THE BRAZILIAN SUPREME FEDERAL COURT AND THE SHARED CONSTITUTIONAL AUTHORITY

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> "A Constitution is a Standard a Pillar and a Bond when it is understood approved and beloved. But without this Intelligence and attachment it might as well be a Kite or Ballon, flying in the air." (John Adams)

INTRODUCTION

The article states the thesis that, in light of the Judiciary power increase phenomenon for macro-political cases resolution, it is possible to observe the legitimacy of its decisions if two requirements are followed: first, the intentional approval of the other branches in the resolution and, second, the Brazilian Supreme Federal Court must not intend to possess full control of the meaning of subjects within macro-politics which is an object of discussion among different institutional scopes; it must, when possible, share its constitutional authority.

We understand that such requirements could contribute to the Supreme Court understanding of political structural

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changes and, eventually, review its prior understandings about the law – after a conversation with other Branches or with the ones affected by the decision – perfecting the decision making process with the participation of other political actors beyond its 11 judges ("ministros" in Brazil).

In this sense, the cycle of political cases which are litigated occurs in the following manner: In the first moment it is transferred to the Judiciary the responsibility to answer to a determined polemic subject of a strong social appeal, emerging, therefore, the phenomenon of the judicial review of a political subject; thereafter, following the Supreme Court holding, the losing party may seek to strengthen its political forces to challenge the winning thesis, without any disrespect for the holding. In case, in another moment, the social mobilization becomes strong enough to reshape the democratic institutions, it will be up to a "new" Court to review its precedent, undoubtedly, considering its previous decision, an object of the review.

The methodology used for the development of this article was the deductive method, based on the investigation of literature, precedents, especially, the Brazilian Supreme Federal Court cases, and rules. Such elements become the basis for the understanding of the herein scrutinized topic.

2 - THE COURT'S POLITICS

In light of the relatively recent ascension of the Judiciary, it is understood that, politically, it is a duty to question the supremacy of a Branch, whose sole responsibility is the interpretation of the constitution. We ought to*, in lieu thereof*, strengthen the democratic institutions to trigger disputes to set forth the meaning of the Constitution. It is not a calling against judicial review or the institutional duty of the Courts to resolve disputes and provide answers for very important issues to society.

The rhythm which has provided endurance for the

institutions is steered by its capacity to face multiple crises and continue to work. This is a signal that, even before troublesome times, the themes which have defined the national identity and are relevant for the construction of the country's political agenda continue to be the fuel of the political actors.

The argument has not been made in the sense that the decisions of the Courts should exclusively handle "legal matters". It is not possible to precisely sever subjects of major or minor social importance or to protect the system from political consequences of cases in which, prima facie, present themselves as aimed to resolve private issues. It is inevitable the outcome in which every judicial decision, on a major or minor scale, encompasses some political dimension.

Such a statement is not new and also does not lead to a debate. The understanding that the Courts, even when occupying a less favorable institution position to act when facing situations that could lead to a change of structural elements within society[1], might not only interfere but they interfere decisively in the game of power, it has generated different layouts in each country which has submitted to democratic constitutional values.

When sharing the limitation of powers and similar elements, as the separation of powers, the protection of fundamental rights, gathering components of the democratic constitutionalism, we may affirm that such countries set forth a major or minor role for the Judiciary due to historical and cultural circumstances - even when observing the growth of political litigation as a worldwide phenomenon.

It is enough to ponder on the differences among the models of the organization of the Branches in France, England, the United States, Brazil, Germany, Colombia, and South Africa to notice that each country ended up defining its institutions with a major or minor capacity of social interference according to

[1] Hamilton, Alexander, James Madison and John Jay. *The Federalist Papers.* New York: Signet Classics, 2003

constitutive elements of the institutional national design, and according to what its political actors understood as adequate places for the execution of changes or to prescribe society core values.[2]

Those countries keep similar values derived from the end of the Second World War to protect human rights and specific ways to protect and apply fundamental rights. Nevertheless, the issue is not only about the identification of these values, but, equally important, which are the institutional adequate spaces for their promotion. In this sense, Ran Hirschl has perceived that in the last decades has occurred an intense transference of powers from representative institutions to the Judiciary and the concept of constitutional supremacy started to be followed by hundreds of countries[3].

The central point of the aforementioned phenomenon entails the increase of the transference of cases which, in the beginning, seemed to belong to the arenas of representatives, to the interpretation and decision of the judicial instances. This has occurred because, among other reasons, of the instrumental development therefor judicial review, as a reflex of the sedimentation of modern constitutionalism, and the reconstruction of democratic institutions after authoritative regimes.

In the young democratic regimes, the application of the constitutional jurisdiction was improved and there has been a significant transference of the main polemic themes debated within society to the Courts.[4] This created the expectation - very

[2] A brief study about the types of constitutional courts was made by Louis Favoreu: Favoreu, Louis. *As cortes constitucionais.* São Paulo: Landy, 2004.

[3] Hirschl, Ran. "The new constitutionalism and the judicialization of pure politics worldwide." *Fordham Law Review*, v. 75 (2006), 721.

[4] 2 "The Supreme Federal Court increase of power may be explained, too, due to other factors. The binding effect of its decisions, the national importance and effect of a judicial review case, and the possibility of issuing binding precedents which may alter the entire system, are mechanisms followed by new decision-making techniques as the judicial interpretation, the unconstitutionality declaration without reduction of the constitutional text, the appeal to the legislator, greater attention to the institute of the review, and polemic proposals as the ratio decidendi bound and the transcendence of the reasoning of the court." Clève, Clèmerson Merlin; Lorenzetto, Bruno Meneses.

clear in the last years in Brazilian soil - that subjects of high political repercussion "naturally" shall be conducted to the Judiciary every time someone suffers a defeat in the traditional political arena about constitutional interpretation.

Despite the thesis of "the spreading of democracy" to explain the formation of stronger Courts after the transition of determined countries for regimes under the guidance of democratic Constitutions, Hirschl mentions that the thesis is insufficient for the analysis of the expansion of the Judiciary in democratically consolidated States[5]. Due to that, it has been put that the expansion of the role of the Judiciary results from a strategic analysis and of hegemonic preservation of political actors holding tremendous power, these, consciously, have realized that the Judiciary could be a new space for the resolution of political disputes.[6]

The thesis of hegemonic preservation possesses a broader scope than the thesis of the spreading of democracy. It

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"Constituição Federal, Controle Jurisdicional e Níveis de Escrutínio." *Direitos Fundamentais & Justiça*, no. 32 (Jul./Set. 2015), 109. In the same sense: "The Supreme Court's precedents, that previously affected the entire population only in exceptional cases (when judicial review was performed in abstract, as is done in the European tradition), may determine the outcome of many cases at once. This has been a remarkable innovation and an impressive break with tradition. Today, the Supreme Court has mechanisms to establish guidelines (called súmulas vinculantes) that bind not only the Judiciary, but also the Executive and all its agencies, and all cases trialed can (or at least should) influence lower courts' decisions.". Fonseca, Juliana Pondé. "The vanishing boundaries between technical and political: normativism and pragmatism in the Brazilian courts' adjustment of public policies." Revista de Investigações Constitucionais, vol. 2, no.3, (Set./Dez. 2015), 67.

[5] Hirschl, Ran. "The Political Origins of the New Constitutionalism." Indiana Journal of Global Legal Studies, vol. 11 (2004)., 74

[6] "Political actors who voluntarily establish institutions that appear to limit their institutional flexibility (such as constitutions and judicial review) may assume that the clipping of their wings under the new institutional structure will be compensated for by the limits it might impose on rival political elements. In short, those who are eager to pay the price of judicial empowerment must assume that their position (absolute or relative) would be improved under a juristocracy." Hirschl, Ran. "The Political Origins of the New Constitutionalism." *Indiana Journal of Global Legal Studies*, vol. 11 (2004), 85-86.

seems simpler to diagnose the diverse manners in which political actors may use the Judiciary as a new deliberative instance, even when it represents a partial sacrifice of their powers[7]. A very well spread example characterizes the transference of the responsibility of unpopular decisions, resulting in a reduction of political costs for the members of congress. It is given away part of the power of the Legislative to the Judiciary, although, on the other hand, it is also transferred the costs and the responsibilities (institutional and political) upon the decision.

Hence, the responsibility for a provision of national importance has had its origin from a different source, not parliament. It occurs not only by virtue of a discussed decision from the Judiciary taking over the role of legislators but also by the strategic use of the Judiciary by the Legislative to avoid problems with the voters - the duty of coherence expected from the Courts is more linked with its own decisions (precedents) than with the pure popular will.[8]

The recurring presence of political cases in the Judiciary has become known as political litigation. This, although, should not be mistaken with the judicial activism[9], characterized by expansive holdings, which have crossed previously set up limits for the Judiciary. It is a more intense performance within the scope designed for the action of other Branches[10], summing up,

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[7] Hirschl, "The Political Origins of the New Constitutionalism", 84

[8] It is not unusual for the judges of the Constitutional Courts to expressly admit that their holdings might have unpopular characteristics.

[9] "We should not commit a mistake by claiming that the activism of the Supreme Federal Court is similar to the one of the entire Judiciary, the reasoning of the Court to defend a less deferent position are, generally, as follows: i) The Constitution is a Fundamental Order "guardian" of substantive principles and not only a "Frame Law"; ii) the defense of fundamental rights and of fundamental principles that are based on our political community is a duty of the Judiciary; iii) such a task asks for, many times, the use of new decision-making techniques due to the national social complexity and promote constitutional justice; iv) the activism of the Court is subsidiary, presenting itself only when the other Branches do not act." Clève and Lorenzetto, "Constituição Federal, Controle Jurisdicional e Níveis de Escrutínio", 108-109.

[10] Barroso, Luís Roberto. "Judicialização, Ativismo Judicial e Legitimidade

characterizing itself as a stronger tendency of the courts to declare the greatest number of statutes as unconstitutional.[11] Therefore, a more activist Court shall exercise a constitutionality control repeatedly and with more freedom, getting to the point of establishing, due to omissions from the Legislative, normative resolutions for challenged cases.[12]

The adhesion of a more active posture or deferent by the Judiciary may, indeed, be directed by sources of different ideological sources. Notwithstanding, we can easily agree upon that, although our jurisdictional activities may be very competent, the Constitution is too important for the monopolization of its interpretation by judges. The difference among other voices that seek to participate in the process of interpretation of the constitutional text has found a greater or smaller leeway following the institutional role provided by the Constitution itself for each political agent.

Hence, the search for the vestment of rights and the scope of judicial decisions which have been enmeshed with political issues of high intensity - such as, for example, questions related

Democrática." Revista de Direito do Estado, no. 13 (Jan./Mar. 2009), 75

[11] We should not ignore that, by itself, the constitutionality control quantitative exercise aspect may not be fragile to characterize the activism. It does not set apart the possibility of an isolated decision of a Constitutional Court to have a deep impact within the entire Powers organization structure. Anyway, it has been recurrent the characterization of the judicial review most intense use, originating a greater tendency of "border crossing" among the branches.

[12] By any manner, as mentioned by Barry Friedman, the activism meaning definition has not been closed and it has been full of ideological tendencies: "Criticizing the justices grew ever more complicated as the Supreme Court's rulings seemed to swing to and fro. Although the most frequent criticism head during the Rehnquist Court was that of judicial activism, critics on the left and right could not agree on what the term even meant. Each side believed that it hewed to a principled definition, and each accused the other of simply complaining about decisions it did not like. Shifting rulings caused much reshuffling of critics' positions. Claims of hypocrisy became the order of the day, as critics turned their attention from the Court and took to calling one another names." Friedman, Barry. *The Will of the People: how public opinion has influenced the Supreme Court and shaped the meaning of the Constitution.* New York: Farrar, Straus and Giroux, 2009, 343.

to affirmative actions, the financing of campaigns, and the marriage of persons of the same sex -, capable of triggering important changes in our relations, are contingent and depend upon the existence of technical conditions - the capability of being litigated - but, in equal measure, a political scenario which has led to social transformations promoted "above". *id est*, resulting from a provision of a Court composed by judges whose activity is not structured to represent or answer to the popular will, but, based on the "reputed knowledge of the law" of its members.

In light of the previously mentioned, observes Hirschl, when the Courts seek to plant the "seeds of social change" in a political community, it depends on the socio-cultural conditions leading to litigation, that is, supporting the transformation accomplished by the Judiciary[13]. A non-exhaustive list helps to illustrate the tendency of transferring the cases of macro-politics to the Judiciary: the electoral process litigation, the limitation on the Executive rights, the collaboration to transform the political regime and the procedures of formation of the collective will and the definition of governmental and structural politics. This has led to what Hirschl called "juristocracy"[14].

We can notice, under such circumstances, the growth of the deference of the Legislative before the Judiciary, the crossing of previously set borders for decision making by the Courts, the redefinition of the duties of the Parliament and the Executive and the political agenda partially delivered to litigation. Apart from the judgments related to the electoral procedure, some of the issues that have been handled by the Courts could have found, previously, a resolution in the political sphere.

In Brazil, during the last decades, the attention increase aimed at the Supreme Federal Court accompanies the tendency also present in other countries in the sense of a possible

[13] Hirschl, "The new constitutionalism and the judicialization of pure politics worldwide," 725

[14] Hirschl, Ran. *Towards Juristocracy: the origins and consequences of the new constitutionalism.* Cambridge: Harvard University Press, 2007, 222-223.

"juristrocacy". The Court, as mentioned by Oscar Vilhena Vieira, became more present in the life of the people, as a growing number of Brazilians have become accustomed to the idea that fundamental questions of politics, economy, or national principles shall be decided by the Supreme Federal Court.[15]

The "hiperconstitutionalization" of several aspects of social life corresponds to a feeling of distrust from part of society to the traditional mechanisms of democratic representation. As consideration for the increase of responsibilities of the Judiciary, for, among other activities, keep its constitutional commitments, it has been mitigated part of the representative system supremacy[16].

Another factor that has contributed to the Supreme Federal Court authority increase derives from the institutional design developed for the Court:

The 1988 Constitution, concerned, once again, about the preservation of its work against the political bodies attacks, vested the Brazilian Supreme Federal Court with broad powers as the guardian of the Constitution. To the Supreme Federal Court were entitled functions which, at the majority of the contemporary democracies, are divided into at least three types of institutions: constitutional tribunals, specialized courts (or

[15] "The expansion of the Supreme Federal Court authority and the courts, in general, is not, however, a strictly Brazilian phenomenon. There is nowadays broad literature seeking to understand such phenomenon of the advance of the law in detriment of politics, hence, the increase in the authority of the courts in detriment of the parliaments." Vieira, Oscar Vilhena. "Supremo Tribunal Federal: o novo poder moderador." In *Os juristas na formação do estado-nação brasileiro*: (de 1930 aos dias atuais), edited by Motta, Carlos Guilherme and Natasha S. C Salinas. São Paulo: Saraiva, 2010, 511. Accordingly: "[...] this authority expansion process of the courts around the world has notably presented, in Brazil, even stronger marks. The huge ambition of the 1988 constitutional text, summed with the concentration of powers under the Supreme Federal Court jurisdiction, that has been happening for the last twenty years, points to a separation of powers system balance change in Brazil." Vieira, Oscar Vilhena. "Supremocracia." *Revista Direito GV*, vol. 4, no. 2 (Jul./Dez. 2008), 444.

[16] Vieira, Oscar Vilhena. "Supremo Tribunal Federal: o novo poder moderador." In *Os juristas na formação do estado-nação brasileiro*: (de 1930 aos dias atuais), edited by Motta, Carlos Guilherme and Natasha S. C Salinas. São Paulo: Saraiva, 2010, 512.

simply specialized jurisdictional powers amid the legal system), and appellate courts of last resort.[17].

In light of the aforesaid, despite being fundamental to discuss the issue of internal disputes on the interpretation of constitutional provisions, not stepping in a direction apart from the relevance of hermeneutics and ideological issues[18], we must focus on the institutional structure designed for the legal system, especially the Supreme Federal Court, and understand the constitutional authority that may be exercised by the Court when resolving matters of national importance amid Brazilian politics.

Due to a scenario that has affirmed that the Court has exercised the functions of other bodies, an answer to that would be to adopt an inverse position: the self-restriction. This would lead to an empowerment of the residual authority of the Court.[19]

Nevertheless, the problem surrounding minimalist models of constitutional jurisdiction is on the limits it has imposed on judges. If, on one hand, the minimalism may contribute to strengthening the stare decisis, on another hand, its full adoption could block every possibility for the constitutional Tribunals to make new progressive decisions.[20] Besides, the pack of duties

[17] Vieira, "Supremo Tribunal Federal: o novo poder moderador," 517.

[18] "A theory of constitutional interpretation matters, but it is no substitute for a substantive constitutional vision." Post, Robert C. and Reva B. Siegel. "Democratic Constitutionalism." In *The Constitution in 2020*, edited by Balkin, Jack M and Reva B. Siegel. Oxford: Oxford University Press, 2009, 26.

[19] "With the concentration of its activities under the scope of constitutional jurisdiction, with strong discretionary powers, the Court, besides starting to rule just as a panel of judges, may also qualify its deliberative procedure with greater quality. What I fear today is a sum of eleven votes (which is a great number of cases that have been written before the arguments during hearings) and not a Court holding, derived from a strong discussion among the ministers (judges of the Brazilian Supreme Federal Court)." Vieira, "Supremo Tribunal Federal: o novo poder moderador," 530.

[20] "[...] it would also be a mistake for progressives to embrace minimalism, a theory that invites judges to construe the Constitution in narrow and shallow ways. Minimalism is aimed at judicial interpreters and counsels against change. It seems unlikely to mobilize progressives to "take back the Court" or to orient the judiciary to break with the conservative constitutional premises that have been incorporated into doctrine in the last several decades. Minimalism cannot endow current generations of Americans

already constitutionally set forth for the Supreme Federal Court is flowing in the opposite direction to an eventual search for self-restriction.

Finally, even if we may defend a position of greater deference of the Judiciary in given circumstances - in which other deliberative instances had promoted a relevant debate about the determined subject, together with expressive popular participation - we understand that it would become a risk to waive completely its constitutional supremacy (that must not be mistaken with a "supremacy" or with a "juristocracy") and its powers therefor judicial review.

3 - THE SILENCE OF THE OTHERS (BRANCHES).

The ascension of the Judiciary did not always happen in the case of a power gap. On the contrary of what could initially seem to be, the greater interference of the Constitutional Courts is due to the strategic use of political actors, who in an expressed or implied way, took advantage of the birth of a new instance to whom they could direct their appeals when facing a situation of loss of power, the lack of governmental coalition, or the defeat of their political thesis. The deference to the Judiciary derived from many political factors - which have granted them institutional support - from technical factors - as the procedural improvement therefor constitutional jurisdiction.

The transference of power resulted from, in addition, another aspect which entails an appearance, many times but not always true - of a better systemic function of the Judiciary in comparison with other decision-making spaces. Judicial institutions are perceived by political agents as spaces holding - as a rule - a better reputation about its effectiveness and its

with the confidence or role authority to assert their own understanding of the Constitution´s meaning." Post and Siegel, "Democratic Constitutionalism," 32.

impartiality compared with other instances[21].

As the political system is treated as dysfunctional in terms of presenting resolutions for political issues, it becomes easier the expansion of the Judiciary - even when the referred arguments are exposed side by side with the criticism about the lack of speedy resolutions. Indeed, political litigation is not based on the average time frame for decision making by an institution or in a mandatory response which may be required upon the Judiciary; it is about, effectively, reducing the risks and responsibilities about political decisions of national importance.[22]

For Mark Graber, one of the reasons that have triggered, in the United States, the power of the Supreme Court to interpret the constitution is the incapacity or lack of drive of the national political bodies to decide a public issue[23]. In such cases, the Judiciary is not occupying an "empty space" left unintentionally by the legislators, on the contrary, the main political actors have invited the Supreme Court to resolve cases that they could not or would not like to decide.

In Brazil, we have examples of famous cases such as the decriminalization of the abortion of an anencephalic fetus (ADPF [a judicial review case] 54, Rapporteur. Minister Marco Aurelio, j. 12.04.2012, Published on the DJe 19.04.2012) and the de facto marriage of persons of the same sex (ADPF 132,

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[21] Hirschl, "The new constitutionalism and the judicialization of pure politics worldwide," 744.

[22] "In fact, mainstream politicians are often more interested in keeping social controversies off the political agenda than in considering the merits of alternative settlements. When disputes arise that most elected officials would rather not address publicly, Supreme Court justices may serve the interests of the political status quo by making policy, taking public responsibility for making policy, and making policy favored by political elites. Judicial policymaking in these circumstances cannot be accurately described as either majoritarian or countermajoritarian; it takes place when and because no legislative majority has formed." Graber, Mark A. "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary." *Studies in American Political Development*, no. 7 (1993), 37-38.

[23] Graber, Mark A. "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary." *Studies in American Political Development*, no. 7 (1993), 36.

Rapporteur Minister Ayres Britto, j. 05.05.2011, DJe 14.10.2011), they have contributed to emphasize that the opinion of Graber may cross borders. For many different reasons - such as a conservative view of part of the voters, the influence of religious arguments, and the presence of interested groups -, we can notice that the political cost of an eventual approval of the issues mentioned above might have led to a negative repercussion in future elections for politicians of different parties.

The issues presented by other Branches to the Judiciary find shelter in the legitimacy of several political bodies, agencies, or legal entities (the President of the Republic, Governor of State, Senate, etc.) foreseen in the Constitution, and, especially, the political parties represented therein the National Congress.

Hence, besides the institutional design expressed in the Constitution, it can be noticed that the political litigation has become a two ways street[24], serving the opposition, that may force a new deliberative instance upon the defeated issues within Parliament or upon the policies, it disagrees with, serving also to the government because when part of its agenda becomes so unpopular or when a majority cannot be formed about a determined issue, the Supreme Federal Court appears as the possible institution for judicial review against the majority which is opposing the government's agenda.

In the case of the holding of the ADPF 186[25], which affirmed the constitutionality of the racial quotas for the

[24] The hegemonic preservation thesis works, hence, both for the base of the government and for the opposition: "The judicialization of mega-politics may also be driven by 'hegemonic preservation' attempts taken by influential sociopolitical groups fearful of losing their grip of political power. Such groups and their political representatives are more likely to delegate to the judiciary formative nation-building and collective-identity questions when their worldviews and policy preferences are increasingly challenged in majoritarian decision-making arenas." Hirschl, Ran. "The new constitutionalism and the judicialization of pure politics worldwide." *Fordham Law Review*, v. 75 (2006), 745.

[25] ADPF 186, Rapporteur. Min. Ricardo Lewandowski, j. 31.07.2009, DJe (published) 07.08.2009.

enrollment procedure at the University of Brasilia, the Democratic Party (DEM) opposed to the provisions therefor the affirmative actions due to an understanding that the adoption of "racial affirmative actions", under the regulations of the UNB (University of Brasilia), would not be in accordance with the "Brazilian characteristics". Independently from the claim's defeat, the holding has proven the use of the STF (Brazilian Supreme Federal Court) as a new argumentative instance for the opposition.

In the holding of the financing of political campaigns by legal entities, even being the plaintiff the Federal Council of the OAB (The Brazilian Bar Association), ADI 4650[26], the understanding of the majority of the Supreme Federal Court when upholding the unconstitutionality of the legal provisions permitting donations from legal entities to electoral campaigns, was together with the will of the government. Indeed, in a first moment, on September 9th, 2015, the Chamber of Deputies defeated the decision of the Senate which had proscribed the private financing of political campaigns. The holding of the Court happened on September 17, 2015, and on the 24th of the same month, President Dilma Rousseff followed the understanding of the Court and vetoed the legal provision which would authorize that type of campaign financing. The presidential veto was based on the holding of the STF against the will of most congresspersons; it is clear that in this case, the STF served as an argumentative instance in favor of the government.

Other examples may be cited to support the argument in which the political parties effectively use the institutional structure of the Supreme Federal Court to resolve different types of political issues as follows: ADPF 347[27], in which the Socialism and Freedom Party (PSOL) claimed for the recognition of systemic violations of inmates fundamental rights in Brazil and has

[26] ADI 4650, Rapporteur. Min. Luiz Fux, j. 17.09.2015.
[27] ADPF 347, Repporteur. Min. Marco Aurélio, j. 09.09.2015.

requested the declaration the State of Unconstitutional Issue of the Brazilian system of imprisonment; ADI (Judicial Review) 3112[28], by the Brazilian Labor Party (PTB) and of the Labor Democratic Party (PDT), against some provisions of the Law 10.826/2003, known as the Disarmament Statute; ADI 1351[29], in which the Brazilian Communist Party (PC do B) and others challenged the constitutionality of some provisions of the Law 9.096/1995 (Law of the Political Parties), which have instituted the "barrier clause" and the ADC (Judicial Review) 29[30], by the Socialist Popular Party (PPS), in which the Party asked for the STF to affirm the constitutionality of the Complementary Law n. 135/2010 (Clean Slate Law), and for the same to be applied for facts that had occurred before the rule was in effect.

The cases were listed aiming to prove the theoretical arguments previously mentioned, both the incapacity or lack of will of such national political group to decide a public dispute, such as the political litigation as a two-way street, to force a new deliberative instance that can be accessed both by the opposition and for those in favor of the government. There is not an argument set by this article whether the decisions of the STF were positive or not. The cases listed above were used as examples to ponder about a simple argument, in that the political litigation, and in some degree, the judicial activism may not be interpreted as a result exclusively liked to a "hunger for power" of the Judiciary or a search for the monopoly of the constitutional interpretation. Not having an observance upon the political orchestrations permitting such phenomenon to gain representation and reshape institutional borders. The supremacy of the Judiciary, due to that, cannot be without the support - even when silent - of the other Branches.

Besides, the Constitution, even before the interpretative

[28] ADI 3112, Repporteur. Min. Ricardo Lewandowski, j. 02.05.2007, DJe 26.10.2007.
[29] ADI 1351, Rapporteur. Min. Marco Aurélio, j. 07.12.2006, DJ 30.03.2007.
[30] ADC 29, Rapporteur. Min. Luiz Fux, j. 16.02.2012, DJe 29;06.2012.

disputes that surround it, possesses the characteristic of challenging the immediate temporal characteristic of part of the political debates. It is a document that has established the constitutive commitments of the political community; hence, it works as a "reserve of justice" both for the legal system and the political system, instituted by the Constitution.[31]

The modern constitutions, as a continuous source of answers for the most important political issues, elevated as hierarchically superior concerning political disputes, observed, in many cases, the formation of Constitutional Courts as guardians of the constitutions[32]. The text of the caput of the Art. 102 - CF (Brazilian Federal Constitution) illustrates: "The Supreme Federal Court is responsible, essentially, for safeguarding the Constitution, and it is within its competence [...]". It is a duty of the Court, hence, to safeguard the constitutional order and protect the constitutive political agreements of the country.

Without the referred differentiation or the elevation of the Courts to the role of authority in which the reading of the Charter is mandatory, we feared the never-ending return of the political clashes and the end of the democratic institutions.[33]

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[31] "When taken from the scope of deliberative majority those rights, principles, and institutions which constitute the rule of the Constitution, the ultra-rigid clauses become the democracy safeguarding legitimate instrument, as a paradox when limited" Vieira, "Vieira, Oscar Vilhena. "A Constituição como reserva de justiça." *Lua Nova*, no. 42 (1997), 61. See also: Canotilho, J. J. Gomes. *Direito Constitucional e Teoria da Constituição*. Coimbra: Almedina, 2003.

[32] Kelsen, Hans. *Jurisdição Constitucional*. São Paulo: Martins Fontes, 2007

[33] "The defense of the CR (Constitution) represents the greatest responsibility of the STF. The STF - which is the guardian of the Constitution, delegated by the Constituent Power - cannot renounce the exercise of this position, because if the Supreme Court fails on the defense of its extremely important duty, the integrity of the political system, the protection of the public freedoms, and the stability of the normative order of the State, the judicial safety, and the legitimacy of the Republic institutions shall be deeply compromised. The unacceptable despise for the Constitution cannot become an accepted governmental practice. At least, while we have a Judiciary Branch which is independent and conscious of its high political, social, and judicial institutional responsibility. (ADI 2.010-MC, Rapporteur Min. Celso de Mello, j. 30.09.1999, DJ 12.04.2002).

Nevertheless, since its origins, the Constitutional Courts have not found a lonely path for the definition of whom would be the guardian of the Constitution or its privileged interpreter. In continental Europe, the answer from Carl Schmitt to Hans Kelsen was that the President of the Reich would be the legitimate guardian of the Constitution due to its submission before the popular will.[34]

In the United States, even before the historical landmark case Marbury X Madison (1803), in which Justice Marshall affirmed to be the duty of the Judiciary to state "what is right under the law", it was open a gap for the participation of other interpreters of the Constitution, as Marshall himself has recognized, at the end of his reasoning in Marbury, that other political institutions also participated actively for constitutional interpretation, their understandings must be accepted as holders of authority.[35]

Accordingly, the function of the STF of safeguarding the Constitution can be linked together with the literature that has emphasized the Constitution as a too important document to be under the responsibility of only one Branch.[36] Therefore, the substantive sense that the Supreme Federal Court stipulates in a

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[34] "The Constitution seeks, especially, to grant authority to the president of the Reich the possibility of uniting directly this political will of the German people and act, in these terms, as a guardian and defendant of the unity of constitutional totality of the German people" Schmitt, Carl. *O guardião da Constituição*. Belo Horizonte: Del Rey, 2007*,* 234.

[35] "Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument." Marbury v. Madison (1803).

[36] "All of the State actions against the Constitution shall be under the judicial censorship of the courts, especially because they are considered void, null and present no validity at all. The Constitution cannot either submit itself to the will of the constituted powers or the empire of facts and circumstances. The supremacy that it has been vested with - while it is respected - constitutes the most effective guarantee that the rights and freedoms thereunder will never be offended. The STF is liable for safeguarding this reality never to be disfigured." (ADI 293-MC, Rapporteur Min. Celso de Mello, j. 06.06.1990, DJ 16.04.1993).

decision may, in the future, be challenged or even reviewed, if the necessary political forces for the alteration of the constitutional interpretation in the dispute or of the members that form the Court are present. In such circumstances, the "new" Court would need to watch out for the procedure of overruling precedent and face the argumentative elevated burden of altering the reasoning or "narrative" previously laid down.[37]

4 - THE SHARED CONSTITUTIONAL AUTHORITY

One of the most important challenges faced by the Constitutional Courts is to mediate the tensions developed within society, presenting answers to moments of change or stabilization. Beyond taking actions that vary from activism and deference, the Constitutional Court is also required to decide amid the political community core values preservation, the so-called constitutional "justice guardians", and steer a renewed constitutional interpretation.

The activity which, at the first moment, may seem ambivalent, can be understood with the support of the concept of *auctoritas*. Hannah Arendt, when emphasizing the Roman origin of the word and concept of authority, sought to calculate the paradoxical temporal dimension assumed. The *auctoritas* is derived from the verb *augere*, increase, and what is expanded by the holders of authority is the foundation[38]. The authority of the living was always derived, dependent on the founders (deceased). The authority, opposed to potestas (power), had found its roots in the past, "[...} but this past was not less present in the life of the city than the power and the strength of the living"[39]. The

[37] We may not forget the normative characteristic of the thesis "law as integrity" defended by Ronald Dworkin. The same not always find a correspondence in the "world of men". See: Dworkin, Ronald. *O Império do Direito*. São Paulo: Martins Fontes, 2003, 276).

[38] Arendt, Hannah. *Entre o passado e o futuro*. São Paulo: Perspectiva, 2007, 163-164

[39] Arendt, *Entre o passado e o futuro*, 164.

tension between constitutionalism and democracy is filled by this old dilemma between the government of the living and the government of the dead.

When analyzing the American Revolution, Arendt understood that the Roman model was affirmed in an almost "blind" way and that from the various innovations presented in the structure of the United States government, maybe, the most important would have been a shift on authority, from its place of origin, Roman Senate, to the Judiciary[40]. After standing out excerpts from the Federalist Papers, especially the famous passage of the n. 78, in which affirms that the Judiciary is the weakest of the Branches[41], Arendt stated: "[...] it is the lack of power, summed with a permanent position as a judge, which indicates that the true source of authority in the American republic is the Supreme Court"[42].

Nevertheless, even showing some Roman aspects upon the distinction between *arctoritas and potestas*, the concept of authority derived from the American Revolution is different, because the Roman authority, according to Arendt, had disappeared from the modern world[43]. Whereas in Rome the Senate worked as an instance of "guidance" given by those who reincarnated their ancestors, the function of the Supreme Court was the interpretation, the Court would have its authority derived from a written document and its competent jurisdiction would be the constitutional hermeneutics.

Indeed, the Constitution brings different values which are similar to the *auctoritas*, because it refers either to the constitutive act (deceased), the foundation, as to the moment that resulted from a previous moment, the Charter, the written text which is the object of interpretation from the Supreme Court

[40] Arendt, Hannah. *Sobre a revolução*. São Paulo: Companhia das Letras, 2011, 256-257
[41] Hamilton, Madison and Jay. *The Federalist Papers*, 464.
[42] Arendt, *Sobre a revolução*, 257-258.
[43] Arendt, *Entre o passado e o futuro*, 127.

(living).[44]

Consequently, the authority of the Constitution would not be based upon its perfection, neither due to an initial moment of force or violence, but on the agreement of the members of a political community when treating the event of foundation as the starting point for all political subsequent activities, of the need of a reference point where all fundamental agreements which have constituted the polis must be based and kept.

The constitutional authority equation shall not be in treating the Magna Carta as o holy and immutable document. Because it will subject itself to interpretation, it is inevitable its alteration and increase[45]. If, on one hand, the Constitution - or, at least, its core - is something that challenges the accelerated temporal rhythm of political disputes, on the other hand, it may be observed from different angles and be interpreted by different political bodies.

A step beyond the notion of *autoritas* permits the observance of different disputes about the Judiciary authority extent and if it is in accordance with the constitutional framework, it is possible to notice the construction of a juristocracy in the course of frequent decisions that have set forth the Supreme Court as the "last interpreter of the Constitution".[46] Within more

[44] "And we may feel tempted including to foresee that the authority of the republic will continue unharmed and safe whereas the act itself, at the beginning as such, is reviewed always when there are constitutional issues in the strictest sense of the word." Arendt, Hannah. *Sobre a revolução*. São Paulo: Companhia das Letras, 2011, 262.

[45] Waldron, Jeremy. "Arendt´s constitutional politics." In *The Cambridge Companion to Hannah Arendt, edited by* Villa, Dana. Cambridge: Cambridge University Press, 2000, 213.

[46] See Backer v. Carr (1962), in which the Supreme Court stated to be the "ultimate interpreter of the Constitution"; U.S. v. Nixon (1974), in which the Supreme Court stated that the power to interpret the Constitution may not be divided by the Judiciary as the Executive may not divide the veto power of the President; City of Boerne v. Flores (1997), in which the Court affirmed that, if the Congress could define its powers, altering the sense of the Fourteenth Amendment, the Constitution would become just a law, setting itself in the same level as the other acts of the legislative.

recent democracies, the conditions for the rise of such phenomenon have not found institutional leeway to occur until the transition of those regimes to democratic constitutionalism.[47] In both layouts, it is very clear the participation of political bodies in favor of not only judicial review, but also the development of judicial supremacy.[48]

As deference is the contrary of activism, the distribution of the constitutional authority can be the contrary of juristocracy. Shifting the focus to the distribution of constitutional authority and placing the responsibility for the constitutional interpretation upon different Branches, it could be feasible to not only reduce the conflict amid Branches[49] but also emphasize that every person must submit to the Constitution, that not an exclusive domain of any institution.

If every political body should submit to the privileged position in which the Constitution stands, they must also spread

[47] The Supreme Federal Court defended its duty to solely have the last word on Constitutional interpretation: "The normative force of the CR and the monopoly upon the last word, by the STF, in terms of constitutional interpretation. The exercise of constitutional jurisdiction - which has a goal to preserve the supremacy of the Constitution - highlights the essential political dimension that the STF's institutional projection stands, because, in the process of judicial review, the Court is in charge of deciding, lastly, on power and its substance. Within the power of interpreting the Fundamental Law, is present an extraordinary duty to review, the judicial review finds itself amid the informal procedures of constitutional mutation, which means, therefore, that 'The Constitution is being permanently drafted within the courts in charge of its application'. Literature. Precedents. The constitutional interpretation derived from the awards from the STF - to whom it was attributed the function of 'safeguard of the Constitution' (CF, art 102, caput) - plays a role of essential importance in the institutional organization of Brazil, to justify the acknowledgment that the current political model in our Country grants, to the Supreme Court, the duty of having the monopoly of the last word upon the interpretation of rules therein the Fundamental Law." (ADI 3.345, Rapporteur Min. Celso de Mello, j. 25.08.2005, DJe 20.08.2010).

[48] "If judicial supremacy cannot simply be assumed to exist, then it must be politically constructed." Whittington, Keith E. *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History.* Princeton: Princeton University Press, 2007, 4.

[49] Whittington, Keith E. *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History.* Princeton: Princeton University Press, 2007, 14.

their interpretative authority upon it. Thus, even those who from time to time criticize a determined Judiciary holding should take into consideration that another institution must take over the constitutional authority exercised by the Court. As stated by Keith Whittington, the constitutional law established itself as a broader area which is constitutional politics[50]. Under this scope, the constitutional authority is dynamic and an object of political dispute. That makes the Judiciary to be considered as an important participant of the constitutional process, although, it mistakes when it believes to be capable of working alone.

We must consider that the emphasis given to the last word or the institutional dialogues of every political actor. Taking into account that the supremacy of the judiciary needs the interests of external political agents to occur, the authority division about the Constitution holds a greater probability to become effective among the bodies that wish to participate than the ones that wish to affirm their monopoly of the last word about the interpretation of the Constitution.[51]

In accordance with Graber, the constitutional readings of a Branch of the government influence the others. In addition, the members of a Branch often give their consent to other branches when they make constitutional decisions (for instance, once again, the holdings about private entities financing political

[50] Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*, 26-27.

[51] "[...] we must acknowledge that the Brazilian experience, essentially, confirms the epistemic and consequentialists theories of constitutional dialogues. With effect, the possibility of constitutional amendments approval permitted the deviation from STF judgments, which although based on technical and textual elements, produced very bad practical effects. On the other hand, the STF has contributed a lot to the resolution of constitutional issues in which the National Congress simply could not fulfill its constitutional duty of legislating, or in which the edited rule could not transcend the influence of interest groups especially articulated within parliament headquarters." Brandão, Rodrigo. *Supremacia judicial versus diálogos constitucionais*: a quem cabe a última palavra sobre o sentido da Constituição? Rio de Janeiro: Lumen Juris, 2012, 299.

campaigns)[52].

One way to steer the institutional dialogues practice is by sharing constitutional authority. Imagine if the Supreme Federal Court, after having understood that a legal issue could lead to a severe dispute, had the normative act, rejected in the STF, been approved in Congress by a close majority, it is requested to participate in another debate in the course of a ADI (action for judicial review) filed by the opposition. After filing, we could notice a growing debate among citizens on every media about the case, considering its national importance.

Before such a landscape, at least three alternatives must be considered. First, in case hermeneutics may be applied, we might assume a deferent posture and affirm the constitutionality of the questioned law, defeating once again the opposition. Secondly, we may assume a position against the majority, declare the law unconstitutional and base the holding as in favor of the Constitution to beyond temporary passions of the majority - giving a victory to the opposition. Finally, there is the alternative of making a decision that could limit the effects or the scope of the holding and its reasoning to fundamental aspects of the case, leaving the legislative and other political bodies[53] responsible to complement with details the holding. In such circumstances, the Supreme Federal Court is not refraining itself from the duty of awarding a judgment; although, it leaves gaps for other political

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[52] Graber, Mark. *A New Introduction to American Constitutionalism*. Oxford: Oxford University Press, 2013, 103.

[53] "Judicial deference of a different sort takes place when cases are decided on fairly narrow constitutional grounds, a practice that empowers other governing officials to retain at least temporary authority over other manifestations of some constitutional controversy." Graber, Mark. *A New Introduction to American Constitutionalism*. Oxford: Oxford University Press, 2013, 125. Cass Sustein defends the formation of agreements that have not been completely theorized: "Participants in legal controversies try to produce incompletely theorized agreements on particular outcomes. They agree on the result and on relatively narrow or low-level explanations for it. They need not agree on fundamental principle. They do not offer larger or more abstract explanations than are necessary to decide the case." Cass Sunstein, "Incompletely Theorized Agreements." *Havard Law Review*, vol. 108, no. 7 (1995): 1735-1736.

constructions from other bodies apart from the Judiciary.

One of the expected effects of sharing the constitutional authority is the incentive to popular participation when permits the citizens and political institutions to express their will about constitutional political issues and participate in the development of the resolutions.[54].

In the three hypotheses previously mentioned, it stays open with a greater or minor extent, the possibility of the decision to be challenged by the parties which had their constitutional position defeated. It is necessary to mobilize sufficient political forces to modify the interpretation set forth.

One of the premises of democratic constitutionalism itself depends on both the authority of the constitution and its democratic legitimacy. The Constitution needs to speak with the citizens to be treated not only as a simple document but as one of the pillars that constitute their political community.

Following Robert Post and Reva Siegel, it is important to invite the citizens to make their constitutional interpretation, and by way of pre-established institutional mechanisms, if necessary express their opposing will against the government when they understand that the government is not respecting the Constitution.[55]. It is up to the government to answer and resist the demands set forth by the people. Such exchange of thoughts might lead to a division or sharing of constitutional authority when those building its meaning are the ones submitting to its provisions.

According to Post and Siegel, the Courts exercise a unique authority of enforcement of rights, due to the constitutional authority thereunder. Thus, as citizens respect the Courts as institutions responsible for the protection of important values when governments act beyond their legal powers, the judicial

[54] Graber, *A New Introduction to American Constitutionalism*, 138.
[55] Post, Robert C. and Reva B. Siegel, "Roe Rage: Democratic Constitutionalism and Backlash." *Harvard Civil Rights-Civil Liberties Law Review*, vol. 42 (2007), 374.

authority shall enforce submission to the Constitution - the Courts are liable for its safekeeping, but it is responsibility of all government officials - it depends on the citizens themselves to make effective its powers. If the Courts make decisions offending popular convictions or understandings, the active citizenship might generate paths of resistance, speaking about their objections and seeking to interfere in governmental institutions formation[56].

A distinction that must be made to mitigate some confusion entailing constitutional decision-making procedures and the Constitution itself. Once the people or the opposition resist the actions of the government presenting other constitutional interpretations, different from the ones set forth by the Courts, it does not necessarily create a threat to the constitutional order. It is part of the democratic game to diverge. Hence, when the citizens: "[...] speak about them most passionately established commitments in terms of sharing a constitutional tradition, they grant new life to this tradition"[57]. We must comprehend that even the resistances to the Court's constitutional interpretation contribute to the sharing of the constitutional authority and as a mechanism of safeguarding the democratic legitimacy.

5 - CONCLUSION

This article sought to scrutinize recurrent issues within the national political scenario. The article provided evidence of political litigation and judicial activism to prove that they do not only happen when there is a power gap.

By way of examples, it has also been shown that it works not only in favor of the government but also the opposition, therefore, we should never state that the Constitutional Courts'

[56] Post and Siegel, "Roe Rage: Democratic Constitutionalism and Backlash," 374.
[57] Post and Siegel, "Roe Rage: Democratic Constitutionalism and Backlash," 374-375.

holdings are always against the majority. It inserts itself within a broader landscape of constitutional politics, which shapes the structure of power and grants opportunities for a greater presence of the Judiciary in the definition of latent political issues.

The article also stands for a perspective in which, in the case of Brazil, both the fact that we have a very young democracy and the strategic performance of political groups have favored the formation of a "juristrocacy". Consequently, as an alternative for the crossing of borders from the Judiciary, was suggested the adoption, when it is possible, of the shared constitutional authority concept.

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