essas Leis foram decretadas usando o Presidente da República da atribuição que lhe conferia o Art. 180 da Constituição de 1937 e que esse artigo apenas dava ao Chefe da Nação, enquanto não se reunisse o Parlamento, o poder de expedir Decretos-Leis sobre matéria legislativa ordinária.

À Primeira vista, a objeção impressiona.

Mas um exame detido deixa vêr que ela improcede.

O art. 13 da Carta de 1937, entre as matérias de competência legislativa da União, inclui expressamente a atinente a "modificação à Constituição". BRASIL. Supremo Tribunal Federal. RE 19.151, Rel. Min. Luiz Galloti, DF, 08/05/1952.

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According to this understanding, then, the president was authorized to amend the Constitution via Constitutional Laws, including to expand his own powers.

Initially, especially when read through today's eyes, the provision seems absurdly authoritarian, but the legal reality of its application is even more severe than this first impression.

First, because the first interesting thing about reading Art. 177 of the 1937 Constitution is that it seems quite clear to the eyes of the current interpreter, given the extremely centralizing character of that charter, that the provision refers to the head of the federal government when it refers to the "sole discretion of the Government."

But that was not the view that prevailed. All heads of government of the states and territories were able to use the constitutional provision to arbitrarily remove opponents from public office.

Despite acknowledging that the heads of the executive used the constitution to commit "the most reprehensible injustices," the Federal Supreme Court did not give it this more restrictive interpretation.

Furthermore, the power provided for in Art. 177, although leading to the most reprehensible injustices, was to be exercised even by local governments, whose use of it was never contested on the grounds that it constituted a privilege of the federal executive.²⁵

It was then, ultimately, the central power itself that ended up limiting the power of local governments to arbitrarily dismiss public servants considered, without any need for justification, as subversives. Decree-Law 1,202 of April 1939 was enacted to regulate the administration of the states and municipalities and provides:

Art. 33. The State and the Municipality are forbidden from: (...) 14 - Exercising, without prior and express authorization from the President of the Republic in each case, the powers conferred upon the Government by Art. 177 of the Constitution and by Constitutional Law No. 2.

But such a limitation did not annul the dismissals that occurred before, as the Justice explains in the continuation of his vote:

The text of Decree-Law No. 1,202 served the centralization of powers that the Dictator arrogated to himself, conditioning its use by local Governors—mere agents of the President of the Republic—on the latter's authorization; a restriction that, far from

²⁵ "Acresce que a faculdade prevista no art. 177, acarretando embora as mais censuráveis injustiças, era de ser exercida inclusive pelos Governos locais, aos quais jamais se contestou o seu uso por que constituísse privilégio do executivo federal." BRASIL. Supremo Tribunal Federal. RE 11.801, Rel. Min. Ribeiro Costa, DF, 18/11/1948. *ISSN 1980 - 8860*

denying the validity of previous acts, actually confirmed the authority of local governments to decree such retirements.²⁶

Only in 1945, with Constitutional Law No. 12, did Art. 177 of the 1937 Constitution cease to be in force. Even so, the Federal Supreme Court remained firm in its understanding of recognizing the validity of the dismissals carried out by local governments, not giving it retroactive effects.

The compulsory retirement of João Etelredo Tavares occurred in accordance with the provisions of the aforementioned Art. 177, then in force, with the ill-fated act being within the exclusive purview of the Executive Branch and issued in the interest of the public service, with pay established proportional to the employee's time of service. Regarding the aforementioned Constitutional Law No. 12, it must be emphasized that it repealed the invoked provision of the 1937 Constitution, without, however, annulling the acts previously carried out by the Government by virtue of the power granted to it.²⁷

Regarding the retirement of tenured employees who were dismissed based on Art. 177 of the 1937 Constitution, the Federal Supreme Court ultimately established the understanding that these employees were entitled to receive their retirement benefits in proportion to their time of service, if they had not yet completed the full time required for retirement. The exception was for magistrates, who were to continue receiving their full pay by application of the principle of the irreducibility of judges' salaries.

Art. 177 of the 1937 Constitution granted the head of the executive branch the power to dismiss and retire public servants without the need for due process or any kind of factual justification. This provision was widely used, including by the heads of local executive branches, for the dismissal of employees of the states and territories.

²⁶ “O texto do Dec.Lei. nº 1202 atendeu à centralização dos poderes, que o Ditador se arrogava, condicionando o seu emprego, pelos Governadores locais, meros mandatários do Presidente da República, à autorização deste, restrição que, sem o mérito de negar a validade dos atos anteriores, veio antes confirmar a competência dos Governos locais para decretar tais aposentadorias.” BRASIL. Supremo Tribunal Federal. RE 11.801, Rel. Min. Ribeiro Costa, DF, 18/11/1948.

²⁷ “A aposentadoria compulsória de João Etelredo Tavares verificou-se segundo o disposto no citado art. 177, então vigente, sendo o ato malsinado da alçada exclusiva do Poder Executivo e baixado no interesse do serviço público, fixados os vencimentos proporcionais ao tempo de serviço do funcionário.

Quanto à mencionada lei adicional nº12, é preciso ressaltar que esta revogou o invocado preceito da Constituição de 1937, sem, contudo, anular os atos praticados anteriormente pelo Governo, por força da faculdade que lhe era outorgada.” BRASIL. Supremo Tribunal Federal. RE 11.398, Rel. Min. Barros Barreto, DF, 25/10/1948.

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Final Considerations

We can verify that the 1937 Constitution existed and is a very important historical document, and that, among the various legal consequences that arose from it, is the dismissal of civil and military public servants without the need for any factual justification.

The dismissal of these employees occurred at all levels, including local governments. The power of dismissal included members of the judiciary, which placed the judicial branch in a position of subordination to the executive branch.

The Federal Supreme Court, at the time, perhaps even because it was operating in "survival mode," ended up serving to support an interpretation as expansive as possible of the powers of the President of the Republic and the other heads of the executive, both to dismiss employees and magistrates, and to expand these very powers indefinitely.

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