THE BRAZILIAN LABOR REFORM IN 2017: THE LIVING CONSTITUTION PROVIDED BY BRAZILIAN SUPREME COURT

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ABSTRACT

This paper aims to analyze the role of the Brazilian Supreme Court in the new interpretation of the Consolidation of Labor Laws following the enactment of the 2017 labor reform. These amendments, called the labor reform, introduced significant modifications to long-standing rules governing employment relationships for the protection of employees, and their unconstitutionality was claimed before the Brazilian Supreme Court in several lawsuits. These lawsuits were based on the argument that the new rules had broken with the fundamental labor principles enshrined in the Brazilian Constitution, most notably principles such the "human dignity" and the "social value of work." However, the new statutory labor law had to be interpreted under the same constitutional framework enacted since 1988. On one hand, the political option adopted by lawmakers in this reform represented the expression of the majority will of the National Congress, absorbing a pro-market agenda that sought to flexibilize labor regulation. On the other hand, the new legal provisions in many cases sought to overcome the stable jurisprudence embodied into the tradition of the Higher Labor Court. In the end, the Brazilian Supreme Court ruled in almost all cases in the same direction, upholding the law amendment for its suitable constitutional content. This solution was possible due to the living constitution theory, came into effect by the Supreme Court to overrule the case law tradition of the Brazilian Higher Labor Court and keep the hierarchy of Constitution due to its supremacy among other sources of law into the legal system.

KEYWORDS: Brazilian Labor Reform in 2017. Living constitution. Brazilian Supreme Court. Flexibilization of Social Labor Law.

SUMMARY: Foreword. 1 - Judicial Activism. 2 - Constitutional Interpretation in labor claims. 3. The Living Constitution Theory. 4 – The principle of enterprise in a rule of law perspective. Conclusion. Bibliographic References.

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FOREWORD

First of all, the National Congress passed Bill No. 6,787/16, introducing the Brazilian Labor Reform in 2017. During the legislative process, lawmakers proposed several changes to the initial bill submitted by the Executive Branch, in this way deepening the pro-market agenda. This movement introduced a broad and significant flexibilization into the Brazilian labor legal system.

This paper analyzes the role played by the Brazilian Supreme Court in the interpretation of Law No. 13,467/17, which restructured many classical rules provided by the Consolidation of Labor Laws, replacing strong protective framework for workers with a more flexible scheme applicable to employment relationships.

At the same time, the Labor Reform also reinforced the application of the principles of legality and legal certainty, in order to provide greater predictability in employment relations. To this end, lawmakers introduced mechanisms of more legal control over the Higher Labor Court's decision-making, often criticized for "judicial activism", thereby avoiding proactive judicial measures and strengthening the value of the rule of law.

According to Article 8, paragraph 2 of the Consolidation of Labor Laws, the effects of the Higher Labor Court's precedents may not create rights not expressly provided by law. Thus, the new law, called the "Labor Reform," aimed to converge on a specific point to grant more competitiveness to the Brazilian corporate environment.

Lawmakers also believed that, through these initiatives, it would be possible to achieve a more favorable model of doing business in Brazil by revising labor regulation and mitigating the so-called "Brazil Cost."

At the time, several scholars argued that the extensive legal changes were unconstitutional because the new statutory provisions conflicted with the jurisprudence of the Higher Labor Court. The constitutional interpretation of labor claims by the Higher Labor Court had generally emphasized greater worker protection, since the Constitution adopted a catalogue of social rights that enumerates several second-generation fundamental rights.

However, the Supreme Court, as the ultimate authority in constitutional interpretation in all kinds of judicial claims, decided on several labor matters after the reform, and most Justices ruled in favor of these legal changes.

These changes did not breach any constitutional provision and were all consistent with the constitutional text, since then the social constitutionalism has been recognizing in its provisions a programmatic nature. Constitutional standards are not rigid like concrete rules; therefore, constitutional principles that allow for legislative adaptation within the framework of constitutional supremacy.

Furthermore, the constitutional preference for principles instead of rules in social provisions also allows for a broader interpretation regarding the constitutionality of the concrete content of laws enacted under constitutional supremacy.

1. JUDICIAL ACTIVISM

The judicial activism model represents a proactive approach by courts to interpret loopholes in the law through the application of general principles provided by constitutional standards to fill these gaps. Sometimes, this interpretation can go beyond the law's intention; in such cases, the replacement of lawmakers' will by judges' views represents an attack on democratic values expressed by the majority will reflect in Congress's outcomes.

In this perspective, the Brazilian Higher Labor Court has, for a long time, issued several case laws whose provisions go beyond the law's intention. From a social standpoint built by the Labor Court's precedents, these interpretations remain aligned with the social standards contained in constitutional provisions, such as the "social value of work" (Article 1, subsection IV) and the "human dignity" (Article 1, subsection III).

What is the problem behind judicial activism?

When a judge goes beyond the law's provisions, the principle of legal certainty is set aside and likely replaced by a subjective view that comes from the judge's personal perspective.

In a comparative perspective, the history of courts shows a steady increase in the judicialization of functions that, in other developed democracies, are handled by administrative bureaucracies. This trend has led to an explosion of costly litigation, slower decision-making, and highly inconsistent enforcement of laws. Courts, instead of acting as constraints on government, have become alternative instruments for the expansion of government itself.

On the other hand, Francis Fukuyama (p. 479) recognizes the key role played by the judiciary in guaranteeing a socially progressive agenda. One of the great turning points in twentieth-century American history was the Supreme Court's *Brown v. Board of Education*

decision, which overturned the constitutional grounds established in the nineteenth century by the *Plessy v. Ferguson* case. That precedent had upheld legal segregation in American schools under the conservative thesis of "separate but equal". The *Brown* decision was also the starting point for the civil rights movement that unfolded over the following decade, succeeding in dismantling formal barriers to racial equality and guaranteeing the rights of African Americans and other minorities.

After that, courts worldwide have enforced new social rules through their decisions, serving as a model for many subsequent social movements in the late twentieth century, from environmental protection to women's rights, consumer safety, and same-sex marriage.

Moreover, the Constitutional Court retains residual political power through its institutional duty to interpret the constitutional text. The principles in the Constitution have been allowed to evolve due to socioeconomic changes and new social values arising from the social fabric.

The post-positivist movement allowed the Higher Labor Court, in several cases, to impose new contractual obligations without legal support or clauses agreed upon by employer and employee. On the one hand, these case law grounds were based solely on judicial discretion, which led the Court to prohibit employers from outsourcing their core business activities for worker protection in its Jurisprudence No. 330 that had been applied for more than twenty years. With the Brazilian Labor Reform of 2017, lawmakers amended statutory provisions to expressly allow outsourcing without legal restrictions. On the other hand, the Supreme Court, as the "last resort" in constitutional claims, overruled that position through Jurisprudence No. 927 in 2023, upholding the new legal provision and authorizing outsourcing in all corporate activities.

In the context of judicial activism globally, there has long been tension between the rule of law and democratic accountability. First, the rule of law principle must bind all citizens, including democratic majorities. However, the democratic majority cannot be used as an excuse to violate the rights of individuals and minorities guaranteed by constitutional provisions. Second, constitutional architecture always assigns the legislative branch the power to make decisions on behalf of the people, but these decisions are subject to judicial control through review, particularly in the Brazilian model, to protect fundamental rights of all dimensions and generations.

According to John Elster (p. 250) the constitution represents the landmark barrier against the prevalence of majority will, that must be retrained by the fundamental rights provisions:

> Constitutions are the 'framework of action' for political actors. A constitution delineates power and the potential abuse by majorities. However, the most heated debate revolves around majority rule or the maximization of interests, given the phenomenon of cyclical majorities, which distorts the economic component. In other words, the people themselves are protected from the tyranny of the majority by following the advice of utilitarians such as Bentham and J. S. Mill. These authors recognized the danger that democracy (defined as government by the majority) could pose by warning of the potential oppression of a minority by the majority.[2]

Moreover, laws are administered by human beings who operate within the judiciary. These individuals have their own beliefs and opinions, which may not correspond to the desires of the broader public. Judicial activism can therefore be as dangerous as weak or politically compliant judiciaries. Sometimes judicial activism provokes a constitutional crisis with other branches of government, weakening the *checks and balances* system and undermining the harmony and equilibrium inherent in the principle of separation of powers. The integrity of the separation of powers is an essential tool to prevent any abuse of authority, in Montesquieu's terms.

Nowadays, due to the changes promoted by the 2017 Labor Reform, the Consolidation of Labor Laws in Brazil includes new provisions in Article 8, paragraph 2, which formally prohibit any action by the Higher Labor Court beyond the law's boundaries, thereby reinforcing a legalist perspective, as provided by Article 5, subsection 2 of the Brazilian Constitution, which mirrored the principle of legality

In sum, the Brazilian Supreme Court ratified the Labor Reform enacted in 2017 through the living constitution theory, upholding the new rules under the predictability standards established by the legal changes.

[2] The original text: "Las constituciones son el 'marco de actuación' de los actores políticos. Un Constitución delimita el poder y el eventual abuso de las mayorías. No obstante, el debate más acalorado radica en el gobiernos de mayoría o de maximización de intereses, dado el fenómeno de las mayorías cíclicas, que distorsiona el componente económico. Es decir, se protege al mismo pueblo de la tiranía de las mayorías, al seguir los consejos de los utilitaristas como Bentham y J. S. Mill. Estos autores veían el peligro que podía ocasionar una democracia (definida como el gobierno de la mayoría) al advertir la eventual opresión de una minoría sobre la mayoría".

2. CONSTITUTIONAL INTERPRETATION IN LABOR CLAIMS

In order to reverse the deficit created by the liberal State and to guarantee better living standards for all, the constitutional response was to increase State intervention in the social sphere. This movement is represented by the second generation of fundamental rights, characterized by their economic and social content - classification originally proposed by Karel Vasak.

Criticism of the role played by the Brazilian Higher Labour Court from a judicial activism perspective is grounded in post-positivist theory. According to post-positivist thought, courts in general began to enforce the social rights enshrined in constitutional provisions even in the absence of concrete legislation ensuring their self-executing character, thereby overcoming the programmatic tradition that had long characterized social constitutional norms.

At times, the jurisprudence of Brazil's Higher Labour Courts has recognized certain social rights even in the absence of specific legislation enacted by the National Congress. These rights were developed through judicial interpretation based on constitutional principles rather than explicit legal rules.

Dieter Grimm (2016, p. 24) identifies the first step toward the construction of Social Constitutionalism as the liberal State's own response to its insufficiencies:

> In the Weimar Constitution of 1919, the new legitimation principle of popular sovereignty was joined with an equally new social provision. Although the Weimar National Assembly retained the catalogue of classical rights of freedom and equality that had been shaped in the revolutions, it added to this a considerable number of fundamental social rights and subordinated economic freedom to the principle of social justice.

Similarly, social constitutionalism in the United States emerged with the *New Deal* as a remedy for the severe economic consequences of the 1929 New York Stock Exchange crash, which drove millions of Americans below the poverty line. As Tom Ginsburg (p. 128) observes in *How to Save a Constitutional Democracy*:

> The Roosevelt administration responded to the Great Depression with a range of both political and institutional changes that remain deeply divisive today. On the one hand are those who see the modern administrative state that emerged from the New Deal as a necessary and essentially beneficial response to economic and social pressures. The New Deal, on this view, was a constitutional revolution to be celebrated as a popular adaptation to new challenges that built on a long tradition of national administration. On the other hand, there are those on the American right who perceive the New Deal as a betrayal of the original Constitution and as a source of what President Trump calls a 'civilizational threat' from the 'creep of government bureaucracy.

In the same perspective, the Brazilian Constitution of 1988 adopted a social constitutionalist approach by including a catalogue of workers' social rights in Article 7, which enumerates various labour guarantees grounded in constitutional principles.

Constitutions typically promote social rights by listing them explicitly within the constitutional text. However, despite such provisions, their effective realization depends on strong and consistent political will. Programmatic social norms do not materialize automatically, as they lack self-enforcement. Therefore, implementing legislation is necessary though it often never arrives. This legislative vacuum has been filled, to some extent, by jurisprudence from the Higher Labour Court of Brazil, which has intervened in several sensitive social issues to protect workers.

Nevertheless, in the absence of concrete legislation, judicially created rights raise a small but relevant deficit of democratic legitimacy. Recently, the Brazilian Supreme Court, in the opinion given by Justice Gilmar Mendes in his rapporteur on ADI nº 5994, has also recognized that employers, as well as employees, are holders of fundamental rights. These rights can operate both vertically against the State and horizontally among private parties.

Stephen Gardbaum (p. 169) distinguishes these two dimensions of fundamental rights, clarifying their horizontal and vertical effects, which support employers' rights against judicial overreach by the Higher Labour Court:

> There are two different ways in which constitutional rights might regulate private actors, that is, have horizontal effect: (i) directly, by governing their conduct; or (ii) indirectly, by governing the private laws that structure their legal relations with each other and that they rely on or invoke in civil disputes.

Conversely, Dieter Grimm (2016, p. 25) highlights the self-restraint that courts should exercise in the social field:

> Under these circumstances, fundamental social rights, which were all designed to be mediated by law, entirely lost their normative force. They were regarded as nothing more than points in a political programme.

Furthermore, labour law, trade union organization, and social security systems are all instruments through which the State seeks to achieve its social objectives. The effectiveness of these institutions depends on the degree of recognition granted by constitutional provisions. In some cases, these goals could only be attained through an appropriate "dose" of judicial activism.

As Francis Fukuyama (2014, p. 46) emphasizes:

> "Social mobilization creates political change by forming new groups that demand participation in the political system. Throughout industrializing Europe and America in the late nineteenth century, workers began to join together in trade unions and pushed for higher wages, as well as better and safer working conditions. They agitated for the right to speak publicly and to vote. Workers also began to support new political parties, which in turn started to win elections under banners like the British Labour Party and the German Social Democratic Party.

The political debate in the United States between conservatives, who oppose "big government," and progressives, who defend an active social agenda, stems from what conservatives view as Roosevelt's betrayal of the original constitutional design.

In Brazil, Law No. 13,467/2017, known as the "Labour Reform", produced a similar effect against the original provisions established during Getúlio Vargas's government in 1943. Lawmakers argued that the Brazilian Labour Code needed modernization to reflect new socioeconomic realities.

In sum, the jurisprudence of the Brazilian Higher Labour Court has often ensured a higher level of worker protection than that envisioned by the 2017 labour reform. This dynamic reveals a living constitutional approach endorsed by the Supreme Court, which continues to interpret constitutional labour provisions in light of contemporary social demands and balanced with private autonomy that given self-determination to private actors.

3. THE LIVING CONSTITUTION THEORY

This counterbalance between the fundamental rights of employers and employee only is possible because there are many ways to amend a constitution by updating its provisions to reflect new socioeconomic contexts.

The Constitution, as a social contract, provides abstract principles and standards designed to remain adaptable to future socioeconomic changes.

The foundation of both rules and principles lies in the normative theory that distinguishes them. On the one hand, rules are norms that definitively require something to be done, they show a categorical command. If a rule is valid and applicable, it mandates that exact what it prescribes must be carried out.

On the other hand, principles are norms that require something to be realized to the extent that it is factually and legally possible. They are characterized by the fact that they can be fulfilled to varying degrees, and the appropriate degree of fulfillment depends not only on factual circumstances but also on legal constraints.

Cass R. Sustein (2001, p. 41) emphasizes the difference between rules and standards, let's see:

> There is a flourishing literature on the choice between legal rules and legal standards. In the familiar formulation, a rule says that no one may drive over 65 miles per hour; a standard says that no one may drive at an excessive speed. A rule therefore operates as a full or nearly full before-the-fact specification of legal outcomes. By contrast, a standard leaves a great deal of work to be done at the moment of application. Costs must be incurred in order to create a rule, and after a rule is in place the decision may be relatively mechanical. With a standard, the costs are incurred in the context of specification.

To resolve hard cases, Robert Alexy (p. 392) developed the principle of proportionality, according to which any principle that prevails over another in concrete application must take into account the dimension of each one in solving the constitutional issue:

> The principle of proportionality, which in recent decades has received increasing international recognition in the theory and practice of constitutional review, consists of three sub-principles: suitability, necessity, and proportionality in the narrower sense. All three sub-principles—and this is the core of the matter—express the idea of optimization. Principles, as optimization requirements, demand optimization relative both to what is factually possible and to what is legally possible.

However, some constitutional norms are not self-executing. Their effectiveness depends on rules that concretely guarantee their realization. Programmatic rules, which represent social constitutional provisions from a conservative perspective, always depend on subsequent legislation for their concrete implementation. The limitation of the State's budget is often used as an argument that social rights can only be realized through political choices made by legislators.

It is sometimes argued that constitutional amendments undermine confidence in the Constitution. Yet changing social realities create a constant need for new norms. The essential nature of constitutional principles lies in their adaptability. Their ability to guide change as society evolves. In concrete terms, these changes usually affect statutory and regulatory law more than the Constitution itself.

There are two main ways to change the Constitution: formally or informally. On the one hand, the Constitution can be formally amended through procedures that require approval by the legislative branch with a qualified majority. On the other hand, the judiciary may informally change constitutional provisions through interpretation, following the theory of the living Constitution.

As David Strauss (p. 20) observes:

> A central criticism of the idea of the living Constitution is that it is too manipulable—that a living Constitution amounts to substituting judges' own views for the Constitution itself. Originalism, it turns out, is vulnerable to the same criticism.

Nevertheless, Strauss also recognizes that, as a well-established aspect of the common law tradition, constitutional interpretation is not merely a matter of following precedent. It must go beyond that, as judges have a legitimate role in ensuring fairness and promoting sound social policy.

In sum, the Constitutional Court retains discretion in exercising residual powers in its decisions, either promoting social milestones or restraining the creation of social rights through the constitutional text itself, thereby preserving a democratic deficit in this type of judicial decision.

4. THE PRINCIPLE OF ENTERPRISE IN A RULE OF LAW PERSPECTIVE

For a complete understanding of originalism, it is essential to note that the United States has a single constitutional text, with only a few amendments. Consequently, there is a strong reverence for this text, which has endured for centuries.

Moreover, the role played by the Federalists in constructing a robust constitutional framework, along with the guidance they left in the Federalist Papers, remains an indispensable resource for interpreting the text.

David Strauss (p. 38) emphasizes the risk of judicial preferences exercised without political competence as conferred by the Constitution:

> Textualist and originalist judges, at least in principle, will on occasion vote to uphold laws they deeply disagree with, or strike down laws they would favor, because the basis for constitutional judging (text, history, tradition, and settled precedents) is independent of their own preferences.

Furthermore, a system of interpretation can be designed to reduce the role of courts in establishing social policies or governing principles, particularly if it is deemed that courts should not be entrusted with such responsibilities. Justice Scalia argued that this version of textualism effectively controls judicial power while simultaneously enhancing the policymaking authority of the legislature, partly by providing appropriate incentives. For example, if legislative history is not considered, legislators face increased pressure to draft statutes with greater clarity. These measures aim to reduce the burden of decision-making and the costs of uncertainty.

Bruce Ackerman (2007, p. 1755) shares a similar view regarding Scalia's approach:

> Justice Scalia proudly declares himself a reasonable originalist and explicitly tempers his fidelity to the founding understanding when it is too out of line with existing precedents and contemporary realities. He recognizes the 'paradigmatic' character of his approach, but despite his well-known renunciation of discretionary judgments in constitutional law, significant exceptions exist when deciding whether constitutional truth outweighs constitutional stability."

According to Cass R. Sunstein (2001, p. 222):

> Justice Scalia is not a literalist; he carefully distinguishes textualism from literalism, and he understands that the meaning of text is a function of context.

Sunstein, in his minimalist theory, further distinguishes between political decisions made by legislators through law and those same decisions interpreted or applied by judges. A central goal of this approach is characteristic of those who oppose minimalism: to reduce the sheer costs of decision-making, so that the burden on courts and litigants remains relatively low. A closely related objective is to make the law more certain and predictable, allowing individuals to know where they stand without excessive effort in interpreting legal content.

As noted, this is particularly important:

> In any legal system, some form of procedural minimalism is likely to have a secure future. Courts know that there is much that they do not know, even when they do not know that they do not know.

The major Western countries around the world have adopted liberal democracy as the mainstream political ideology. In this context, the principle of free enterprise can be seen as a consequence of the rule of law, although it is often difficult to draw a clear line between the public and private spheres, as this division depends on the choices made by the State through legislation.

In Ronald Reagan's speech, the sharp division between conservatives and progressives regarding the proper size and role of government became evident: "Government is not the solution to our problem; government is the problem."

First, the main constitutional goals to be pursued by public authorities are the protection of freedom and the promotion of equality for all. However, equality is often understood only in a formal sense as equal treatment under the law, despite the economic and social disparities that exist among individuals.

Second, the Constitution should not be regarded as an abstract construct; rather, it is responsible for ensuring the functionality of essential social subsystems such as the economy, the media, and others.

The modern State holds the monopoly on the legitimate exercise of power. Its purpose lies in the regulatory enforcement necessary to control the autonomy granted by individual freedom, in the name of the public good. Freedom, in itself, always allows the emergence of powerful social actors within the public sphere. Taxation represents the most visible expression of the State's monopoly of power, providing the essential revenue for its budget.

How, then, should the State act in the social sphere?

From this perspective, the Constitution may not establish a specific social program; its primary role is to safeguard the security of the State's form, as well as the existence and legal certainty of its citizens.

On this subject, Dieter Grimm (2019, p. 133) highlights Forsthoff's teachings, noting that he recognized the legitimacy of certain affirmative actions by the State to preserve social justice. According to Grimm:

> Historically inevitable, domestic policy today emphasizes compensation and redistribution, while a constitution entirely devoted to the rule of law loses its central role and is able to integrate state action only in a fragmentary manner.

The principle of free enterprise unfolds in the division of labor, as it ensures entrepreneurial freedom to organize businesses autonomously in pursuit of better results. A highly complex industrial society cannot function effectively without planning and division of labor.

When analyzing the limits of free enterprise from the perspective of the rule of law, two major ideological positions emerge concerning the size and role of the State in contemporary society. On the one hand, liberal theorists - from John Locke to Friedrich Hayek - have traditionally been skeptical of government-mandated redistribution, as it risks rewarding the lazy and incompetent at the expense of the virtuous and hardworking.

Following this reasoning, redistributive programs may lead to what economists call "moral hazard," by rewarding individuals based on their income level rather than their effort. In this way, government intervention can discourage work and personal initiative.

This thesis of division of labor was adopted by the Brazilian Supreme Court to authorize, in jurisprudence No. 725, an alternative work arrangement between employment relationships (Article 7) and self-employment (Civil Code 2002). In Brazil, workers can use a legal entity to avoid the application of the Consolidation of Labor Law, as the Supreme Court would decide in another case (No. 1389) whether workers can make their own decisions regarding the contract model, or whether the presence of subordination is a mandatory criterion for determining fraud.

On the other hand, it is morally difficult to justify a minimalist State that provides no safety net whatsoever for its less fortunate citizens. Such an approach would only be defensible in a society where the playing field was perfectly level, where accidents of birth or mere luck played no role in shaping individuals' life prospects, wealth, or opportunities.

John Rawls (p. 15), in his seminal book *A Theory of Justice*, provides essential insights into political choices within the framework of social constitutionalism, expressed through his "veil of ignorance" approach:

> A final remark. Justice as fairness is not a complete contract theory. For it is clear that contractarian idea can be extended to the choice of more or less an entire ethical system, that is, to a system including principles for all the virtues and not only justice [...] For example, if a man knew that he was wealthy, he might find it rational to advance the principle that various taxes for welfare measures be contend unjust. If he knew that he was poor, he would most likely propose the contrary principle.

From Amartya Sen's (2017, p. 345) viewpoint, equality of opportunity should be understood as follows:

> Similarly, the requirement that jobs be open to all via open competition on the basis of qualifications does guarantee an important type of nondiscrimination, but it does not do much for someone who did not have the opportunity to get the right kind of schooling which would allow him or her to acquire the necessary qualifications.

The Constitution can be put into force through the social consensus reached in a social contract. From this perspective, constitutional provisions have their own authority, hierarchically recognized as high-level rules within the legal system. These kinds of rules can make the consensus enduring and bind future generations, thereby granting stability for the future.

The fundamental question then becomes: how can the acting generation acquire the legitimacy to bind future generations?

The death of the founding generation creates a legitimacy vacuum, which courts have successfully filled by serving as the primary defenders of the legacy left by their predecessors. The new generation of political leaders is guided by the judiciary's professional efforts to safeguard core constitutional principles.

Bruce Ackerman (2019) described a metaphorical relation between constitutional provisions and their capacity to prevail over challenges posed by an unknown future:

> In his view, constitutional designers confront a problem similar to the classical dilemma faced by Ulysses, who sought to preempt the Sirens' attempt to lure his ship into disaster. To deflect this threat, Ulysses orders his sailors to put wax in their ears so they will not hear the Sirens' song. Similarly, Elster advises constitution-makers to take precautions: they should design the modern ship of state while recognizing that citizens may succumb to moments of passion in the future—and create a system of fundamental rights and institutional checks that will allow the government to stay more or less on course until the waves of emotion subside.

Fundamental rights are key to preserving institutional stability, both for the government and for citizens, during emotionally charged times in the future.

So, how can any constitution claim the authority to control later generations?

What justification can there be for allowing the "dead hand of the past" (as the phrase is inevitably used) to govern us today?

David A. Strauss (2010) highlighted how one generation can bind another, citing James Madison's view: "the earth belongs to the living, and not to the dead". There must be a counterbalance between the guidance of the founding generation, which provides predictability for the future, and the amendments that update constitutional provisions.

Sophisticated constitutional mechanisms can be adopted to overcome the challenges posed by the tension between past and future. The Constitution often uses principles as standards (ethical guidance) rather than strict rules, because its abstract content can adapt to future socio-economic changes.

Finally, the decision taken by the Supreme Court will impose a transaction cost on society as a whole, because social security in Brazil is funded through regular employment relationships. This may compromise its sustainability for future generations, and, as symbolized in Ulysses' metaphor, the Constitution could face a step from which there is no return.

CONCLUSION

Our analysis considers the view of the Brazilian Federal Supreme Court regarding the Theory of Social Constitutionalism, rooted in the Federal Constitution in a living constitution perspective.

The question arises: is this new constitutional interpretation the best means to achieve social justice?

There are two possible paths that the Constitutional Court could follow. First, it could preserve the foundations of originalism, in which case the constitutional text would continue to be interpreted according to the traditional understanding established by lawmakers since the inception of the Labor Code, preserving the labor relationship and the sustainability of social security scheme.

Second, the Justices of the Federal Supreme Court could exercise discretionary authority to promote a new interpretation of the constitutional text, informed by contemporary socioeconomic realities, in line with the doctrine of the living Constitution authorizing the broad adoption of legal entity by workers to render their services to the market without any legal constraint.

In our view, the Brazilian Federal Supreme Court has followed the second path, which has been weakening the Theory of Social Constitutionalism and aligned it more closely with liberal economic ideology.

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