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## Weimar, the South American Way

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## Abstract

The essay explores the reception of the Weimar Constitution in South America in the 1920s and 1930s. After some general and comparative remarks on the South American case, the article identifies certain milestones for understanding the particularities of the constitution's reception by South American scholars, notably through the analysis of the first translations and early commentaries on the German Constitution of 1919. In a final section, it examines the normative reception proper, focusing on the Brazilian constituent debate and the 1934 Constitution.

Keywords: Weimar Constitution, South America, legal doctrine, Brazilian Constitution



Carlos M. Herrera\*

## Weimar, the South American Way

To Juan Herrera

This text describes the reception of the Weimar Constitution in South American States in the 1920s and 1930s. Why focus on this period? The 1930s saw a series of very important constitutional transformations concerning social rights,<sup>1</sup> one of the aspects considered as one of the most distinctive of the Weimar Constitution. Another element that had affected the European debate after 1919, the renewal of the mechanisms of parliamentary democracy, appeared to be more abstract, given the presidential regime predominant in Latin American, and, later on, the decline of democracy in Germany after 1933. A third key aspect of the Weimar Constitution, the question of territorial organization and the renewal of federalism, occupied a less important place in the Latin American constitutional reforms of the 1930s. All these topics were discussed by constitutional jurists in the different countries since the beginning of the 1920s. It was modest but very representative of the reception of German thought in South American Faculties of Law.

My essay aims to propose only a general framework, based on a series of hypotheses and developed in four directions, which will be integrated into two large blocks. In the first part, I will present some metahistorical observations and propose a periodization for approaching the reception of Weimar ideas in South America. The second, more extended, part will focus on an analysis, on the one hand, of some doctrinal discourses and then, on the reception within the framework of a constituent process, which constitutes the clearest example of the presence of Weimar Constitution in Latin American debates. For reasons of space, I will not be able to study any of these topics exhaustively here, but they will be subject to further developments in other publications.

1

I will discuss two sets of (relatively general) questions. The first touches on certain methodological problems in examining the reception of Weimar principles in Latin American legal cultures. This section reveals some problems of temporal distance and levels of analysis, which will lead us to a first periodization to explain the reception.

### 1.1 *How to Approach the Weimar Constitution's Reception in Latin America?*

Let me introduce my comparative enterprise with a number of metahistorical remarks. Some are general, but the most important take Weimar as an object. These presuppose a distinction between doctrinal or academic reception on the one hand, and normative reception, on the other.

The first touches upon the characteristics of the reception that can be found in Latin America, which has rather particular features when compared to that of European countries with an old Republican tradition such as France, for example, which I have studied elsewhere.<sup>2</sup>

A preliminary difference obviously also affected the temporality in which the normative reception unfolded: in contrast to some European countries, in Latin America this did not follow a strict logic of contemporaneity, but took place after a (short) interval. As I have shown elsewhere, the inclusion of socioeconomic rights in South American constitutions took place mainly in the 1930s.<sup>3</sup> However, at that time the German Constitution of 1919 was already overshadowed by its failure. The *non-contemporaneity* of the normative reception will have consequences for the periodization.

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1 HERRERA (2012).

2 HERRERA (2011).

3 HERRERA (2012).

Due to the significant cultural distance, the Latin American reception also had other specific aspects. It was above all a *hybrid* reception, as the Weimar Constitution was rarely seen in isolation. When it comes to the normative reception, it almost always appeared together with other constitutions, some predating Weimar (like the Constitution of Mexico of 1917) and some later ones (e.g. the 1931 Constitution of Republican Spain).

At the same time, it was more *positive*, less suspicious than the French reception, for instance. The reasons for this are not difficult to understand. On the one hand, in Latin America Germany was not the former enemy with whom territorial or economic disputes were ongoing. On the other hand, German ideas benefitted from the admiration that European thought in general enjoyed in Latin America at the time, although it was not as highly esteemed as other cultures, for example the French.

The reception of the 1919 Constitution was sometimes also *indirect* in academic terms. Certainly, direct knowledge of the constitution was not lacking: by 1920, at the latest, there were many translations of the Weimar text into the Latin American cultural space. In Argentina, there were at least two different translations barely two years after the adoption of the Weimar Constitution,<sup>4</sup> followed soon by a Portuguese translation in Brazil,<sup>5</sup> and then another Spanish one, this time in Chile. Sometimes, as in the case of Argentina and Brazil, the translation seemed to follow a purely intellectual goal, while in the case of Chile, it was directly linked to the constitutional revision projects that occurred in the country towards the mid-1920s. Indeed, the 1925 text of the Chilean constitution includes the first provisions on social rights.<sup>6</sup>

Along with the translations, Latin American commentaries had already appeared, although they remained rather modest in number. Their interest changed over time: at the beginning of the decade, they seem motivated by the novelty, whereas later,

they engaged more with the practical aims for ongoing reforms.

However, the reception of scholarly interpretations of the Weimar Constitution could also be indirect. French authors had an important role in spreading the knowledge of the Weimar institutions in Latin America. Thus Boris Mirkiné-Guetzévitch's work on the new constitutionalism was translated first into Spanish, then into Portuguese (in 1933), and was cited in the Spanish, the Brazilian and the Colombian constituent debates, as well as later in Argentina. In fact, part of the Weimar experience was also reabsorbed in Léon Duguit's theory of social law, which was very well known in most countries.<sup>7</sup> But also »minor« works of French thought – those of authors who did not represent an intellectual authority or who were not even jurists (such as R. Brunet or E. Vermeil) – played a role in the analysis of the German institutions in Latin America.

From a general point of view, there was no homology between normative and scholarly reception, although they are closely linked. Scholarly work contributes to normative reception, making foreign experiences available to the legislator. Moreover, only in the academic reception was Weimar constructed as a specific object. But the normative translation of this intellectual reception is always difficult to measure; in any case, its importance does not presuppose the adoption of the institutions, or a favorable judgment of the model, as the French case proves.<sup>8</sup>

Nevertheless, when looking for traces of normative reception, we need to keep in mind that the legislative discourse was always more nationalistic than the scholarly discourse, often preferring to refer to local rather than foreign examples due to the fear of losing originality. Spain was partly an exception to this, something that critics of the Constitution of 1931 exploited.

Certainly, in the Latin American context, European constitutionalism could be mobilized as a »model« or at least an »authority«. Did Weimar

4 MARTÍNEZ PAZ (1921). The earlier translation into Spanish, published by the RACP and revised by WILMART (1920) had been based on a French version.

5 GARCIA (1924). The translator, Aprígio Carlos de Amorim Garcia, was a

substitute federal judge in the early 1930s.

6 DÍAZ VALDERRAMA (1925). The translator, Francisco Javier Díaz Valderrama, was an army officer and military professor.

7 HERRERA (2014a).

8 HERRERA (2011).

function as an authority for Latin American constitutionalism? Before attempting an answer, it is worth highlighting one of the main paradoxes that our subject faces: as we said above, the development of social constitutionalism in Latin America has its second, strong impulse in the 1930s, when the Weimar regime had already entered into crisis. By the middle of the 1930s, it was clear that the German republican experience had lost much of its appeal. In countries like Colombia, for example, foreign constitutional references in the context of the constitutional amendments of 1936 were principally made to France, Spain or even, in matters of expropriation of private property, to Chile.

Yet, every constituent process in the world at the time had to take into account the German precedent, at least in social matters, and Latin America was not an exception from the 1930s. If we said above that the adoption of social and economic standards was the most enduring of the 1919 Constitution's innovations, one issue stood out amongst all others: the social function of property. Other aspects, such as a peculiar parliamentary system, with the election of the President of the Republic by direct universal suffrage, do not seem to have been the subject of much interest. In any case, the changed functioning of German parliamentarism after the world economic crisis of 1929 seemed to exclude it from debates, with the exception of the presidential powers from Article 48.

As we know, Germany was not the only source for social constitutionalism in Latin America, since the Mexican Constitution of 1917 had outpaced its European sister in the adoption of what I have elsewhere called »the device of social constitutionalism.«<sup>9</sup> In the Chilean case, where the incorporation of social norms into the constitution of 1925 followed a certain peculiarity, the source referred to in social matters was above all the Treaty of Versailles and the ILO.

The Latin American context during the 1930s was even more complex as it was also witnessing a new modality of incorporation of social norms in constitutions; such a »constitutional populism« stood in complex relation to the Weimar tradition.<sup>10</sup>

## 1.2 *Toward a periodization*

It is perhaps possible to speak – borrowing Eric Hobsbawm's style – of the »long 1930s« of Latin American constitutionalism. The knowledge of the Weimar Constitution spread already from the early 1920s onwards, even if interest in it was uneven and by no means only focused on the question of social and workers' rights. However, the processes of constitutional revisions that greatly increased in number in the 1930s were quite multifaceted and utilized the Weimar argument to varying extent.

In all cases, it is important to distinguish between *vigor* and *actuality*. If the first notion refers to normative efficiency, the second one tells us about a (political, intellectual) project. In this sense, when the 1919 Constitution enabled the German democracy's collapse into Nazism after March 1933, not only was the fate that awaited it in constitutional history unknown, but it was thought that its projections remained still active.

We can therefore consider three moments of the Weimar Constitution's Latin American reception in these long 1930s, closely related to its evolution, or at least to how its evolution was perceived from abroad.

### 1.2.1 »Contemporaneous« Reception

If during the first years the reception of the Weimar Constitution was above all an academic one, a work of erudition and comparison, then the Spanish Constitution of 1931 brought it into a form of normative actuality in Latin America. Indeed, the debates in Spain under the Second Republic represented an update of the Weimar constitutional project for, and in, the Hispanic world. This aspect appears very clearly when we compare the constitutional revisions in Latin American states before and after 1931, including in those constitutions that already had adopted social or economic standards.

Scholarly interest in Weimar Germany increased sharply in the aftermath of the new Spanish constitutional culture. In particular, Ottmar Buhler's commentary on the 1919 Constitution, translated into Spanish in 1931, had by then become

9 HERRERA (2003), HERRERA (2008), HERRERA (2018).

10 HERRERA (2017).

authoritative. The Spanish editions of the works of the most original jurists of the Weimar Republic (such as Gustav Radbruch, Carl Schmitt, Hermann Heller) also reached Latin America around that time.

Clearly, Spain was one of the vehicles of German constitutional lessons into Latin America, but other countries, such as France or the United States, were also continuously present in discussions. Regarding social rights, there was always the Mexican precedent, but other Latin American states, like Chile or Uruguay, also played a role, for example in the Colombian constitutional deliberations.

### 1.2.2 The Moment of Defeat

The Third Reich and particularly the Second World War sounded the death-knell of the Weimar Constitution for most observers. There were other social experiments in the North of interest to Latin American jurists, such as Roosevelt's New Deal or even the Soviet Constitution of 1936, not to mention Italian fascism or Portuguese corporatism, which were sometimes grouped together with the Weimar Constitution as expressions of protest against liberalism.

From the second half of the 1930s onwards, the importance of Weimar as a point of reference declined sharply – even with regard to the social character of private property. For example, in the Colombian deliberations of 1934–1936, the governmental actors thought that the German formula, like the subsequent Spanish article, was not precise enough (»vague«) to protect private property. They therefore proposed a new formula of »rightfully acquired rights« in Article 10 of the Colombian Constitution.

Towards the end of the decade, the Germany that appeared in the Latin-American constituent assemblies' debates was above all that of Nazism. In the Cuban debates, for instance, liberal public law professors preferred to speak of other constitutions, like those of Poland or Estonia.

The defeat of German democracy by Hitler's regime cannot fully account for this; after all, in the

same Cuban assembly, references were made to Republican Spain at a time that General Franco had already put an end to its democratic constitution. We can even see a critical allusion to social constitutionalism when, in the Cuban deliberations, the deputies criticized its so-called casuistry in social matters. At the same time, other issues about Weimar institutions, not only regarding social matter, were re-evaluated, such as the issue of legislation by decree in exceptional situation.

### 1.2.3 After Weimar

By »after Weimar«, I refer not to its dismantling by the Nazi rise to power, but its place after the birth of new constitutions elaborated after the Second World War, including in West Germany in 1949. Weimar had already gone down in history as an expression of a new type of constitutionalism, and foreign scholars were ready to acknowledge its role – perhaps most meaningfully by Costantino Mortati in his 1946 essay – even if its normative specificity had lost some of its value.

At this moment, Weimar became the object of different, even contradictory appropriations. Once again, its topicality rested above all in its socio-economic part, the one least tainted by historical events – to the point that there were jurists, for example in the constituent discussions in Argentina at the end of 1940s, who dated the rise to social constitutionalism to the 1919 text.

Henceforth, reference to Weimar was sometimes implicit, even if it remained always openly venerated. We can see these new perspectives for Weimar in the Argentine constituent assembly's debates in 1949, which elaborated the country's first social constitution, very late compared to other Latin American countries. The reference did not appear in a central position during the presentation of the project, made by a good connoisseur of German legal thought, but it was mobilized by both the opponents and the defenders of the constitutional reform. These crossed appropriations reveal its entry in the history of constitutionalism.<sup>11</sup>

11 HERRERA (2014b). On Weimar references in the debates on the 1949 Argentine constitutional reform, see the article by VITA in this *Focus* section.

2

A key example of the Latin American normative reception of Weimar was the Brazilian Constitution of 1934. But what knowledge did these legal actors have about Weimar before the adoption of these norms? How did jurists evaluate its presence in a very different political context? We will first look at some of the scholarly analysis that appeared in the 1920s in South America, before turning to the uses of Weimar in the Brazilian constituent process and in the Brazilian Constitution's subsequent doctrinal interpretations.

### 2.1 *The Weimar Constitution as a Subject in Legal Scholarship*

The initial reception of the Weimar Constitution by Latin American jurists was purely scholarly. A prime example of this, at the beginning of the 1920s, was Raymond Wilmart, a former activist of the First International of Belgian origin, who had become a respected professor of Roman law at the University of Buenos Aires. In a comparative perspective, Wilmart praised the national character of German federalism, in particular its extension to education and social aspects (*sociabilidad*). However, he devoted most of his attention to the detailed workings of government, particularly the Weimar Constitution's construction of ministerial responsibility in a cabinet government. He strongly criticized this, especially the powers of the German chancellor over his ministers, which he blamed on Germany being a country organized hierarchically. Wilmart also criticized the appointment of the president by universal suffrage in a parliamentary regime, because this would give him a partisan base and prevent him from exercising a referee function. He also disapproved of the constitution's inclusion of semi-direct democratic forms, among other hybrid elements, and hoped that time would remove its effects. His assessment is doubtlessly the result of a failure to comprehend the novelty of the Weimar system, because Wilmart's vision was very attached to the English model.<sup>12</sup>

Remaining in Argentina, another key work was the more substantial – if purely descriptive – essay

of Enrique Martínez Paz that appeared in the *Revista de la Universidad Nacional de Córdoba* in 1921, in which he compared the Weimar Constitution to the Argentine system.<sup>13</sup> The text was also accompanied by a new Spanish translation of the German text.

For Martínez Paz (who followed René Brunet in this), the German Revolution had been the work of extremist socialists, but had ended up favoring the moderates. In his view, the main characteristics of the constitution were federalism, republicanism and democracy. Of the latter, he especially emphasized the mechanisms of direct democracy that meant that the Weimar Republic could not be defined purely as a representative system. This direct participation of the people in government and in determining the direction of the Reich marked an important difference with the Argentine system of government. It was «a bold innovation and a useful experience». At the same time, he understood that Weimar parliamentarism was of a particular type, given the powers of the president. The economic councils, «very important institutions», are even seen as an attempt at a professional parliament, which could lead to a revision of democracy.

According to Martínez Paz, the fact that the constitutional text regulated rights only in the second part corresponds to the idea that they are born of society – for which it was necessary to speak first of the organs of the state. Taking up Duguit's idea of a social function, Martínez Paz argued that all rights are relative. In his view, the Weimar Constitution was social, human, and concrete, in strong contrast to the abstract and absolute character of rights in the old constitutions. In fact, to Martínez Paz, the constitution's most positive aspect and innovation was the part dedicated to economic life that included a right to work and labor law. He spoke of a plan of social legislation, but confessed to feeling «perplexed» by the socialization provisions, although he emphasized that they only created the possibility of expropriation.

Martínez Paz argued that in its socio-economic provisions the constitution opened up new avenues for action and thought regarding the transformation of the state, and that these actually

12 WILMART (1920b).

13 MARTÍNEZ PAZ (1921).

called into question the omnipotence of its authority, its strength. He did, however, not share the French suspicion that the changes might be imputed to cunning or simulation, but saw them as the expression of the social forces at work in the present. To him, economic life, even more than politics, ran outside the old legal molds. Trade unions had transformed the entire social topography. In that sense, Weimar offered a solution, if perhaps a provisional one, for the reconstruction of the principle of authority. A purely political constitution could no longer be conceived. The German Constituent Assembly in 1919 wanted an ethical, political, social, and economic interpenetration in the constitution as a guarantee of its vitality and effectiveness, which led Martínez Paz to speak of a »total state«.

In a short preface to the 1925 translation of the Weimar Constitution published in Chile, Francisco Javier Díaz Valderrama highlighted a number of points that he thought of interest to the contemporary Chilean debates. These included the implementation of the federal system, the relations between public powers and, above all, the application in the text of »what among socialist doctrines is fair, reasonable and healthy« in such a way that impartial criticism had come to declare it a masterpiece of its kind. Just as Díaz saw many foreign influences in the German text (from both English and French law), his own judgment was eclectic, because he characterized the constitution as federalist, but unitary in terms of foreign relations or defense, as democratic and parliamentary in its political system but socialist in the economic field (but with a full guarantee of private property and capital), and even as conservative in relation to the establishment of the principles of authority and the social order.<sup>14</sup>

While all these comments related to the promising beginnings of the 1919 Constitution, the tone did not change in the early 1930s, even though the German system had entered into crisis since the Brüning government in September 1930. The marks of the crisis did not appear in the earliest analyses of the new decade, for example in the 1931 study of the Peruvian lawyer José León Barandiarán. They sometimes even showed signs of renewed

optimism, as in the case of the Brazilian publicist Victor Viana.

Barandiarán detected the importance of the 1919 Constitution in having »solved problems that fundamentally concern contemporary world politics«. Examples of these problems were the questions of representative government *vs* direct democracy, of presidential dominance *vs* parliamentary absolutism, of representative *vs* functional democracy, of individual natural rights *vs* social rights.<sup>15</sup> Barandiarán argued that the Weimar Constitution expressed the political and social ideology of its time and therefore inspired many of the contemporary constitutions, as the Declaration of 1789. This, however, did not keep Barandiarán from affirming the 1919 Constitution's character as an expression of the German spirit, which also constituted for him a guarantee of its future.

Barandiarán's conclusions were not very different from the European works on which he based himself, particularly regarding the Weimar Constitution's territorial organization and democracy. With respect to the first, he understood that a unitarian model prevailed, which was nuanced by regionalism but clearly more centralized than the Bismarck state. Barandiarán judged the Weimar Constitution's political system more effective. For him, the broad powers of the president operated as a counterweight to parliamentary absolutism. Barandiarán thought the constitution a spirit of organic integration that operated in both political forms. Thus, the *Volksstaat* appeared as an expression of integral democracy, including professional elements. He did not go into detail about social analysis, which he calls the »most human and just norm of individual and social rights«, although he had previously emphasized its value as an evolutionary modality towards socialism.

By contrast, Victor Viana (also writing in 1931) insisted more strongly on the constitution's social aspects, expressed in a set of statements of principles, in which, according to him, the socialist influence could be felt. More precisely, in analyzing the continuity with the Bismarck state he stressed that the social obligations have now entered into the constitutional text. At the same time, he in-

14 DÍAZ VALDERRAMA (1925).

15 BARANDIARÁN (1931).



sisted that the Weimar Constitution's provisions did seek to create new realities. Moreover, although Viana mentioned Article 165 only briefly, he did not fail to underline its importance for practical socialism.

Viana preferred to reproduce the text of the constitution to show that this code was not a step back vis-à-vis the constitutional tradition, but that it enshrined and developed liberal and democratic principles, including its social orientation. Viana's statements express a very optimistic view of the current social and political trends underlying the constitution: »in the modern world, all the progressive forces and all the elements leading humanity to a better world are, overall, in favor of the development of liberalism and democracy.«<sup>16</sup> In this sense, Viana considered the Weimar Constitution a good model for Brazil »in the direction of progress and not ... of reaction!« But, on the other hand, he insisted that it helped to create new realities: »The influence of socialism is in fact apparent in all the important provisions ... but always tempered by the resistance of social conservatives.«

The author of the most important Brazilian scholarly work on the Weimar Constitution, however, provided a more complex evaluation. Pontes de Miranda, possibly the best expert on German doctrine in the Americas, had been arguing for constitutional reform since the 1920s. Two of his works from the 1930s show the extent of the German presence in the Brazilian debate. In *Os fundamentos Actuaes do Direito Constitucional* (1932), Pontes de Miranda argued that the right to subsistence and the right to education were at the center of modern constitutionalism. If not secured in an »irreducible« manner in a constitution, these rights were unlikely to withstand the first crisis that challenged them. Included in the constitution, these rights determined the state's aims and purpose. Of course, Pontes de Miranda also discussed the idea of property as a social obligation. For him, the German constitution had not solved the problem, but it did have the merit of having raised the problem of the compat-

ibility of pluralist democracy with the state's objective. Like many legal thinkers – at least since Duguit – Pontes de Miranda proposed overcoming the class struggle through forms of social symmetry, which implied, in his lexicon, the socialization of the means of production.<sup>17</sup>

A year later, in 1933, insisting now on the importance of rights, Pontes de Miranda pointed out that the 1919 Constitution had recognized the right to subsistence. The new social rights constituted the state's purpose and formed what he called the »socialist constitution« that would allow political integration and solidarity through the »new fundamental rights«, avoiding violence and the disintegration of the state.<sup>18</sup> However, the Weimar solution with its »hesitations« was »insufficient«, and, in fact, it created a polycracy.

These works demonstrate the very significant presence of Weimarian ideas in Latin American constitutional debates and thought. Some moved in a doctrinal perspective and tried to analyze the Constitution of 1919 within the framework of academic knowledge of constitutional law – predictably, these were the works of professors. However, we also found essays, not necessarily by legal scholars, motivated by an interest in promoting Weimar's ideas in a progressive interpretation in connection with the constitutional reforms in Chile and Brazil. It is also important to emphasize the erudite characteristics of this reception, although it was not always entirely original. The authors discussed above spoke German and were able to work directly with the source text, although they also considered other national readings, such as the French one.

## 2.2 *Weimar in the Tropics?*

Finally, let us turn to a specific case of normative reception: the Brazilian Constitution of 1934. There are a number of reasons why Brazil makes for a particularly suitable case study. First of all, the constituent debates in Brazil took place at a time when the reception of the Weimar Constitution in Latin America was not yet overshadowed by the

16 VIANA (1931). He considered Friedrich Naumann a socialist.

17 PONTES DE MIRANDA (1932). On the positions of Pontes de Miranda in this years, see BERCOVICI (2015).

18 PONTES DE MIRANDA (1933).

Nazi dictatorship. Second, Spanish developments unsurprisingly exerted less influence on Brazilian thought than on that of most other Latin American countries. Finally, at the beginning of the 1930s Brazil was likely the country with the Latin American legal culture in which the knowledge of the German experience was the greatest, or in any case, in which it was used most explicitly. Here we are interested in identifying some of the uses of the Weimar Constitution during the constituent debates of 1934.

The particular position represented by the Brazilian reception in any case implies assuming the modernity of the Weimar Constitution, as we saw it reflected in Viana's book, touching on issues such as democracy, economic order, rights or federalism. We will focus here on »social« modernity, which illustrates the hybrid character of the reception that we have seen earlier. Professional legal scholars at the beginning of the 1930s, such as Pontes de Miranda, underlined the importance of the »group« at the expense of the individual in new constitutions, although he pointed out that if group interests become more specialized, they should not completely override the individual's needs. In his speech opening the work of the constituent assembly in November 1933, President Vargas himself emphasized that »the sociological foundation of economic life today is solidarity. The principle of free competition has given way to cooperation. The tendencies towards solidarity will favor the formation of collective groupings, increasingly strengthened, for the defense of the interests of the group« under the control of, and in collaboration with, public powers. It was what he called »the constructive phase of the syndicalist movement«.<sup>19</sup>

Regarding the social provisions, a series of cross-connections to Weimar ideas were made during the constituent debate and before in the legal scholarship, sometimes discussed in relation to the topic of institutional organization. An important jurist like José Augusto had analyzed the issue as the problem of *professional* representation in democracy. This was not a Latin American mistake: Marcel Prélôt had made a similar reading of Article 165 of the Weimar Constitution in the Europe of

the early twenties. Among the Argentine Socialists, too, the idea of a functional democracy prevailed in the early readings of the same article (or in the interpretation of Russian Revolution). Augusto distinguished it from the mere »government of technicians« with an exclusive character. For him, in the midst of the weakness into which the Versailles Treaty had plunged the German state, there remained »the organized forces of the economy and the classes« that had managed to weather the storm. This explained the importance that the National Assembly had given them in the 1919 Constitution, creating a true economic parliament. He saw Article 165 as reconciling all the antagonistic ideas that had existed in the Weimar constituent assembly. However, the constitution was the work of a »cautious and prudent bourgeoisie«, which aimed only to complete political democracy, but not replace it, with a democracy of the producers, in which class struggle gave way to class collaboration. In that sense, Weimar was a model that achieved the same status as communist Russia or Fascist Italy.<sup>20</sup>

Augusto summarized the historical significance of the German constitution in a 1933 document that discussed the draft of the Brazilian Constitution:

The Weimar Constitution of 1919 enacted a series of measures to address all the problems that the new economy presents to the public authorities. Freedom in economic life, freedom of contract, a right to property that establishes obligations and demands it to be used to serve the highest common interest, the right of succession with an inheritance tax reserved for the state, the division and use of land, the progressive socialization of land, homogeneous labor law, trade union freedom, labor relations and the rights to health protection of workers, social insurance, the obligation to work and the right to work, international protection for workers – all these are contained in many express constitutional provisions in Germany.<sup>21</sup>

However, the recognition of a historical reference did not necessarily mean that it was evaluated

19 VARGAS (1933).

20 AUGUSTO (1932).

21 AUGUSTO (1933).

positively. Another of the protagonists of the debate, João Mangabeira, thought that the Weimar influence could be negative. Mangabeira had been one of the main actors of the so-called Itamaraty Subcommittee that had begun discussing the text of a new constitution at the end of 1932. Discussing the draft presented to the Constituent Assembly, Mangabeira refers to the German text to report an error in legal technique: »the project, taking as a model the Constitution of Weimar, expands and covers the whole preliminary chapter with the role of competencies, which will have to be repeated in several points later.« Nevertheless, it is interesting to note that his criticism did not refer to the Weimar constitutional experience but rather to an aspect of German culture:

Germans do not always make for good role models. Goethe stated that they »make everything difficult and complicated«; and Schopenhauer described the German characteristic to be »to see what is happening in the clouds and not to see what is before our eyes« ... And all these German faults are reflected in the great constitution, in whose mold the first chapter [of the Brazilian Constitution] has been cast.<sup>22</sup>

The criticisms directed against Weimar became more precise with respect to its treatment of private property. According to Antônio Marques dos Reis, one of the conservative deputies at the Assembly, »the right to property is one of the paramount rights of man«. This attack on the Weimar model also shows the importance of Weimar during the debates. Against the deputies who wanted to remove private property from the Bill of Rights, Marques dos Reis railed:

This anathema originates with a kind of obsession with, or superstitious belief in, the Weimar Constitution ... If it comes from the German Constitution of 1919, it is sacred and needs only to be translated, well or badly, faithfully or not, and translated into Brazilian law ... Such kind of superstition absolutely does not belong among the cultured minds assembled here.<sup>23</sup>

Finally, the Weimar Constitution was literally present in some passages of the new Brazilian Constitution, in particular, in Title IV, »Da ordem econômica e social.«<sup>24</sup> Article 115, which opens this section, essentially reproduced Article 151 of the Weimar Constitution on matters of economic organization, which is defined in terms of justice with the aim of ensuring that everybody can live a life compatible with human dignity.

Sometimes a literal borrowing was less decisive from an institutional point of view. This is the case in Article 138 e) of the Brazilian Constitution on the protection of youth (»It is the responsibility of the Union, the States and the municipalities, under the terms of their respective laws ... to protect the young against all exploitation, as well as against physical, moral and intellectual neglect.«), which repeats the formulations of Article 122 of the Weimar Constitution (»Youth shall be protected against exploitation as well as against moral, spiritual, or physical neglect. The state and the municipalities shall make the necessary provisions. Protective measures by way of compulsion may be instituted only by authority of law«).

Article 113, 17), which governs private property in the Brazilian Constitution certainly included the lessons of German Article 153, but also of the Mexican and Spanish precedents, pointing out that the right to property cannot be exercised against the social or collective interest. On the other hand, socialization, provided for in Article 156 of the Weimar Constitution, was translated only in terms of »monopolization« into the Brazilian Constitution's Article 116 of the. More innovative provisions, such as Weimar's Article 165, were not received in the Brazilian text, despite the recognition of trade unions (Art. 120) and worker protection (Art. 121). The greater elaboration of the latter items did not only rely on Mexican antecedents, but also took into account the evolution of the last three decades, for example, the establishment of labor courts in several states.

My last point here searches to explore the presence of Weimar references in the doctrinal interpretation of the new constitution, using the work of Pontes de Miranda. His was certainly an excep-

22 MANGABEIRA (1934).

23 MARQUES DOS REIS (1934).

24 It is thought that this section, which had been drafted by the Brazilian

Minister of Economy Oswaldo Aranha, reflected the intentions of the *Tenentes* and the »gaucho« group.

tional case, even with respect to the other Latin American countries: as I said above, Pontes was the greatest expert on Weimar doctrine in Latin America. His commentaries on the Constitution of 1934 attest to this, as he quoted such German authors as G. Anschütz, R. Thoma, H. Triepel, C. Schmitt, R. Smend, O. Koelreutter, E. Kaufmann, H. Heller, H. Kelsen, H. Wenzel, F. Giese, H. Nawiasky, W. Jellinek, to mention only those best-known today. He himself published in the German journals of the 1920s and 1930s; direct access to sources greatly expanded his knowledge.

Predictably, for Pontes de Miranda the original character of the new Brazilian Constitution was its programmatic profile, as expressed in its Article 115. This program was, in his terms, both social-democratic and Catholic in relation to the economic order: it was social-democratic above all regarding interventionism and Catholic with respect to the moral order. Pontes de Miranda sought to define, in the face of the Soviet or fascist alternatives, a single goal: practice representation through free elections, ensure individual liberties, production and distribution. In contrast to Mirkin-Guetzévitch, Pontes argued that the constitutional technique – the means to secure the ends of the state – was not restricted only to freedom, but also to many other aspects, such as the representation of labor and its liberation, and the distribution of material goods. At the same time, in matters as health protection or public assistance, Pontes de Miranda considered that Article 139 of the Brazilian Constitution remained in »objective law«, without creating a subjective constitutional right.

Pontes de Miranda called the German Constitution of 1919 »the main European constitution of our time«. In his writings, Weimar functioned as the criterion of constitutional modernity applied to the analysis of the different tests under consideration, and particularly to determining the position of the Brazilian Constitution in the context of contemporary constitutionalism. He even claimed that in some cases the German Constitution was superior to the Brazilian one, for example in defining the popular sovereignty, where Pontes de Miranda preferred the Weimar solution to Article 2 of the Brazilian Constitution. He considered the mechanisms of popular initiatives and referenda

»ingenious without ceasing to be simple«. In his view, they made democracy work, whilst at the same time fostering »a sense of responsibility in the organs of the state«. He also welcomed municipal autonomy as a specific organizational technique of the state.<sup>25</sup>

From his point of view, the modality of the economic councils of Weimar's famous Article 165 seemed to avoid socialism, because the councils did not have the capacity to legislate but were only consultative. He admitted that the German republican experience had shown that the mechanism was insufficient to protect labor interests but considered the Brazilian solution a hybrid. To Pontes de Miranda, what mattered was the distinction between the workers' claims and political representation that had to take into account general interests.

In this political sense, Pontes de Miranda preferred »mixed democracies« such as the Weimar model, which introduced some direct forms into a parliamentary democracy. In particular, he judged the German provisions for the president's powers »exquisitely democratic« and though they »constitute[d] a precious achievement of our day«. For him, the presidency was »became strength without being despotism, power without violence«. However, he also referred to the Weimar Constitution's »imprecisions on goals« to explain some defects of the presidency as constructed in the Brazilian Constitution.

Still, alongside Soviet Russia and later Fascist Italy (which was then joined by National Socialist Germany), the Weimar Republic was one of the three concrete alternatives that had been imagined in the 20<sup>th</sup> century to overcome the crisis of the representative democracies of liberal states. Pontes de Miranda noted that, unlike social transformations, political transformations were easier to evaluate and judge by their results. What was sought in these constitutional projects was the increase of social welfare and of distributive justice, the improvement of the state. In the pluralist, polycratic Weimar state – where there had not been a »general change of color«, but only some »staining«, as he put it – this had resulted in an unequal and heterogeneous material law. It was no coincidence that Carl Schmitt was the constitutionalist most utilized by Pontes de Miranda.

25 PONTES DE MIRANDA (1936).

It is rather curious that he defended the Weimar model of democracy – he referred to the balance between president and parliament as a »miracle« – at a time when Weimar Republic had failed by its internal mechanisms after September 1930. On the other hand, the social innovation of the Constitution of 1919 seemed to have been surpassed for him and Pontes de Miranda thought that the fascist experience could be considered a new kind of modernity, even he explicitly stated that he did not sympathize with it. It was no coincidence that he did not include finally the Weimar model among the influences on the Brazilian Constitution, but a diffuse form that he associated with fascism.

Although the *Estado novo*, which eliminated the 1934 Constitution three years later, seemed at least at first to confirm Pontes de Miranda's vision, it soon became clear that it was truly a more complex process. He erred in describing the Vargas project as »fascist«, even if by using this adjective he did not intend a value judgment. To him, this category probably stood for the new modality of social government, including the very complex links with mass democracy typical of populism. The continued use of Weimar references to explain this new form is another proof of its heuristic power in constitutional law.

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