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Can we talk about a radical constitution?

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Introduction

Clarice Lispector who is one of the best Brazilian writers of the 20th century, in a book called *The hour of the star* (New Directions Paperbook, 1992, NY) writes: *how does one start at the beginning, if things happen before they actually happen?* I quote this passage of Lispector's novel to start this paper on the possibility of a radical constitution.

Since its very beginning, the notion of constitution poses some difficulties to constitutional law such as: 1. a presuppositionless beginning i.e. the constituent power means an absolute fresh new beginning; 2. a "homeless" beginning, which immanently provides and justifies its own presuppositions in the unfolding of its own constituent movement; 3. a pure beginning or a constituent power that must be free from any external determinations in the constitution of a political community; 4. on the other way around, the beginning of a constitution presupposes something that is prior and external to it as a constitutional history or a prior constitution; 5. the beginning of a constitution is no longer **a** pure beginning but **the** beginning, the constituent assembly, the event itself, which combines both immanency and transcendence.

Thus, the constitution faces from its very beginning a contradictory or paradoxical relation between itself and that, which constitutes it and there is no

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big news in asserting this paradox, yet the difficulty to deal with it still remains for political and constitutional scholars. The idea of a radical constitutional takes this paradox as foundational.

Another way of looking at this foundational paradox between constituent power, sovereignty and the constitution is focusing on the relation between democracy and constitutionalism. As a matter of fact, *(t)hese two categories are themselves too unstable to support the scholarship that builds upon them* (Sultany, 374), which poses the same difficulties in terms of not having a “secure” ground or a no paradoxical basis for the accommodation of democracy and constitutionalism (or rather politics and the law).

In this paper I share some ideas from progressive constitutional scholarship² such as democratic constitutionalism (Post & Siegel), popular constitutionalism (Tushnet), and dialogical constitutionalism (Gargarella), as well as some ideas from radical political theory (Agamben, Mouffe) and deconstruction (Derrida). These latter are important to the extent they highlight the limits of our institutions and what exceeds them or are not of the order of calculation (affects, social imaginary, desire, etc).

Progressive constitutionalism and radical political theory, particularly radical democracy, are different, internally variegated but share some points of view, such as a critical attitude towards liberal democracy and, paradoxically, a commitment to certain elements of the liberal tradition.

Radical democracy favors participation and enhanced opportunities for popular control (self-government) over the limitations of representative or parliamentary democracy. It is attentive to the inequalities of power that undermine people’s capacities to access or exercise abstract liberal rights. The radicalization of democracy depends on certain liberal principles such as equality and freedom. Such principles and democratic *demos* unite and reunite (Finlayson, 2009, 13).

² See Mark Tushnet, *What is constitutional about progressive constitutionalism?* 4 Widener L. Symp. J. 19 1999. See Frank Michelman, *What (if anything) is progressive liberal democratic constitutionalism?* 4 Widener L. Symp. J. 181 1999.

Progressive constitutionalism can be associated either with judicial or political action. Some progressive constitutional scholars³ deny the first kind of association. Yet, for the purpose of this paper, political action and judicial action are very much related in the idea of a radical constitution. Regardless the significant internal differences among progressive constitutionalism there is sufficient common ground such as the benefit of reason over power by means of dialogue and deliberation, according to normatively grounded procedures and principles.

The idea of a radical constitution is an effort to build a more critical and politically committed notion of the Constitution on which radical political action can be grounded and by which it can be mediated. This mediation associates social power (contestation), political and legal institutions (legislative houses, courts, etc.) so that **people's claims for rights, as well as their enforcement**, entail a permanent movement from outside to inside and vice-e-versa.

At this point institutional design matters, however the idea of a radical constitution is not driven by that, on the contrary, it is the idea and the practice of a radical constitution that will redesign institutions.⁴ There is an interesting insight in Unger's democratic experimentalism (2015, 63-67) and his idea of re-inventing institutions (more) open to their own revision, so that in doing it one can deeper democracy in society.

My argument is the following: a radical constitution is at the same time promise and effectiveness. It retains the constituent impulse as far as it is enforced. Then, it is a possible mediation for political action. The tension between constituent power, sovereignty and constituted powers or rather between potentiality and actuality plays a fundamental role for contemporary constitutionalism and democracy. Then, constitutionalism is that which exhibits and reaffirms - instead of annihilating- constituent power as far as it ensures and renews democratic politics and its radical commitments. A radical Constitution is that which retains the radical impulse of constituent power in the constituted

³ See Robin West, *Progressive and conservative constitutionalism*. 88 Mich. L. Rev. 641, 714-15 (1990).

⁴ The so-called positive social science like rational choice theories and new institutional theories are well accepted for some political scientists and constitutional scholars when constitution-making is in question. I completely disregard them for the purpose of this paper.

community aiming at a provisory yet necessary agreement between promise and effectiveness; between people's absolute power and its restraints; between political action and the law; between democracy and constitutionalism.

Constitution as promise is what makes one act politically, i.e., it is no longer a simple radical impulse but the realization of something (**like the enforcement of rights and the innovation of existing institutions**).

In the first part of the paper I discuss the notion of Constitution either as promise or the realization of such promise and the bulk of difficulties, precisely, contradictions, paradoxes, tensions it entails. I take Robert Post's (2000, 187) premise that democratic constitutionalism implies a collective intervention by the people (a shared voice), which assumes the ineradicable tension between collective self-governance and the rule of law in order to establish the ongoing structure of democratic states. For, I relate constituent power, sovereignty and the constitution, as well as constitutionalism and democracy. The former relation concerns the whole first part of this essay and the latter its second part. Finally, I propose the notion of a radical constitution as a possible mediation for political action based on the arguments brought in the first and second parts.

The proposal of a radical constitution is also an effort to deal with a constitutional time that integrates past, present and future redeeming the promise of the constitution in the "now." Constitution is always *a work in progress* (Blakin, Siegel, 2009, 02) and radical democracy *embraces a politics of contingency and contestation* (Adrain Little and Maya Lloyd, 2009, 1999). The constituent power interrupts the cycle of time establishing a new time to which it belongs by not belonging. It is the time of action. The challenge of a radical constitution is to trigger and mediate political action and in doing so it submits constitutionalism to a democratic re-constitution.

It is worth mentioning that the paper assumes a normative point of view. It reflects on the tension between constitutionalism and democracy in order to critically propose the idea of a radical constitution based on which political action and legal action merge for the innovation of existing institutions, the enforcement of basic rights as well as their reinvention. Concerning institutional innovations and the enforcement of rights I am still working on the "how" the idea of a radical

constitution would bring new designs and imply new procedures. So, this will be the subject-matter of my next paper. I also intend to link the idea of a radical constitution to the possibility of justice but I will not discuss it in this draft.

Part I

I.1 Constituent power and constitution: promise and effectiveness

I want to think the Constitution as promise and for this very reason as a possibility for constitutionalism and democracy, that is, as something real or effective. In this sense, the link between Constitution and constituent power is either contingent (eventual yet necessary and inevitable) or immanent to the very notion of Constitution. Thus, one cannot reduce the constituent moment (promise) and the Constitution (the real thing) to the terms of a dual logic (another world and this world). This is the premise of my proposal of a radical constitution, which from its very beginning deconstructs the naïve faith on a Constitution as a text or as a basic norm, which appeases all tensions in a given society.

Then, my point starts with this promise, this absolute indeterminate or structural future, i.e., a future to come. Such structure (I am talking about the Constitution) that in principle cannot happen (it is a promise) is the very openness of the present. The Constitution as promise, as something to come, exposes the contingency of the present. According to Derrida (1996, 82) there is no language without the performative dimension of the promise. Then, the language of constitutionalism as well as the language of democracy is in itself promise. To constitutionalism, it is the promise of the Constitution and its effectiveness: the enforcement of rights and the ongoing innovation of institutions. To democracy, promise means the always-present possibility of reinventing rights. The intriguing point is that from this perspective the Constitution as promise entails the impossibility of its full realization in the present as far as it would mean the dissolution of its own conditions of possibility. That is, the language of constitutionalism somehow imprisons the future in the present (in the now); it

also imprisons the possibility of justice as law. Then, to think the Constitution as promise leads us to think justice beyond the law. (Derrida, 1990, 946).

The Constitution is also promise as a constituent force or impulse and at this point it is very much related to democracy. Such promise or constituent force prevents Constitution of being a fixed thing like a trophy won in a battle by constitutionalism; of being just the source of constitutional norms/rules. Considering constitutionalism as a restraint to constituent power and democracy it imposes to itself a certain closure yet this latter will always be provisory. The Constitution as promise and as a real (effective) thing - likewise constituent power, democracy and constitutionalism - experiences an on-going and unavoidable tension.

Democracy presupposes the irreducibility of the promise as far as it can come; it can happen. The same happens with constituent power. The promise of democracy is, at the same time, a suspension and an impulse to the real Constitution.

In relation to time, constituent power is its suspension as well as its acceleration. Constituent power opposes itself to constitutionalism as far as this latter operates as a constraint on power so that does not fit in the constituent impulse or force (which always happens in the present). Constitutionalism is precisely the opposite, that is, the constituted thing, which had already happened (in the past).

Constitutionalism restrained to an idea of a Constitution as a fixed thing it is always a glance to the past, except if it retains the constituent impulse (the promise, the future to come).

A radical Constitution is the one which does not conform itself to the liberal tools of mutual negotiation among constituted powers. It dares to be more than that, that is, to be the subject and the object of democratic politics. Fundamental rights are in the Constitution as far as they allow their permanent reinvention through political action. A radical Constitution does not simply synthetizes the tension between constituent power and constituted powers, between democracy and constitutionalism: it is precisely that (the tension). One should interpret

Sieyès' statement that the Constitution presupposes a constituent power as the Constitution presupposes itself as a constituent power (Agamben, 1998, 40-41).

I also assume that the Constitution is the first and foremost command, which imposes itself as the manifestation of constituent power and popular sovereignty. Actually it binds both: constituent power and popular sovereignty. Thus, I reaffirm my point that in order to better face and explore the link between democracy and constitutionalism one has to first face and explore the link between sovereignty and constituent power. My task is from now on to work on the possibilities and difficulties of such link so as to construct the notion of radical constitution. This is the subject matter of the following topic.

I.2 Constituent power and sovereignty: a zone of indistinction

Derrida (2003) in his book *Voyous* says that the concepts of reason, democracy, world and, mainly, event belong to the same skein which is the question of sovereignty. The relation between constituent power and sovereignty is a keystone, at least for constitutional democracies in civil law countries.⁵

In the Sixteenth Century Jean Bodin (1955, 53) says in his book *De la République* «(l)a souveraineté est la puissance absolue et perpétuelle d'une République...».⁶ These two characteristics, absolute and perpetual, were thought as fixed conditions for the exercise of power. It is perpetual as far as "(t)he true sovereign remains always seized of his power. A perpetual authority therefore must be understood to mean one that lasts for the lifetime of him who exercises it." (1955, 54) It is absolute to the extent of its unconditionality. A power is given to a sovereign not in virtue of some office or commission, nor in the form of a revocable grant. The people has renounced and alienated their power in order to invest him with it and put him in possession, and it thereby transfers to him all its

⁵ According to Tushnet (2014, 10), *the conceptual and practical role played by "constituent power" in constitution-making is a pervasive theme*. However, I don't think sovereignty is as pervasive as constituent power in common law countries as it is in civil law countries.

⁶ Bodin "SOVEREIGNTY is that absolute and perpetual power vested in a commonwealth which in Latin is termed majestas ... The term needs careful definition, because although it is the distinguishing mark of a commonwealth, and an understanding of its nature fundamental to any treatment of politics, no jurist or political philosopher has in fact attempted to define it."

powers, authority, and sovereign rights. If the power given by the people is charged with conditions is neither properly sovereign, nor absolute, except the conditions that are inherent to the laws of God and of nature. So, it is an absolute power in the sense that it does not owe obedience to positive laws passed by whom earlier had the power and, neither to the laws the sovereign himself has made. For Bodin, neither the laws of the sovereign's predecessors nor the sovereign own laws can bind him as there would be no sense in him giving orders to himself. He was only subjected to divine and natural laws and even to certain human laws common to all nations being these exemptions to him who exercises the absolute power.

Bodin assumes that there is a hierarchy of laws that must be respected. At the top of this hierarchy are the laws to which even the sovereign is bound as they involve some principle of natural justice. These cannot be amended or annulled. Hence, for Bodin, absolute power only implies freedom in relation to positive laws, and not in relation to the law of God or nature. This means that if power is absolute yet it is not unlimited. The essence of sovereignty is in the power of making and annulling the laws what means that through the monopoly of the law the unity of the state would be maintained.

One century later, Hobbes (1997, 129) affirms that *"(t)he final cause, end, or design of men, who naturally love liberty, and dominion over others, in the introduction of that restraint upon themselves, in which we see them live in commonwealths, is the foresight of their own preservation, and of a more contented life thereby; that is to say, of getting them out of that miserable condition of war"*. This miserable condition of war of everyone against everyone is the consequence of men natural passions, precisely when there is no power to keep them in peace *"and tie them by fear of punishment to the performance of their covenants, and observation of those laws of nature..."* And he adds: *"covenants, without the sword, are but words, and of no strength to secure a man at all."*

For Hobbes (1997, 132), the origin of this coercive power is the will. Initially, the will of every man to concede to one person or to a group of people his or her own will, that is, *"to reduce all their wills, by plurality of voices, unto one will"*. The will is a prior condition for constituting the political community and whose structure is paradoxical and without which the State -the great Leviathan or mortal

god- would not exist. This situation of willing to get out of the miserable condition of war is dramatic precisely for costing the alienation of part of one's liberty. This is the price one pays for getting out of that 'wild' condition for a time and space where promises and covenants can be accomplished. But the act of willing is not enough if there is not a will that, according to Hobbes, reduces the plurality of all voices into one voice. For it is necessary power. The sovereign's will becomes the principle of order. For the sovereign must have the monopoly of force. It is in this movement of willing, monopolizing force (violence), and establishing order that remains the very aims of sovereignty.

Hobbes and Bodin identify the sovereign power in its site, which is occupied by the figure of the king. Nevertheless, even Bodin was careful in defining sovereignty abstractly and impersonally. In this sense, one could abstract the figure of the sovereign either from the government or the parliament or still the people.

Late modern thought about sovereignty – I mean, from the end of nineteenth to the twentieth century- has reacted to abstract definitions and formal analysis of sovereignty. That is, the foundation of most part of sovereign States was due to a situation one might call revolutionary. And even considering that such revolutionary situations are not necessarily spectacular genocides, expulsions or deportations that often go with the foundation of States (Derrida, 1990, 991), they are invariably terrible, as far as they are in themselves and in their very violence uninterpretable and indecipherable. This violence is not strange to law; instead it is in the law and suspends the law. It interrupts the established order to found another one.

The force that is at the origin of sovereignty, that constitutes it, it is not simply force but violence; precisely, the violence that the rule of law wants to expurgate through the rationalization of force (by the law). In a passage above I said that force and the law are the very aims of sovereignty. At this point I dare saying that violence and law do not differentiate themselves within sovereignty. Sovereignty is, then, a zone of indistinction. This is even more visible when one relates sovereign power to constituent power.

For legal science, the constituent power is traditionally the source from where it springs the new constitutional order. It is the power to make a (new) constitution from which the remaining (constituted) powers of the State get their structure. From this perspective, the constituent power installs a whole new legal order. It is noteworthy that Joseph Siey s' theory of constituent power is not detached from the facts he experienced at the time of French revolution. For him a Constitution presupposes, first of all, a sovereign and constituting power to which all other (constituted) powers are subjected. This power is not bind by anything except by its own will which, according to Siey s, it is the nation's will. For, constituent power is omnipotent and unconditioned: the nothing from which springs everything. The constituent power breaks out destroying all previous equilibrium and all possible continuity.

If constituent power does not emanate from any constituted power, if it is not an institution of the constituted power then it is an political act of choice, the radical determination that unfolds a horizon or yet the radical device of something that still does not exist and whose conditions of existence presuppose that the creating act does not loose its characteristics in the creation.

Constituent power opposes constitutionalism as the government constrained by law. The limitation of power by the law and, accordingly, the control over government do not fit in a constituent movement (a present time) but is, precisely, the opposite, the constituted thing (a past time). We are dealing here with times (in the plural). A time in the present (continuous) that in constituting a new time not just redeems the old time but reverses it. In its relation to time, the constituent power accelerates it, breaking with the past and instituting a new time.

Does the concept of sovereignty work as a criterion of truth to the constituent power? At this point, it is worth recalling the arguments I have just presented on sovereignty and to perceive that once we understand the *locus* of sovereignty as a zone of indistinction (between outside and inside), that is, as a zone of an ineradicable tension, we can think it in terms of constituent power without any mutual sacrifice. This interpretation stresses the paradox of sovereignty. Agamben (1997, 48) nicely associates this paradoxical situation to that of the state of nature with the state of law, in which the former maintains a "relation of ban" with the latter, "so the sovereign power divides itself into

constituting power and constituted power and maintains itself in relation to both, positioning itself at their point of indistinction.”

The rule of law as a representation of constituted powers opposes constituent power to sovereignty and it is against this opposition that I claim. My point is that the Constitution – as the result of constituent power – cannot become an obstacle to political action in terms of democratic politics. On the contrary, it must mediate it.

One has to rescue this idea and this practice that sovereign people create and establish its Constitution (constitutes themselves as such) by means of all radical impulse that is in such constituent act and for this very reason they (the people) impose to themselves the norms/rules which will regulate their constituted powers.

I. 3 Constituent power and sovereignty: potentiality and actuality

In the *Metaphysics*, in the very beginning of book *Theta*, Aristotle (1984, 181) says: “*We have dealt with primary being; that is, with what ‘is’ in the primary sense of the word, or with that to which the other categories of being refer. For it is with regard to the concept of primary being that we speak of the being of the others, quantity, quality, and so forth; ... But since ‘being’ applies not only to a particular something or to a quality or a quantity but also to power or to a fulfillment or to a working, let us now explain ‘power’ and ‘fulfillment’.*” (1045b26-36) As we can see power (δυναμις), working (ενεργεια) and fulfillment (ευτελεχεια) belong to the realm of being. Then, power is not a mere category but it is essential to understand being as such what means that a question on power is also a question on being; it is an ontological question. However, power once applied to being is considered as related to change and movement. Accordingly, to understand being implies to understand power as change and movement, that is, as what moves.

Being in “change and movement” is rather becoming. Taking the word as such, being as a noun can be thought as a fixed entity. However, when this fixed entity moves and changes, the noun gives place to the present participle. This shifting in which the noun becomes the participle present or (fixed) being becomes

being (in movement) implies - or rather is- *dynamis*. So, we might say that in book *Theta* of the *Metaphysics* Aristotle is concerned with being not as a fixed entity but with this becoming, that is, being-in-change and movement.

Aristotle (1984, 182) affirms that there is a primary kind of power to which genuine powers are really related. (1046a9). This primary power "*which is the source of change in another thing or in another aspect of the same thing*" (1046a11-12) is *dynamis*, and cannot be confounded with that which changes -the fixed entity. Then, power is primarily active -power of acting- or passive -power of being acted upon and either one has to be thought in relation to the other. For, power is one yet in an active or passive mode. In a passage a bit further Aristotle says that "*an incapacity, or what cannot be done, is merely the lack or privation of the correspondent active capacity; so that any power in a given object related to a given process has a corresponding incapacity.*" (1046a29-32) Lack or privation of power is as essential as the (active or passive) presence of power. Then, lack or privation is not a negation of power but essentially constitutes it.

Not only to power but being applies also to actuality. For, Aristotle says, "*actuality in things is a state of being*". (1048a33) Power and act differ in the sense that "*something may be capable of being without actually being, and capable of not being, yet be*". (1047a21-23)" In the antithesis indicated by this assertion, there is potentiality in one pole and actuality in the other. Yet, Aristotle does not prefer one instead of the other, as both are two modes of primary being. The actuality of movement is related to the potentiality or the power to move. In this sense, the actuality of our world cannot be reduced to acts, events, and phenomena as far as it implies power and the possibility of becoming actual according to an end. Actuality refers to action and its fulfillment. Then, the end of actuality is the doing of the action, which can either results in a product (the activity of building lies in the house being built) or in the agent (living is in the actually living being). For, it would be a mistake to think that potentiality would disappear into actuality.

Potentiality or rather the "*effective modes of potentiality's existence*" (Agamben, 1997, 45) cannot dissolve into actuality and this is the case of potentiality being the power not to (do or be): "*whatever is potentially in being may either be or not be*" (1050b12). *Dynamis* is constitutively also a-dynamis. Both *dynamis* and a-dynamis refer to the same phenomenon: "*...any power in a given*

object related to a given process has a corresponding incapacity." (1046a32-33)

Potentiality appears as potentiality to and potentiality not to.

The relation between potentiality and actuality can be thought in terms of a suspension, that is, potentiality relates itself to actuality to the extent of its suspension: "*it is capable of the act in not realizing it, it is sovereignly capable of its own im-potentiality.*" (Agamben, 1997, 45) By assuming that for Aristotle being applies either to potentiality or actuality and that one does not predominate over the other but there is a relation set in the mode of a suspension, we reaffirm the idea that both –potentiality and actuality- are the two faces of the same phenomenon, namely the sovereign self-founding of being.

Aristotle's considerations on being became paradigmatic for modern political philosophy especially for thinking the relation between constituent power and sovereignty. It is possible to associate the Aristotelian structure of potentiality and actuality to the structure of sovereignty and constituent power. To the same extent that potentiality does not pass over actuality, Agamben (1997, 47) advocates that sovereign power does not pass over actuality and then it retains its potentiality or its constituting power in the form of a suspension. "*This is why is so hard to think both a 'constitution of potentiality' entirely freed from the principle of sovereignty and a constituting power that has definitely broken the ban binding it to constituted power.*"

The sovereign power as a constituted order keeps the radical impulse of constituent power. This does not mean that the constituent power is ontologically reducible to the constituted order losing its autonomy and freedom but instead stresses the permanent tension that is present in these two concepts showing that there is no possible *Aufhebung* between the two. There is no dialectics –in the strong Hegelian sense- between constituent power and constituted power.

At a first glance, constituting potentiality seems to be there in the constituted power in the form of its own opposite with which it is identical and whose contradiction is reconciled in the idea of sovereignty that contains within itself the opposition of the other two and yet it contains their unity. However, sovereignty does not appease or resolve the contradiction as it is supposed to do so by the fact that a rational structure cannot rest on what is self-contradictory. On

the contrary, constituting potentiality remains there, recalcitrant, as a radical impulse. For, one may think beyond any possible dialectical relation between constituent power and constituted power: first, by agreeing with the fact that sovereignty is not an exclusively political concept or an exclusively legal concept; second, by considering that sovereign power is not opposed to constituent power as they are at a point of indistinction; third, by assuming that there is no possible synthesis between the two and that on this impossibility that one has to remain and, fourth, because they are somehow incommensurable, therefore, one cannot be the dialectical opposite of the other. Finally, the tension between constituent power and constituted power has to be understood as a vigorous sign towards a radically democratic society.

I.4 threshold

Thus, I am back to my initial problem concerning the paradoxical relation between democracy and constitutionalism yet from the viewpoint of the relation between constituent power and constituted powers. My point is that it is possible and desirable to conceive constitutionalism as that which exhibits and reaffirms - instead of annihilating- constituent power as far as it ensures and renews democratic politics and its commitments. This happens when rights are respected, enforced and reinvented and institutions are innovated. If, on the one hand, constitutionalism leads to the past, on the other hand, it can happen in the present not as a mere repetition of the past but as the condition to the exercise and enforcement of rights. That is, as a condition for political action, constitutionalism opens itself for the future. This happens at the moment when democratic commitments assumed by the people become effective in the constitution and because of the constitution.

In contemporary Brazilian constitutional history, constituent power (as potentiality) refers to a series of events carried out by the people, from 1985 on, and not exactly to the National Constituent Assembly of 1987-88. This potentiality

reappears every time that someone or something (such as the current demand for a new constituent assembly) intends to hit the Brazilian constitution.⁷

The 2013 demonstrations in Brazil and elsewhere put in evidence social, economic, cultural, religious and other kinds of conflicts. Generally speaking, most of the people that were on the streets claimed, in many aspects, for a more just and equal society reaffirming, then, the potentiality of constituent power as far as they called for the effectiveness of the constitution (promise), that is to say, their claims raise the question about what the constitution can actually do to people's quotidian life. As one can see, my understanding of the 2013 protests is that of a radical political action supported by the constitution and not against it. Taken as a day-to-day living experience the constitution retains -as I am claiming- the constituent impulse and this is a good thing for constitutional democracies. The dynamics of political relations of inclusion and exclusion as well as the destabilization of social order are connected to the process of transforming present precarious political minorities conditions and the constitution plays a major role in this process. (Almeida, 2015, p. 169-170). That is, the tension between constitutionalism and democracy triggers social transformations by means of the on-going claims for (citizenship) rights, at the same time, it supports institutions and their openness to innovation.

According to Almeida (2014, 184) if the actuality of the constitution means the enforcement of basic guarantees and rights, which are also important political achievements, it is not reasonable to conceive the constitution as that which **controls** the on-going tension in political battles. This kind of understanding takes the constitution as something superior to political struggle and it is not the case. He argues that such theoretical point of view is naive (as I said before) and it is another inadequate effort towards the judicialization of politics. Political conflicts and power contestation actualize the normative content of the constitution and in doing that they challenge the traditional idea according to which constitutionalism

⁷ The political crisis that is going on in Brazil right now is, in my view, a *coup* against constitutionalism and democracy as far as the protests against the current government – or at least against the current president, Dilma Rousseff and the former president, Lula da Silva – are based on an extremely conservative agenda. Yet, this is a sensible moment from which I do not have the necessary detachment to talk about.

protects and realize democracy, that is to say, the constitutional form is that which makes democracy possible.

Relating sovereignty and constituent power, constituent power and constituted powers it makes room for (the notion of) a radical Constitution. Looking from another perspective, this *dynamis* refers to the people's capacity to rule themselves and to impose to themselves a Constitution. In doing so, people radically constitute themselves as a political community. For this very reason the Constitution must be respected and enforced. This is part of the issue about democracy and constitutionalism.

Part II

II.1 the clash between democracy and constitutionalism: Michelman and Post

At the very beginning of his book *Brennan and Democracy*, Frank Michelman (1999, 04) asserts that *American constitutional theory is eternally hounded (...) by a search of harmony between (...) two clashing commitments: one the ideal of government as constrained by the law ("constitutionalism"), the other to the ideal of government by act of the people ("democracy")*. This is also true for most of constitutional theory and constitutional practices after the terrible experiences of totalitarianism and authoritarianism⁸ and the predominance of constitutional democratic States in western societies from the second half of the last century on.

If the settlement of constitutional democracies in most western countries has been a significant achievement in the last sixty years yet the conciliation between constitutionalism and democracy has still been very problematic. Democracy as the sovereign government of the people inevitably implies a tension with constitutionalism as the rule of law. That is, people ruling themselves or the government by the people – majority government - is limited by the constitution. As Michelman says (1999, 06), *"Constitutionalism" appears to mean something like this: The containment of popular political decision-making by a basic law, the Constitution – a "law of lawmaking"*. Considering that the Constitution for and in

⁸ I am referring to the event of Nazism in Germany, Stalinism in the former Soviet Union and most south-American dictatorship in the last century.

democracies is the outcome of a popular constituent power and considering that it is the basic law, then it *must be untouchable by the majoritarian politics it means to contain*. (Michelman, 1999, 06) This does not mean (and it is not desirable at all) that the constitution shields itself in face of democratic politics but it means that democracy and constitutionalism are compromised, so that Michelman folds these two principles from the standpoint of that which can be politically decidable. And what is politically decidable? Can the people themselves define it? Yes and no!

Of course the people must decide for themselves those politically decidable matters on moral, political and cultural grounds. But, on the other hand, some decisions taken by the people that turned into constitutional principles have to lay beyond the reach of majority, such as the limits of governmental powers, the commitments with human dignity, self-determination, liberty and equality etc.

This paradox is somehow unavoidable and necessary and it brings some institutional difficulties. Yet it must be faced if one intends to radicalize the Constitution.

According to Post (1998, 430) the *tension between constitutionalism and democracy identified by Michelman is a classic example of a central, ongoing argument within the practice of constitutional adjudication*. That is, to reconcile constitutionalism and democracy is a task of constitutional adjudication. However, says Post (1998, 430), Michelman formulates the issue in a strange way as he refers to a “necessity” that underlies the “irrepressible impulse to hive off fundamental-law determinations from the procedural purview of democracy” and that even “entirely bars democracy from a decision-space where it would seem urgently and rightly to want to go, that of deciding the contents of a country’s most basic laws, its laws of lawmaking. Yet, within the practice of constitutional adjudication there are obviously paradigmatic instances, left unexplained by this conclusion, that subordinate constitutional meaning to the peremptory and even arbitrary direction of popular will.

Michelman sees in Justice Brennan’s adjudication an answer to the tension between constitutionalism and democracy, mainly in his attempt to reconcile constitutional interpretation (law) with democratic self-governance (politics). According to Post (1998, 433) in order to succeed in his reconciliation attempt he

would have to admit that *justice's judgments are generally accepted as "just or fair" or "right". But how does it work for those who do not accept this condition? How in the face of manifest and indissoluble differences, we may be said to govern ourselves through collective self-determination. Why is every majoritarian enactment not also an act of oppression against a minority? (...) If we agree that a great justice like Brennan has correctly interpreted **our** fundamental law then our particular will is in fact in conformity to the general will as enacted in Brennan judgments. So to obey these judgments is to obey ourselves (...)*. Despite Micleman's virtuous attempt in reconciling judicial interpretation to popular will he does not make clear how this latter is the outcome of people's identification with public opinion. That is to say, it is not clear how people participate in the public forum where those who agree and do not agree with a justice's interpretation about the constitution deliberate. It is even more difficult to see people's participation and the idea of self-governance in the mere exercise of adjudication. As a matter of fact, democracy cannot depend on taking the court's interpretations right. That what makes Michelman's argument vulnerable is its consensual structure, which underestimates the role of social disagreement for democracy.

The fact of social disagreement plays a different role within Michelman's model. He does not relate it to democracy. Instead, it is the achievement of consensus that that defines the scope of democracy. In Michelman's model citizens govern themselves to the extent that they agree with the constitutional judgments of the Court. (Post, 1998, 436).

Constitutionalism means to restraint political power by the law. This notion becomes stronger as far as there is a Constitution, especially a written Constitution, with binding norms/rules to which all other norms/rules are subjected. However, none of this would be enough without a democratic counterpart. It is democracy that do not let constitutionalism be paralyzed in its achievements. On the contrary, democracy tensions constitutionalism all the time and it renews it by means of the enforcement of the Constitution. As Post and Siegel (2007, 374) proposes democratic constitutionalism *is a model to analyze the understandings and practices by which constitutional rights have historically been established in the context of cultural controversy*. They also take disagreement as a normal condition to the development of constitutional law. As matter of fact any

attempt to avoid disagreement threatens democracy and constitutionalism or rather, politics and the law.

II. 2 Constitution triggering and mediating political action

The Constitution is between the political act that established it and the legal act that enforces it. This tension is rather productive than problematic. The challenge for contemporary constitutional theory is then to conciliate a reasonably stable Constitution that assure full protection to people's rights at the same time it restrains power with an intuition in favor of self-government. (Gargarella, 1996, 128) Besides stability, power restraint and self-government, the Constitution triggers political action.

A radical Constitution must retain the potentiality of constituent power yet such potentiality becomes actuality by means of the enforcement of rights. In other words, the potentiality of the Constitution (as a radical one) appears when it is enforced, when it gives arguments for decisions that grant rights. This is either an institutional task and therefore faces institutional difficulties or an individual and collective endeavor by the people themselves through political action. Yet both, institutions of government and the people are constituted by a (radical) Constitution as something that it is daily experienced.

In 2013 a sequence of events in different places around the world such as the Arabic Spring, protests in Turkey, Spain, Portugal and Greece, the Occupy movement in Wall Street, New York, June protests in Brazil suggested that political action does not have to be mediated by anything. They are radical in this very sense of not being mediated by anything: no labor unions, no political parties, no traditional mass organizations but lots of young people mobilized by social networks. It is as if nowadays none of these young people had the power to decide the most important issues that concern their life in society or rather that concerns their fate. Abandoned by the government they are very skeptical about institutional designs and solutions. Then, they claim to take their fate on their own hands without mediation. They act directly and without a general goal yet with a common feeling of dissatisfaction, which put individual demands together.

My argument is the opposite. The Constitution (as a radical constitution) has to trigger political action. By saying that, I defend the idea that these events occur because they are grounded either in the achievements of democracy or in the achievements of constitutionalism: there is a right to protest (even against the Constitution). One has to consider that not everybody shares the same interpretation and judgment about the Constitution.

It seems somehow contradictory that in democratic constitutional States (some of them more or less democratic and more or less constitutional) facts such as the ones that happened in Turkey, Egypt, Greece, Spain, Portugal, Brazil and United States were taken as if they correspond to the “state of exception”. Zizek (2013, p. 101-108) says that problems in the hell seem to be understandable yet problems in paradise should not happen. Do these facts affect the very sense of democracy and constitutionalism? Of course they do, but how do they affect? Or, is there a constitutional democracy without the possibility to put into question its own basis? At this point I recall Michelman’s (1999, 06-07) assertion that *by the principle of democracy, the people of a country ought to decide for themselves all of politically decidable matters about which they have good moral and material reason to care*. The tricky thing is first to define what should be politically decidable by the people (as it is a deliberation and a decision to be taken by the people themselves) and second, how should be? I also recall Post and Siegel’s (2007, 375) assertion that *(w)hen citizens speak about their most passionately held commitments in the language of a shared constitutional tradition, they invigorate that tradition. In this way, even resistance to judicial interpretation can enhance the Constitution’s democratic legitimacy*.

For Michelman (1999, 14), the core idea is the self-government of individuals, which poses an institutional difficulty in the field of politics where laws are made as far as not everyone can make the laws. If self-government intensifies individual responsibility it can be even stronger if thought in terms of political action and participation. For Post and Siegel (2007, 375) citizens should not acquiesce in judicial decisions that speak in a disinterested voice of law. Such nonacquiescence means to act politically, yet not without taking into account the constitutional order and the precarious but necessary negotiation it generates between the rule of law and self-governance.

II. 3 Radical constitution or a new glance at the relation between politics and the law in contemporary constitutional-democracies

The answer to the question that motivated this paper (*Is there such a thing as a radical constitution?*) is yes. A radical Constitution is that which retains the radical impulse of constituent power in the constituted community aiming at a provisory yet necessary agreement between promise and effectiveness; between people's absolute power and its restraints; between political action and the law; between democracy and constitutionalism. Constitution as promise is what makes one act politically, i.e., it is no longer a simple radical impulse but the realization of something (like the enforcement of rights). The 2013 events I mentioned before are noteworthy as far as they are not an exception to the possibilities of a constitutional democracy but exactly what it is about: potentiality and actuality; promise and effectiveness; stabilization and crisis not against the Constitution but because of the Constitution; a radical Constitution. It is necessary to reaffirm my conviction on a Constitution that is not a fixed thing but that which constitutes something. It is also an on-going process of dispute and of a democratic re-constitution. The word radical has either to do with that which is at the origin, at the root, or with that which is unstable and provokes chain reactions and I take it in both senses for the purpose of my work.

The tension concerning the constitution of power is intensely connected to the justification of power. On the basis of a negotiation between justifying principles such as liberty and equality that avoids their antagonism, the liberal-democratic framework of modern state presupposes that the dilemma of/at the constitution of power is not really a dilemma, nothing that within the limits of a strict constitutionalism we could not find an answer for. The idea of radical constitution does not avoid the tension and does not have the intension to have the right answer to it. It takes it as a shaking effect and offers contingent answers through highly participatory means.

As I said in the begging of the paper radical democracy favors participation and increases popular control over the limitations of representative democracy. It is attentive to the inequalities of power that undermine people's capacities to access

or exercise abstract liberal rights. Progressive constitutionalism is also attentive to inequalities of power and stands for popular participation in the interpretation of the constitution. Instead of opposing democracy (passion) to constitutionalism (reason), a radical constitution moves between these two categories taking this paradoxical relation as a vibrant and insightful way to face the challenges put by contemporary States, sometimes more or less democratic or more or less constitutional.

If constituent assembly is the space and time of making promises then, it is exactly this (that which the Constitution has retained of constituent potentiality) that gives its actuality and turns it effective. By effectiveness I mean the radical character Constitution has retained from constituent power which allows one, in the name of democracy and constitutionalism to innovate institutions, to fight for rights, to reinvent them every time on the street and from the street. The present time of the Constitution has to be understood in its relation to the past and to the future. Thus the time of the Constitution is the time of its enforcement by the people and by institutional spheres; the time of the Constitution is the time of the event, that which entails, past, present and future: the now.

Until now I haven't mentioned Derrida and deconstruction. Nonetheless, to be just with them I have to say that I would not come to the idea of a radical constitution if it were not Derrida's work on deconstruction and the possibility of justice. Inasmuch law is deconstructible, justice beyond the law is not deconstructible, precisely because deconstruction is justice. Deconstruction is there in hiatus that separates the undeconstructibility of justice from the deconstructibility of law. Thus, my final claim is that to deal with the paradoxical relation between constitutionalism and democracy and to the contingent nature of decisions taken in their names, there must be a commitment to justice.

I started this paper with Clarice Lispector and I would like to finish it with Franz Kafka. In a dialogue of *the Trial*, K. says to Titorelli, the painter: *'That must be a Judge'* to what the painter replies: *'It is Justice'*. *'Now I can recognize it,'* said K.

'There's the bandage over the eyes, and here are the scales. But aren't there wings on the figure's heels, and isn't flying?' 'Yes', said the painter ... 'Actually it is Justice and the Goodness of Victory in one.' *'Not a very good combination, surely,' said K., smiling. 'Justice must stand quite still, or else the scales will weaver and a just verdict will become impossible.* (Kafka, 146) Somehow Kafka anticipates Derrida's intuition for the undeconstruction of justice: *Does deconstruction insure, permit, authorize the possibility of justice? Does it make justice possible, or a discourse of consequence on justice and the conditions of its possibility?* (Derrida, 1991, 922) At this point I got from Derrida that law (let's say constitutional law) is deconstructible and this makes a lot of sense in my proposal of a radical constitution. However, there is a long way to go to better articulate deconstruction, radical constitution and justice having in mind the day-to-day enforcement of rights, their reinvention and the innovation of existing institutions.

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