PROTECTING POLITICAL RIGHTS OR INTERFERING IN THE POLITICAL ARENA? THE ONGOING POLITICAL-REFORM AT THE BRAZILIAN FEDERAL SUPREME COURT (STF)

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Abstract

The interactions between legal and political system has been strengthened in recent years, especially through judicial review, with the transference to Courts of themes that define and divide a political system. In brazilian case, in the absence of legislative deliberation some of these discussions are forwarded Brazilian courts, who gave controversial decisions about "mega politics". So, the research's question "is the Brazilian Federal Supreme Court (re) building electoral legislation, as a manifestation of judicial activism, interfering in mega politics? The study starts from a theoretical approach, with the deductive method, combined with a qualitative case analysis about courts's decisions regarding party loyalty, coalition verticalizations, threshold clauses and the rights of legislative minorities, and political donations. Therefore, the research is supported by a bibliographical and documentary survey. Based on the methodological approach of Judicial Politics, the legal protection of fundamental political rights and the structure of the Brazilian strong judicial system are described (Normative Theory), and evaluated the motivations of legal decisions, taking into account judicialization as exercise of a political activity (Positive Theory).

Keywords

Political rights. Brazilian Constitution. Judicialization of Politics. Democracy. Electoral Governance.

Summary

1. Introduction. 2. The Judicialization of Mega Politics: General Outlines of a Global Phenomenon. 3. Political Rights and Public Participation: The Citizen Constitution as Protection of Political Democracy in Brazil. 4. Two Super Courts, a Non-Political Electoral Governance Model: The Judicialization of Politics in Brazil. 5. Party Loyalty: is it the Clearest Instance of judicial activism? 6. Outlining Coalition Verticalizations: The Superior Electoral Court's Rulings. 7. Threshold Clause and the Protection of Parliamentary Minorities. 8. Campaign Financing: ADI 4,650 as a Starting Point to the Institutional Dialogue on Political Reform. 9 Conclusion: Should STF Make the Wheels of History Turn When They Have Stopped?

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1. INTRODUCTION

Issues that have been traditionally dealt with at the Legislative or Executive branches are now routinelly directed to the Judiciary all over the world. There is a broad literature discussing this process — both causes and effects — as it pertains to judges, courts, and other social and political actors. In Brazil, this phenomenon is in full effect as a direct consequence of the Constitution of the Federative Republic of Brazil (CRFB), that granted extensive powers to the judicial system, especially its main court, Brazilian Federal Supreme Court (STF).

The transformation of courts into a crucial part of the political system in several countries, however, is surrounded by criticism. Regarding the performance of the judiciary, exercising judicial review, doubts remain about its compatibility with the democratic principle, of the risks represented by the interference in the action of the majority powers - whose legitimacy is based on democratic representation and because they have the structure and technical means to achieve their constitutional functions - and, finally, the interpretative methods used by courts.

As roles change for the courts, a new process starts to take place in the 21st century — something Ran Hirschl has called the "judicialization of pure politics." Such process later becomes a so-called "mega politics," in which courts start to arbitrate issues of "absolute and extreme importance," things that define and divide the political system, "existential matters" for the nation. This broad category includes electoral results, changes to the political system, and complex debates on collective identity and national projects.² It also includes a legitimacy element: the idea that courts are the proper place to decide greater political issues in debate.

Although Hirschl does not refer directly to Brazil, STF and the Superior Electoral Court (TSE) interferences in important issues of the political process allow us to consider whether the judicialization of mega politics is

² HIRSCHL 2008, 7.

taking place in the country. There, the crisis of the political system leaves the door open to extensive debates on political reform, something that would comprise "all changes to popular sovereignty institutions, deeply restructuring their operations and being more than electoral reform, for it would affect the very structures of power". Political reform has languished in Congress, however. Several of its projects are included on Constitutional Amendment Proposals (PECs) 182/2007 and 113/2005. Absent legislative debates, and given the importance of the issues at hand, STF could be called upon to decide the matters.

So, in this context, are the courts in Brazil protecting political human rights or performing the role of positive legislator, characteristically of judicial activism, on the construction of a new electoral law? To answer this research question, we will combine methods both from the disciplines of Law and Political Science - in other words, taking into account normative and positive theories. The former prescribes the criteria that should be observed in any decision; the latter asks what factors motivate judicial decisions in the real world, as they are themselves political acts.⁵ Considering human political rights as the normative element of the present work, we will present an outline of the discussion about the convergence of political rights in CRFB, that establishes a strong judicial system. If the organization of activities related to the structure of electoral systems is seen as an "essential variable in the consolidation of democratic regimes"6, becoming an important topic of studies in international literature, it is important to explore the peculiarities and structure of the Brazilian model, with a view to the behavior of the institutions in charge of this function. In this case, due to their relevance to the system, STF and TSE will be studied.

³ AGRA 2012, 64.

⁴ BRASIL. Camara dos Deputados. *Comissão Especial: relatório final.* Brasilia, DF, 2015. BRASIL. Senado Federal. *Quadro comparativo*. Brasilia, DF, 2015.

⁵ SHAPIRO and SWEET 2002, 24; WHITTINGTON 2008; FRIEDMAN 2005.

⁶ LIMA and CARVALHO 2014, 63.

The article suggests that a court's judicial activism can be studied from two analytical axes, commonly identified in discussions on the topic: (a) methodological, which corresponds to the interaction between court and legal doctrine and the "state of the art" around the theoretical proposals for judicial action and its criteria for the evaluation of decisions; (b) institutional, which portrays the relationship between the court and the other state power agencies (legislative and executive branches, other jurisdictional bodies, federated entities), with the characterization or removal of their effective interference.⁷

After drafting this general framework, we will proceed to the case study and this paper will analyze courts's decisions regarding party loyalty, coalition verticalizations, threshold clauses and the rights of legislative minorities, and political donations. We argue that there is already a political reform being advanced by STF, inclined as it is to judicial activism, because of the judicialization of mega politics in Brazil.

2. THE JUDICIALIZATION OF MEGA POLITICS: GENERAL OUTLINES OF A GLOBAL PHENOMENON

The term *judicialization of politics* became well known after the publication of Neal Tat's and Torbjörn Vallinder's *The Global Expansion of Judicial Power* in 1995, in which the authors and other researchers outlined the features of a Western phenomenon: the delegation of political decisions to the judicial arena. The process takes place within certain institutional (political and judicial) and cultural-behavioral conditions (including commitment by the actors, the demand by political agents, clashes between government and the opposition, among others).⁸

⁷ LIMA 2014, 329.

⁸ In the work organized by Neal Tate and Tobjorn Vallinder, the legal and political contexts of the United States, countries of Western and Eastern Europe, Australia and even countries in Africa and Latin America are studied. They assume a starting point that

It is a process in which judicial discourse is subsumed into political discourse, despite many distinctions between them: while the judicial system is characterized by norms and interpretive demands, interests, power, and ideology are defining features of politics.⁹

Thus, in expanding the role of the law and the judicial system, we run the risk of strengthening "tensions between law and politics — without a specific conceptual definition of which process is more damaging to each sphere". The activities of the judicial branch, however, are not unanimously agreeable, as there are no constitutional guidelines and little democratic oversight to its operations. 11

In addition to the constitutionalization of legal systems and the general affirmation of a judicialization of politics, there is nowadays a new movement of judicial expansion, a kind of deepening of these processes. The strengthening of the courts seems to transcend the judicial discussion of public policies, the decisions on fundamental rights or the judicial redrawing of the legal boundaries between state agencies, which would constitute the policy.

While the judicialization of politics implies difficulties, the qualitative change in the demands delegated to the judicial branch makes the matter particularly intriguing. After all, it has started to decide important political questions, such as electoral laws, political mandate rules, and, eventually, the removal from political office.

Ran Hirschl, in identifying this judicialization of mega politics, goes over events that took place all over the world, highlighting the judicial interference into domains traditionally reserved to politics — conducted by

the directing of expectations to the judiciary is a worldwide trend, typical of contemporary democracies. Studies focusing on the peculiarities of judicialization in regional contexts are being developed all around the world. About Asia, GINSBURG 2003; Europe, STONE SWEET 2000; Latin America, GLOPPEN et al., 2004.

⁹ SWEET 2002, 187.

¹⁰ VERONESE 2011, 249.

¹¹ HIRSCHL 2006, 722-729.

political agents in majoritarian institutions — in constitutional democracies. 12

Initially, the clearest instance of this interference takes place when courts decide on matters of the democratic process itself. In the United States, the Supreme Court has laid rules on campaign donations, gerrymandering, and redistricting. These kinds of decisions include rules on how political parties and candidates should act, whether they should be removed from electoral disputes, and the validity of closed list representation.

The judgment of notable political leaders under corruption charges (Silvio Berlusconi in Italy, Alberto Fujimori in Peru) and other "political trials" — where leaders are accused, disqualified or removed from political campaigns by a "political Judiciary" — are part of this new moment as well.¹³ Other authors, in contrast, distinguish between judicialization (intending to delegate to the judicial branch matters usually under the umbrella of majoritarian institutions) and the so-called "criminalization of politics".¹⁴ Over twenty five countries have seen their electoral processes arbitrated or decided by the judicial system. Taiwan (2004), Puerto Rico (2004), Ukraine (2005), Congo (2006), Italy (2006), Mexico (2006), and Nigeria (2007) have all seen their constitutional courts called upon to decide on political disputes.

We should also note that the involvement of the Judiciary in issues of national security, foreign policy, and even fiscal policy has increased. In the United States, for instance, the post-11 September 2001 (War on Terror) has routinely been questioned in court as an attempt to check executive power.¹⁵

As the Judiciary has been increasingly called upon to evaluate government policy, the notion that it serves as an effective check on other powers has

¹³ HIRSCHL 2008, 7-8.

¹² HIRSCHL 2008, 3.

¹⁴ PRZEWORSKI 2003, 14.

¹⁵ HIRSCHL 2008, 9.

legitimized its involvement not only in the evaluation of constitutional law, but in the arbitration of conflict between the executive and legislative branches, as well as its constant decisions on turbulent political processes. As examples of each of these situations, we can mention: (a) the "judicial certification" process by South Africa's Constitutional Court, where it refused to accept a new constituion drafted by a body of political representatives; (b) South Korea's Supreme Court conducting president Roh Moo-Hyun back to power after he was impeached by the National Assembly; (c) Pakistan's Supreme Court decision to legitimize a political coup according to the doctrine of "state necessity" and under the principle salus populi suprema lex, in order to "protect the country from chaos and collapse". Hirschl thereby shows us the new face of judicial institutions: they now serve as arbiters of political and electoral conflict. ¹⁶

It is possible to classify three new possibilities in which the courts have new and important roles vis-à-vis the political system, especially the parliament: regulation of the exercise of parliamentary authority, imposing substantive limits on the power of legislative institutions; becoming the institutional space for political decision-making; regulation of political activity - whether in legislatures, government or even the electorate - building acceptable standards of conduct for interest groups, political parties and elected or appointed representatives.¹⁷

We can even say that, in Brazil, where the debate on judicialization of politics and social relations has mostly been unanimous, a similar phenomenon has taken shape, but why?

3. POLITICAL RIGHTS AND PUBLIC PARTICIPATION: THE CITIZEN CONSTITUTION AS PROTECTION OF POLITICAL DEMOCRACY IN BRAZIL

¹⁶ HIRSCHL 2008, 11.

¹⁷ FEREJOHN 2002, 41.

The conjunction of political democracy, reciprocal control between powers and the provision of a catalog of human and fundamental rights, with their corresponding guarantee instruments, would be the central elements of the judicialization of politics in Brazil. In a typical constitution of the third wave of democratization, the health of the political process was expected to have its main aspects raised to a constitutional theme, especially in an analytical and extensive constitution.¹⁸

In practical terms, it adopted an analytic model for the "democratic transition," allowing the "translation of political demands into judicial language, making them legally actionable". There was a clear Iberian (especially Portuguese) influence guiding this democratic and communitarian constitutional view²⁰. The very concept of communitarian constitutionalism is interpreted according to "popular citizenship" ideas, which subject constituted officials to a collective understanding about the scope of their powers. Furthermore, social groups are eager to attain political representation by widening the circle of "allowed interpreters of the constitution".²¹

So, Constitution of the Federative Republic of Brazil, enacted on October 5, 1988, establishes a legal democratic state, founded on citizenship and political pluralism, based on fundamental rights and the guarantee of democratic institutions,in which "all power emanates from the people, who exercise it by means of elected representatives or directly, as provided by this Constitution" (article 1, Sole paragraph).

In this context, the achievement or compatibility of the binomial fundamental rights x democracy is one of the biggest challenges, from the theoretical point of view and the reality

¹⁹ LIMA 2014, 234.

¹⁸ LIMA 2014, 254.

²⁰ "It is legitimate to speak of an objective dimension of fundamental rights as values, since their judicial reach and scope (that is, the legitimate situations or forms of exercise) are determined, in part, by the recognition of the community, and not simply by the opinion (desire) or the claimant." As pointed by SIQUEIRA CASTRO 2005, 43.

²¹ CITTADINO 2000.

of the constitutions, considering the dissent and disagreement typical of pluralist societies. Thus, democratic constitutions would constitute a proposal for possible solutions and coexistences, or rather, a "compromise of possibilities", in Zagrebelsky's words, to determine the conditions for carrying out political debates about their contents.²²

The discussion on constitutional content is supported by the current text, which, supported by a redemocratizing project, guaranteed representative and participatory democracy. The provision of means of channeling the expectations of the "community of interpreters" to state institutions, the mechanisms of popular defense of collective and diffuse rights, or even the possibilities of complaints to public authorities, allow us to confirm that the constitutional text provided for future clashes on its content, in the branches of government - judiciary included...

On the other hand, the lack of effectiveness of socioeconomic rights can lead to a distortion of the democratic ideal, with the exclusion of certain groups from popular representation channels. Thus, it is the task of an effective Democratic State of Law to ensure the participation of individuals in the management of public assets, providing the mechanisms that guide decisions taken in the "public sphere" to the daily decisions of government. In this way, even theorists who advocate a procedural approach to democracy pay attention to the need to ensure social justice, in order to guarantee the effectiveness of electoral processes as products of the effective participation of citizens in public life.²³

In this universe, although often associated with its negative dimension, as manifestations of the right to freedom, political rights guarantee the positive liberty to contribute to the political process, so the government should be structured to provide opportunities for participation of all eligible citizens, directly or through chosen representatives, without unreasonable restrictions.

Certainly, in order to guarantee effective political freedom, which presupposes autonomy of will and information, the need to protect other

²² ZAGREBELSY 1999, 13-14.

²³ BARRY 2003, 262-273 and 264.

rights is understood, considering that human rights are intrinsically connected and cannot be viewed in isolation from each other, because they're indivisible, interdependent and interrelated

Liberal authors like John Rawls understand the existence of "constitutional foundations" that involve both the "fundamental principles that specify the general government structure and the political process" and the "equal basic rights and freedoms of citizenship that legislative majorities must respect", so that the minimum social provision for the basic needs of all citizens must be ensured, as an "essential element of a constitution". ²⁴

That is why guaranteeing civil and political rights depends on protecting socio-economic rights - often under the formula of positive rights. As David Bilchitz recalls, without respect for the two sets of rights (civil / political and socioeconomic), a society cannot claim to treat individual lives as being of equal importance: the measure of any decent policy.²⁵

For Jeremy Waldron, there is no way to dissociate first and second-generation rights:

In any case, the argument from first-generation to second-generation rights was never supposed to be a matter of conceptual analysis. It was rather this: if one is really concerned to secure civil or political liberty for a person, that commitment should be accompanied by a further concern about the conditions of the person's life that make it possible for him to enjoy and exercise that liberty. Why on earth would it be worth fighting for this person's liberty (say, his liberty to choose between A and B) if he were left in a situation in which his

²⁴ RAWLS 1993, 227-9.

²⁵ BILCHITZ 2007.

choosing one rather than the other would have no impact on his life?²⁶

In this sense, political or civic rights are equivalent to the prerogatives and duties inherent to citizenship and encompass the right to participate directly or indirectly in the government, organization and functioning of the state. To this end, it devotes a chapter to political rights, which consist of instruments of representative democracy - universal suffrage and by the direct and secret voting – and direct democracy – plebiscite, referendum and people's initiative to propose bills.²⁷ In general, such rights are not granted to all those who inhabit the national territory, but only to nationals who fulfill the requirements determined by the constitutional text itself.

Political rights can be positive, which correspond to the right to vote and to be voted and aim to guarantee the participation of the people in power through active suffrage, in the first case, or passive, in the second.²⁸ And they can also be negative, which occurs when the citizen is deprived of the enjoyment of these rights due to a permanent or temporary loss.²⁹

²⁶ WALDRON 1993, 7.

²⁷ Through this institute, a group of citizens can prepare a bill and submit it to the Legislative (municipal, state and federal) Branch, subject to certain requirements. (articles 29, XIII; 27, Paragraph 4; 61, Paragraph 2). BRASIL. Constituição da República Federativa do Brasil de 1988. *Diário Oficial da União*. Brasília, DF, 05 out. 1988.

²⁸ The right to vote is inherent and mandatory for some people - those over eighteen; optional for others - the illiterate, those over 70 and those over 16 and under 18; and, yet, forbidden for others - foreigners and conscripts (as long as they are performing mandatory military service). To be eligible to be voted, in addition to being voters, those interested must obey conditions expressed in the constitutional rule, such as: Brazilian nationality, full exercise of political rights, electoral enlistment, electoral domicile in the constituency, party affiliation and minimum age. BRASIL. Constituição da República Federativa do Brasil de 1988. *Diário Oficial da União*. Brasília, DF, 05 out. 1988.

²⁹ The only chance of loss of political rights would be the cancellation of naturalization by a final and unappealable judicial sentence and, as for the suspension, involve absolute civil incapacity, final criminal conviction, refusal to comply with all obligations imposed or

It is important to note that the CRFB also ensured, among the rights of direct participation, the right of citizens (linked to the right to vote) to filing a lawsuit (popular action) as a way of exercising popular sovereignty, for the defense of collective rights or interests against harmful acts to the detriment of the Public Power (article 5, LXXIII) Thus, there is an opportunity for citizens to directly exercise their accountability, which, as a rule, is done through their representatives in the Legislative Houses. Finally, the right to party organization and participation is guaranteed, with political parties being recognized as indispensable institutions to representative democracy.

Article 17. The creation, amalgamation, merger and extinction of political parties is free, with due regard for national sovereignty, the democratic regime, the plurality of political parties, the fundamental rights of the individual, and observing the following precepts: (CA 52, 2006) I – national character;II – prohibition from receiving financial assistance from a foreign entity or government or from subordination to same;III – rendering of accounts to the Electoral Courts;IV – operation in the National Congress in accordance with the law.³⁰

The Brazilian Constitution adopted the principle of "party freedom", in an objective and subjective sense. The first establishes the freedom to create, transform by merger and incorporation and to extinguish parties, in addition to internal autonomy, to define the institution's structure, organization and functioning. In the second sense, citizens are free to register for or withdraw from a particular political party.³¹

Therefore, CRFB brings the material and procedural rules for the exercise of political rights, inserting them in a dimension of participation in

alternative provision, and administrative dishonesty. (Article 15). BRASIL. Constituição da República Federativa do Brasil de 1988. *Diário Oficial da União*. Brasília, DF, 05 out. 1988. ³⁰ BRASIL. Constituição da República Federativa do Brasil de 1988. *Diário Oficial da União*. Brasília, DF, 05 out. 1988.

³¹ TAVARES 2013, 787.

the public and governmental sphere. Political rights are included in the list of individual rights and guarantees and are protected against constitutional changes, considered the so-called stone clauses - or immutable core of the CRFB. In Article 60, Paragraph 4, "no proposal of amendment shall be considered which is aimed at abolishing the direct, secret, universal and periodic vote" and "individual rights and guarantees".

Protected political rights at the constitutional level and established material limits for parliamentary action through constitutional amendment and legislation on the political system, there are the constitutional foundations for judicial decisions on political issues, including judicial review by Brazilian courts.

4. TWO SUPER COURTS, A NON-POLITICAL ELECTORAL GOVERNANCE MODEL: THE JUDICIALIZATION OF POLITICS IN BRAZIL

Regardless of local circumstances, there has been a global movement towards directing to the judicial system conflicts and tensions inherent to the political process, and the same holds true for Brazil. The CRFB, as one of the instruments of the democratic restoration in the country, attempted to redefine the "ways of reaching decisions in national politics." Among other measures, it empowered courts and other judicial instances, such as the Public Prosecutor's Office, the Public Defender's Office, and the Attorney-General.³²

Over the last decade, judicial institutions have become a relevant study subject for judicial scholars and political scientists, who have reached some degree of consensus on the judicialization of politics and social relations.³³ So, there is a vast academic production that studies the causes and

³² CARVALHO 2010, 186.

³³ VIANNA et al 2007, CARVALHO 2005, FALCÃO et al 2011.

consequences of this process in which the Judiciary is moving towards a leading role in front of the majority powers in Brazil.

It is a process that has been felt in the entire Brazilian judicial system, from smaller lawsuits concerning specific individual rights, to public class action suits, to challenging the tenets of public policy in the Federal Supreme Court, *Supremo Tribunal Federal*.³⁴

The institutional model attributed to the STF is seen as one of the key elements for understanding its relevance in the political game after the 1988 Constitution. In Brazil, a reversal of the route in highly judicialized systems would have occurred, because, instead of "to gain their power, the courts received an abundance of powers in the Constitution and only later did they have to decide how best to use them without provoking reactions from the elected branches".³⁵

According Luís Roberto Barroso, currently STF justice, the "judicialization, which in fact exists, was not due to an ideological, philosophical or methodological option of the Court", which was limited to "strictly fulfilling its constitutional role, in accordance with the current institutional design". According to article 102 of CRFB, the STF is the "guardian of the Constitution", which converts it into a court responsible for judicial review, reconciling european (abstract) and american model, powers whose extension make it a "third judicial instance" - as the court is usually called among legal professionals. The Brazilian court would be a different institution compared to the "history of existing courts in other democracies, even the most prominent ones". 37

This arrangement received its own name, the so-called "supremocracy", which represents the preponderance of the STF in the political system, in which everything seems to demand a last word from the institution, but also

³⁶ BARROSO 2012, 26.

³⁴ VIANNA and BURGOS 2002, CASAGRANDE 2008, TAYLOR 2007.

³⁵ TAYLOR 2007, 244.

³⁷ VIEIRA 2008, 444.

in a concentration of powers before the judicial branch itself (lower courts). In this context, the STF would be "responsible for (...) numerous issues of a substantive nature, now validating and legitimizing a decision by the representative bodies, other times replacing the majority choices".³⁸ In addition to the demands that are presented to the court, the absence of constraints to appreciate the most sensitive political and economic issues, in their disposition for judicial activism, is always highlighted. In fact, the Court constantly reiterates its position as "guardian of the constitution" to support a discursive construction around the last word on constitutional matters.³⁹

With regard to political issues, there is an additional factor: the active participation of the Brazilian Judiciary in establishing the conditions of the political process, for part of this literature, is attributed to the "electoral governance" model adopted in the country. 40 And, in these matters, the focus is on the relationship between the Brazilian Federal Supreme Court and the Superior Electoral Court, in the assessment of political questions. The "electoral governance" deals with "activities involved in the creation and maintenance of the institutional structure within which the vote and political competition develop ". These activities correspond to three levels (or dimensions): establishment of competition rules (rule making), application of these rules to processes (rule application) and, finally, adjudication of electoral rules (rule adjudication). The first function has a lawful nature, in setting rules for political competition, covering issues such as the electoral formula (size of districts, magnitude), conditions of (in)eligibility, profile of electoral bodies, campaign financing, definition of the registration of candidates, parties and voters, in addition to the date of the elections.41

³⁸ VIEIRA 2008, 444-445.

³⁹ LIMA 2014, 280.

⁴⁰ FERRAZ JÚNIOR 2008, 209-210.

⁴¹ MOZAFFAR and SCHEDLER 2002, 7.

The second corresponds to the administration and execution of the elections, with registration of the parties (coalitions), candidates and voters, guarantee of the material conditions for the exercise of the vote, election publicity, ballot box distribution, promotion of educational campaigns and others. And, finally, the exercise of a judging function, with the solution of eventual disputes, ensuring correct application of electoral rules, transparency and confidence in the results. Thus, electoral governance corresponds to the three classic functions of the state, usually divided into different power agencies, based on separation of powers principle.

After research by the International Institute for Democracy and Electoral Assistance (IDEA), Victor Marchetti proceeded to systematize these models, which can be governmental (when linked to the Executive Branch), independent (if removed from the Executive Branch) or mixed (in the presence of electoral bodies with different functions - application and adjudication, for example), and may be dependent or independent.⁴²

Specifically in Latin America it would be possible to observe two major models: political organ (in which there is interference by the executive, the legislature or the political parties") or non-political (jurisdictional). Although there is a prevalence of independent regional bodies in the region, the institutions are usually "made up of political criteria", with the exception of Costa Rica. 43

It can be said that in Brazil, since the creation of Electoral Justice in the Electoral Code of 1932, there has been an independent, non-governmental and non-political body, since it has no institutional link with political

⁴² The author also makes distinctions regarding the form of recruitment, which affects the profile of these bodies. If the members are chosen by the Executive, there is the government model. If the recruitment occurs outside the Executive (non-governmental), one can be partisan, specialized (in the case of choice by technical criteria) or mixed, with the combination of the choice criteria. FERRAZ JÚNIOR 2008.

⁴³ SADEK 1995, 7.

powers.⁴⁴ The intention was that, based on an impartial body, "in the sense of not having a direct interest in the outcome of the electoral dispute", it would be possible to avoid the frauds that characterized the elections in the previous period, in which the administration of the elections it was up to the Executive and the adjudication to the Legislative. Subsequently, Electoral Justice was established in the Constitution of 1934 and in all subsequent constitutions - except in 1937 - which maintained the organization of the electoral process by this independent body.⁴⁵

But, internally, which courts are in charge of Electoral Governance in Brazil? According to the constitutional rule, the electoral body is a specialized branch of Brazilian Justice. Thus, the Electoral Justice is composed of the Superior Electoral Court (dome court), Regional Electoral Courts (state capitals and Federal District), Electoral Judges (judges designated for the exercise of this activity) and the Electoral Boards).

As seen above, electoral governance functions (rule application, rule adjudication and rule making) they are all concentrated, in the Brazilian system, in the Electoral Justice, that is, in an institution that is part of the judicial administration. In fact, there are those who mention four functions: jurisdictional, administrative, consultative and rulemaking, which would have been present since the creation of this branch.⁴⁶

⁴⁶ VALE 2009.

⁴⁴ BRASIL, 1932. *Decreto Nº 21.076, de 24 de fevereiro de 1932*. Decreta o Código Eleitoral. Rio de Janeiro, 24 de fevereiro de 1932. http://www2.camara.leg.br/legin/fed/decret/1930-1939/decreto-21076-24-fevereiro-1932-507583-publicacaooriginal-1-pe.html. Acesso em: 10 dez. 2017. The adoption of an unusual model at the time is explained by a moralizing interest in the elections, suited to the pretensions of the "1930s constitutionalist movement", which had among its claims the motto "representation and justice". SADEK 1995, 30.

⁴⁵ BRASIL. Constituição da República dos Estados Unidos do Brasil, de 16 de julho de 1934. Disponível em: http://www.planalto.gov.br/ccivil_03/constituicao/constitui%C3%A7ao34.htm Acesso em: 3 nov. 2012. GRAEFF and BARRETO 2017, 108.

The effective controversy is concentrated under the exercise of consultative and rulemaking functions, precisely because it consists of one of the differentiating aspects of the judicialization of politics or, in the hypothesis supported by this paper, megapolitics: the construction of "acceptable standards of conduct for interest groups, political parties and elected or appointed representatives", despite - and often in disagreement - with constitutional or legislative provisions.⁴⁷

It is reported that the rulemaking power has been foreseen since the legislation that established the Electoral Justice, having been reproduced in the current Electoral Code (Law 4,737 /65), so that the Superior Electoral Court is responsible for "issuing the instructions it deems convenient to the execution of this Code" (article 23, IX). ⁴⁸ There is a certain consensus in the differentiation between standardization, exercised through resolutions, and legislation. Although the rulemaking power is part of the electoral legislation, with generality and abstraction, it must be limited to the terms of the legislation. Otherwise, it would violate the principle of legality (article 5°, II, CRFB). However, there is a lot of academic discussion about the extrapolation of limits, in situations where the Court has stipulated rules and replaced parliamentary deliberation. ⁴⁹

In addition to the rulemaking, it is up to the Electoral Justice to perform the advisory function, based on the provocation of "authority with jurisdiction, federal or national political party", to issue a thesis guidance, regardless of litigation.⁵⁰ It is controversial, in this case, the bindingness of these advisory opinions⁵¹, which may eventually be questioned before the STF, as well as other decisions and acts of the Electoral Justice.

 48 BRASIL. Lei nº 4.737, de 15 de julho de 1965. Código Eleitoral. $\it Diário$ Oficial da União. Brasília/DF, 15 de julho de 1965.

⁴⁷ FEREJOHN 2002, 41.

⁴⁹ SOARES, 2010; NUNES JÚNIOR ,2014.

⁵⁰ BRASIL. Lei nº 4.737, de 15 de julho de 1965. Código Eleitoral. *Diário Oficial da União*. Brasília/DF, 15 de julho de 1965.

⁵¹ GRAEFF and BARRETO 2017, 113.

By the way, considering the recognized breadth of procedural instruments that make the STF intervention feasible, many political-electoral issues can be directly related to the constitutional text and, consequently, addressed to the STF. In this way, the Court would integrate, in the function of "last and decisive instance", the Electoral Judiciary, characterized by its ambivalence, when accumulating judicial and executive functions.⁵²

Therefore, the relations between the STF and TSE, in the structure of the electoral organization, are a relevant characteristic for the judicialization of mega politics. There is debate, however, as to the degree of convergence between the institutions. For Victor Marchetti, "TSE is an STF body for electoral matters - not by law, but in fact", as a consequence of the composition of the TSE, because of its seven justices, three are STF justices and two lawyers - who work temporarily there - are also appointed by the Court. In addition, the Presidency and Vice-Presidency, with an undeniable role in shaping the agenda and structuring the work, are positions reserved exclusively for STF justices.⁵³

Therefore, the normative-institutional conditions for the STF-TSE consortium were created in response to the provocations - not necessarily litigious - of the political system. This union, as will be seen below, is marked precisely by the convergence of interpretations⁵⁴. Thus, we will analyze the decisions of the higher courts — Superior Electoral Court (TSE) and the Federal Supreme Court (STF) — regarding the most pressing issues of national politics.

5. PARTY LOYALTY: IS IT THE CLEAREST INSTANCE OF JUDICIAL ACTIVISM?

⁵² FALCÃO and OLIVEIRA 2012, 339.

⁵³ MARCHETTI 2013.

⁵⁴ MARCHETTI 2015, 59-60.

Rulings on party loyalty have been considered a symbol of the judicial branch's involvement in politics, and an example of the judicialization of Brazilian politics. Furthermore, it took place in a transitional stage, where the courts went from a period of restraint to activism.⁵⁵

The matter arose after a ruling by TSE that opened the possibility of losing one's electoral mandate by leaving a party without just cause. These causes were then specified as the merging or the creation of a new party, a substantial change or consistent departure from party principles, and, lastly, serious political discrimination. In these cases, the representative would not be subjected to any punishment. This TSE consultation should be valid not only for the Chamber of Deputies, but also for state Legislative Assemblies and City Councils all over the country.

An understanding was established that leaving a party by the elected would imply the loss of the right to exercise the elected office. Hence, a new cause for loss of parliamentary mandate was created, even though Justice Celso de Melo had stated that the Article 55 of CRFB explicitly ruled on these cases. ⁵⁶ Here, we saw an atypical manifestation of judicial activism, as there was no constitutional provision for the ruling and it was entirely independent of legislation. ⁵⁷ This was no mere constitutional change, for it marked the transformation of the Judiciary into a "constitutional reforming power". ⁵⁸

After TSE's Consultation n. 1,398, several political parties requested to the Speaker of the Chamber of Deputies the "declaration of vacancy, by reason presumed renouncing, of mandates exercised by federal deputies elected

⁵⁵ According to Roberson Henrique Pozzobon, the matter is of "utmost importance . . . to the analysis of the judicialization of Brazilian politics, as well as for the proper localization of the role of the Federal Supreme Court in a more active exercise of its powers". POZZOBON 2009, 107.

⁵⁶ VIEIRA 2008, 455.

⁵⁷ BARROSO 2009, 8.

⁵⁸ POZZOBON 2009, 113.

under a given party who have migrated to another". 59 Such requests were denied, which prompted the filing of writs of mandamus at STF.

STF then legitimized, with the Writs of Mandamus 26,602, 26,603 and 26,604, the constitutional foundation of TSE's decision, ruling that electoral mandates belonged to the party or the party coalition so long as representatives had their right to present a defense guaranteed (Article 5, LIV, CRFB), under these terms:

Party defections, as they occur through the actions of holders of parliamentary seats, imply a violation of the proportional system, crippling the rights of social minorities, depriving them of representation in the legislative bodies, and attacking basic rights — notably the right to opposition — that derive from the foundations of the rule of law itself, such as popular sovereignty, citizenship, and political plurality (CRFB, Article 1, I, II, and V). Institutionally rejecting party defections, not only honors a constitutional value (CRFB, Article 17, Paragraph 1, "in fine"), but it (a) preserves the legitimacy of the electoral process, (b) enshrines the respect to the sovereign will of the people, (c) impedes the distortion of the model of popular representation, (d) guarantees the goals of the proportional electoral system, (e) values and strengthens party organizations, and (f) grants precedence to the goals that the elected deputy should observe regarding their own voters and the party under which they ran for office.60

It is interesting to note that the basis for the decision was the normative power of the Constitution and, as its corollary, STF's monopoly on judicial review — that is, the affirmation of judicial supremacy.

⁵⁹ NUNES JÚNIOR 2014, 120.

⁶⁰ BRASIL. Supremo Tribunal Federal. MS 26603/DF. Rel. Min. Celso de Mello, Tribunal Pleno. Diário de Justiça da União. Brasília, DF, 19 dez. 2008.

The normative force of the Constitution and the monopoly, held by the Federal Supreme Court, on matters of judicial review.

- The exercise of constitutional authority, which has as its objective to preserve the supremacy of the Constitution, evidences the essentially political dimension of STF's activities, for in their judicial review prerrogatives they can ultimately rule on what power in fact entails.
- In the power of interpreting fundamental law, there is the prerrogative to remake it, since judicial review is one of the informal processes of constitutional mutation, which means that the "Constitution is in permanent elaboration in the Courts responsible for enforcing it." Doctrine. Precedents.
- The constitutional interpretation derived from rulings of the Federal Supreme Court — to whom the function of "guarding the Constitution" (CRFB, Article 102, caput) was ascribed takes on an important role in the institutional organization of the Brazilian state, justifying the recognition that the present political-judicial model in the country has conferred to the Federal Supreme Court the unique monopoly of ultimate decision on matters of fundamental law.61

According to Brazilian academics, "Justice Marco Aurélio (2007) considers the decision by TSE on party loyalty 'the most important in terms of purification in recent years.' He considered it a considerable step forward in citizen representation and strengthening of political parties". 62

⁶¹ BRASIL. Supremo Tribunal Federal. MS 26603/DF. Rel. Min. Celso de Mello, Tribunal Pleno. Diário de Justiça da União. Brasília, DF, 19 dez. 2008.

⁶² SOARES 2010, 105.

On the same issue, in 2007, during the evaluation of the Consultation n. 1,407, filed by deputy Nilson Mourão, it was established that party loyalty would also apply to the holders of majoritarian offices, such as the president, state governors, city mayors and senators.

Soon thereafter, there was the approval of the Resolution n. 22,610, that regulated the loss of electoral office and the justification for party migration. There, TSE established that the procedures and responsibilities for the removal from office. It is the responsibility of the party to file the vacancy request in thirty days; if it does not, any person — who has a stake in it — or the Public Prosecutor's Office may file the request. If TSE rules it as well-founded, the office is declared vacant and the house speaker should seat the alternate or vice of the position in up to ten days (Article 10).⁶³

This resolution established two ways of vacating electoral office: (I) the administrative-institutional path, which takes place in the legislative houses themselves; and (II) the electoral-civil path, supervised by the Electoral Justice, where one may be removed from office or conducted back to it.

In any case, there are several criticisms pertaining to this second set of procedures — that STF and TSE have both named "administrative-electoral," but has become an independent body, ignoring Article 22, I, CRFB, according to which only the Federal Government can legislate on electoral law and civil procedures. There have also been repeated debates on the fact that the removal from office after 15 days had always went through common courts, not specialized ones.⁶⁴

Several decisions later confirmed that parties are the actual office holders. In case someone requests to leave the party, or migrates from one party to another, the seat stays with the party itself. Additionally, other rules were put in place with Article 13 stipulating that the resolution applies to the

⁶³ BRASIL. Tribunal Superior Eleitoral. Resolução 22.610, de 25 de outubro de 2007. Disciplina o processo de perda de cargo eletivo, bem como de justificação de desfiliação partidária. *Diário de Justiça da União*. Brasília, DF, 30 jul. 2007.

⁶⁴ CERQUEIRA and CERQUEIRA 2008, 70-85.

elected to proportional election offices after 27 March 2007, and to majoritarian offices after 16 October 2007.

These changes were brought up in Congress. Law n. 13,165/2015 regulated the matter with Article 22-A. It reads:

Article 22-A. The office holder who leaves, without just cause, the party with which they were elected will vacate office.

Single paragraph. These are considered just causes:

I - substantial change to or repeated departures from party program;

II - serious political discrimination;

III - party change occuring thirty days before the period required by law to run for office, either majoritarian or proportional, during the current mandate.⁶⁵

We note the exclusion, among the hypotheses, the "creation, merging, and incorporation of parties." Furthermore, Congress established, among the exceptions to the party loyalty rule, "party change," regardless of reason, as long as it takes place 30 days before the period of party affiliation (cf. Article 9 in Law n. 9,504/97).⁶⁶

Law n. 13,165/2015 has been challenged in STF with the Direct Unconstitutionality Action (ADI) no. 5,398/DF, filed by Sustainability Network Party (REDE).⁶⁷ The then recently created party discussed the possibility of exclusion of "creation of a new party" as just cause for vacating office. In a precautionary measure, it went against the "consolidated judicial regime" established by TSE's Resolution no. 22,610/2007, which, after the Consultation n. 755-35, ruled as a "reasonable"

⁶⁵ BRASIL. Lei nº 13.165, de 29 de setembro de 2015. *Diário Oficial da União*. Brasília, DF, 29 set. 2015.

⁶⁶ SEVERO 2015, 84. BRASIL. Lei nº 9.504, de 30 de setembro de 1997. Estabelece normas para as eleições. *Diário Oficial da União*. Brasília, DF, 1 out. 1997.

⁶⁷ BRASIL. Supremo Tribunal Federal. ADI 5398, Rel. Min. Roberto Barroso. *Diário de Justiça da União*. Brasília, DF, 12 nov. 2015.

timeframe for the migration of a new party, without vacating office, the period of 30 days, starting from the statute registry by TSE". 68

Justice Luis Roberto Barroso partially granted the motion, under these terms:

For these reasons, preventing the affiliation of parliament members to new parties without vacating their office makes it impossible that such parties will have the right to party publicity, to get a larger share of party fund, and to enjoy free TV advertising time for the 2016 municipal elections.

Considering that the next elections for the Chamber of Deputies and the Federal Senate will take place only in 2017, the window for leaving a party, stipulated by Article 22-A Law n. 13,165/2015, would only open in March 2018. Thus, given today's ordinances, no federal deputy would be able to migrate to newer parties and take their offices with them.

Furthermore, the new norm puts hurdles in place to the functioning of new parties. Only with the migration of parliament members of other parties they would be able, from their inception, to operate within Congress — representing themselves in the legislative houses, organizing in caucuses under the direction of a leader, and taking part in their various instances.

Thus, there is an unmistakable *periculum in mora* that justifies granting the precautionary measure.

⁶⁸ BRASIL. Tribunal Superior Eleitoral. Resolução 22.610, de 25 de outubro de 2007. Disciplina o processo de perda de cargo eletivo, bem como de justificação de desfiliação partidária. *Diário de Justiça da União*. Brasília, DF, 30 jul. 2007. BRASIL. Supremo Tribunal Federal. ADI 1.351, Rel. Min. Marco Aurélio. *Diário de Justiça da União*. Brasília, DF, 29 jun. 2007.

I partially grant the requested precautionary measure, *ad referendum*, to determine the full restitution of the period of 30 days for the affiliation to parties registered at the Superior Electoral Court until the Law n. 13, 165/2015 is in full effect.⁶⁹

Therefore, we see that STF has itsef regulated party loyalty by ratifiying TSE's rulings and consultations: they have established its material requisites, sanctions (office vacancy), and administrative and judicial rules (keeping the same responsibilities the Electoral Justice already had).

The National Congress quietly acquiesced to these actions.

6. OUTLINING COALITION VERTICALIZATIONS: THE SUPERIOR ELECTORAL COURT'S RULINGS

The judicial branch's interference in politics was also in display during the episode of the "verticalization of party coalitions," resulting from a consultation with TSE regarding the extent of the Law n. 9,504/97, Article 6, on coalitions for both majoritarian and proportional elections. The judiciary was called upon to clear up the possibilities of distinct arrangements for different elections being held (at federal, state, and municipal level).

In 26 February 2002, TSE released Resolution n. 20,993 (drafted by Justice Fernando Neves), determining in its Article 4, Paragraph 1:

Political parties that launch, independently or in coalition, candidates to the presidency of the Republic will not be able to form coalitions for state or Federal District governor, senator, federal deputy, state or district deputy runs with parties that,

⁷⁰ BRASIL. Lei nº 9.504, de 30 de setembro de 1997. Estabelece normas para as eleições. *Diário Oficial da União.* Brasília, DF, 1 out. 1997.

⁶⁹ BRASIL. Supremo Tribunal Federal. ADI 5398, Rel. Min. Roberto Barroso. Diário de Justiça da União. Brasília, DF, 12 nov. 2015, 15.

independently or in a different coalition, have launched another candidate for the presidency.⁷¹

In evaluating the Direct Unconstitutionality Action (ADI) n. 2,626-7, filed by government-supporting parties against the provision, STF ruled that, since it was responding to a consultation, in a "mere act of interpretation," it was not subjected to judicial review.⁷² By ruling in favor of the decision by TSE, which is composed mostly of the same members as the STF, we have a curious case in which the demand is not granted, but the decision may be construed as judicial activism nonetheless.

Afterwards, decisions by TSE and STF alike have merited response from the National Congress, with the enactment of the Constitutional Amendment (EC) n. 52/2006, which granted political parties autonomy in choosing electoral coalitions, without replicating the same coalitions at the national, state, district or municipal level (art 17, Paragraph 1).⁷³ It is of note that the same amendment, in Article 2, enacts the "new rule" from the "date of the publication, applying to the 2002 elections". ⁷⁴ There had been, thus, a prompt reaction by the legislative branch.

At this point, when the matter was sent to the STF, this time by the Order of Attorneys of Brazil, arguing that it would harm the principle of electoral

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⁷¹ BRASIL. Tribunal Superior Eleitoral. Resolução n.º 20.993, de 26 de fevereiro de 2002. Dispõe sobre a escolha e o registro dos candidatos nas eleições de 2002. *Diário de Justiça da União*. Brasília, DF, 11 abr. 2002.

⁷² BRASIL. Supremo Tribunal Federal. ADI 2626, Relator(a): Min. SYDNEY SANCHES, Relator(a) p/ Acórdão: Min. Ellen Gracie, Tribunal Pleno, julgado em 18/04/2004. *Diário de Justiça da União*. Brasília, DF, 5 mar. 2004.

⁷³ BRASIL. Constituição (1988). Emenda Constitucional nº 52, de 8 de março de 2006. Dá nova redação ao § 1º do art. 17 da Constituição Federal para disciplinar as coligações eleitorais. *Diário Oficial da União*. Brasília, DF, 08 mar. 2006.

⁷⁴ "Article 16. The law that alters the electoral procedure shall come into force on the date of its publication, and shall not apply to the elections that take place within one year of it being in force." BRASIL. Constituição da República Federativa do Brasil de 1988. *Diário Oficial da União*. Brasília, DF, 05 out. 1988.

anteriority. In deciding the matter (ADI n. 3,685), STF followed an "interpretation according to the Constitution" to rule that the new rule should be applied in the year following the enactment. It is worth noting that when TSE itself enacted the resolution, the verticalization rule went into effect immediately — there was simply no debate about it violating the principle of anteriority.⁷⁵

In any case, the amendment was kept, and the Congress had the last word on the issue. Such was the conclusion reached by the Consultations n. 1,225 and n. 760, where TSE accepted the thesis of a "flexible verticalization," which allowed an "arrangement of powers in the states distinct from the national agreements." It is worth noting, too, that the judicial community is widely favorable to verticalization. As Marcus Vinicius Furtado Coelho states, "electoral norms should contribute for a unity of thought and action by national parties, helping establish a strong democracy and a stable and responsible nation". 76

We should add that one of the concerns about STF's actions is that they are expanding the parameters of their powers, overlapping them with traditionally legislative work. However, in a case like this, where legislation is in effect created, the criticism is ignored due to the general agreement to the conclusions reached.

7. THRESHOLD CLAUSE AND THE PROTECTION OF PARLIAMENTARY MINORITIES

The so-called "threshold clause" was introduced by Law n. 9,096/95, which regulated constitutional norms (Articles 17 and 14, paragraph 3) pertaining to "party organization". Article 13 stated:

Article 13. The party that has the support of, at least five per cent of the counted votes, not considering blanks and null

⁷⁵ SOARES 2010, 42.

⁷⁶ COELHO 2010, 217.

votes, distributed on at least a third of the states, at the minimum of two per cent of the total in each of them, has the right to function in the parliament, to act in all Legislative Houses where it has a representative.⁷⁷

The political party that could not meet this performance clause would be subjected to a drastic reduction to their free national TV time and the complete elimination of their TV time at state level. Moreover, they would see their share of the electoral fund be drastically reduced, as ninety-nine percent of the total would be split among parties above the threshold, while the remaining one percent would be equally split among all the remaining registered parties.

STF evaluated these changes in a concurrent trial — given the similarity between ADI n. 1,351-3 and 1,354-8. In 1996, a preliminary injuction filed for the second action was dismissed. The judgment then spurred the declaration of the unconstitutionality of Articles 13, 41, 48, 49, and 57 of the Law.

According to the court, founded on "reasonableness," the norm would preclude minorities from accessing the political system, violating the principle of equality, as we can see from this excerpt from the vote written by Justice Marco Aurélio Mello:

We should repeat to exhaustion if needed be: Democracy is not the dictatorship of the majority! It is so obvious, though many may not realize that there is no democratic regime without the protection of minorities, their guaranteed

⁷⁷ BRASIL. Lei n.º 9.096, de 19 de setembro de 1995. Dispõe sobre partidos políticos, regulamenta os arts. 17 e 14, § 3º, inciso V, da Constituição Federal. *Diário Oficial da União*. Brasília, DF, 20 set. 1995.

existence, and the preservation of their fundamental rights enshrined in the Constitution.⁷⁸

After casting the vote, the Justice puts forward his concerns: Mrs. President, I ponder this historical judgment, considering the rule of law itself, the transference of power by the people to the rulers, the transference of power by the people to its representatives. For that reason — and I do not usually take much time on my votes — I ask for patience from my colleagues as well as assistance for what I must point out and register in the annals of the Supreme Court (emphasis added).⁷⁹

Later, the decision put forth by Justice Gilmar Mendes was accepted by the Court, since Article 57 — declared unconstitutional — referred to transition norms:

I understand that the transition norms present in Article 57, that regulated the matter since the Law of Political Parties of 1995, should stay in effect until the legislator issues new law, providing new regulation.

Thus, I propose to the Court that the transition norms contained in Article 57 of the Law n. 9,096/95 should stay in effect until there is new regulation on the matter, within the limits established by this Court in this ruling (emphasis added).⁸⁰

Contrary to the aspirations of the Justice, we should note that there is a relative consensus when it comes to the binding effect of STF's decisions towards the legislative branch. The Constitution itself, in Article 102,

⁷⁸ BRASIL. Supremo Tribunal Federal. ADI 1.351, Rel. Min. Marco Aurélio, j. 07/12/2006. *Diário de Justiça da União*. Brasília, DF, 29 jun. 2007.

⁷⁹ BRASIL. Supremo Tribunal Federal. ADI 1.351, Rel. Min. Marco Aurélio, j. 07/12/2006. *Diário de Justiça da União*. Brasília, DF, 29 jun. 2007.

⁸⁰ BRASIL. Supremo Tribunal Federal. ADI 1.351, Rel. Min. Marco Aurélio, j. 07/12/2006. Diário de Justiça da União. Brasília, DF, 29 jun. 2007.

Paragraph 2, states that these rules are applicable to "other bodies of the Judiciary Branch and to the direct and indirect public administration, in the federal, state, and municipal spheres." That means that Brazilian law understands that the parliament may legislate in an opposite direction to an understanding reached by STF to ensure the "freedom from conformity for the legislator" and to avoid a "petrification of social evolution." STF itself has already supported this understanding in previous judgments admitting direct action to assess the conformity of the new rules to the constitutional text.⁸¹

Justice Gilmar Mendes employed in his vote several terms constantly mentioned when STF's activist tendencies are discussed:

It is possible to anticipate that the Federal Supreme Court will end up abandoning the decrepit dogma of the negative legislator and will align itself to the more progressive jurisprudential line of interpretive decisions with additive efficacy, already adopted by the main Constitutional Courts in Europe. The adoption of a creative posture by the court can be determining for the solution of old problems related to unconstitutionality by omission, which often hinders the realization of fundamental rights and guarantees secured by the constitutional text. The present case offers an opportunity for the court to advance in this path.⁸²

⁸¹ BRANCO et al 2009, 1332.

⁸² Justice argued thus: "The judicial void that is produced by a simple declaration of unconstitutionality/nullity of the normative devices disputed — especially the transition norms contained in article 57 — makes it necessary to adopt a different solution, a decision that should perform a 'restorative function,' or, as Blanco de Morais states, 'a correctional restauration of the judicial order affected by the unconstitutionality ruling'." BRASIL. Supremo Tribunal Federal. ADI 1.351, Rel. Min. Marco Aurélio, j. 07/12/2006. *Diário de Justiça da União*. Brasília, DF, 29 jun. 2007, 160.

According to Vianna *et al*, the STF ruling mentioned above, proposed by the main "leftist and smaller parties," voided the measure that had "wide support from the largest parties of the country".⁸³ It was, no doubt about it, a profound interference in the political arena, and a counter-majoritarian one at that.

8. CAMPAIGN FINANCING: ADI 4,650 AS A STARTING POINT TO THE INSTITUTIONAL DIALOGUE ON POLITICAL REFORM

The Federal Council of Brazilian Bar Association (OAB) filed in 5 September 2011, the ADI n. 4,650, taking issue with campaign and political party financing. The initial filing argued for the unconstitutionality of Articles 23, Paragraph 1, I and II. 24 and 81, *caput*, and Paragraph 1 of Law n. 9,504/97 and Articles 31, 38, line II, and Article 39, *caput* and Paragraph 5 of Law 9,096/95, which allowed the donation by juridical persons (corporations) to electoral campaigns and political parties. ⁸⁴ This would be a partial declaration of unconstitutionality without text reduction. It would be so because, according to OAB, the model violates Article 1, *caput*, Article 5, *caput*, Article 14, *caput* and single paragraph, and Article 60, Paragraph 4, II, of CRFB — which protect the principles of isonomy, democracy, republic, and proportionality.

Not only did OAB request the recognition of the invalidity of campaign and party financing, something that ensures a relation of dependency between economic and political powers, guaranteeing equality and fairness to all participants of the process (that would be able to use their own resources

⁸³ VIANNA et al 2007, 78.

⁸⁴ BRASIL. Lei n° 9.504, de 30 de setembro de 1997. Estabelece normas para as eleições. *Diário Oficial da União*. Brasília, DF, 1 out. 1997. BRASIL. Lei n.º 9.096, de 19 de setembro de 1995. Dispõe sobre partidos políticos, regulamenta os arts. 17 e 14, § 3°, inciso V, da Constituição Federal. *Diário Oficial da União*. Brasília, DF, 20 set. 1995.

or outside contributions), but they requested that the National Congress should "issue legislation" establishing:

unified limit per capita for campaign donations or donations to political parties by natural persons, in a low enough level to ensure that election equality will not be compromised, as well as a limit, with the same features, to the use of one's own resources by candidates during electoral campaigns. Should in 18 months the National Congress not legislate on the matter, the Superior Electoral Court should regulate it provisionally.⁸⁵

Some fruitful debate took place, with elaborate arguments on all sides involved. The Chamber of Deputies and the Federal Senate defended the constitutionality of the legal devices, while the Attorney General's Office stated that the action was admissible. Many entities were also heard as *amici curiae*.⁸⁶

In the end, the action was ruled partially justified, "to establish only the partial unconstitutionality, without reduction of text, of the Article 31 of the Law n. 9,096/95, at the point it authorizes, *a contrario sensu*, donations by juridical persons to political parties," and to declare unconstitutional the terms "or juridical person," present in Article 38, III, as well as the word "juridical," in Article 39, caput and Paragraph 5. The pretense of stipulating specific criteria for parliamentary action was, then, waived. ⁸⁷

⁸⁵ BRASIL. Supremo Tribunal Federal. ADI 4650, Rel. Luiz Fux, julgado em 17/09/2015. *Diário de Justiça da União*. Brasília, DF, 24 fev. 2016, 2.

⁸⁶ The admitted were: the Executive Secretary of the National Committee of the Movement Against Electoral Corruption — SE-MCCE, of the Unified Socialist Workers Party (PSTU); the National Conference of Brazilian Bishops — CNBB; the Institute of Brazilian Attorneys — IAB; and, in a single petition, the Clinic for Fundamental Rights of the Law School of the University of the State of Rio de Janeiro — Clínica UERJ Direitos, and the Institute of Research Rights and Social Movements — IPDMS.

⁸⁷ BRASIL. Lei n.º 9.096, de 19 de setembro de 1995. Dispõe sobre partidos políticos, regulamenta os arts. 17 e 14, § 3º, inciso V, da Constituição Federal. *Diário Oficial da União*. Brasília, DF, 20 set. 1995.

It is worth noting the the court's conundrum, according to the justices' arguments: under the principle of the separation of powers, the theme would demand legislative action. In its absence, the STF would have to perform, as Justice Luis Roberto Barroso stated, two functions: antimajoritarian, for it would swim against the choices of political majorities, but also representative, for it would attempt to satisfy the needs of the sectors of society that were not met in the parliament.

In the end, these concerns were mirrored in the ruling itself:

- 1. The attitude of the Federal Supreme Court in the exercise of judicial review is imperative in the hypotheses of safeguarding the functioning of democratic institutions, in order to (i) correct the pathologies that distort the representative system, especially when they hinder the channels of expression and political participation, and to (ii) protect the interests and rights of minority political groups, whose demands hardly ever get any traction in majoritarian deliberations.
- 2. The workings of the political-electoral process, while a sensitive matter, demans a more expansive posture from the Federal Supreme Court, to the detriment of more formalistic approaches, on the political choices exercised by the majorities in the Parliament, an instance quintessentially dedicated to first-order decisions on the matter.⁸⁸

There is, therefore, a recognition of the function of the Parliament, in one of the first instances of the possibility of institutional dialogue inside STF. Justice Luis Roberto Barroso, stated that, beyond declaring the unconstitutionality of certain norms, the STF's decision would have the effect of "starting a debate, a dialogue between the Federal Supreme Court

⁸⁸ BRASIL. Supremo Tribunal Federal. ADI 4650, Relator(a): Luiz Fux, julgado em 17/09/2015. *Diário de Justiça da União*. Brasília, DF, 24 fev. 2016, 3.

and the National Congress to establish groundrules for the democratic process. These are not simple political options". 89

Thus, members of the court have come to realize that the institution performs a role of arbitrating conflict, but they have retained the responsibility and the legitimacy to exercise powers of political reform.

9. CONCLUSION: SHOULD STF MAKE THE WHEELS OF HISTORY TURN WHEN THEY HAVE STOPPED?

Is the Brazilian Federal Supreme Court (re) building electoral legislation, as a manifestation of judicial activism, interfering in mega politics?

Political reform, as a corollary of the crisis of representation of the current political system and the majority institutions — legislative and executive branches —, has been discussed for a few years now. Several proposals of constitutional amendment have been put forward, without affecting changes already made to electoral law. Recently, we have had a "small electoral reform" in the form of Law n. 13,165/2015, that made a few changes to the Law n. 9,096/95, including rules of party administration and incentives to female participation, limits to campaign financing and so on.⁹⁰ The constitutionalization of the main points of the representative system requires, however, that drastic changes be made to the CRFB and that can only take place through constitutional amendment. To do so, the National Congress has set up, in 2015, the Special Committee for the Political Reform. After many legislative procedures, the Project of Constitutional Amendment (PEC) 182/2007 was incorporated to the PEC 113/2015. Recently, the Constitutional Amendment n. 91/2016 was put in effect, "establishing the possibility, exceptional, and in a given timeframe, of

⁹⁰ BRASIL. Lei nº 13.165, de 29 de setembro de 2015. *Diário Oficial da União*. Brasília, DF, 29 set. 2015.

⁸⁹ BRASIL. Supremo Tribunal Federal. ADI 4650, Relator(a): Luiz Fux, julgado em 17/09/2015. *Diário de Justiça da União*. Brasília, DF, 24 fev. 2016, 131.

leaving a party without losing office". Parliamentary procedures, however, do not seem to follow the desires of society and political actors. Important sectors have, for years, mobilized for changes in the electoral process. During the last few years, we have seen these pressures come to a boiling point. 91

We have, for example, the Coalition for a Democratic Political Reform and Clean Elections, whose main proposals are: "the prohibition of campaign donations by companies and the adoption of Democratic Financing of Campaigns; proportional elections in two rounds; gender parity on a closed list; strengthening of direct democracy with the participation of society in important national decisions." The coalition gathers entities such as OAB, CNBB, the Unified Workers Central (CUT), the National Student Union (UNE), and numerous others.⁹²

While National Congress conducted its own procedures, political actors, through consultations with the TSE and organizations such as OAB — that have the legitimacy to demand judicial review from the STF — have provoked the judiciary institutions to get them to ensure the integrity of the political and electoral process in the interpreting constitutional principles.

The judicialization of mega politics in Brazil becomes evident when we go over issues such as party loyalty, coalition verticalizations, threshold clause, and campaign financing. Both the STF and the TSE, in evaluating consultations and issuing resolutions, writs of mandamus, as well as direct unconstitutionality actions, have openly taken the role of building an expansive jurisprudence.

Moreover, the relationship between STF and TSE is confirmed, in their predisposition to judicial activism, in an indifferentiation between

92 Reforma Política Democrática. Conheça o projeto. http://www.reformapoliticademocratica.org.br/conheca-o-projeto/, accessed 8 January 2020.

⁹¹ BRASIL. Camara dos Deputados. Comissão Especial: relatório final. Brasilia, DF, 2015. BRASIL. Senado Federal. Quadro comparativo. Brasilia, DF, 2015.

interpretation of fundamental constitutional rights and electoral legislation, due to the institutional model foreseen in the CRFB that strengthens the jurisdiction and, consequently, also accentuates the normative function of the Electoral Justice, since the option for a judicial (non-political) model of electoral governance, as seen.

The article proposed that a court's judicial activism can be studied from two analytical axes, methodological and institutional, in order to assess the effective interference in mega politics. Discussions about STF decisions indicate a consensus on judicial activism, because the criticisms regarding the institutional aspects prevail - in view of the strengthening of the court to the detriment of the other jurisdictional bodies and progress in the competences of the executive and legislative power - and methodological, given the failure to observe the constitucional e legal norms and, finally, the rules and procedures that provide guidelines for the exercise of its activity. These decisions have been widely debated, as we have shown. There have been numerous criticisms to the technical aspects of the rulings, of activism as method, as courts distance themselves from the acceptable boundaries of judicial action. And from the point of view of a separation of powers, analyzing how courts interfere in the political system is also an institutional issue, as they expand over to the territories usually under the umbrella of majoritarian institutions. 93 Courts have affirmed their activism in their consistent reinforcement of their sole entitlement to constitutional interpretation.

Most recently, we have seen that STF, rather than consigning itself to the role of ultimate arbiter, has emphasized its ability to spur debate. Or, as Justice Luis Roberto Barroso has stated during the ruling of the ADI n. 4,650:

Here we have the issue of the Federal Supreme Court. I think

— I continue to think, and I expect to think so in the future

⁹³ LIMA 2014, 179.

— that, in a democracy, political decisions should be made by those who vote. Therefore, the political reform the country needs, system-wide, capable of producing results . . . must be performed by the National Congress. It cannot be done by the Supreme Court, for we lack the democratic legitimacy; we probably lack the ability to execute it; perhaps we would not even be able to reach a consensus on what kind of political reform we need. 94

In this instance, the STF has made its own role clear: to move the wheels of history when they have stopped. ⁹⁵It remains to be seen whether the National Congress, whose activities possess an unmistakable representative dimension, will continue to delegate to the judicial branch the role of regulator of the political process.

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95 BRASIL. Supremo Tribunal Federal. ADI 4650, Rel. Luiz Fux, julgado em: 17/09/2015. Diário de Justiça da União. Brasília, DF, 24 fev. 2016, 129.

⁹⁴ BRASIL. Supremo Tribunal Federal. ADI 4650, Rel. Luiz Fux, julgado em: 17/09/2015. Diário de Justiça da União. Brasília, DF, 24 fev. 2016.

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