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# Changes in the institutional role of the brazilian Supreme Court and a reflection on coalition presidentialism[*]

## *Alterações no papel institucional do Supremo Tribunal Federal e uma reflexão acerca do presidencialismo de coalizão*

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**Abstract**:

With the growing importance of the Judiciary Branch, and its interactions promoted in the Brazilian political system, we investigated where is based this paradigm shift. To this end, we examined three different proposals: the first, which points to the strengthening of the courts as an immediate consequence of the expansion of the market system; the second, which takes on an evolutionary character to the constitutionalization of rights, especially after the Second World War; and the third, which sees this move as a harmony between the economic, political and judiciary elites. Considering this last proposal, we evaluate how these relations between economic, political, and judiciary elites transform into insufficient concepts that we use to describe our institutional policy, such as coalition presidentialism. We conclude that a renewal of this notion is essential, now taking into account a new component that was not considered when the concept was originally proposed: the Judiciary Branch.
***Keywords***: *National constituent assembly. Constitutionalization. Coalition presidentialism. Supreme Court.*

***Resumo***:

*Com a crescente importância do Poder Judiciário, bem como suas interações promovidas no sistema político brasileiro, investigamos em que se baseia essa mudança de paradigma. Para tanto, examinamos três propostas diferentes: a primeira, que aponta o fortalecimento dos tribunais como consequência imediata da expansão do sistema de mercado; a segunda, que assume um caráter evolucionista no que concerne à constitucionalização de direitos, em especial a partir da Segunda Guerra Mundial; e a terceira, que percebe esse movimento como uma harmonia entre as elites econômica, política e dos tribunais. Considerando essa última proposta, passamos a avaliar como essas relações entre elites econômica, política e jurídica transformam em insuficientes conceitos que utilizamos para descrever nossa política institucional, como o de presidencialismo de coalizão. Concluímos que é imprescindível uma renovação dessa noção, agora levando em consideração um novo componente que não foi considerado na formatação original do conceito: o Poder Judiciário.*
***Palavras-chave****: Assembleia nacional constituinte. Constitucionalização. Presidencialismo de coalizão. Supremo Tribunal Federal.*

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## 1 Introduction

The importance of the Judiciary in the national political system has become unquestionable. Although law and politics are not exactly distinct fields, issues that could previously be considered restricted to a discussion in the legislative or executive spheres have become an issue in the Federal Supreme Court. The creation of new norms endowed with generality and universality, such as, for example, on the authorization of the interruption of pregnancy of anencephalic fetuses, civil unions for homosexual couples and even the appointment of ministers, began to stand out as an activity of the Supreme Court. With this movement, there is an attempt to understand the reasons and implications of this phenomenon.

To this end, it is essential to understand that this paradigm shift may have global and local reasons, including changing concepts such as coalition presidentialism, until today used to explain the interactions between the Executive and Legislative Branches in Brazil, and forget, therefore, the role played by the Judiciary. In order to understand how this phenomenon occurred, this article takes as a reference the suggestion of Hirschl (2004, p. 71-108), who offers the following interpretation: the interaction between power groups – such as the legal, political and economic elites – with the specific objective of expanding their dominance in the future order, undoes the most usual reading that there would have been a kind of democratic proliferation motivating the constitutionalization of rights and consequent greater intrusion of Power Judiciary in the regulation of the community in general.

We start from the assumption that the legal and the political are confused in the process of producing law, that is, in the actions of creating and interpreting norms. Assuming a rhetorical point of view and sensitive to the theses of hermeneutic jurisprudence, we seek to analyze the concept of coalition presidentialism with special attention to the reality of Brazil. The examination of the concept in contrast to the phenomena of the Brazilian reality seeks to point out in an analytical way what is meant by coalition presidentialism and how reality imposes itself on the concept.

Thus, we present the hypothesis to be discussed throughout this work: the concept of coalition presidentialism is no longer able to describe the Brazilian political-institutional reality. In order to make an examination around this hypothesis, we carried out a bibliographic research, based on the literature review on the subject, in order to, once the change in the institutional context was verified, demonstrate a new proposal for description of the behavior of the institutions that make up the Legislative, Executive and Judiciary Branches.

## 2 The Federal Supreme Court, *the well-recognized*

The decisions of the Supreme Court have intensified its presence on the front pages of newspapers. If we carry out a search in any of the collections of the largest newspapers in the country, such as the *Estado de São Paulo*, we can observe that, especially from the second decade of the 2000s, just as an example, the mentions in the news to the provisions of control of constitutionality, such as the Allegations of Non-Compliance with a Fundamental Precept, almost [1]quadrupled. A result like this cannot be surprising to those who have been focusing for some time on the importance that manifestations of the Supreme Court achieve in contexts that could once be considered eminently political.

However, and without drawing any Manichean conclusion from this, the Judiciary and, here it should be highlighted, in particular, the ministers of the STF, have contributed to a series of discussions concerning political dynamics. Society does not find in the judge only the figure of a professional responsible for the technical work of neutralizing the dissent between parties in a judicial litigation, since, sometimes, his performance goes in the opposite direction, and may occupy, for example, a position of animator of public policies. Thus, for no other reason, expressions such as "judicialization of politics" and "judicial activism" were created.

This once unknown (Baleeiro; Pedroso, 1968) is currently a figure stamped in the headlines and individually its components, in this context, are also not usually in a disadvantaged position. The biography of each STF Justice is routinely scrutinized. Individual political preferences, friendships, enmities and even the most mundane details of private life (Carvalho, 2010) become relevant to the extent that they may eventually imply decision-making in one direction or another.

The biographical literature of the justices seeks to demonstrate the imprint of their individual personalities in the jurisprudence itself. This phenomenon, much more common in the United States[2], associates the image of each judge with a Manichean paradigm that treats them as heroes or villains in a simplified narrative.

[1] The research carried out in the collection of the newspaper O Estado de São Paulo can be viewed through the following link, which redirects to the newspaper's electronic portal: https://acervo.estadao.com.br/procura/#!/ADPF/Acervo//spo/ Accessed on: 05 feb. 2019.

[2] In 2019, two of the films nominated for the Oscars illustrate well what is intended in the text about the treatment of American *justices*. *RBG* is a documentary about Justice Ruth Bader Ginsburg, in which she is constantly described as a hero on the Supreme Court, for the progressive role she assumes. On the other hand, the film *Vice* has as one of its supporting actors the late *justice* Antonin Scalia, notorious for his conservative positions that gave support to the Republican government of George W. Bush, portrayed as despicable by the feature film. This perspective is close to what we have already seen done by the Brazilian press. The headline of Veja magazine that

In Aristotelian terms, the study of a magistrate's biography can be framed as part of the analysis of the *judges' ethos*, that image they produce for themselves in order to ensure the reliability of their judgments. Ethos, as understood in Aristotle's theory of rhetoric (1971, p.10), is, along with *pathos* and *logos*, one of the three technical proofs available to every speaker.

Ethos, also translated as "character of the speaker", is built, according to Aristotle, through what the speaker himself says in his speech. Of course, their actions or modes of behavior are also of interest to a rhetorical theory of communication, and even involuntary gestures or facial expressions can be part of the communicational interaction between different interlocutors. They are forms of language, even if in the paralinguistic sense of the term. That is, it is not verbalized language, but it can be as fundamental as words when communicating something to someone. Thus, even though Aristotle emphasizes that prejudices or pre-judgments about the speaker are less relevant in the construction of his *ethos*, we know that often the image of the speaker begins to be constituted even before the speech is effective. Of course, these prejudices and preconceptions about the *ethos* of the speaker can be completely undone throughout the speech.

In terms of Ballweg's analytical rhetoric (1971, p. 175-184), which in turn is inspired by Aristotelian theory and also by more recent traditions such as semiotics and linguistics in general, what Aristotle calls *ethos*, as a technical proof or argumentative strategy of practical rhetoric, would be, from the rhetorical-analytical point of view, the object of study of phronetics. In fact, phronetic analysis does not only take the speaker into account, that is, it does not exclusively study the *ethos* of the speaker, but on the contrary, it is designed to examine the relationships between all the interlocutors involved in the communicational interaction. In the context of a rhetorical situation, the position occupied by the interlocutors (speaker and audience in the traditional terminology of rhetoric) is an essential part of the phronetic analysis that Ballweg called "agontic", especially in view of the interaction of these actors constructing, in an intersubjective way, what is considered reality, or, in the rhetorical tradition, what is considered the winning report (Castro JR., 2018, p. 154-155).

Understanding to what extent the justices of the Supreme Court behave in front of their audience, made up of both technicians and society in general, is an essential part of rhetorical analysis. By the way, the first step of rhetorical analysis is to carefully examine how the speaker

brings former minister Joaquim Barbosa sporting black robes, emulating the image of a superhero on a cape, is famous.

and the audience behave. And it is precisely from this theoretical-methodological perspective that we develop our study.

Returning to an analysis of the judge's personality: it is possible that in the social imaginary an association between the figure of judicial interpreters and monarchical personalities can be traced (Maus, 2000, p. 183-202), who extracted the validity of their determinations from a higher order of values. In this condensed image of the moment of transition from an absolutist society to one that adopts the system of tripartition of powers, the judge would be the figure who has an ethical formation that would allow him to achieve justice. Thus, he assumes a character of a paternalistic nature, as he has a fair personality, being the diffuser of a common morality that society no longer has. Imperial stability, associated with the expression *"king can do no wrong*", is transmuted into a reliability in the fundamental rights established by the constitution and for its ultimate interpreters: judges, ministers and *justices* of the constitutional courts.

## 3 The inadequacy of the evolutionist thesis of democratic proliferation

It is, or should be, uncontroversial that the legal possibilities of the legal system are limited by ideological and historical aspects, but it is not because we do not notice them that we should forget to outline any discussion around such values and conceptions (Ferreira JR., 2016, p. 367). It is in this sense that we seek to investigate what has been forgotten, purposely or naively, and not yet exhaustively problematized about the transformation of Brazilian constitutional jurisdiction.

The reflection of Ingeborg Maus (2000) discussed above reveals that the discussion about the advance of the Judiciary beyond the lines of containment outlined in previous times is not a local debate, and has drawn the attention of several other scholars in various countries. As a symptom, there are those who point out that the strengthening of the authority of the courts has been an immediate consequence of the expansion of the market system at a global level (Vieira, 2008, p. 450), challenging more usual explanations of this phenomenon, as we will see below, based on a kind of spread of democracy in the post-war period.

This hypothesis would be justified by the perception of investors that the courts would be a more reliable space to ensure legal certainty, stability and predictability than the parliament, with a properly legislative function, composed of members elected in a democratic way, but who occupy their positions motivated by demands of a populist nature and inefficient, within an economic perspective. It is important to highlight that this perception does not exclude the

one elaborated by Ingeborg Maus, but, in fact, it can confer the veneer of supposedly rational legitimacy that a response provided through the movement of the international financial market lacks.

The understanding that the constitutional transformation that meant a passage from the legislative to the constitutional parameter was determined by the financial market is one of the main objects of study by the American author Hirschl (2004, p. 74-78). According to his considerations, most constitutionalists have a tendency to mistakenly believe that the expansion of the number of democratic countries and the global growth of the Judiciary go hand in hand. Thus, such thinking could not only be verified in what would be the most obvious examples, such as in Latin American countries, which at the end of the eighties of the twentieth century saw the end of a series of military dictatorships, but also in countries with a more consolidated democracy, such as those that occupy central and southern Europe.  especially from the end of the seventies. This conclusion follows the perception that the consolidation of a democratic regime implies the adoption of some form of separation of the functions of the State between the branches of government, with the existence of an independent and active Judiciary being a necessary condition for the proliferation of democracy.

This thesis of constitutionalization due to a supposed democratic expansion, however, hardly provides us with an adequate explanation for an unapparent scenario of constitutionalization, which is very common, especially in countries that are not located in Latin America, in which constitutional reforms did not imply any significant and fundamental changes in the political and economic regimes of the countries of the regions. In this sense, some examples of this phenomenon can be seen in countries such as: New Zealand, which, in 1990, enacted a Bill of Rights Act; Israel, which has adopted two new basic laws, protecting a large number of fundamental rights and freedoms; Great Britain, in 1998, passing a Human Rights Act; and the adoption of the Canadian Charter of Rights and Freedoms and the corresponding establishment of large-scale judicial review in Canada in 1982.

There is another theory, very close to the last one analyzed, which seeks to associate these changes with an inevitability of judicial progress due to macro factors, such as the end of World War II, assuming an evolutionist character with regard to the constitutionalization of rights. These theories are quite common to some of the authors of the most used books in law schools in Brazil[3]. According to this conception, the historical milestone of the so-called new

[3] As in Ives Gandra da Silva Martins, in his book *Tratado de Direito Constitucional*. 2nd Edition. São Paulo: Ed. Saraiva, 2012.

constitutional law would be the reconstitutionalization of Europe, immediately after the Second World War, which would have redefined the place of the Constitution and the influence of constitutional law on contemporary institutions.

In this post-war moment, there would have been a perception that political majorities can perpetrate barbarism, as had occurred in German Nazism, which would have led the new constitutions to create or strengthen constitutional jurisdiction, instituting powerful mechanisms for the protection of fundamental rights even in the face of the legislator (Sarmento, 2009, p. 95-133), From there, a fruitful theoretical and jurisprudential tradition began, responsible for the scientific rise of Constitutional Law.

In addition to sinning by containing, at the same time, an excess of simplicity and grandeur, trying to provide a simple foundation to a phenomenon that has been protracted for six decades, this current seems to be mistaken in not offering a coherent explanation of the reasons for the long duration of time that some nations took to converge in relation to these notions acquired in the second post-war period, seeming more like an attempt to create a narrative of redemption of rights Human.

As described above, some countries such as Canada (1982), New Zealand (1990), Israel (1992) and Great Britain (1998) took decades to understand this alleged need for constitutionalization of rights and for a greater scope of jurisdiction to be attributed to the courts. It is not clear whether the adherence of a legal system to this conventional notion of the treatment that should be given to human rights really reflects a commitment of that country's policy to basic rights and freedoms (Hirschl, 2004, p. 82-100). To make an assessment of the accuracy of this sentence, we can try to ascertain how the constitutional systems of the most advanced countries work when it comes to the protection given to human rights and individual freedoms.

*Freedom House* is a non-profit organization based in Washington, founded in 1941 and whose main activities are to provide annual assessments of the conditions of freedom among the countries of the world. In its most up-to-date report[4], released in 2019, countries that do not have an intense judicial review system such as Sweden (100 points), Norway (100 points) and the Netherlands (99 points) remained among the top places, while countries such as Germany (94 points), Italy (89 points), Belgium (96 points), the United Kingdom (93 points), Israel (78 points), the United States (86 points) and Brazil (75 points). which represent a range of

[4] The full study is available at: https://freedomhouse.org/report/freedom-world/freedom-world-2019/map Accessed on: February 06, 2019.

countries that went through a moment of constitutionalization of rights, both in the post-war period and in later decades, had a lower score.

Thus, the adherence of a legal system to the conventional notion that human rights should be constitutionalized and greater authority should be conferred on the courts, which does not necessarily reflect a greater commitment of a given country's policy to the most basic rights and freedoms. And it is based on this same notion that Ronald Dahl (2001, p.99) indicates that democratic countries, in the end, cannot depend on their constitutional systems to preserve their freedoms.

An understanding that sees this moment as a kind of maturation of the constitutional system, judging the post-war period as the propelling moment of these changes that evoked the constitutionalization of rights, takes part in a narrative of eschatological bias, imagining that it is possible to understand the ends of man when, in truth, it does not seem likely that there is a single path towards which the entire world society will converge. It is also for this reason that it cannot surprise us that countries such as the Netherlands or Norway, despite not adopting a model of constitutional system that provides for intense judicial review, enjoy an excellent international reputation when it comes to respect for basic freedoms and human rights. The perception of history as a totalizing experience, ignoring the microparticularities of each society that makes up the global fabric, serves more as a discursive strategy than as a representation of a reality that is much more complex and unpredictable.

Another attempt to strengthen narratives that attempt to deal with this wave of constitutionalism perceives this movement as a harmony between the economic, political, and judicial elites (Hirschl, 2004, p. 71-108). Although it is possible to trace the interests of other groups that do not participate in the power dynamics associated with the economic, legal and political elites, it would be naïve to believe that any demand would have a chance of success without representing a direct or indirect advantage to any of these groups. If this is not the totally adequate understanding to describe the phenomenon, it seems to come closer than the other attempts analyzed here.

Political forces can benefit from the expansion of the Judiciary in several ways, among them, one of the most prominent is the reduction of the wear and tear of the political capital itself resulting from the approval of any legislation that displeases certain social groups. There are some political debates that most legislators consider too dangerous to take place in Congress, as they would mean, regardless of the victorious position, a political attrition.

As one of the components of this set that favors this new paradigm of the constitutional system, we can also point to an interest of the legal elites themselves. This interest goes back

to an aspect already touched on at the beginning of this text, when we highlighted the public curiosity in the phenomenon of the biographization of a large number of judges, especially those who make up the Constitutional Court of a country, in our case, the Federal Supreme Court. Thus, to the extent that judicial authority was redesigned by the Constitution of 1988, it was also resized by the daily performance of judges.

Of course, we should not look for any particular event in order to perceive this event, in which magistrates or ministers of the Supreme Court met to ask for more power, but rather in each judicial decision that pushes the limits to what before, in a traditional view of the system of tripartition of powers, would not have been considered appropriate. The association between vanity and the legal class, and its need to be prestigious, does not cause the slightest surprise. For no other reason did cinema choose the profession of lawyer to receive the devil's own provocation: *Vanity! Definitely my favorite sin*[5]. The prestige sought by the category is a factor that demonstrates our participation in the expansion of our powers, hand in hand with the economic elite and the political elite.

It is not an obligatory task to describe parallels between these interests of the groups pointed out, which trigger a constitutional reform in a country like Brazil. The role of the Judiciary appears to be even more reinforced when the legislative houses, places where the political elite of a country is expected to be found, enjoy little trust (Bilenky, 2018). It is no wonder that there is a hope, stimulated by the media in various ways, that the Judiciary would remedy the political crisis of recent years. If we think in retrospect, there were not a few discussions that passed through the plenary or, in most situations, through the hands of only one of the ministers of the house, such as: the impeachment process of Dilma Rousseff; Operation Car Wash and its constitutional implications; legislative maneuvers by Federal Deputy Eduardo Cunha; reforms proposed by the government of Michel Temer; imprisonment of former President Lula; dispute for the presidency of the Federal Senate in early 2019. Anyway, the list is endless.

Society can no longer be satisfied with traditional instances and is fascinated – or perhaps hypnotized – by the possibility of replacing political discourse with the judicial process. This ostensible presence of the Judiciary in various areas of ordinary life should cause a profound change in the way we see and analyze segments in which the legal elite has come to have a decisive importance. This is how we can glimpse that concepts created to try to rationalize the national political system, such as the notion of coalition presidentialism, by ignoring the

[5] Scene from Taylor Hackford's film, *Devil's Advocate*. United States: Regency, 1997.

manifest presence of the Judiciary today, can no longer manage to explain the Brazilian political-institutional reality.

## 4 A Brazilian political-institutional reality

The expression "coalition presidentialism" has become, especially since the impeachment process of President Dilma Rousseff, a commonplace in the mouths of those who criticize Brazil's institutional arrangements. The exhaustion of this model was pointed out as the reason for the successive crises between the Executive and Legislative Branches, represented in the figures of the so-called bomb agendas approved by Congress prior to the 2016 impeachment.

It is not our objective to indicate that there is a relationship between the adoption of this strategy by the political parties and the political crisis. For this work we leave it reserved for essayists and political scientists. But we cannot fail to warn that a model that proposes to be current, that is, successful in describing the political-institutional arrangement of the country, must consider the role of the Judiciary as a relevant political actor, after all, the performance of the Federal Supreme Court has relevant importance in a series of decision-making processes that, according to the traditional literature, would be eminently political.

The origin of this concept dates back to 1988 (Abranches, 1988, p. 5-10), the year that saw the promulgation of the so-called Citizen Constitution. The creator of the expression, Sergio Abranches, described Brazil as the only user of this model, as it combines the proportional system, multipartyism and what the author pointed out as imperial presidentialism , an independence between the powers – if not hegemony of the Executive – which organizes the ministry as broad coalitions, as opposed to a mitigated presidentialism, which is characterized by parliamentary control over the cabinet and which also constitutes this cabinet, occasionally or frequently, through large coalitions.

Because it presents great heterogeneity and conflicts between the parties, the national alternative was the grand coalition, which includes a greater number of partners and admits greater ideological diversity, assuming a much greater probability of instability and complexity of negotiations. These contexts, of higher economic, social and political division, are also characterized by the presence of persistent and vigorous centrifugal forces, which stimulate fragmentation and polarization.

Coalition presidentialism stands out for demanding the formation of a parliamentary base for the president that is not limited to being strictly partisan, meeting a regional criterion, in view of the degree of social heterogeneity in the country. The criticisms of this model are not

easily summarized, and this configuration is pointed out more as a problem than a solution for the Brazilian political system, since Abranches himself, who despite pondering that a structure of this type would prevent the action of a paralyzing effect on the political agenda, also viewed it with caution (even understanding that this theory no longer couples so well with the national reality).

We have previously listed some of the discussions that have recently passed through the plenary of the Supreme Court and that have transported the body to the center of the national political process, so any explanation of the Brazilian institutional arrangement that disregards the institution will inevitably sin by lack of accuracy. One of the main distinctions that exist in the approach of coalition presidentialism and this new institutional arrangement, which considers the Judiciary, is that that first model assumes a strategy much more focused on consensus, in which the various political forces that make up a strong majority group extract an advantage from some legislative change, and must be taken into account, satisfactorily, the interests of all. However, when the Judiciary is inserted in this scenario, due to its own characteristics that allow it greater independence, considering that its members are not concerned with contesting elections every four years, as a rule, decisions are made by establishing a winning and a losing pole. One of the parties is satisfied, while the opposing party is defeated.

Therefore, although the elements that make up coalition presidentialism are still present, they were added to other components, introduced due to the performance of the Judiciary.

## 5 The transition of the Brazilian institutional model.

Following a path in which the tripartition of powers is strictly observed, the Judiciary would have its role limited to acting as a third house, after the proper processing of the legislative proposal in the National Congress. However, the Superior Court has been changing its constitutional policy in a sense that makes it perform a different function, in order to enable its performance as the first and last legislative house (Arguelhes, 2017), surpassing the legislative performance of the Senate and the Chamber of Deputies. There is, therefore, a transition from the figure of the STF as a negative legislator, only acting as an institution that restrains the Legislative Branch, to its performance as a properly legislating house.

This transition of paradigms can be described from two axes, the first of which refers to the institutional redesign of the Court, through the 1988 Constitution, which caused severe changes, especially with regard to the possibilities for the Supreme Court to control the

constitutionality of legislation and, in a second axis, gradually, through the action of each Justice of the Court over the last thirty years, that has broken down the fences that limited the action of the Judiciary. To perceive this phenomenon, it is necessary to understand, albeit superficially, the characteristics of the model of control of constitutionality adopted prior to the Charter of 88, so that the modifications introduced by the Constitution were of a unique nature for the aforementioned paradigm transition to occur.

The Constituent Assembly that deliberated on the Charter of 88 was an event that synthesized what has already been mentioned above about the composition of the interests of the elites in composing a new political-legal arrangement for our country, in a sense that mobilized the agenda of those groups to reorganize the Brazilian State, while maximizing their advantages in this new context. This understanding takes on an even greater projection when we realize that the case of Brazilian democratization was, among all the recent cases of transition, the most controlled by authoritarian leaders and the one in which the members of their civilian elite guaranteed not only their political survival but also a broad participation in power after democratization (Arturi, 2001, p. 11-15).

At first, the Judiciary considered the Constituent Assembly unjustified (Correa, 1996), and only a reform of the Constitution was necessary, since the central problem was not the text, but its non-execution. Already during the work of the National Constituent Assembly, as a body of judges, especially the Federal Supreme Court, it played the role of an interested party, after all, a series of questions about the institutional design of the Supreme Court would be defined in the discussions of the Constituent Assembly, such as the creation of the Constitutional Court, in addition to the prevailing notion that the court would be a kind of third peacemaker (Corrêa, 2007, p. 31-77), an arbitrator who, according to the statements of the then Minister Oscar Dias Corrêa, would resolve the conflicts between the other powers of the State, whose function would be to rebalance the threatened interdependence, or the harmony achieved. This function was reflected in the various decisions taken by the Supreme Court regarding the relations between the Constituent Assembly and the constituted powers, the internal rules of the Assembly, and the duration of President Sarney's term of office (Koerner, 2013, p.141-150).

Publications in Brazilian newspapers at the time of the Constituent Assembly help us understand the vision and debates around the proposals for the configuration of the Judiciary in the National Constituent Assembly (Carvalho, 2017, p. 35-50). From these data, it can be seen that among jurists, including the judges themselves, the discourse that associated the national judiciary with attributes of intellectual preparation and morally appreciated behavior prevailed. The courts were described as society's greatest reserves in terms of knowledge, morality and

devotion to public affairs; and the judges portrayed as hardworking and independent of the powerful of all time and the powerful of the day, called for the hard and lackluster and helpless life of the galas of public recognition.

Despite a relative consensus at that time that it was essential to strengthen judicial institutions and that the guarantees of the members of the judiciary should be preserved, there were also many discussions about the very maintenance of the Supreme Court as a court of constitutional jurisdiction (Koerner, 2013, p. 152-170). No wonder, as an attempt to hinder the creation of a Constitutional Court outside the organization of the Judiciary, with exclusive competence for constitutional jurisdiction, interviews and essays made by judges or ministers popped up with self-praise for the performance of the judiciary, such as those mentioned above.

The incursions of the judiciary in the discussions of the Constituent Assembly were not limited to the STF, but despite this, there was the manifestation of associations of judges, in addition to the establishment of a permanent position against the creation of the Constitutional Court, possibly (or especially) motivated by the maintenance of diffuse constitutional jurisdiction. In an article for the Folha de São Paulo, in May 1987, Miguel Reale[6] ironized about the situation, insinuating that the illustrious ministers of the Federal Supreme Court clung tooth and nail to the then prerogatives of the office, harming the country by depriving it of the performance of a body of political legal configuration, a position appropriate to a sovereign judicial body, and taking a position in defense of the creation of the Constitutional Court.

Thus, from these movements, the judiciary played not only the role of recipient of the actions promoted on the occasion of the Constituent Assembly, but also acted in the expectation of decisively influencing its inclinations. It was through this action of the judiciary that the intentions of creating a constitutional court in Brazil, attributing the appellate function to a court of a different nature, were frustrated. In this sense, the Constituent Assembly of 87/88 originated a Charter that attributed to the Federal Supreme Court the functions of Constitutional, Revisional and Criminal Court.

## 6 Final considerations

The Constitution of 1988 was born with an ambiguous mission. And while it preserved the interest and prerogatives of the political and economic elites of the military regime, it also

[6]The article by Professor Miguel Reale, *The Judiciary Power in the Constitution*, is from the newspaper Folha de São Paulo and is available at: https://www2.senado.leg.br/bdsf/bitstream/handle/id/130939/maio87%20-%200068.pdf?sequence=1. Accessed on: 26 mar. 2019.

sought to legitimize itself as a reaction to the dictatorial framework. The judges' fundamental mission would be to contribute with each sentence to remove the authoritarian debris that still persisted. For this mission, the Federal Supreme Court was equipped with a series of tools that would allow that, in addition to the collegiate, the ministers, acting individually, could try to ensure the preservation of the newborn Brazilian democracy.

However, as noted, the strong presence of the Federal Supreme Court in the control of collective life does not find its reasons only in the creation of instruments for the control of constitutionality, derived from the will of an abstract entity such as the constituent. The choice for these instruments was determined by the combination of distinct interests of the economic, political, and legal elites, which either made up the National Constituent Assembly or were fundamental, in some other way, to guide the discussions that were held in that space.

In turn, the most usual narratives, which try to rescue the understanding that the constitutional transformation occurred due to a kind of democratic proliferation in the aftermath of World War II, should be examined with caution. These considerations are usually part of an explanation of eschatological and evolutionist bias, in addition to not being able to explain why countries enjoy an excellent international reputation, with regard to respect for basic freedoms and human rights, even if they do not adopt a model of constitutional system.

Specifically in the case of Brazil, in which these movements described are still allied to an intense discredit of the Executive and Legislative Branches, the Judiciary takes on even greater importance and, therefore, significantly modifies models that previously sought to describe the behavior of our institutions, such as the concept of coalition presidentialism. We do not proclaim here exactly the death of the concept, but its renewal, now taking into account the role played by the Judiciary.

The Federal Supreme Court, through the actions of its members, has transformed the institution into an important agent in the political context. This change, in turn, does not only imply an exclusive change of the Court, but also an effective change in how the groups that have access to the Supreme Court behave. If, still speaking in terms of coalition presidentialism, it would be unthinkable to adopt strategies aimed exclusively at convincing members of the judiciary to the detriment of convincing groups in the legislature, this may be becoming more common.

This new format of the institutional political environment adds the Judiciary to the elements of coalition presidentialism, composing what we can call compensation presidentialism, which is characterized by the participation of judges as a counterpart to situations of inaction by the Legislative Branch, due to a combination of several factors, which

will, for example, from the lack of interest of parliamentarians to alienate a large slice of the electorate, to the tools that the Judiciary, especially the Federal Supreme Court, acquired with the promulgation of the 1988 Constitution.

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