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O Supremo Tribunal Federal e a democracia em crise no Brasil: Pressupostos institucionais para um modelo inclusivo de interação institucional*

The Supreme Federal Court and democracy in crisis in Brazil: Institutional assumptions for an inclusive model of institutional interaction

El Supremo Tribunal Federal y la democracia en crisis em Brasil: suposiciones institucionales para un modelo inclusivo de interacción institucional

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Resumo

Este artigo discute o papel dos Poderes e das instituições no contexto de uma crise democrática (erosão democrática), destacando que uma crise institucional pode ser evitada quando o protagonismo do Supremo Tribunal Federal na criação e gestão de conflitos institucionais é exercido de forma prudente e comedida. Assim, coloca-se a seguinte questão: como definir parâmetros para uma atuação mais cooperativa e harmônica entre os Poderes, considerando o cenário institucional brasileiro e os desafios jurídico-políticos práticos? Além disso, de que forma os Poderes e as instituições podem contribuir para responder à crise da democracia no Brasil? Com base nas reflexões de Mezzaroba e Monteiro (2023), este estudo utiliza o método hipotético-dedutivo, complementado pelo método histórico. A pesquisa, de caráter qualitativo, é fundamentada na inter-relação de fatores e contextos, além de ter uma vertente prescritiva, ao descrever o contexto fático e, assim, propor soluções para os problemas abordados. Para tanto, aborda-se a teoria das capacidades institucionais a partir de Sunstein e Vermeule (2003), destacando-se a relevância da questão institucional nas relações entre os Poderes. São também apresentados os conceitos de autoridade constitucional compartilhada (Clève; Lorenzetto, 2021), virtudes passivas (Marinoni, 2021) e jurisdição constitucional anticíclica (Souza Neto, 2020) como soluções para uma atuação do Supremo Tribunal Federal mais preocupada com as consequências institucionais de suas decisões, bem como visando uma maior harmonia entre os Poderes dentro do arranjo institucional brasileiro e para a defesa da democracia.

Palavras-chave: Supremo Tribunal Federal; crise democrática; teoria das capacidades institucionais; interação institucional.

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Abstract

This article discusses the role of the Powers and institutions in the context of a democratic crisis (democratic erosion), highlighting that an institutional crisis can be avoided when the leading role of the Supreme Federal Court in the creation and management of institutional conflicts is exercised in a prudent and measured manner. Thus, the following question arises: how do we define parameters for more cooperative and harmonious action between the Powers, considering the Brazilian institutional scenario and the practical legal-political challenges? Furthermore, how can the Powers and institutions contribute to responding to the crisis of democracy in Brazil? Based on the reflections of Mezzaroba and Monteiro (2023), this study uses the hypothetical-deductive method complemented by the historical method. The research, of a qualitative nature, is based on the interrelationship of factors and contexts, in addition to having a prescriptive aspect when describing the factual context and, thus, proposing solutions to the problems addressed. To this end, the theory of institutional capacities is addressed, highlighting the relevance of the institutional issue in relations between the Powers. The concepts of shared constitutional authority, passive virtues, and countercyclical constitutional jurisdiction are also presented as solutions for the Supreme Federal Court to be more concerned with the institutional consequences of its decisions, as well as aiming at greater harmony between the Powers within the Brazilian institutional arrangement and for the defense of democracy.

Keywords: *Supreme Federal Court; democratic crisis; theory of institutional capabilities; institutional interaction*

Resumen

Este artículo discute la función de los Poderes y de las instituciones en el contexto de una crisis democrática (erosión democrática), enfocando que una crisis institucional puede ser evitada cuando el protagonismo del Supremo Tribunal Federal en la creación y gestión de conflictos institucionales es ejercido de forma prudente y comedida. Así, se lanza la siguiente cuestión: ¿Cómo definir parámetros para una actuación más cooperativa y harmónica entre los Poderes, considerando el escenario institucional brasileño y los retos jurídico-políticos prácticos? Además de esto, ¿de qué forma los Poderes y las instituciones pueden contribuir para responder a la crisis de la democracia en Brasil? Como base en las reflexiones de Mezzaroba y Monteiro (2023), este estudio utiliza el método hipotético-deductivo, complementado por el método histórico. La investigación, de carácter cualitativo, es fundamentada en la interrelación de factores y contextos, además de tener una vertiente prescriptiva, al describir el contexto fático y, así, proponer soluciones para los problemas enfocados Para eso, se enfoca en la teoría de las capacidades institucionales, enfatizando la relevancia de la cuestión institucional en las relaciones entre los Poderes. Son también presentados los conceptos de autoridad constitucional compartida, virtudes pasivas y jurisdicción constitucional anticíclica como solución para una actuación del Supremo Tribunal Federal más preocupada con las consecuencias institucionales de sus decisiones, como también buscando una mayor harmonía entre los Poderes dentro del arreglo institucional brasileño y para la defensa de la democracia.

Palabras clave: *Supremo Tribunal Federal; crisis democrática; teoría de las capacidades institucionales; interacción institucional.*

1 Introduction

The separation of Powers, in its classic configuration, values dividing the power of the State into three organs with specific functions, avoiding that in a single man, or in a single body of people, all the Powers are concentrated. Here, the idea of its tripartite division arises, as well as the effective control of one power over the other[1].

In the theory of the separation of powers, the existence of a monopoly of decisions on rights in charge of a single power is not discussed, because, if possible, its objective would

[1] Montesquieu (1996, p. 168) affirms the existence of three types of powers in each State: that of creating laws, that of executing public orders and that of judging crimes or conflicts between private individuals. This system had its legacy consolidated when it became the subject of discussion by the Founding Fathers of the American Constitution of 1787.

be unattainable (Mendes, 2011, p. 271). In the paradigm of constitutional democracy, no matter how democratic the Power is, it will be subject to limits and constraints, for example, the existence of a range of fundamental rights, with the purpose of making it impossible that it degenerates, due to its natural vocation, into tyrannical or despotic powers (Ferrajoli, 2006, p. 109).

The relationship between the Branches, from 2016[2] onwards, began to show signs of malfunctioning. This occurred when he was faced with a scenario of evident democratic crisis, as well as a deep distance between the Powers caused by constant institutional retaliation and the ascension, to the highest political office in the country, of a leadership that embodied in his way of doing politics the purest and most genuine spirit of an authoritarian ruler.

That said, it is worth asking: how to define parameters to operationalize a more cooperative and harmonious action between the Powers, taking into account the Brazilian institutional scenario and its practical problems coming from the legal-political field? And more: how the Powers and institutions can contribute to the response to the crisis of democracy in Brazil?

In this sense, the focus of the article is to rethink the activity of the Supreme Court in its leading role in the current performance of the institutional arrangement and to draw attention to the importance of recognizing the institutional capacities that exist outside the Judiciary with the support of Sunstein and Vermeule (2003).

Based on the reflections of Mezzaroba and Monteiro (2023), this study employs the hypothetical-deductive method, aided by the historical method. The research, of a qualitative nature, interrelates privileged factors and contexts from a prescriptive approach, as it describes the current context and proposes possible solutions to the problems addressed. In the development of the research, a technical procedure of consultation, research, analysis and reading of bibliographic and documentary sources was used, such as: monographs, theses, scientific articles and dissertations. Through the hypothetical-deductive method, the research seeks to examine different contexts that influence the interpretation of the performance of the Supreme

[2] "The party conception, the contestation of the 2014 electoral result by Aécio Neves, the various institutional thrusts of Eduardo Cunha, which culminated in the *Impeachment* of the president, the capitulation of the Superior Electoral Court (TSE) in the trial of the Dilma-Temer ticket, among other events, point to a weakening of the constitutional commitment on the part of various political and institutional leaders" (Vieira, 2018, p. 153). Still, a succession of episodes in Brazilian politics manages to define, from a factual point of view, episodes that, analyzed together, demonstrate the malfunctioning of the institutions and a clear disregard for democratic issues: "[...] the opening of the *Impeachment* by Eduardo Cunha, on December 2, 2015; the vote in the Chamber of Deputies, on April 17, 2016; the provisional removal of Dilma Rousseff by the Senate, on May 12, 2016; the definitive overthrow of the president, on August 31, 2016. The coup was a process, emblematized by the fall of Dilma, but which was not exhausted in it, a coup whose meaning is the setback in rights, the reduction of the weight of the popular field in the production of political decision-making and the numbness of the project of building a fairer society. Jair Bolsonaro's victory in the 2018 presidential elections was a somewhat unforeseen development of this process, which remains open and for which, unfortunately, there is no prospect of a solution in the short term" (Miguel, 2019, p. 21-22).

Court, in the Brazilian institutional arrangement, and its institutional interaction with the other Powers of the Republic, based on the dynamics defined in the constitutional text. It should be noted that the purpose of the article is to present solutions so that the performance of the Federal Supreme Court (STF) is more harmonious with the other Branches of the Republic, using the authors Sunstein and Vermeule (2003), Clève and Lorenzetto (2021), Marinoni (2021) and Souza Neto (2020) to develop a specific type of institutional action of the STF that preserves and strengthens, even more, its very important function as guardian of the Federal Constitution. In addition, historical comparisons are used to explore and describe the implementation of political-institutional precepts that were foreseen in Brazil and abroad, with a focus on the performance of Constitutional Courts. A qualitative and prescriptive approach also allows us to examine different perspectives on the position of institutional powers in the debate of ideologies, pointing out conflicts and proposing solutions to mitigate their practices and/or effects.

The proposal defended in this study is based on the 1988 Constitution as the main guideline. As the ultimate foundation, it is the guidance of any and all interpreters who venture into the sea of what is constitutionally possible. As the first foundation, it is the most important order of Ulysses[3].

2 Democracy in crisis in Brazil: escalation of a rupture without tanks

Contemporary democracies are no longer at the peak of their popularity. In fact, our daily lives are already getting used to concrete acts of disinterest in the democratic experience. Not infrequently, one is faced with an almost peaceful coexistence between concrete acts of authoritarianism and the Democratic Rule of Law[4], as the use of hermeneutics for shady purposes reveals that legality often legitimizes the rise of an authoritarian leader[5]6. Such a situation results in the creation of another paradox: "Respect for legality is a condition for democratic life, but it does not ensure it" (Casara, 2018, p. 60).

In this perspective, Runciman (2018), at the end of his book *How Democracy Comes to an End*, presents readers with some lessons for the twenty-first century, and, in the

[3] "When Ulysses chained himself to the mast and ordered his rowers to put wax in their ears, he aimed to make it impossible for himself to succumb to the song of the sirens" (Elster, 2009, p. 127). In the original, Homer relates the problem faced by Ulysses when passing through the island of the sirens: "Not just one or two, friends, know the auras and the pilot; I say (sic): What the goddess of goddesses told me, so that we will all die or flee from the Parka. The Sirens avoid the flowery meadow and the divine voice command us; it allows me to hear them, but along the mast in stiff ropes. And if I ask you to untie me, you others hand and foot, bind me more tightly." (Homer, 2009).

[4] For Casara (2018, p. 64): "The Democratic Rule of Law focuses on two basic ideas: a) the State limited by the Law, especially by fundamental rights, which function as 'trump cards against the majorities' (not even the occasional will of the majority can remove fundamental rights); and b) the political power of the state legitimized by the people. Democracy and fundamental rights are shown to be intertwined, in a relationship of reciprocal dependence."

[5] "Legal actors are generally important parts of the authoritarian models of the State. The Holocaust was possible despite the rule of law, as it had the help of jurists and judges. Fascism and Nazism used the Law. Oppression is not incompatible with the Law" (Casara, 2018, p. 60).

first of them, states that: "Mature Western democracy is in decline. It has passed its prime" (Runciman, 2018, p. 198).

And now, how is it possible to recognize the signs that prove that democracy is coming to an end? This is exactly a different phenomenon from what is commonly observed in history. Democracies,

As a rule, they no longer collapse due to a single event and with a scheduled date and time. For this reason, few democracies are ruined by a classic coup d'état, in which certain political actors use state mechanisms to promote intimidation and coercion (Runciman, 2018, p. 44).

The rupture of democratic structures has always been part of our imagination with specific images and elements. It is not possible to think of the ruin of a democracy without tanks in the streets or without heavy artillery to support it. In this sense, this is how we are inclined to see the death of democracies: "at the hands of armed men" (Levitisky; Ziblatt, 2018, p. 14).

In this context, the experiences of the 1930s or 1970s made available the main allegories of what we know about what happens when democracy collapses: "tanks in the streets; caricatured dictators shouting messages of national unity while leaving a trail of violence and repression" (Runciman, 2018, p. 5).

However, another way to destroy democracy is in evidence. A little less caricatural, but just as perverse: "Democracies can die not at the hands of generals, but of elected leaders – presidents or prime ministers who subvert the very process that brought them to power" (Levitisky; Ziblatt, 2018, p. 15). Conclusion: "The tragic paradox of the electoral road to authoritarianism is that the murderers of democracy use the very institutions of democracy – gradually, subtly and even legally – to kill it" (Levitisky; Ziblatt, 2018, p. 17). This increasingly complex area of degradation of democracy has credited, in certain aspects,

the occurrence of coups d'état, without the common practice of an exclusive act of mercy: "There is no before and after. Only the space shrouded in shadows between one and the other" (Runciman, 2018, p. 56).

The problem is that it becomes much more difficult to identify where the process of disaffection for democracy begins. The main distinction between a conventional coup d'état and this other, more current, type of death of democracy, is that the first focuses on an isolated event, in which the future of the nation is between total collapse and coup frustration, while the other is characterized by being a more gradual process. An abrupt power grab of the first kind will succeed or prove to be a fiasco in a matter of a few hours. The other unfolds for continuous years, without anyone being able to identify what is happening, or when (if it is at the beginning, in the middle or if democracy has already collapsed): "It is much more difficult to distinguish the limits. And more than that: while the people wait for the real coup to be revealed, the gradual coup may have been underway for a long time" (Runciman, 2018, p. 43-44).

In this sense, Souza Neto (2020, p. 33) warns: "This is what characterizes the

process of democratic erosion: institutions remain in operation, but under permanent threat"[6].

Therefore, the death of a democracy no longer happens as before: "The definitive end of a life has turned into something more akin to a gradual process" (Runciman, 2018, p. 199).

It is clear, therefore, that it will only be possible to defend democracy if we recognize the characteristics of this gradual process of erosion of the democratic environment. Levitisk and Ziblatt (2018) developed a set of four indicators that allow citizens to be alerted to the existence of political figures who incorporate authoritarian behaviour into their political action. For this reason, the authors say, every citizen should be concerned when politicians: 1) preface, either through speeches or concrete acts, the rules that govern the democratic game[7]; 2) refuse to accept the legitimacy of political opponents[8]; 3) they demonstrate tolerance or encourage violence[9]; and 4) they signal that they are willing to create mechanisms to restrict the civil liberties of people who act against their government, including explicit threats to the media[10] (Levitisky; Ziblatt, 2018, p. 32).

The erosion of democracy sponsored by a winning majority in the electoral dispute and by a large part of the elite that holds economic power is a concern constantly renewed by scholars of Western political thought. A democratic government and its constitutional barriers can no longer be trusted to be the antidote to the tyranny of circumstantial majorities[11]. It is necessary to strengthen its support structures and enable democratic life as a *sine qua non* condition for the survival of any Republic. The bet on strengthening autonomous institutions of control and law enforcement can be a powerful weapon of prevention and protection against hostilities to democracy in an environment taken by authoritarian desires. The fact is that "the conduct of politics outside the rules and procedures established by the Constitution inevitably degenerates into arbitrariness and violence" (Vieira, 2018, p. 218).

It is true that contemporary Western democracy is moving towards paths that "seem to echo the darkest moments of the past" (Runciman, 2018, p. 8).

Some political analysts say it is almost certain that the demise of democracy will be delayed. Modest improvements, palliative changes and purely technical adjustments are able to keep it almost permanently in a vital state in autopilot mode.

Democracy's capacity for resistance is put to the test when it is charged with the task

[6] Many Brazilian jurists disagree with this statement, using as an example the performance of PGR Augusto Aras during the Bolsonaro government.
[7] In addition to the public and notorious desire to disobey court decisions, government allies admit that Bolsonaro intends to prevent the elections at risk of imminent defeat. See Megale (2022).
[8] President Bolsonaro calls his main political opponent a thief and his vice president a bum (Gullino, 2021).
[9] At an event in Acre in 2018, when he was still campaigning, Bolsonaro stated and staged that he would shoot the petralhada of that state (Ribeiro, 2018).
[10] At an event to commemorate National Press Freedom Day, Bolsonaro once again attacks the press. See Gomes (2022).
[11] On the tyranny of circumstantial majority: "No generation, much less a mere circumstantial majority, moved by fear, hatred or the seduction of a charismatic leader, would be authorized to suppress fundamental rights, as well as the prerogatives of future generations to determine their own destiny" (Vieira, 2018, p. 215-216).

of destabilizing problems in order to make them harmless, which obliges the democratic system to be able to dismantle ambushes that lead to its own death: "thus, at least, postpone it, day after day" (Runciman, 2018, p. 199).

As much as, at times, the scenario is taken by adversity, indifference often caused by impotence in the face of facts, will never be the most appropriate behavior.

It is necessary to remain in a state of permanent alert in relation to the ongoing process of corrosion of democracy's guardrails, as its main threat is indifference (Runciman, 2018, p. 145).

But what if democracy dies? What will remain? Only the silence (the worst of death) funereal than what does not exist more, although it is loaded with an infinity of meanings.

3 Strengthening the theory of institutional capacities: taking democratic institutions seriously

Sunstein and Vermeule (2003) are adopted as a reference in this part of the article. The authors' proposal argues that the institutional analysis employed in Law consists of investigating the performance of institutions that make legal decisions, confronting it with that of other institutions, and proposing reflections on "who" should decide and "how" should decide. Not only from the point of view of an interpretative theory, but also to evaluate the (systemic) consequences of a given decision within the organizational model (institutional arrangement), especially if the decision has repercussions on other branches[12].

For this reason, the authors argue that discussions about legal interpretation can only be adequately resolved when institutional issues are considered relevant[13] (Sunstein; Vermeule, 2003, p. 848). In this sense, the authors recognize that institutional issues must be minimally appreciated in order to achieve some kind of progress in theoretical discussions: "At the very least,

[12] "Our ambition has been both narrower and more critical—to show that interpretive theory, as elaborated by its ablest practitioners, has been remarkably indifferent to institutional issues, proceeding as if judges were trustworthy and as if their choice of approach lacked systemic consequences. We think that this indifference is a kind of pathology, produced, in large part, by the continuous insistence of the legal culture in framing the question of interpretation as: 'What would you do in the face of a problem of this type?' We hope we have shown that this is a misleading question to ask, and that it has quite harmful consequences not only for the academic study of law, but also for legal institutions. Once the question is properly reformulated, it should be possible to see the interpretive questions in a new and better light, and perhaps adopt new and better answers as well" (Sunstein; Vermeule, 2003, p. 950-951). " *Our ambition has been at once narrower and more critical – to show that interpretative theory, as elaborated by its most able practitioners, has been remarkably indifferent to institutional issues, proceeding as if judges are reliable and as if their choice of approach lacks systemic consequences. We think that this indifference is a kind of pathology, produced, in large part, by the legal culture's continuing insistence on framing the question of interpretation as, 'What would you do, when faced with a problem of this sort?' We hope to have shown that this is a misleading question to ask, and one that has quite damaging consequences not only for the academic study of law, but for legal institutions as well. Once the question is properly reframed, it should be possible to see interpretive questions in a new and better light, and perhaps to adopt new and better answers as well"* (Sunstein; Vermeule, 2003, p. 950-951).

[13] Own translation, in the original: *"We have argued that issues of legal interpretation cannot be adequately resolved without attention to institutional questions"* (Sunstein; Vermeule, 2003, p. 848).

an appreciation of institutional issues should allow people to have a better appreciation of what they are disagreeing with, and also of strategies to make some progress in the future"[14] (Sunstein; Vermeule, 2003, p. 949).

It is important to emphasize that from the second post-war period and the dissemination of the atrocities carried out by totalitarian/authoritarian states, the feeling that inhabited the minds of those who survived the trivialization of evil, as well as those who were aware of how serious the Nazi/fascist experience was, was one of distrust in the majority political instances. Therefore, the ambience of distrust and fear of anti-democratic majorities is the perfect scenario for the perpetuation of a state power, in theory, politically neutral. Or The Judiciary Branch ascends, in the public debate linked to the discourse of centralization of fundamental rights in the legal system and recognition of the normative force of the Constitution and its principles, themes that have placed the judicial bodies in a prominent role in the definition of the most relevant issues for the redemocratization of the public space of deliberation.

Therefore, with the advance of discussions on the role of the judicial organs in controlling the validity of laws, together with the collapse and rise of certain models of State, which sometimes allowed the prominence of one of the state powers and sometimes of another, in the current political-social context, the Constitutional Courts and Supreme Courts held the leading role in the political-decision-making processes.

With this, the image of a heroic Judiciary is created. Precisely at this point, Sunstein and Vermeule project their theory to the field of the application and theorization of Law:

> With an emphasis on institutional capacities and dynamic effects, we can see that almost all of the most prominent discussions of interpretation—including, for example, those of Jeremy Bentham, William Blackstone, H.L.A. Hart, Henry Hart and Albert Sacks, Ronald Dworkin, William Eskridge, John Manning, and Richard Posner—are incomplete and unsuccessful, simply because they usually proceed as if the only question is how 'we' should interpret a text. Where they serve institutional roles, these theorists often work with an idealized, even heroic, image of judicial capacities and, as a corollary, a prejudiced view of the capacities of other legislators and interpreters, such as legislative agencies and bodies. And if the focus is placed on institutional capacities and dynamic effects, we will find it much easier to understand what is behind many interpretative divergences in Law and also to see how these divergences can be resolved[15] (Sunstein; Vermeule, 2003, p. 886).

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[14] At *the very least, an appreciation of institutional questions should make it possible for people to have a better appreciation of what they are disagreeing about, and also of strategies for making some progress in the future"* (Sunstein; Vermeule, 2003, p. 949).

[15] "*With an emphasis on institutional capacities and dynamic effects, we will be able to see that nearly all of the most prominent discussions of interpretation - including, for example, those by Jeremy Bentham, William Blackstone, H.L.A. Hart, Henry Hart and Albert Sacks, Ronald Dworkin, William Eskridge, John Manning, and Richard Posner - are incomplete and unsuccessful, simply because they generally proceed as if the only question is how 'we' should interpret a text. Where they attend to institutional roles at all, these theorists frequently work with an idealized, even heroic picture of judicial capacities and, as a corollary, a jaundiced view of the capacities of other lawmakers and interpreters, such as agencies and legislatures. And if the spotlight is placed on institutional capacities and dynamic effects, we will find it much easier to understand what underlies many interpretive disagreements in law, and also to see how such disagreements might be resolved"* (Sunstein; Vermeule, 2003, p. 886).

The debate in contemporary Law has been constantly led by discussions that feed back advantages and disadvantages of certain interpretative methodologies that reveal the best understanding of what Law is and what are the best answers to complex problems that modern societies face.

The theory of institutional capacities aims to demonstrate the futility of efforts to show that abstract ideals can be used to resolve disagreements about which interpretive methodologies are most appropriate[16] (Sunstein; Vermeule, 2003, p. 885-886).

On the other hand, the authors warn that the theory of Law fails to neglect two important issues[17]. The first concerns institutional capacities and the insistence that debates on legal interpretation cannot be reasonably resolved when these capacities are not taken into account. The central point is not "how, in principle, should a text be interpreted?". The focus should instead be "how should certain institutions, with their distinct capacities and limitations, interpret certain texts?".

The fact is that there is absolute confidence in the interpretation made by judges, and a generalized distrust in any type of legal interpretation made outside the scope of the Judiciary – almost always accused of being inauthentic. If the competent judges safely come to the conclusion that a literal interpretation of a law is inadequate, the argument for refusing the literal interpretation is greatly strengthened. However, it is important to emphasize that judges are highly fallible, which may lead one to believe that the interpretative methodology employed by judges may have some neglected virtues (Sunstein; Vermeule, 2003, p. 886).

This is why interpretive theory must emphasize the question "What interpretive methods should judges use?" rather than "What interpretive methods would I use if I were a judge?" This negligence, as to the focus that should be given, is a symptom of institutional blindness in interpretative theory (Sunstein; Vermeule, 2003, p. 941). For the authors: "[...] the treatment of basic issues of constitutional law, such as judicial review, has always suffered from institutional blindness [...]" (Sunstein; Vermeule, 2003, p. 932-933)[18].

The second question concerns the dynamic effects of any more particular interpretation – its consequences for the dynamic play of public and private relations of various kinds. If a non-literal interpretation of the phrase "cause cancer" would create an environment of insecurity in the system and, with that, reduce the Legislature's incentive to make

[16] *Part of our goal here is to demonstrate the futility of efforts to show that abstract ideals can resolve disagreements about appropriate interpretive methods"* (Sunstein; Vermeule, 2003, p. 885-886).
[17] "Our contention here is not that the Supreme Court, or the courts in general, ignore the institutional dimension, but that consideration of that dimension remains episodic and occasional, and that more general theorizing about interpretation pays too little attention to it" (Sunstein; Vermeule, 2003, p. 887). Our *claim here is not that the Supreme Court, or courts generally, ignore the institutional dimension, but that consideration of that dimension remains episodic and occasional, and that more general theorizing about interpretation pays too little attention to it"* (Sunstein; Vermeule, 2003, p. 887).
[18] Own translation, in the original: *"[...] the treatment of basic questions in constitutional law, such as judicial review, has always suffered from institutional blindness [...]"* (Sunstein; Vermeule, 2003, p. 932-933).

corrections. Therefore, it might be reasonable not to recognize exceptions in cases that carry low-impact risks (Sunstein; Vermeule, 2003, p. 886).

In the end, it is a matter of concluding that: "By drawing attention to both institutional capacities and dynamic effects, we are suggesting the need for a kind of institutional turn in thinking about interpretive issues" (Sunstein; Vermeule, 2003, p. 886).

To this end, it is worth asking: Why do modern theories of legal interpretation neglect the Institutional issues?

A careful reading of what Sunstein and Vermeule say already makes it possible to draw some productive conclusions:

> This is a big question, and we don't offer a full answer here; But we have some speculations. Because of their own role, judges themselves naturally ask a specific question ('How is this text best interpreted?'), and this question naturally diverts attention from the question of institutional capacities. Legal education and legal culture in general invite interpreters to ask the following question: 'If you were the judge, how would you interpret this text?' If the question is posed in this way, the institutional issues disappear. The very form of the question makes them irrelevant[19] (Sunstein; Vermeule, 2003, p. 888).

In addition, it is important to establish that the theory of institutional capacities does not aim to consolidate a particular idea about what type of approach an interpretative methodology should prioritize in order to be more adequate. It is only a matter of suggesting that it is not possible to advance in the theory of Law leaving aside the institutional capacities of the various members of the organizational model and the dynamic effects of competing interpretative constructions. The authors state, in summary, that "the focus on institutional issues radically re-signifies the analysis of legal interpretation – and that it is past time for those interested in interpretation to see what can be done with this resignification"[20] (Sunstein; Vermeule, 2003, p. 890).

Therefore, what is defended from this perspective is to draw attention to the impact that the decisions of the Federal Supreme Court can cause to the integrity of the institutional arrangement when they do not take into account the institutional capacity of the other branches. Depending on the situation to be faced, it is a fact that the Legislative or Executive Branches are in better conditions to make better decisions than the STF. In this sense, in line with what has been discussed throughout the research, it is necessary for the STF to avoid as

[19] Own translation, in the original: *"Why have modern interpretive theories neglected institutional issues? This is a large question, and we do not offer a full answer here; but we do have some speculations. Because of their own role, judges themselves naturally ask a particular question ('How is this text best interpreted?'), and that question naturally diverts attention from the issue of institutional capacities. Legal education, and the legal culture more generally, invite interpreters to ask the following role-assuming question: 'If you were the judge, how would you interpret this text?' If the question is posed in that way, institutional issues drop out. The very form of the question makes them irrelevant"* (Sunstein; Vermeule, 2003, p. 888).

[20] In *these and other cases, our goal is not to settle on any particular view about what interpretation should entail, but to suggest that it is impossible to answer that question without looking at the institutional capacities of various actors and the dynamic effects of competing approaches. We claim, in short, that a focus on institutional issues radically reframes the analysis of legal interpretation – and that it is long past time for those interested in interpretation to see what might be done with that reframing"* (Sunstein; Vermeule, 2003, p. 890).

much as possible morally ambitious innovations – desirable directions – and interventionist ones for politics.

In this sense, it is also worth noting that the purpose of the study is focused on discussing the influence of an institutional perspective, in the construction of an action of the Constitutional Jurisdiction more concerned with the purpose of avoiding institutional crises related, to some extent, to the processes of democratic erosion. Here it is not advocated to expand this discussion in relation to other judicial instances.

It is also worth discussing a proposal by Clève and Lorenzetto (2021) about the Supreme Court sharing its constitutional authority with the other branches.

The aforementioned proposal is formulated in the sense that the decisions rendered by the Judiciary, when exercising its competence to review constitutionality, in the face of a growing relevance of cases involving macropolitics, may achieve greater legitimacy with the implementation of two conditions:

> [...] first, the manifestation of deference to the other Powers in the resolution of conflicts and, second, the unpretentious exercise of the monopoly over the definition of the disputed meanings in the different institutional spheres, and should, when possible, share the authority it holds in constitutional matters (Clève; Lorenzetto, 2021, p. 49).

This can be observed, for example, when the institutional disagreement involves complex issues of greater amplitude, in which a joint effort is required so that constitutional limits are not exceeded. It is for this reason that, as Marinoni (2021, p. 200) states: "[...] because it can develop from shared premises, it has a great chance of allowing the finding of an adequate solution".

Deference is the opposite of activism, and the sharing of constitutional authority can be the opposite of excessive protagonism. By directing the focus to the sharing of constitutional authority and distributing the interpretative role in relation to the constitutional text among the various constitutional bodies, it is possible not only to reduce conflicts between the Branches, but also to emphasize the subjection of all to the Constitution, which, in turn, does not substantiate the exclusive domain of any of them (Clève; Lorenzetto, 2021, p. 70-71).

The Federal Supreme Court is an important actor and a fundamental component so that the gears of the constitutional process continue to function without any hindrance. However, those who consider that the Court should act alone, with absolute control of ownership throughout the constitutional process, may be mistaken (Clève; Lorenzetto, 2021, p. 71).

It is understood that such conditions are important for the Federal Supreme Court to be able to move well within the universe of structural changes in politics and, whenever possible, adapting past positions – after establishing a dialogue with the other Powers or more

precisely with the Power that will be affected by the decision – to improve the dynamism of its decision-making process with the involvement of other political actors in addition to the deliberation of the members of the Court (Clève; Lorenzetto, 2021, p. 49). It is worth remembering that the dialogue between the Powers must always take place from a constitutional language and not through a political language. However, due to its constitutional competence as guardian of the Constitution: "It is inevitable that this or that judicial decision, to a greater or lesser extent, touches on some political dimension" (Clève; Lorenzetto, 2021, p. 49).

In the face of numerous criticisms in which it is claimed that the Federal Supreme Court has usurped functional prerogatives of other branches, one of the solutions would be the use of a different behavior: self-restraint. This, supposedly, would lead to a strengthening of the Court's residual authority: "[...] the virtuous use of the power not to decide, or rather, the power not to decide to provide greater popular discussion and due legislative decision, which is obviously exposed to challenge before the Judiciary" (Marinoni, 2021, p. 33).

Thus, the precaution in not deciding what has not yet been adequately debated, whether in the Legislative Branch or in the Constitutional Court, constituted a good argument to defend the virtuous use of "decide not to decide" (Marinoni, 2021, p. 33).

The Federal Supreme Court, in order to protect the Constitution without disrespecting the values of democracy, is prohibited from getting ahead of the Legislature: "[...] a non-decision by the Court[21], in specific situations, allows a broader and more fruitful discussion to flow within the democratic process" (Marinoni, 2021, p. 189).

The doctrine of passive virtues, defended by Marinoni, is more attentive to the management of the time of the decision, based on the assumption that this is fundamental for the Court to be able to establish a closer dialogue with society and with the political powers in order to build a satisfactory result based on the Constitution (Marinoni, 2021, p. 193).

The power not to decide should be the posture to be frequently followed by the Court, which necessarily stems from the concern with the Court's commitment to democracy (Marinoni, 2021, p. 194). In this circumstance, the Federal Supreme Court does not shirk its duty to decide; however, it provides opportunities for the construction of political decisions carried out in broader institutional spaces (Clève; Lorenzetto, 2021, p. 73).

In this sense, it is necessary to recognize the value of not deciding: "Not deciding should be an option for the best path. When the Court decides not to decide, it obviously uses its power in a virtuous way, so that its function is performed correctly in the broader framework of constitutional democracy" (Marinoni, 2021, p. 549).

The case involving the arrest in flagrante delicto of former federal deputy Daniel

[21] "[...] the Court, in certain situations, must not decide, or rather, that non-decision, as well as decision, constitutes a virtue. She it only changes sign, as it is a passive virtue, determined by prudence" (Marinoni, 2021, p. 190).

Silveira may well demonstrate how the insertion of any level of the institutional dimension in the judicial debate can avoid or better circumvent an institutional crisis between the Branches. It is true that the insertion of an institutional character in the construction of a solution by the Constitutional Court will always take place based on a constitutional language and, therefore, the Federal Constitution will be the starting and ending point for this response, more appropriate from the institutional point of view, of constitutional jurisdiction.

It turned out that "Deputy Daniel Silveira (PSL-RJ) had been arrested in flagrante delicto on the night of February 16, 2021, after the publication of a video in which he criticized the ministers of the Federal Supreme Court (STF) and defended Institutional Act No. 5 (AI-5)" (Agência Câmara Notícias, 2021).

It was found that the arrest order came from the minister of the STF, Alexandre de Moraes. In the decision, Moraes stated that "energetic measures are essential to prevent the perpetuation of the criminal action of a parliamentarian aimed at harming or exposing to danger of injury the independence of the instituted Powers and the Democratic Rule of Law" (Deputy [...], 2021, n.p.).

Subsequently, the minister considered that, by posting and allowing the dissemination of the video on social networks, with a expressive scope, Daniel Silveira would have committed a permanent infraction, and, therefore, possible flagrante delicto:

> 'By posting and allowing the dissemination of said video, which I repeat, remains available on social networks, he is in permanent infraction and consequently in flagrante delicto, which allows the consummation of his arrest in flagrante delicto', says Alexandre in the decision (Deputy [...], 2021, n.p.).

It happens, however, that the crimes committed by the deputy are related, among other manifestations, to express statements calling for the return of Institutional Act No. 5 – one of the most repressive acts of the military dictatorship – to enable the impeachment of STF ministers, including direct references to some ministers, with the aim of promoting an institutional rupture. He also called on the population, through his social networks, to invade the STF.

After the facts, on 04/20/2021, the Plenary of the Federal Supreme Court, by 9 (nine) votes to 2 (two), sentenced federal deputy Daniel Silveira to 08 (eight) years and 09 (nine) months of imprisonment, in an initial closed regime, in addition to a fine of R$ 192,500.00 thousand (one hundred and ninety-two thousand and five hundred reais), monetarily corrected. The dissenting votes were cast by Justices André Mendonça and Nunes Marques – both appointed to the Supreme Court by former President Bolsonaro himself (a political ally of Daniel Silveira). The first, partially followed the leading vote of the rapporteur Minister Alexandre de Moraes, while the second, respectively, decided for the acquittal of all crimes imputed to the deputy.

It should be noted that, in the Daniel Silveira case, shortly after the aforementioned conviction, former President Jair Bolsonaro announced, on the afternoon of 04/21/2022, in *a live* broadcast on his social networks, the pardon of the sentence of the government deputy, who was sentenced the day before to 08 (eight) years and 09 (nine) months in prison by the Federal Supreme Court. Soon after the announcement, the decree was published in an extra edition of the Official Gazette of the Union[22]23. In the case under analysis, as an example of a decision more appropriate to the context and to the recognition of the Legislative Branch, as having greater institutional capacity to resolve the situation, would be the one in which the STF communicated, institutionally, to the Legislature the serious facts committed by the federal deputy. Thus, it would give the Chamber of Deputies the opportunity to deliberate on a possible revocation of the mandate, for breach of parliamentary decorum or another solution that the parliamentary house deems more appropriate.

In this way, the investigations would continue, and a future criminal action against the deputy would also follow its procedural course normally. However, considering the reasons that led Justice Alexandre de Moraes to decree the arrest of Daniel Silveira in flagrante delicto – the conclusion that because the video still remains available and accessible to users of the world wide web would be a suitable reason to constitute a permanent crime, and, consequently, the flagrante delicto – had negative repercussions on public opinion and on the relationship with the Legislative Branch.

Therefore, the focus of this study is to demonstrate that this decision caused a negative impact on the relationship with the Legislative Branch and that, following a decision-making logic more concerned with the institutional aspect, it could have been solved in another way. The STF could have recognized that the Legislature has the institutional capacity to solve this problem internally and, in this way, the Court would decide "not to decide" at that time so that the issue could be better discussed.

It is considered, based on the outcome given to the case of former deputy Daniel Silveira, that the collapse of Constitutional Courts in democratic regimes is due to the loss of their authority (Glezer, 2020, p. 40). Thus, the grace granted to former deputy Daniel Silveira, in addition to demonstrating the disregard that the former president of the Republic has for the authority of the STF, contributes to the demoralization of the Court in this troubled political scenario. In practice, this serves to spread a general belief that the STF is useless.

In some situations, the Constitutional Court goes beyond a simple counterbalance, generating discussions about what its constitutional limits are, since it is assumed that the use of certain contemporary interpretative methodologies is not sufficient to maintain the balance

[22] See: Borges and Sant'ana (2022).

fostered by the separation of powers. What would be the effective counterweight of the representative political system? The institution of a system of checks and balances in which each Power can act, in order to prevent the abuse of the others, is something to be conquered by the Brazilian constitutional system.

Drawing attention to a mode of action of the STF that is more concerned with the consequences that may have negative repercussions on the functioning of the institutional arrangement, in situations of greater institutional stress, aggravated by a context of democratic erosion, reveals that "[...] the Court, in order to decide properly, often does not need to use the full extent of its power" (Marinoni, 2021, p. 184).

Finally, another proposal to rethink the way the STF operates should be analyzed. It is the one developed by Claudio Pereira de Souza Neto (2020) and called by him the "countercyclical function of Constitutional Jurisdiction".

The author understands that the system of checks and balances acts to avoid arbitrariness. Thus, the instruments that make up this system must remain in a state of alert when an authoritarian ruler conquers power. In this circumstance, the system of checks and balances must perform a "countercyclical function." Democratic governments should be treated with greater deference, their actions are presumed to be in accordance with the legal system, and should, in general, be maintained. On the other hand, authoritarian governments should be treated with discredit. The right posture of the institutions capable of protecting democracy is one of robustness in the repression of authoritarian abuses: they must act *in dubio* pro-democracy. The intransigent protection of fundamental rights and guarantees, of the resources of political participation made available by the democratic system, of the rights of minorities, of the broad and plural political debate is postulated. In the face of a government that incessantly seeks to intimidate the fundamental pillars of constitutional democracy, any direct action that may prevent them must immediately activate the instruments of control of authoritarianism and the preservation of democracy (Souza Neto, 2020, p. 255).

In summary, the author defends this countercyclical function of constitutional jurisdiction to contain authoritarian governments, borrowing a concept developed by economists:

> Keynesian economists often recommend that economic cycles be balanced through the adoption of countercyclical policies: recessions are mitigated by public investment; In the period of accelerated development, savings are made. The constitutional courts must assume the same role in the face of political cycles – one can conceive, in this sense, a countercyclical constitutional jurisdiction. In the face of governments that do not reveal a commitment to democratic institutions, the countercyclical function of constitutional jurisdiction implies the 'situational reduction of deference', which results in the adoption of stricter parameters for the control of state acts. The Courts should not act as vanguards of social transformation processes, notwithstanding, in specific issues, they can issue innovative decisions. Rather, it is up to them to mitigate the extremism of political cycles, with the purpose of protecting democracy and protecting

> minorities. The countercyclical function provides balance to the system, preserving, above all, what cannot be made available to eventual majorities: the system of fundamental rights and the procedures for the election of rulers (Souza Neto, 2020, p. 291-292).

This article argues that both the sharing of constitutional authority and the passive virtues of deciding not to decide are consequences, to some extent, of the institutionalization of the theory of capacities in the decision-making process of the Federal Supreme Court. The Court, when it resists certain more orthodox constitutional interpretations that may, to some extent, compromise the proper functioning of the institutional arrangement, promotes greater democratic legitimacy of its action. In scenarios of democratic crises or erosion processes caused by the rise of authoritarian populism, it is necessary for the Constitutional Court to assume the role of countercyclical constitutional jurisdiction.

Thus, from the outset, it is necessary to recognize that the reinforcement of the institutional issue is an important tool in the defense of democracy[23]. In fact, it is essential to ensure and strengthen institutionality as well, so that "successive reelections, the perpetuation of parties in government, or the election of populist leaders do not only lead to the game of ascension and permanence in power, but rather to the institutionalization of a true and broad democracy" (Schwarcz, 2019, p. 209).

Thus, the interpretation of the Law made by the judge, when it incorporates a terminology that fits into a theoretical crossroads more linked to fusion or more conniving with the inability to separate what the Law is and what it should be, will only have the function of polluting or covering up the interpreter's access to the facts.

For this reason, Hart (2010, p. 95) states that "we live in the midst of uncertainties from which we must choose, and that the existing Law only imposes limits on our choice and not the choice itself". Therefore, if the Law is not capable of limiting its conditions of possibility in the world, its theorists do not have the capacity to ignore that there is a possibility of improvement in the dialogue between the Powers – to reduce the occurrence of institutional crises – from the insertion of the institutional question both in the interpretative aspect and for the definition that the Federal Supreme Court has the duty to take into account the practical consequences of its decisions and the harmful effects of these sentences on the maintenance of balance in the organizational model (institutional arrangement). As Gonçalves (2020, p. 271) states, "the decision-making capacity of the Judiciary cannot be analyzed in an institutional vacuum".

This implies greater prudence on the part of the Supreme Court in decisions that

[23] In order to articulate a political community diligent in the defense of democracy, the basic premise is: "[...] to make commitments to the improvement of institutions; contesting administrative acts that threaten our democracy and threaten it; and demand constitutional guarantees" (Schwarcz, 2019, p. 217).

move on the threshold between the excessive advance in its interpretative role as guardian of the Constitution and the limits imposed by the Constitution, as well as the institutionalization in decision-making practice of a greater attachment to self-restraint, especially in moments of institutional crisis between the Branches: "[...] the Court needs to modulate activism and deference in a prudent way" (Mendes, 2011, p. 287). Moreover, it is necessary to rethink the role of the Federal Supreme Court in its counter-majoritarian action, since the control, in some cases, does not comply with solid constitutional commitments and confronts the normative-constitutional model of the separation of Powers, with the objective of moralizing the political performance of the other Powers. The fact is that, as Arguelhes (2023, p. 16) states, the STF is an institution "that needs to protect the Constitution that the constituents created, with its problems and contradictions, and not the Constitution that I would like the constituents to have created".

4 Final considerations

Knowing how much and when to decide, finding a middle space that avoids excess and shyness are challenges that the Court will have to solve on a case-by-case basis (Mendes, 2011, p. 305). However, the greatest challenge is to prevent the STF from judging against the express constitutional text, because "it ceases to be the guardian of the Constitution and its jurisprudence becomes the Constitution itself" (Abboud; Oliveira, 2014, p. 38). And for this, not underestimating the importance of the institutional aspect for democracy is the first step.

The crisis of democracy or its process of erosion cannot leave out the actors that make up the institutional arrangement, because this entire process of degradation in the democratic environment has, at least, two elements that integrate the Brazilian particularity: 1) the role of the Federal Supreme Court in the institutional arrangement and its central role in the scenario of democratic crisis as the last trench in containing the advance of authoritarianism and; 2) inaptitude or omission of other institutions in this process of democratic erosion as a cause of this protagonism, that is, the non-performance or incapacity of other institutions generates the need for an oversizing of the performance of the Federal Supreme Court.

In view of the above, it is concluded that the institutional issue must be guaranteed and reinforced, both in the sense of being a preponderant factor in the defense and maintenance of the Democratic Rule of Law, as well as in the thesis defended from sufficiently strong reasons of fact and law. This thesis argues that the Judiciary, more particularly the Federal Supreme Court, must cede interpretative space in its decision-making constructions to include the institutional capacities of the other Branches, either to share their constitutional authority or to virtuously not decide in certain more complex situations, as well as when it acts

in its role as a countercyclical constitutional jurisdiction.

To some extent, accepting that the institutional aspect is important for the construction of judicial responses in times of crisis or to avoid crisis scenarios is not only to strengthen the institutional arrangement, but also to promote a dialogue without the need to "sit at the table"[24], that is, a dialogue in which politics should not prevail over the Constitution. Here, therefore, it is possible to see a victory of the normative over the descriptive.

Finally, and considering the elements put up for discussion, it is possible to affirm that the threats to the functioning of democratic institutions can be better circumvented when the institutional aspect is a relevant factor to guide the performance of institutions in contexts of democratic crisis.

References

ABBOUD, Georges; OLIVEIRA, Rafael Tomaz de. The Federal Supreme Court and the new separation of powers: between the interpretation of the Constitution and the modifications in constitutional engineering. **Revista de Processo**, [*s. l.*], v. 39, n. 233, p. 13-39, jul. 2014.

ARGUELHES, Diego Werneck. **The supreme**: between law and politics. Rio de Janeiro: História Real, 2023.

BORGES, Beatriz; SANT'ANA, Jéssica. Bolsonaro announces pardon of sentence to Daniel Silveira, sentenced to 8 years and 9 months in prison by the STF. **G1**, Brasilia, 21 Apr. 2022. Available at: https://g1.globo.com/politica/ noticia/2022/04/21/bolsonaro-anuncia-indulto-para-deputado-daniel-silveira.ghtml. Accessed on: May 11, 2022.

CASARA, Rubens R. R. **Post-democratic state**: neo-obscurantism and management of the undesirables. 4. ed. Rio de Janeiro: Civilização Brasileira, 2018.

CLÈVE, Clèmerson Merlin; LORENZETTO, Bruno Meneses. **Supreme Court, strategic action and shared constitutional authority**. Belo Horizonte: Forum, 2021.

DEPUTY Daniel Silveira is arrested for preaching dictatorship and attacking the Supreme Court. **Legal Consultant**, [*s. l.*], 17 Feb. 2021. Available at: https://www.conjur.com.br/2021-fev-17/deputado-preso-pregar-ditadura-atacar-supremo. Accessed on: 25 out. 2022.

ELSTER, Jon. **Ulysses** freed: studies on rationality, pre-commitment and restrictions. São Paulo: UNESP, 2009.

FERRAJOLI, Luigi. **Garantismo**: una discusión sobre derecho y democracia Traducción de Andrea Greppi. Madrid: Editorial Trotta, S.A., 2006.

GLEZER, Rubens. **Constitutional catimba**: the STF, from the anti-game to the constitutional crisis. London: Arraes Editores, 2020.

GOMES, Beatriz. On Press Freedom Day, Bolsonaro suggests closing Brazilian media. **UOL,** São Paulo, 07 Jun. 2022. Available at: https://noticias.uol.com.br/politica/ultimas-noticias/2022/06/07/jair-bolsonaro-imprensa.htm. Accessed on: 06 jul. 2022.

[24] At this point, the use of the term "institutional interaction" in the title is justified, with the aim of differentiating the proposals presented in the article of the Theory of Constitutional Dialogues.

GONÇALVES, Marcelo Barbi. **General theory of jurisdiction**. Salvador: Editora JusPodivm, 2020.
GULLINO, Daniel. 'A thief running for president and a bum as vice-president', says Bolsonaro about 2022. **O Globo**, Brasília, 21 May 2021. Politics. Available at: https://oglobo.globo.com/politica/um-ladrao-candidato- president-a-bum-bum-as-vice-says-bolsonaro-about-2022-1-25027936. Accessed on: 07 jul. 2022.

HART, Herbert Lionel Adolphus. **Essays on theory of law and philosophy**. Rio de Janeiro: Elsevier, 2010.

HOMER. **Odyssey**. Translated by Manoel Odorico Mendes. 3. ed. [*s. l.*]: Ebooks Brasil, 2009. Available at: http://www.ebooksbrasil.org/adobeebook/odisseiap.pdf. Accessed on: 04 out. 2021.

LEVITSKY, Steven; ZIBLATT, Daniel. **How democracies die**. Rio de Janeiro: Jorge Zahar, 2018.

MARINONI, Luiz Guilherme. **Constitutional process and democracy**. São Paulo: Thomson Reuters Brazil, 2021.

MEGALE, Bela. Members of the government admit that Bolsonaro may act to stop elections at risk of imminent defeat. **O Globo**, [*s. l.*], 17 Jun. 2022. Available at: https://blogs.oglobo.globo.com/bela-megale/post/ members-government-admit-that-bolsonaro-can-act-to-stop-elections-at-risk-of-imminent-defeat. html. Accessed on: 06 jul. 2022.

MENDES, Conrado Hübner. **Fundamental rights, separation of powers and deliberation**. Healthy
Paulo: Saraiva, 2011.

MEZZAROBA, Orides; MONTEIRO, Cláudia S. **Manual de metodologia da pesquisa no direito**. Rio de January: Editora Saraiva, 2023.

MIGUEL, Luis Felipe. **The collapse of democracy in Brazil**: from the constitution to the 2016 coup. São Paulo: Rosa Luxemburg Foundation: Expressão Popular, 2019.

MONTESQUIEU, B. C. S. **The spirit of laws**. São Paulo: Martins Fontes, 1996.

RIBEIRO, Janaína. "We are going to shoot the petralhada," says Bolsonaro during a campaign in Acre. **Exame**, [*s. l.*], 03 Sep. 2018. Available at: https://exame.com/brasil/vamos-fuzilar-a-petralhada-diz-bolsonaro-em-campanha-no- acre/. Accessed on: 06 jul. 2022.

RUNCIMAN, David. **How democracy comes to an end**. São Paulo: Todavia, 2018.

SCHWARCZ, Lilia Moritz. **On Brazilian authoritarianism**. São Paulo: Companhia das Letras, 2019.

SIQUEIRA, Carol. Bill increases the quorum of the STF's decision on constitutionality. **Chamber of Deputies**, Brasilia, 28 nov. 2019. Politics and public administration. Available at: https://www.camara.leg.br/ noticias/617384-projeto-aumenta-quorum-de-decisao-do-stf-sobre-constitucionalidade/. Accessed on: 22 jul. 2021.

SOUZA NETO, Cláudio Pereira de. **Democracy in crisis in Brazil**: constitutional values,

political antagonism and institutional dynamics. São Paulo: Editora Contracorrente, 2020.

SUNSTEIN, Cass; VERMEULE, Adrian. Interpretation and Institutions. **Michigan Law Review,** [*s. l.*], v. 101, n. 4, p. 885-951, 2003. Available at: https://repository.law.umich.edu/mlr/vol101/iss4/2/. Accessed on: 22 jul. 2021.

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