



# REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS

**JOURNAL OF CONSTITUTIONAL RESEARCH**

vol. 9 | n. 2 | maio/agosto 2022 | ISSN 2359-5639 | Periodicidade quadrimestral  
Curitiba | Núcleo de Investigações Constitucionais da UFPR | [www.ninc.com.br](http://www.ninc.com.br)



## Questioning our faith in the Judiciary: from institutional entrenchment to the monopoly of constitution

### *Questionando nossa fé no Judiciário: do entrenchment institucional ao monopólio da constituição*

**RAFAEL BITENCOURT CARVALHAES**<sup>1,\*</sup>

<sup>1</sup> Universidade Federal Fluminense (Niterói-RJ, Brasil)  
rafael.carvalhaes.adv@gmail.com  
<https://orcid.org/0000-0002-0252-0419>

**FERNANDO GAMA DE MIRANDA NETTO**<sup>1,\*\*</sup>

<sup>1</sup> Universidade Federal Fluminense (Niterói-RJ, Brasil)  
fernandojuris@yahoo.com.br  
<https://orcid.org/0000-0002-5199-6050>

**Recebido/Received:** 11.02.2022/ February 11<sup>th</sup>, 2022  
**Aprovado/Approved:** 08.08.2022 / August 8<sup>th</sup>, 2022

#### Abstract:

This paper intends to question the role of the Brazilian Supreme Federal Court as an agent of democratic construction and its role as guardian of the constitution. The interest in the Supreme Court is due to the political arrangement and the overlapping of powers and functions of the court than the other powers. A Constitutional Court with inflated powers can lead to democratic dysfunction and judicial hegemony about institutions. Notably, an expansion of the Brazilian Supreme Federal

#### Resumo:

*Este trabalho pretende questionar o papel do STF como agente de construção democrática e de guardião da constituição. O interesse pelo STF se deve pelo atual arranjo político e a sobreposição de poderes e funções da corte perante os demais poderes. Uma Corte Constitucional com poderes inflacionados pode acarretar numa disfunção democrática e na hegemonia judicial em relação às instituições. Notadamente, a expansão dos poderes do STF se deve a forma como ele interpreta a Constituição e a sua influência no*

Como citar esse artigo/How to cite this article: CARVALHAES, Rafael Bitencourt; MIRANDA NETTO, Fernando Gama de. Questioning our faith in the judiciary: from institutional entrenchment to the monopoly of constitution. **Revista de Investigações Constitucionais**, Curitiba, vol. 9, n. 2, p. 347-370, maio/ago. 2022. DOI: 10.5380/rinc.v9i2.86725

\* PhD candidate in Law, Institutions and Business-PPGDIN at Universidade Federal Fluminense (Niterói-RJ, Brazil), Master in Law and Public Policies from the Federal University of the State of Rio de Janeiro-UNIRIO. Specialist in Constitutional Civil Law from the Universidade do Estado do Rio de Janeiro – UERJ. Specialist in Public and Private Law from UNESA/FEMPERJ. Bachelor of Laws from Centro Universitário da Cidade. Professor at the Faculty of Law of Rio Pomba-Instituto Federal Sudeste – MG. E-mail: rafael.carvalhaes.adv@gmail.com

\*\* Associate Professor of Procedural Law at the Universidade Federal Fluminense (Niterói-RJ, Brazil) since 2009, leader of the Fluminense Laboratory of Procedural Studies (UFF), and member of the Doctoral Programs in Sociology and Law (since 2011), and in Law, Institutions, and Business since 2017. Doctor of Law from Universidade Gama Filho (2007), with a one-year period (March/2006-2007) of research at the Deutsche Hochschule für Verwaltungswissenschaften in Speyer (Germany) and at the Max-Planck-Institut (Heidelberg) with a CAPES/DAAD scholarship. He completed a post-doctoral internship in Constitutional Justice at the University of Salamanca (2011-2012). E-mail: fernandojuris@yahoo.com.br.

Court's powers should create a way for it to interpret the Constitution and its influence on the political process. There is no doubt that the Brazilian Supreme Federal Court has become an important political actor, making it present in almost all legal and political areas. However, constitutional monopoly, judicial activism, and excessive interference in the political process degenerate the original democratic model, deconstructing the excess of faith deposited in the judiciary.

*processo político. Não há dúvidas que o STF se tornou um importante ator político, fazendo-se presente em quase todas as áreas jurídicas e políticas. No entanto, o monopólio constitucional, o ativismo judicial e a excessiva interferência no processo político degeneram o modelo democrático original, desconstruindo o excesso de fé depositada no judiciário.*

**Keywords:** Brazilian Supreme Federal Court; judicial activism; guardian of the Constitution; democracy; constitutional monopoly

**Palavras-Chave:** Supremo Tribunal Federal; ativismo judicial; guardião da Constituição; democracia; monopólio constitucional.

## CONTENTS

**1.** Introduction; **2.** The STF's empowerment and the (de)construction of democratic institutions: questioning our faith in the judiciary; **3.** Institutional entrenchment and monopoly of constitution; **4.** The constitutional change of art. 102, caput, of the Constitution: deference, supremacy and judicial sovereignty; **5.** Conclusion; **6.** References.

### 1. INTRODUCTION

This paper aims to analyze the role of the Brazilian Supreme Federal Court (STF) in the construction of a new democratic model inaugurated by the 1988 Constitution. As main questions that are intended to answer: what is the role of the STF in the current Brazilian democratic model? Can the STF be considered an agent of democratization? How did your powers expand over these 33 years of the Constitution? What are the institutional effects of codification on other powers?

These issues are important for understanding the current political and legal scenario of the Supreme Court, mainly to identify the process of constitutional change in art. 102, which does not allow the expansion of the possible meanings of the term “guardian of the Constitution”, highlighting three different features: deference, supremacy, and judicial sovereignty.

The methodology used in the present work is exploratory, as it aims to raise qualitative data of the judicial role through national and foreign bibliographies, an end of evaluation, or problem of judicial activism in the construction of Brazilian democracy. It is intended, therefore, to correlate the phenomenon of judicial expansion with a constitutional change in art. 102, caput, of the Constitution, demonstrating that the original role of being executed by the STF was gradually changed over 31 years.

In the first chapter, the excess of faith deposited in the judiciary for the construction of new democracies will be discussed, demonstrating the excess of competences and the powers associated with an imbalance between institutions. The second chapter

demonstrates how to configure or code the STF and its overlap over other powers. In the third chapter intends to prove that the expansion of the powers of the Supreme Court took place through a constitutional change in art. 102, caput, of the Constitution, in which the “guardian of the Constitution” went through a being interpreted as a monopoly interpretive of constitutional rules by the Brazilian Supreme Court.

## 2. THE STF’S EMPOWERMENT AND THE (DE)CONSTRUCTION OF DEMOCRATIC INSTITUTIONS: QUESTIONING OUR FAITH IN THE JUDICIARY

In a recent study on the democratic construction and the role of the judiciary, Tom Gerald Daly pointed out that in the new democracies the courts had an important factor as an agent of democratization, especially in countries like Brazil. In *“The Alchemists: Questioning Our Faith in Courts as Democracy-Builders”*, Tom Gerald states that the new democracies adopt a strong model of judicial review and that the question of the final say on constitutional issues ends up becoming a mental component of political bargaining. In this way, judicial review in new democracies is a requisite for an eventual democratic project, such as in South Africa, which had the task of validating the South African Constitution.

Tom Gerald Daly<sup>1</sup> points out that the role of the Supreme Courts in new democracies is different from those in more mature democracies. New democracies are generally supported by a substantially revised constitution and legislative residues from the authoritarian era, requiring courts to filter past laws to build a new democratic model. This work of reorganizing and conforming the previous law to the current Constitution is different from the role of institutional improvement performed by the courts in mature democracies. Added to this is the limitation of other political actors, in the face of the dominance of coalition presidential, stifled by a process of corruption and the low political participation of civil society. The constituent power inspired by the post-authoritarian models understood well to place the STF as an institutional constructor of the new democratic process, allocating greater institutional autonomy to the judiciary.<sup>2</sup>

Now, if the milestone of the process of democratization was the Constitution, which in its widely prolix disposition designed several public policies linked to the

<sup>1</sup> DALY, Tom Gerald. **The Alchemists: Questioning Our Faith in Courts as Democracy-Builders**. Cambridge: Cambridge University Press, 2018, p. 6.

<sup>2</sup> Ernani Carvalho points out that: “In Brazilian political history, full of authoritarian passages, the political dependence of the courts on other branches of power, particularly on the Executive, only loses strength in the Constitution of 1988. Despite being a constant in constitutional history, the search for greater autonomy and independence of the Judiciary only took strong contours in 1988. The autonomy achieved will be an important explanatory vector for the process of judicialization of politics”. CARVALHO, Ernani. *Trajetória da revisão judicial no desenho constitucional brasileiro: tutela, autonomia e judicialização*. **Sociologias**, Porto Alegre, n. 23, p. 176-207, Apr. 2010.

realization of fundamental and social rights, and article 102, caput, of the same constitution, makes it clear that the Supreme Court exercises primarily function of guardian of the constitution, there is no denying that there is a relevant role of this institution in this democratic enterprise.

When analyzing the STF, Tom Gerald Daly states that the Brazilian model maintained this idea of a classic Constitutional Court close to the European model, but that it remained as a Court of appeals. This hybrid model reinforces some questions for its classification of the STF as a democratic institution. In comparison with the post-war German Constitutional Court, for example, it can be said that the STF played a relevant role in the compatibility of laws of the authoritarian regime through the construction of a theory of reception, in the construction and effectiveness of a theory of rights in the construction of a public sphere as a mediator of the transition from the old regime to a new democratic order.

The author points out that the jurisprudence of the Federal Supreme Court in the first twenty years (1988-2008) is a fertile ground for analyzing time, progress, context, content and methodology in the role of democratization, highlighting that in the case of the Supreme Court the role of agent democratic remains to date.

This period was marked by the ideal of respect for the supremacy of the constitution, often used as an argumentative reinforcement for the construction of a new society, whose normative center was the Constitution itself. Note the efforts of the STF Justices and academics to implement an effective constitutional order in re-democratized Brazil, built through the jurisprudence of the Supreme Court itself and intense doctrinal mobilization of authors such as Luis Roberto Barroso, José Afonso da Silva, Clèmerson Merlin Clève, Lenio Streck, Paulo Bonavides among others.<sup>3</sup>

This era was marked by the introduction of German and American theories in the application and construction of the new constitutionalism, having as main authors Hans Kelsen, Konrad Hesse, Friederich Müller, Peter Härberle, Robert Alexy, Ronald Dworkin, and others. These authors were debating constitutional issues based on the structural problems of their countries, a fact that was very little respected in Brazil, generating a methodological syncretism that often contradicted the authors' theories. This problem directly interfered in the construction of a constitutional epistemology consistent in the STF, resulting in a casuistic and imprecise jurisprudence.

<sup>3</sup> Luis Roberto Barroso, one of the precursors of the theory of effectiveness in Brazil, includes: "The constitution or the first legal document of the State, as the hierarchical chronological point of view. Endowed with supremacy, its rules should have a preferential application, condition, adequacy, and validity of all normative acts. A constitution, when establishing the State, (a) organizing the exercise of political power, (b) defining the fundamental rights of the people, and (c) defining the public principles and objectives of the people affected". In: BARROSO, Luis Roberto. **O Direito Constitucional e a Efetividade de Suas Normas. Limites e possibilidade da Constituição brasileira**. 8. ed. Rio de Janeiro: Renovar, 2006, p. 291.

The process of hermeneutic construction in the STF goes far beyond the dogmatic approach of the institutes, often based on random models of collective or individual attitudinal argumentation by the justices themselves, without any improvement in the construction of the decision model. Sometimes the construction of votes does not obey a rational theoretical pattern, making the doctrinal constructions exported into mere rhetorical subterfuge, approaching much more a consequentialist and decisionist model.<sup>4</sup>

At this first moment, it is necessary to separate mature democracies from new democracies. The American and German models for example are more mature democracies. Therefore, criticisms of constitutionality control focus on the process of improving the democratic regime. Thus, the effects of the decision by *Marbury v. Madison*, decided in 1803 by the United States Supreme Court, which practically inaugurated the constitutionality control model through the idea of Constitution Supremacy, must be interpreted based on the ideals of the American Constitution of 1787, that is, a democratic model still under construction at that time.

Tom Gerald Daly points out that on the American scene the debate over the role of the courts has been debated since the end of the 19th century, both concerning the implications of the reasons for the US Supreme Court in *Marbury versus Madison*, as well as the application of judicial review strong, manifested in the *Lochner* era.

It should be noted that the American Supreme Court is seen by society itself as a legitimate constitutional coordinator to deliberate on constitutional issues, and there has been a vast study since the mid-twentieth century by political scientists on the democratic functions or dysfunctions of the judiciary.<sup>5</sup>

The Brazilian democratic model, on the other hand, had to learn to deal with an institution that gained enormous power with the 1988 Constitution, without a specific methodology for that, often requiring the uncritical use of standards of judicial control in more mature democracies. Between hits and misses, it can be said that the construction of a theory of fundamental rights, the implementation of rights, and the correction of some defects in the democratic process were important milestones for the democratization process. However, what was supposed to be a process of re-democratization

<sup>4</sup> Note the problems of application of the principle of proportionality by the STF, which, in addition to not applying a collective institutional standard model, has left it up to each Justice and consequently to the other members of the judiciary to apply the theory. It should be noted that in Brazil, jurisprudence cites Robert Alexy in a hegemonic way, without highlighting that the German Constitutional Court sometimes uses a different decision pattern in the application of proportionality. NETO, João Andrade. **Borrowing Justification for Proportionality: On the Influence of the Principles Theory in Brazil**. Springer, 2018.

<sup>5</sup> Martin Shapiro and Alec Stone Sweet point out that: "The judicialization of policy-making is, in essence, the formalization of an extensive and intimate form of what in American parlance has been called 'coordinate construction'. Justices and parliamentarians deliberate in the language of constitutional law and make reasoned decisions about the constitutionality of legislation; these deliberations then structure both judicial legislative behavior and constitutional lawmaking processes". SHAPIRO, Martin; SWEET, Alec Stone. **On Law, Politics, and Judicialization**. Oxford: Oxford University Press, 2002, p. 208.

and harmonization of the Constitution has become a project of institutional entrenchment and monopoly of the Constitution.

### 3. INSTITUTIONAL ENTRENCHMENT AND MONOPOLY OF CONSTITUTION

This role of constructing a new democracy was not well interpreted during the first years of the 1988 Constitution, as seen in the debates of the Supreme Court at the time, mainly the arguments against a more activist role of the Court by Justice Moreira Alves.<sup>6</sup> Justice Moreira Alves was a voice for judicial self-restraint in the Supreme Court, sometimes criticizing the withdrawal of civilian powers from the Court, a fact that extended the use of a strong constitutionality control model for almost a decade.<sup>7</sup>

The Court was much more concerned with its image in the current political scenario and in building a strong judiciary than exercising the role of constructing a more comprehensive democratic model, in line with the process of democratization. It should be noted that the expansion of constitutionality control was a common phenomenon in the world, as Tom Ginsburg highlighted: “Judicial review reflects the incentives of constitutional designers to adopt a form of political insurance. By ensuring that losers in the legislative arena will be able to bring claims to court, judicial review lowers the cost of constitution-making and allows drafters to conclude constitutional bargains that would otherwise be unobtainable”.<sup>8</sup>

It can be said that the first ten years of Brazilian constitutionalism were of institutional self-construction, modeled after the international Supreme Courts, ceasing to be that institution hitherto unknown, as Aliomar Baleeiro pointed out.<sup>9</sup> This period was of great importance, as stated by Fabiana Oliveira when she said that in the period

<sup>6</sup> LEGALE FERREIRA, Siddharta; MACEDO, Marco Antonio Ferreira. A “Corte” Moreira Alves (1975-2003): a judicatura de um civilista no STF e o controle de constitucionalidade. *Observatório da Jurisdição Constitucional*, ano 5, vol. 2, ago./dez. 2012.

<sup>7</sup> In the speech of the mandate of Justice Sydney Sanches, Justice Moreira Alves declared: “The glaring imbalance, in our society, of the distribution of incomes, leads to the emergence of tendencies in the magistracy, especially the younger one, to reduce it through decisions that violate head-on. The law when it appears that it is not fair to apply it to the specific case. It is an old phenomenon in the times, although it presents itself with new names, as currently the movement of alternative judges. (...) Muratori said that the second of the maxims to regulate the balance of the Judiciary is that “judges should not under the pretext of equity murder Justice”. In commenting on it, he started by pointing out that, although it was necessary to attribute sometimes the power to judge by equity, this “easily becomes abuse and prejudice to Justice”, because “there were and will always be those who, in the Courts, they think they are superior to all laws and all contracts”. ALVES, Moreira. [Discurso]. In: **Solenidade de posse dos Ministros Sydney Sanches, na Presidência e Octavio Gallotti, na Vice-presidência**: sessão solene realizada em 10-5-1991. Brasília: Supremo Tribunal Federal, 1993. p. 6-25.

<sup>8</sup> GINSBURG, Tom. **Judicial review in new democracies: Constitutional Courts in Asian Cases**. Cambridge: Cambridge University Press, 2003, p. 33.

<sup>9</sup> The STF Justices of the pre-constitutional period did not ignore the political role of the STF, however, the Court was not a real power in the authoritarian period, resulting in disillusionment regarding its institutional role. Justice Aliomar Baleeiro pointed out that: “Around an institution relatively protected from public curiosity,



1988/1995 “the Supreme Court started to occupy a distinct space in the country’s political life”, highlighting “that the Supreme Court’s performance has changed, now the Supreme Court Justices openly assume their position as essential political actors”.<sup>10</sup>

The second decade of the STF, on the other hand, reflected the impacts of the construction of a Court that began to directly influence the Brazilian political scenario, developing a kind of constitutional messianism, establishing an institutional view that would soon be severely criticized by the indoctrinators. The construction of a more activist Court began in the first period of the 2000s, having its culmination with the reform of the judiciary through EC 45/2004, allowing the passage from a theory of constitutional supremacy to judicial supremacy, leading to the rise the judiciary to the detriment of the role of constitutional mediator in the process of re-democratization.

Alexandre Azevedo Campos explains that the advance of activism in the Federal Supreme Court is of an institutional nature, established many times by the legislative power itself with the creation of Constitutional Amendment n.45/2004, and by Ordinary Laws such as 9.868 / 1999 and 9.882 / 1999. According to the author, “it was not, however, just a radical change in the structure of constitutionality control, but in the structure of opportunities for a new dynamic of constitutional interpretation and construction of the legal order”.<sup>11</sup>

It should be noted that in 2008, in the possession of Justice Gilmar Mendes, Justice Celso de Mello described the role of the Supreme Court in the Brazilian democratic model, paving the way for a premature debate on the judicialization of politics and judicial activism: “Practices of judicial activism, Mr. President, although moderately performed by this Court in exceptional moments, an institutional necessity becomes, when the organs of the Public Power omit or delay, excessively, the fulfillment of obligations to which they are subject by express determination of the constitutional statute itself, even more, if one bears in mind that the Judiciary, in the case of state behaviors that are offensive to the Constitution, cannot be reduced to a position of pure passivity”.<sup>12</sup>

José Ribas Vieira adds that the STF gradually took over the space designed by the 1988 Constitution and that the institutional enlargement of the court does not depend on the judicialization of politics. “Such a process means a centralization of power to the detriment of other instances of the judiciary. This institutional dynamic results,

---

such as the Supreme Court, myths are formed, which contribute to its prestige, albeit at the price of illusions. BALEEIRO, Aliomar. **O Supremo Federal, esse Outro Desconhecido**. Rio de Janeiro: Forense, 1968, p. 110.

<sup>10</sup> OLIVEIRA, Fabiana Luci de. **Supremo Tribunal Federal: do autoritarismo à democracia**. Rio de Janeiro: Elsevier: FGV, 2012, p.147.

<sup>11</sup> CAMPOS, Carlos Alexandre de. **Dimensões do Ativismo Judicial do STF**. Rio de Janeiro: Forense, 2014, p. 258.

<sup>12</sup> MELLO, Celso de. Discurso Proferido pelo Ministro Celso de Mello, em Nome do Supremo Tribunal Federal, na Solenidade de Posse do Ministro Gilmar Mendes, na Presidência da Suprema Corte do Brasil, em 23/04/2008. **Revista de Direito Administrativo**, Rio de Janeiro, v. 248, p. 199-247, 2008.



for example, that, in the universe of the STF, this jurisdictional activism conflicts with the judicialization of politics in the first instance”.<sup>13</sup>

Diego Werneck Arguelhes and Evandro Proença Süssekind point out that “high-intensity conflicts that profoundly affect that society - before the new constitution, the more we may question whether the expansion of the Supreme’s power was an umbilical phenomenon linked to re-democratization”.<sup>14</sup>

Faith in the Constitution resulted in faith in the judiciary, mainly in the figure of the STF as guardian of the Constitution of a new constitutional democracy. This democratic construction through a judicial institution has led to what American scholars, such as Mark Tushnet and Jeremy Waldron, call the Strong Judicial Review, questioning the democratic legitimacy of the role of the Supreme Courts to the detriment of the Legislative and Executive, which are majority institutions and elected by the people.

Jeremy Waldron, for example, argues that strong judicial control of legislation is inappropriate as a model for final decisions in a democracy. There is no evidence that the court when repealing legislation is speaking on behalf of the people, the theory of constitutional pre-engagement, in which the Supreme Court should protect previously established commitments is an unfounded mystique, since “when citizens disagree about this, it is not clear why granting judges the power to decide should be understood as maintaining a pre-commitment”.<sup>15</sup>

In twenty years of democracy, the STF has ceased to be a self-contained institution and intermediary in the institutional architecture of a new democracy, to become the main constitutional designer of democratic arrangements, often subjugating the other powers of the republic through strong judicial control. Luís Roberto Barroso, before becoming a Justice of the Supreme Court, pointed out in 2008 that the Court began to play a more active role in Brazilian institutional life, and that judicial activism at that time was not a problem, but a risky solution that should not be to deviate from the democratic dysfunctions that plagued institutions, such as the crisis of representativeness, legitimacy, and functionality of the Legislative Power.<sup>16</sup>

Oscar Vilhena Viera points out that the detailing of the 1988 Constitution resulted in the judicialization of all acts of public life and that the freedom of other political actors ends up being empty, since “any more abrupt movement by administrators or

<sup>13</sup> VIEIRA, José Ribas. Verso Reverso - A judicialização de política e o ativismo judicial no Brasil. **Estação Científica**, Juiz de Fora, v. 1, p. 45-58, 2009.

<sup>14</sup> ARGUELHES, Diego Werneck; SUSSEKIND, E. P. Judicialização antes da democratização? O Supremo Tribunal Federal e o Destino da Emenda Constitucional das ‘Diretas Já’. **Pensar**, Fortaleza, v. 23, p. 1-16, 2018, p. 5.

<sup>15</sup> WALDRON, Jeremy. O judicial review e as Condições da Democracia. In: BIGONHA, Antônio. MOREIRA, Luiz. (Org.) **Limites do Controle de Constitucionalidade**. Rio de Janeiro: Lumen Juris, 2011, p. 143.

<sup>16</sup> BARROSO, Luis Roberto. Judicialização, Ativismo Judicial e Legitimidade Democrática. **Revista Thesis**, Rio de Janeiro, vol. 5, n. 1, 2012, p. 23-32.

legislators generates a constitutionality incident, which, as a rule, flows into the Supreme Court".<sup>17</sup>

However, excessive judicial activism is often a phenomenon closer to the allocation of institutional power than the possible correction of democratic dysfunctions. Alexandre Garrido says that "the realistic approach to the phenomenon of the judicialization of politics allows us to affirm that the progressive transfer of powers to the judiciary in contemporary democracies serves the interests of a Supreme Court that seeks to highlight its political influence".

It should be noted that this moderating power role attributed to the STF triggered a democratic imbalance in the institutions, concentrating too much power in the judicial sphere to the detriment of the other representative powers, transforming the STF into a permanent blocking institution (veto-player).<sup>18</sup>

The Supreme Court as a constitutional creature took possession of the Constitution through the theory of the last constitutional word, denaturing the Constitution in its political-democratic sense, taking possession of the constitutional soul, causing the creator and creature to merge into a single institution. So that in the eyes of society it is almost impossible to dissociate the Constitution from the STF, making the court a permanent constituent power, as Justice Luis Roberto Barroso himself pointed out.<sup>19</sup>

Walter F. Murphy, in analyzing the issue of American judicial supremacy, notes that the transition from judicial review to judicial supremacy is a matter of claiming purpose. This link rests on the judicial exclusivity for interpreting the law, including the

<sup>17</sup> In the same sense, Ran Hirshl points out that: "Over the past two decades the world has witnessed an astonishingly rapid transition to what may be called juristocracy. Around the globe, in numerous countries and several supranational entities, fundamental constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries. Most of these policies have a recently adopted constitution or constitutional revision that contains a bill of rights and establishes some form of active judicial review. National high courts and supranational tribunals meanwhile have become increasingly important, even crucial, policy-making bodies. To paraphrase Alexis de Tocqueville's observation regarding the United States, there is now hardly any moral, political, or public policy controversy in the new constitutionalism world that does not sooner or later become a judicial one. This global trend toward the expansion of the judicial domain is arguably one of the most significant developments in the late twentieth and early twenty-first-century government". HIRSCHL, Ran. *The Political Origins of the New Constitutionalism*. *Indiana Journal of Global Legal Studies*, v. 11, 2004, p. 71.

<sup>18</sup> This phenomenon was named by Oscar Vilhena Vieira as Supremocracy: "Supremocracy is unprecedented power conferred on the Supreme Federal Court to give the last word on decisions taken by other powers concerning an extensive list of political, economic, moral and social issues, even when these decisions are linked by amendments to the Constitution. The "supremocracy" is a consequence of mistrust in politics and the hyper-constitutionalization of Brazilian life. Its architecture is based on the concentration of three jurisdictional functions in the hands of a single court, as well as the creation of direct access channels for politicians to provoke the jurisdiction of the Court". VIEIRA, Oscar Vilhena. *Supremocracia*. *Revista Direito GV*, São Paulo, v. 4, n. 2, jul./dez. 2008, p. 447.

<sup>19</sup> As José Adércio Leite Sampaio rightly pointed out: "We are not going to take sides on the legitimacy of the constitutional judge to rework, reinventing, the constituent work, but affirm that, empirically, it re-elaborates or reinvents, sometimes intentionally intricate". SAMPAIO, José Adércio Leite. *A Constituição Reinventada Pela Jurisdição Constitucional*. Belo Horizonte: Del Rey, 2002, p. 893

Constitution itself as the supreme law, on the ambiguity of the constitutional text on the interpretative authority of other branches, and on the need for an institution that has supreme power to guarantee the supremacy of the constitution.<sup>20</sup>

The Supreme Court gradually drew up an invulnerable institution under the control of the other powers, placing itself as a messianic institution that should be responsible for constitutional custody alone, based on a judicialized democracy whose representative bases were about to collapse. The culmination of the problem occurred in the judgment of AP (Criminal Prosecution) N. 470, commonly referred to as big allowance (mensalão) since it was not a simple case of corruption in a vote-buying scheme that was being judged, but also the legislature itself as a democratic institution. Note that the STF emerged from an institutional omission in the case of the impeachment of ex-President Collor, to a total monopoly on the power to subdue an agonizing and corrupt legislative power.

The mastery of interpretive techniques, at the time, was not intended to correct and improve legislative power, but to condemn an entire political class and, consequently, the legislative power itself. What was witnessed was an inter-institutional battle at the Supreme Court, followed daily by society through TV Justiça and other radio and television channels, generating a feeling of revolt and dissatisfaction with politics. For Oscar Vilhena Vieira, this trial projected the STF to a new level in Brazilian public life, highlighting that “with the big allowance (mensalão), the Supreme Court took a definitive step in affirming its power to control the conduct of the highest authorities in the country”.<sup>21</sup>

With a constitution dehydrated by constitutional supremacy and a framework of instruments such as the binding summary, the STF started to exercise a normative power similar to the legislative one, only much more powerful in terms of argumentation and legal construction. The binding summary is born to correct the problem of the Supreme Court’s stare decisis, given the dispersion of jurisprudence about the STF judgments. However, by establishing a legal effect on the binding, the legislator ignored the common law tradition and instrumentalized a Supreme Court that was undergoing extensive institutional expansion.

Still in the expansion phase, with the new reformulation of the STF composition, especially with the entry of Justice Luis Roberto Barroso, the STF gradually underwent a theoretical refinement in the exercise of its functions. Under the (neo)constitutionalist and post-positivist foundation, a doctrine that became hegemonic in the law professions, the STF started to legitimize it is judicial sovereignty through antipositivist legal

<sup>20</sup> MURPHY, Walter F. Judicial Supremacy. In: LEVY, Leonard W.; KARST, Kenneth L. (Orgs.). *Encyclopedia of the American Constitution*. United States: Macmillan, 2000, p. 1488.

<sup>21</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes. Da transição democrática ao mal-estar constitucional**. São Paulo: Companhia das Letras, 2018, p. 199.

theories. Neoconstitutionalism presented itself as a new feature of contemporary constitutionalism in the face of overcoming legal positivism, intending to overcome the existential crisis of Law. According to Miguel Carbonell, the term (neo) constitutionalism is not one, it can be read both in the plural and in the singular, dividing itself into two distinct doctrinal questions. The first can be defined by the new characteristics of contemporary constitutionalism, and how these changes operate on the new constitutional model. The second, on the other hand, refers to a new theory of law that aims to justify and explain this new theoretical paradigm.<sup>22</sup>

However, what should be a criticism of a systematic model of describing law independent of morality has become a motto against the law itself, often mistaking positivism as a theory with democratically produced legislation. Theoretical confusions created a judge who was no longer bound by the “cold letter of the law”, having political, moral and institutional legitimacy to overcome the law as a normative source, under an alleged ideal of justice. Nevertheless, the legal positivism of an exegetical matrix of the judge’s total binding to the law had already been overcome by Kelsen’s positivism, for whom “the validity of a legal norm cannot be questioned on the pretext that its content is incompatible with some moral value or political”.<sup>23</sup> For positivism, the separation between law and morality was only on the plane of validity and not of efficacy and effectiveness.

However, Brazilian legal theory has come to view positivism as an enemy to be defeated, accusing it, often mistakenly, of having legitimized Nazism. How can a persecuted Jew, who criticized Carl Schmitt’s theory about the “Guardian of the Constitution” in the figure of the Reich president, proposing a democratic Constitutional Court model for law control, have created a theory that legitimized his persecutors?<sup>24</sup>

The war against legislation involved the use of the ad hominem argument against Kelsen himself, who instead of attacking the theoretical inconsistencies of the fundamental rule, for example, national authors began to attack any positivist theoretical model that had some legitimacy legislation. Positivism came to be confused with a positive norm and a “cold letter of the law”, giving rise to decision-making and arbitrary model, in which the judicial will prevails.

<sup>22</sup> Para Miguel Carbonell, “Lo que haya de ser El neoconstitucionalismo en su aplicación práctica y en su dimensión teórica es algo que está por verse. No se trata, como se acaba de apuntar, de un modo consolidado, y quizá ni siquiera pueda llegar a estabilizarse en el corto plazo, pues contiene en su interior una serie de equilibrios que difícilmente pueden llegar a convivir sin problemas”. CARBONELL, Miguel. Prólogo: nuevos tempos para el Constitucionalismo. In: CARBONELL, Miguel (Org.). **Neoconstitucionalismo(s)**. 4. ed. Madrid: Trota, 2009, p. 9-10.

<sup>23</sup> KELSEN, Hans. **Teoria Geral do Direito e do Estado**. São Paulo: Martins Fontes, 2004, p. 166.

<sup>24</sup> RODAS, Sérgio. Positivism jurídico não legitimou nazismo, e sim combateu o movimento de Hitler. **Conjur**, 2019. In: <https://www.conjur.com.br/2019-ago-09/positivismo-juridico-nao-legitimou-nazismo-sim-combateu>. Access in 21/01/2019.

The overlap of the judiciary over the legislator and the legislation itself had two bases: the first with the deconstruction of a law theorist, in which authors such as Alexy and Dworkin<sup>25</sup> were used inappropriately and decontextualized to dispose of that a certain model of legal positivism had defeated, demanding that any norm could be interpreted by judicial voluntarism through a moral appeal. The second occurred at the institutional level, in which the judiciary became a type of superego in a society tired of ineffectiveness, inefficiency, and political corruption, with the Justices as the central figure when judging the criminal cases of original jurisdiction.

This phenomenon had its peak in the last decade, leading to a crisis in the legislature itself as a democratic institution and in its institutional legitimacy to perpetuate social changes. Jeremy Waldron points out that we have come to see the legislative activity as unworthy, and that “people have convinced themselves that there is something unseemly in a system in which a legislature is elected, dominated by political parties and making their decisions based on majority government, has the final say on issues of rights and principles.”<sup>26</sup>

The institutionalization of aggressive control of constitutionalism resulted in the loss of space for political debate and self-government, weakening the democratic process in the representative sphere. Samuel Issacharoff, analyzing the era of the rise of the judiciary as the guardian of democratic commitments, highlights that “fragile democracies are plagued by weak institutions. Courts are called upon to reinforce institutional weaknesses by imposing, and often creating, a constitutional structure that allows democratic governance to have at least a chance of success.”<sup>27</sup>

Fernando Gama de Miranda Netto points out that such empowerment of the Judiciary is due to a determined hermeneutic approach on the part of the Court, extrapolating the positive law, therefore appealing to the moral order.<sup>28</sup> Thus, the Supreme Court often calls for unnecessary meta-legal constructions, out of difficult cases, avoiding law enforcement by subsumption, applying unnecessary interpretive methods to remove law enforcement, leading to interpretive authoritarianism. This

<sup>25</sup> It appears that the STF ignores the differentiation that Dworkin made between principles and policies. For the author, the courts must make decisions based on principles and not policies. The principle forum is related to the application of stricto sensu principles that are related to the rights of individuals and not to specific political issues that involve social, economic and public policies. DWORKIN, Ronald. **Levando os Direitos a Sério**. São Paulo: Martins Fontes, 2002, p. 36.

<sup>26</sup> WALDRON, Jeremy. **A Dignidade da Legislação**. São Paulo: Martins Fontes, 2003, p. 5.

<sup>27</sup> ISSACHAROFF, Samuel. **Fragile Democracies: Contested Power in the Era of Constitutional Courts**. Cambridge: Cambridge University Press, 2015, p. 196. For Samuel Issacharoff: “Democratic politics needs and deserves a wide berth, with all the messiness and interest group battles that ensue. Excessive constitutionalization of policy risks debilitating rather than promoting democratic self-government. The hard question is to find a zone of proper political disagreement that is not subject to being commandeered by a too ready recourse to constitutional principle”. *Ibidem*, p. 282.

<sup>28</sup> MIRANDA NETTO, Fernando Gama de; PEREIRA, Daniel Nunes. Supremacia Judicial e Superego na Justiça Constitucional. **Libertas**, v. 1, p. 114-143, 2014.

court with ample normative powers went from inactivity to tyranny in thirty years of the Constitution.

#### 4. THE CONSTITUTIONAL CHANGE OF ART. 102, CAPUT, OF THE CONSTITUTION: DEFERENCE, SUPREMACY AND JUDICIAL SOVEREIGNTY

As previously highlighted, discursive theories have come to play a fundamental role in the construction of STF legal decisions. This discursive model has a claim of moral correction or a criterion of justice that validates the law through universal moral conceptions. However, what should be a form of restraining judicial arbitration has come to be used as a rhetorical foundation to legitimize judicial activism to correct institutional injustices and intervene in other powers.

This phenomenon of transfer and loss of power has been a constant in these more than 30 years of democratic period, in which the legislative power, in addition to instrumentalizing the judiciary with broad normative powers and contesting its formulation process before through Concentrated Action or Writ of Mandate Security, also began to transfer morally controversial issues to the judiciary, to avoid the political cost of decision-making, making the Supreme Court a type of second way of ratifying political decisions. Rogério Bastos Arantes pointed out that the transfer of authority from the legislature to the judiciary and constitutionalization of rights represents “a cost for political elites, but they will prefer this type of ‘insurance’ if the probable costs of future electoral losses seem greater”<sup>29</sup>

The issue becomes more worrying when Justice Luis Roberto Barroso himself destroys the image of the legislature by stating that “due to different circumstances, the Judiciary and the Supreme Federal Court itself are, in general, more liberal/progressive than the Legislative, where the influence economic power has become excessive and distorted from representation”. This idea of distorted legislative power influenced Justice Barroso’s decision when judging the Question of Order in Criminal Action No. 937- RJ, highlighting in his vote that: “The problems and dysfunctions associated with the privileged forum can and should produce changes in constitutional interpretation. Thus, to better make it compatible with the constitutional principles, as well as to reduce the dysfunctions produced, the rules of the 1988 Constitution that establish the hypotheses of the forum by the prerogative of a function must be interpreted restrictively”<sup>30</sup>

<sup>29</sup> ARANTES, Rogério Bastos. Cortes Constitucionais. In: AVRITZER, Leonardo; BIGNOTTO, Newton; FILGUEIRAS, Fernando. (Orgs.). **Dimensões Políticas da Justiça**. Rio de Janeiro: Civilização Brasileira, 2013, p. 198.

<sup>30</sup> BRASIL. Supremo Tribunal Federal. Recurso Extraordinário. AP 937-RJ. Relator: Ministro Roberto Barroso. DJ: 11.06.2018. STF, 2018.

The constitutional rules of jurisdiction were changed through constitutional change, that is, an informal change in the constitution without changing the text, to meet social and democratic developments. However, as Anna Candida da Cunha Ferraz warns: “Constitutional change alters the meaning, meaning, and scope of the constitutional text without violating its letter and spirit. This is the fundamental characteristic of the notion of constitutional mutation that deserves, for now, to be highlighted. It is, therefore, a constitutional change, that is to say, that, indirectly or implicitly, is accepted by the Major Law”.

In the case, however, art. 102, I, “b” of the Constitution, despite the dysfunctions caused by the judicial slowness and the overload of competences of the STF, had as a constitutional spirit to preserve and guarantee the representative political mandate, that is, it was an original rule that aimed to guarantee the process political and the democratic game. Therefore, its amendment should have been carried out through an institutional dialogue process and not through an interpretative restriction of the constitutional rule by the STF, resulting in the breakdown of the separation of powers.<sup>31</sup>

François Rigaux makes it clear that there is a dynamic relationship between the legislator and the judges, in which the higher the judicial hierarchy, the closer the judges are to the exercise of the legislative function. This role of filling constitutional gaps employing judicial techniques such as weighting can be misleading, as the author warns: “most of the time, it is the judge himself who creates the alleged gap by identifying a new need while striving to satisfy -over there”.<sup>32</sup> Thus, unlike legislators who have legal and constitutional restrictions on the exercise of their mandate, under penalty of judicial control, it is the judges, especially those of the Supreme Court, who stipulate the limits of their performance, delimiting or continuously expanding their powers according to the case at trial.

The expansion of the political role of the judiciary in the Brazilian scenario does not depend exclusively on the institutional design or the transfer of power carried out by political institutions, despite having a significant influence on the behavior of the Supreme Courts. However, the judges’ interpretative stance towards maintaining

<sup>31</sup> Jane Pereira Reis warns about the risks of the judiciary directly assuming the role of political representation of society: “The notion that the courts are representatives of society is seductive because it seems to solve, in a word composition, the difficulties inherent in the tension between democracy and constitutionalism. But it is doubtful because it artificially brings together two different realities. The modern notion of political representation is closely linked to the free mandate, in which the representative acts with full autonomy, without being bound by the will of the represented. This lack of connection of wills is compensated for by its elective and transitory character, which, in theory, allows institutionally effective control of its democratic performance. The investiture of the judges does not have a direct popular origin, and in our system, it is not transitory, but for life. On the other hand, the performance of the judges is not politically free, nor is their permanence in office legally linked to the majority will of the people”. PEREIRA, Jane Reis Gonçalves. *O Judiciário pode ser entendido como representante do povo? Um diálogo com “A razão sem voto” de Luís Roberto Barroso*. In: VIEIRA, Oscar Vilhena; GLEZER, Rubens. (Org.). **A razão e o voto**. São Paulo: FGV, 2017, p. 373.

<sup>32</sup> RIGAUX, François. **A Lei dos Juízes**. São Paulo: Martins Fontes, 2003, p. 323.



judicial supremacy and the use of theoretical instruments unrelated to an institutional democratic project are essential factors for judicial activism. As Rodrigo Brandão approached, the judicialization cycle depends on the acceptance of the political burden by the judges, considering “it is a typical function of the judiciary to resolve these controversies, adopting an activist stance in the direct application of principles, in the use of complex technical and moral arguments, in the use of more fluid methods and interpretations than subsumption”.<sup>33</sup>

Analyzing the institutional construction of the STF regarding the expansion of its powers, it appears that the STF in 31 years of the constitution has made a true constitutional change in art. 102, caput, of the Constitution, specifically concerning the reach of the possible meanings of “primarily, the guard of the Constitution”. The open texture and indeterminacy of art. 102, caput, of the Constitution, makes that constitutional rule more susceptible to constitutional mutation since its text imposes less restriction on the activity of the interpreter. As highlighted by Cláudio de Souza Pereira Neto and Daniel Sarmento: “plasticity gives the constitutional system a greater learning capacity ; by making it more permeable to inputs from social reality”.<sup>34</sup>

The original constituent’s project was to protect or take care of compliance with the Constitution, a mission that was accomplished in the first decade of the Supreme Court, with Justice Moreira Alves as one of the prominent figures at the time. Rodrigo de Oliveira Kaufmann points out that for Justice Moreira Alves, the Constitution was a guarantee of the institutions and that political stability and security were values that should serve as a parameter of constitutional interpretation, “leaving the larger dimension of discussion to the democratic and political space about new rights and duties”.<sup>35</sup>

This fact can be observed in the Injunction n. 107-3, adopting the non-concretist theory, in which Justice Moreira Alves, in his vote, stressed that it would not be up to the judiciary to provide legislation even if provisionally, demanding greater deference to the institution’s policies. The “guard of the constitution”<sup>36</sup> was procedural and aimed at ensuring the balance of democratic institutions.

<sup>33</sup> BRANDÃO, Rodrigo. **Supremacia Judicial Versus Dialogos Constitucionais. A quem cabe a última palavra sobre o sentido da Constituição?** Rio de Janeiro. Lumen Juris, 2012, p. 84.

<sup>34</sup> SARMENTO, Daniel; SOUZA NETO, Claudio Pereira de. **Direito Constitucional, Teoria História e Métodos de Trabalho.** Belo Horizonte: Editora Fórum, 2012.

<sup>35</sup> KAUFMANN, Rodrigo de Oliveira. A grande dicotomia: o STF entre as visões de Moreira Alves e Sepúlveda Pertence. **Conjur**, 2019. Disponível em: <https://www.conjur.com.br/2019-ago-24/grande-dicotomia-stf-entre-moreira-alves-sepulveda-pertence>. Access in 21/01/2019.

<sup>36</sup> For John Hart Ely, “Malfunction occurs when the process is undeserving of trust when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system”. ELY, John Hart. **Democracy And Distrust.** Cambridge: Harvard University Press, 1980, p. 88.

From the 2000s onwards, the “custody of the Constitution” underwent a constitutional change and began to be interpreted as a monopoly on constitutional interpretation, as confirmed in the vote of ADI 3.345, by the rapporteur of the Min. Celso de Mello:

*The normative force of the Constitution of the Republic and the monopoly of the last word, by the STF, in matters of constitutional interpretation. The exercise of constitutional jurisdiction - which aims to preserve the supremacy of the Constitution - highlights the essentially political dimension in which the institutional activity of the Supreme Court is projected, since, in the process of constitutional inquiry, the great prerogative of deciding is based, ultimately, about the very substance of power. In the power to interpret the Basic Law, there lies the extraordinary prerogative to (re) formulate it, behold, the judicial interpretation is included among the informal processes of constitutional change, meaning, therefore, that “The Constitution is in permanent elaboration in the Courts charged with applying it”. Doctrine. Precedents. The constitutional interpretation derived from the decisions made by the STF - to whom the eminent role of “guarding the Constitution” (CF, art. 102, caput) has been attributed - assumes an essential role in the institutional organization of the Brazilian State, justifying the recognition of that the political-legal model in force in our country gives the Supreme Court the unique prerogative of having the monopoly of the last word on the subject of exegesis of the rules inscribed in the text of the Basic Law.*<sup>37</sup>

Guarding the Constitution came to be understood as an interpretative monopoly of the Supreme Court, in which judges and constitutional courts would have moral and political superiority over other institutions. However, as Thomas Bustamante warns, “the interpretative controversies within the court are identical in nature to the disagreements that exist in the political process in general, and the disagreements among the court judges themselves are also decided by the majority principle”.<sup>38</sup> The term precipitously constant in the constitutional norm cannot be interpreted as exclusively, under penalty of insulting the literality of the constitutional text itself.

The idea that art. 102, caput, of the Constitution, attributed to the Supreme Court a role of epistemic prominence to the other institutions is anti-democratic and violates the principles of popular sovereignty and the separation of powers, allocating immense institutional power through an interpretive inversion of the supremacy of the

<sup>37</sup> BRASIL, STF, ADI 3.345, rel. min. Celso de Mello, j. 25-8-2005, P, DJE de 20-8-2010.

<sup>38</sup> BUSTAMANTE, Thomas. **Em defesa da Legalidade: Temas de Direito Constitucional e Filosofia Política**. Belo Horizonte: Arraes, 2018, p. 11. For Jeremy Waldron: “Judges vote when they disagree and—as we all know— many important U.S. Supreme Court cases are settled by a vote of five to four among the justices, even when the Court is reviewing legislation and deciding whether to overturn the result of a majority vote among elected representatives”. WALDRON, Jeremy. **Political Political Theory: Essays on Institutions**. Cambridge: Harvard University Press, 2016, p. 246.

constitution by judicial supremacy, violating the institutional design projected by the original constituent, constitutionalizing an activist position of the STF. Diego Werneck Arguelhes and Thomaz Pereira point out that:

*To imagine that, as “guardian of the Constitution”, any acts of the Legislative or Executive that contradict an interpretation of the STF is under the authority of the STF is to set aside the idea that the Constitution is composed of rules of two types: (i) rules of competence and (ii) substantive rules. In this sense, enforcing its constitutional interpretation while ignoring that the Constitution established zones of autonomy for other powers is not the same as defending the “supremacy of the Constitution”, but rather establishing the supremacy of the STF, which would have the power to disregard rules constitutional rules of the first type in the name of an alleged prioritization of constitutional rules of the second type.<sup>39</sup>*

Finally, in this last stage of constitutional change or mutation, we can see the transition from a model of judicial supremacy to institutional sovereignty of the Supreme Court, completely abandoning the Kelsen model of negative legislators and assuming the possibility of building abstract and general normative standards through judicial decisions, for example in additive sentences that practically create rules for the gaps generated by the declaration of partial unconstitutionality of a rule, or manipulative sentences in which the STF can modify or edit a rule in terms of constitutionality control.

Emílio Peluso Neder Meyer, when critically analyzing the modalities of judicial decisions, highlights that: “the judicial decision, when it uses techniques of evident pragmatic nature, such as modifying sentences, the declaration of incompatibility, the appeal to the Legislator and the binding and repristination effects (this, when evidently misused), closes the doors for the legitimacy of the exercise of jurisdiction, which arises precisely from the possibility that the addressees-jurisdictional feel as authors of the provision.”<sup>40</sup>

I understand like judicial sovereignty the possibility for a Constitutional Court to alter, modify, create or edit rules of competence of political institutions that affect society through an extremely strong constitutional review procedure, imposing the will of eleven justices at the expense of the democratic process. Thomas Bustamante points out that political decisions follow the rule of reasonable disagreement, in which the legislative deliberative process takes into account the exclusive positions of the

<sup>39</sup> ARGUELHES, Diego Werneck; PEREIRA, T. H. A. J. Separação de Poderes como Alocação de Autoridade: uma espécie ameaçada no direito constitucional brasileiro? In: LEAL, Fernando. (Org.). **Constitucionalismo de Realidade: Democracia, Direitos e Instituições**. Belo Horizonte: Forum, 2019, v. 1, p. 103-124

<sup>40</sup> MEYER, Emílio Peluso Neder. **Decisão e Jurisdição Constitucional: críticas às sentenças intermediárias, técnicas e efeitos do controle de constitucionalidade em perspectiva comparada**. Rio de Janeiro: Lumen Juris, 2018, p. 285.

participants, emphasizing that “no constitutional court must have the power to irreversibly annul the validity of a law that is formally established by the legislative branch”<sup>41</sup>

Note that the Judicial Sovereignty does not dialogue with the other powers, but imposes a legal duty, as in the case of the Interlocutory Appeal in Mandando de Segurança nº 31.816 / MC, in which Justice Luiz Fux established the procedure for examining vetoes by the National Congress follow a chronological order. In injunction No. 34.530, also judged by Justice Fux, an injunction was granted to suspend the processing of the popular bill PL No. 4.850 / 2016, originating from the movement “ten measures to fight corruption”.

As the court itself highlighted on its website, the trials in 2019 had a strong social, political and economic impact, deciding questions about the criminalization of homophobia, the prohibition of automatic arrest after second instance conviction, the question of impossibility the unhealthy work of pregnant women, the sharing of bank data for investigative purposes, animal sacrifice, traffic violations, regulation of transportation by application, transfer of royalties, demarcation of indigenous lands, etc.<sup>42</sup>

I am not questioning the merits of these actions, but the change in the democratic locus at the institutional level. While the political institutions experienced a struggle to approve the pension reform, the legal institution defined the directions of public policies that generate a great impact on democracy. The allocation of power by the STF is marked in the argument of Justice Luis Roberto Barro by stating that “in addition to the purely representative role, supreme courts occasionally play the Enlightenment role of pushing history when it gets stuck”<sup>43</sup>

This “enlightenment” stance outside legal procedures has no connection with the provisions of art. 102, caput, of the Constitution, but aims at creating judicial sovereignty that is beyond any interpretive method, as can be seen in the vote of Justice Luiz Fux in the precautionary injunction in the Direct Action of Unconstitutionality N. 6.298 - Federal District, which determined the indefinite suspension of the implantation of the Guarantee Judge created by Law 13,964/2019, without presenting any formal or material defect, alleging an alleged violation of the rules of judicial organization (art. 96 of the Constitution), creating a form of unconstitutionality due to defect thus guaranteeing judicial sovereignty.

The soundness of the political process is no longer a major factor for the analysis of constitutionality, as evidenced in the vote that suspended the articles of the referred law: “the fact that the questioned law was approved by the National Congress and

<sup>41</sup> BUSTAMANTE, Thomas. **Em defesa da Legalidade: Temas de Direito Constitucional e Filosofia Política**. Belo Horizonte: Arraes, 2018, p. 218.

<sup>42</sup> See SUPREMO TRIBUNAL FEDERAL. **Julgamentos de impacto social, político e econômico marcaram pauta do STF em 2019**. 31 dez. 2019. Available at: <<http://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=433939>>.

<sup>43</sup> BARROSO, Luis Roberto. **A Judicialização da Vida e o Papel do Supremo Tribunal Federal**. Belo Horizonte: Fórum, 2018, p. 59.

sanctioned by the President of the Republic did not it works as an argument capable of minimizing the legitimacy of the Judiciary for the exercise of constitutionality control".<sup>44</sup>

Contrary to the understanding presented by the Justice, in a democracy, the rule of law will always be an argument that must be taken into account when exercising constitutional control, under penalty of transforming the exceptionality of judicial interference in the political process into the rule. Thomas Sowell points out that the problem of judicial activism involves the foundation of decisions, questioning "whether these decisions are based on laws created by others, including constituent assemblies, or whether, on the contrary, it is the judges themselves who base their decisions on their conceptions about 'the needs of the time' and 'social justice' or other considerations that go beyond what is written in the law or legal precedents".<sup>45</sup> As Jeremy Waldron emphasized, "our respect for legislation is, in part, the tribute we must pay for the achievement of concerted, cooperative, coordinated or collective action in the circumstances of modern life."<sup>46</sup>

The "guard of the Constitution" cannot be interpreted in a selfish and insular way, under penalty of subversion of the democratic constitutional model established by the original constituent. In this sense, the criticism of Lenio Streck, Marcelo Cattoni and Martonio Mont'Alverne, when stating that "a court cannot change the Constitution; a court cannot 'invent' the law: this is not its legitimate role as a judicial power in a democracy".<sup>47</sup>

The STF, abandoning the constitutional scope of the democratic balance believer, started to occupy the political space of the other institutions, assuming the democratic game as a player and judge, becoming a player with wide veto power, demanding more and more another extra-procedural and political legitimacy for its actions. However, as Ingborg Maus rightly pointed out: "the judge does not have to act as a spokesman for any national feeling, but teaching a 'sick' people a 'healthy' feeling is precisely what his superego function consists of."<sup>48</sup>

## 5. CONCLUSION

In conclusion, I return to the work of Tom Gerald Daly to highlight the four lessons that can be extracted from the Brazilian constitutional experience. The first highlights that incremental constitutionalism has its limits and that profound flaws in the

<sup>44</sup> BRASIL, ADI 6.299, rel. min. Luiz Fux, j. 22-01-2020.

<sup>45</sup> SOWELL, Thomas. **Os intelectuais e a Sociedade**. São Paulo: Realizações Editora, 2011, p. 266.

<sup>46</sup> WALDRON, Jeremy. **A Dignidade da Legislação**. São Paulo: Martins Fontes, 2003, p. 190.

<sup>47</sup> STRECK, Lenio Luiz; LIMA, Martonio Mont'Alverne Barreto; OLIVEIRA, Marcelo Andrade Cattoni de. A nova perspectiva do Supremo Tribunal Federal sobre o controle difuso: mutação constitucional e limites da legitimidade da jurisdição constitucional. **Argumenta Journal Law**, Jacarezinho, n. 7, p. 45-68, fev. 2013.

<sup>48</sup> MAUS, Ingborg. **O Judiciário como Superego da Sociedade**. Rio de Janeiro: Lumen Juris, 2010, p. 33.

constitutional and political design in a new democracy cannot be mitigated by a constitutional court.

The Constitutional Court has a role of correction, effectiveness, and co-participation in the democratic construction, and must dialogue with the other institutions. On the other hand, the second lesson meets the arguments already presented, since there is no evidence or guarantee that a constitutional court will mitigate rather than exacerbate the flaws in the constitutional design. There is no way to predict the behavior of judges in the face of the transfer of interinstitutional powers in a new democracy. The third lesson points out that the elaboration of an excessively inclusive constitution and that bets on the constitutionality control for the realization of rights can hinder the construction of a democracy.

Thus, the excess of legitimates for proposing actions to control constitutionality results in permanent blocking and entrenchment of legislation in the Supreme Court. Finally, the fourth lesson warns that judicialization cannot be seen as a positive sign of the democratic trajectory but as a sign of institutional problems that must be corrected for democratic development.

Such issues are closely linked to the role of the Constitutional Courts in new democracies, especially the case of Brazil. In these 31 years of the constitution, the STF has gone from an institution unknown to Brazilian society to the center of political debates. However, instead of correcting and strengthening the democratic process with the other institutions, the court expanded its powers and competences to the detriment of the other powers, building a judicialized and unbalanced democracy.

Through an implicit process of constitutional change in art. 102, caput, of the Constitution, the STF went from deference to judicial supremacy, subverting the supremacy of the constitution into judicial supremacy, becoming a hegemonic interpreter of constitutional norms. Nevertheless, the court's powers in the past decade have again undergone a mutation, alternating between judicial supremacy and judicial sovereignty, effectively acting as a political institution.

Faith in the Constitutional Courts as builders of a new democracy revealed that although the Supreme Court has become an institution that guarantees the effectiveness of constitutional norms, it was not possible to guarantee political and democratic stability in institutional terms. Judicial protagonism is a democratic defect that must be corrected, under penalty of degeneration of institutional design and democratic institutions.

Thinking of the STF as "guardian of the Constitution" does not mean hegemony or institutional overlap, but an institutional collaboration between the powers in the construction of a new democracy. However, after 33 years of the Constitution, there is no turning back, if democracy is still our goal as a society, we must question our faith

in the judiciary and try to correct the institutional vices that weaken the democratic process and the exercise of constitutional jurisdiction.

## 6. REFERENCES

ALEXY, Robert. **Teoria da Argumentação Jurídica: A Teoria do Discurso Racional como Teoria da Fundamentação Jurídica**. Rio de Janeiro: Forense, 2011.

ALVES, Moreira. [Discurso]. In: **Solenidade de posse dos Ministros Sydney Sanches, na Presidência e Octavio Gallotti, na Vice-presidência**: sessão solene realizada em 10-5-1991. Brasília: Supremo Tribunal Federal, 1993. p. 6-25.

ARANTES, Rogério Bastos. Cortes Constitucionais. In: AVRITZER, Leonardo; BIGNOTTO, Newton; FILGUEIRAS, Fernando. (Orgs.). **Dimensões Políticas da Justiça**. Rio de Janeiro: Civilização Brasileira, 2013.

ARGUELHES, Diego Werneck; SUSSEKIND, E. P. Judicialização antes da democratização? O Supremo Tribunal Federal e o Destino da Emenda Constitucional das 'Diretas Já'. **Pensar**, Fortaleza, v. 23, p. 1-16, 2018.

ARGUELHES, Diego Werneck; PEREIRA, T. H. A. J. Separação de Poderes como Alocação de Autoridade: uma espécie ameaçada no direito constitucional brasileiro? In: LEAL, Fernando. (Org.). **Constitucionalismo de Realidade: Democracia, Direitos e Instituições**. Belo Horizonte: Forum, 2019.

BALEEIRO, Aliomar. **O Supremo Federal, esse Outro Desconhecido**. Rio de Janeiro: Forense, 1968.

BARROSO, Luís Roberto. **O Direito Constitucional e a Efetividade de Suas Normas. Limites e possibilidade da Constituição brasileira**. 8. ed. Rio de Janeiro: Renovar, 2006.

BARROSO, Luis Roberto. Judicialização, Ativismo Judicial e Legitimidade Democrática. **Revista Thesis**, Rio de Janeiro, vol. 5, n. 1, 2012.

BARROSO, Luis Roberto. **A Judicialização da Vida e o Papel do Supremo Tribunal Federal**. Belo Horizonte: Fórum, 2018.

BRANDÃO, Rodrigo. **Supremacia Judicial Versus Dialogos Constitucionais. A quem cabe a última palavra sobre o sentido da Constituição?** Rio de Janeiro. Lumen Juris, 2012.

BRASIL. Supremo Tribunal Federal. **Recurso Extraordinário. AP 937-RJ**. Relator: Ministro Roberto Barroso. DJ: 11.06.2018. STF, 2018. Disponível em: <http://portal.stf.jus.br/processos/detalhe.asp?incidente=4776682>. Acesso em 21 jan. 2018.

BRASIL, STF, **ADI 3.345**, rel. min. Celso de Mello, j. 25-8-2005, P, DJE de 20-8-2010.



BRASIL, STF, **Julgamentos de impacto social, político e econômico marcaram pauta do STF em 2019. Disponível em** [http://www.stf.jus.br/portal/cms/verNoticiaDetalhe .asp?idConteudo=433939](http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=433939). Acesso em 25 jan. 2019.

BRASIL, STF, **ADI 6.299**, rel. min. Luiz Fux, j. 22-01-2020, P, DJE pendente de publicação.

BUSTAMANTE, Thomas. **Em defesa da Legalidade: Temas de Direito Constitucional e Filosofia Política**. Belo Horizonte: Arraes, 2018.

CAMPOS, Carlos Alexandre de. **Dimensões do Ativismo Judicial do STF**. Rio de Janeiro: Forense, 2014.

CARBONELL, Miguel. Prólogo: nuevos tempos para el Constitucionalismo. In: CARBONELL, Miguel (Org.). **Neoconstitucionalismo(s)**. 4. ed. Madrid: Trota, 2009.

CARVALHO, Ernani. Trajetória da revisão judicial no desenho constitucional brasileiro: tutela, autonomia e judicialização. **Sociologias**, Porto Alegre, n. 23, p. 176-207, Apr. 2010.

DALY, Tom Gerald. **The Alchemists: Questioning Our Faith in Courts as Democracy-Builders**. Cambridge: Cambridge University Press, 2018.

DWORKIN, Ronald. **Levando os Direitos a Sério**. São Paulo: Martins Fontes, 2002.

ELY, John Hart. **Democracy And Distrust**. Cambridge: Harvard University Press, 1980.

FERRAZ, Anna Cândida da Cunha. **Processos informais de mudança da Constituição**. São Paulo - Max Limonad, 2000.

GINSBURG, Tom. **Judicial review in new democracies: Constitutional Courts in Asian Cases**. Cambridge: Cambridge University Press, 2003.

GRIFFIN, Syephen M. **A Era Marbury: o judicial review em uma Democracia de Direitos**. In: BIGONHA, Antonio Carlos Alpino; MOREIRA, Luiz. Legitimidade da Jurisdição Constitucional. Rio de Janeiro: Lumen Juris, 2010.

HIRSCHL, Ran. The Political Origins of the New Constitutionalism. **Indiana Journal of Global Legal Studies**, v. 11, 2004.

ISSACHAROFF, Samuel. **Fragile Democracies: Contested Power in the Era of Constitutional Courts**. Cambridge: Cambridge University Press, 2015.

KAUFMANN, Rodrigo de Oliveira. A grande dicotomia: o STF entre as visões de Moreira Alves e Sepúlveda Pertence. **Conjur**, 2019. Disponível em <https://www.conjur.com.br/2019-ago-24/grande-dicotomia-stf-entre-moreira-alves-sepulveda-pertence>. Access in 21/01/2019.

LEGALE FERREIRA, Siddharta; MACEDO, Marco Antonio Ferreira. A “Corte” Moreira Alves (1975-2003): a judicatura de um civilista no STF e o controle de constitucionalidade. **Observatório da Jurisdição Constitucional**, ano 5, vol. 2, ago./dez. 2012.

MURPHY, Walter F. **Judicial Supremacy**. In: LEVY, Leonard W.; KARST, Kenneth L.;(Orgs.). Encyclopedia of the American Constitution. United States: Macmillan, 2000.

- MAUS, Ingborg. **O Judiciário como Superego da Sociedade**. Rio de Janeiro: Lumen Juris, 2010.
- MELLO, Celso de. Discurso Proferido pelo Ministro Celso de Mello, em Nome do Supremo Tribunal Federal, na Solenidade de Posse do Ministro Gilmar Mendes, na Presidência da Suprema Corte do Brasil, em 23/04/2008. **Revista de Direito Administrativo**, Rio de Janeiro, v. 248, p. 199-247, 2008.
- MEYER, Emílio Peluso Neder. **Decisão e Jurisdição Constitucional: críticas às sentenças intermediárias, técnicas e efeitos do controle de constitucionalidade em perspectiva comparada**. Rio de Janeiro: Lumen Juris, 2018.
- MIRANDA NETTO, Fernando Gama de; PEREIRA, Daniel Nunes. Supremacia Judicial e Superego na Justiça Constitucional. **Libertas**, v. 1, p. 114-143, 2014.
- MURPHY, Walter F. Judicial Supremacy. In: LEVY, Leonard W.; KARST, Kenneth L. (Orgs.). *Encyclopedia of the American Constitution*. United States: Macmillan, 2000.
- NETO, João Andrade. **Borrowing Justification for Proportionality: On the Influence of the Principles Theory in Brazil**. Springer, 2018.
- OLIVEIRA, Fabiana Luci de. **Supremo Tribunal Federal: do autoritarismo à democracia**. Rio de Janeiro: Elsevier : FGV, 2012.
- PEREIRA, Jane Reis Gonçalves. O Judiciário pode ser entendido como representante do povo? Um diálogo com “A razão sem voto” de Luís Roberto Barroso. In: VIEIRA, Oscar Vilhena; GLEZER, Rubens. (Org.). **A razão e o voto**. São Paulo: FGV, 2017.
- RIGAUX, François. **A Lei dos Juízes**. São Paulo: Martins Fontes, 2003.
- RODAS, Sérgio. Positivismo jurídico não legitimou nazismo, e sim combateu o movimento de Hitler. **Conjur**, 2019. In: <https://www.conjur.com.br/2019-ago-09/positivismo-juridico-nao-legitimo-nazismo-sim-combateu>. Access in 21/01/2019.
- SAMPAIO, José Adércio Leite. **A Constituição Reinventada Pela Jurisdição Constitucional**. Belo Horizonte: Del Rey, 2002.
- SARMENTO, Daniel; SOUZA NETO, Claudio Pereira de. **Direito Constitucional, Teoria História e Métodos de Trabalho**. Belo Horizonte: Editora Fórum, 2012.
- SHAPIRO, Martin; SWEET, Alec Stone. **On Law, Politics, and Judicialization**. Oxford: Oxford University Press, 2002.
- SOWELL, Thomas. **Os intelectuais e a Sociedade**. São Paulo: Realizações Editora, 2011.
- STRECK, Lenio Luiz; LIMA, Martonio Mont'Alverne Barreto; OLIVEIRA, Marcelo Andrade Cattoni de. A nova perspectiva do Supremo Tribunal Federal sobre o controle difuso: mutação constitucional e limites da legitimidade da jurisdição constitucional. **Argumenta Journal Law**, Jacarezinho, n. 7, p. 45-68, fev. 2013.

SUPREMO TRIBUNAL FEDERAL. **Julgamentos de impacto social, político e econômico marcam pauta do STF em 2019**. 31 dez. 2019. Available at: <<http://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=433939>>.

VIEIRA, Oscar Vilhena. **A Batalha dos Poderes. Da transição democrática ao mal-estar constitucional**. São Paulo: Companhia das Letras, 2018.

VIEIRA, José Ribas. Verso Reverso - A judicialização de política e o ativismo judicial no Brasil. **Estação Científica**, Juiz de Fora, v. 1, p. 45-58, 2009.

VIEIRA, Oscar Vilhena. Supremocracia. **Revista Direito GV**, São Paulo, v. 4, n. 2, jul./dez. 2008.

WALDRON, Jeremy. **Political Political Theory: Essays on Institutions**. Cambridge: Harvard University Press, 2016.

WALDRON, Jeremy. **A Dignidade da Legislação**. São Paulo: Martins Fontes, 2003.

WALDRON, Jeremy. O judicial review e as Condições da Democracia. In: BIGONHA, Antônio. MOREIRA, Luiz. (Org.) **Limites do Controle de Constitucionalidade**. Rio de Janeiro: Lumen Juris, 2011.