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Judicial supremacy and institutional dialogues in the brazilian constitutional order

Jadson Correia de Oliveira[1]
Raíssa Fernanda Cardoso Toledo[2]
Natanael Lima Santos[3]

Abstract

The purpose of this article is to present, criticize and synthesize the nuances of judicial supremacy theories and institutional dialogues regarding the interpretation of national constitutions, as well as to problematize its framework and foundations in the Brazilian constitutional order, especially in the Constitution of 1988, which celebrates its 30th (thirtieth) anniversary on October 5th (fifth) this year. Furthermore, this article sought to answer the following inquiry: Which model represents the greatest guarantee and the materialization of the most sovereign yearnings of Brazilian citizenship, expressed in the Constitution of 1988? The chosen methodology was the detailed bibliographic research and exegetical and dialectical analysis of several constitutional, legal and jurisprudential provisions, however, all related to the main topic, addressing the themes, sometimes at the most abstract level and in the international doctrine, sometimes applying and thinking about the concepts exposed to the Brazilian reality. In this endeavor, the objective is to demonstrate how the judicial supremacy system in the constitutional hermeneutics of the country has been inadvertently in force without any substantial criticism and how a dialogical system among the different

[1]Pós-Doutor em Democracia e Direitos Humanos pelo Ius Gentium Conimbrigae - IGC/CDH, da Universidade de Coimbra. Doutor em Direito pela Pontifícia Universidade Católica de São Paulo - PUC/SP. Mestre em Direito pela Universidade Católica de Pernambuco - UNICAP. Especialista em Direito Público pela Escola Superior da Magistratura de Pernambuco - ESMAPE. Professor do Centro Universitário do Rio São Francisco - UniRios e da Universidade Católica do Salvador - UCSal, graduação, especialização e mestrado. Advogado. E-mail: jadson_correia@hotmail.com.
[2]Especialista em Direito Civil pela Universidade Anhanguera. Bacharela em Direito pelo Centro Universitário do Rio São Francisco - UniRios. Professora do Centro Universitário do Rio São Francisco - UniRios. E-mail: raissafcardoso@hotmail.com.
[3]Bacharel em Direito pela Fasete/UniRios de Paulo Afonso/BA. Advogado. E-mail: natanaellima_santos@outlook.com.

institutions would represent a greater and better respect to democracy and to the popular decisions and consensus.

Keywords: Judicial supremacy. Institutional dialogues. Interpretation. Constitution.

Supremacia judicial e diálogos institucionais na ordem constitucional brasileira

***Resumo**: O presente artigo tem por escopo apresentar, criticar e sintetizar as nuances das teorias da supremacia judicial e dos diálogos institucionais quanto a interpretação das constituições nacionais, bem como problematizar seu arcabouço e fundamentos na ordem constitucional brasileira, especialmente, na Constituição de 1988, que completa 30 (trinta) anos no próximo dia 05 (cinco) de outubro. Buscou-se responder a seguinte indagação: qual modelo representa maior garantia e concretização dos anseios mais soberanos da cidadania brasileira expressos na Constituição de 1988? A metodologia eleita foi a de pesquisa bibliográfica refinada e análise exegética e dialética de dispositivos constitucionais, legais e jurisprudenciais diversos, porém, relacionados à temática, tratando-se dos temas ora a nível mais abstrato e na doutrina internacional, ora aplicando e pensando os conceitos expostos à realidade brasileira. Nesta empreitada, objetiva-se demonstrar como o sistema da supremacia judicial na hermenêutica constitucional pátria vigorou inadvertidamente sem quaisquer críticas substanciais e como um sistema dialógico entre as diferentes instituições representaria maior e melhor respeito à democracia e às decisões e consensos populares.*

***Palavras-chave**: Supremacia judicial. Diálogos institucionais. Interpretação. Constituição.*

Supremacia judicial y diálogos institucionales en la orden constitucional brasileña

***Resúmen**: El propósito de este artículo es presentar, criticar y sintetizar los matices de las teorías de la supremacía judicial y los diálogos institucionales con respecto a la interpretación de las constituciones nacionales, así como problematizar su marco y fundamentos en el orden constitucional brasileño, especialmente en la Constitución de 1988, que celebra su trigésimo (trigésimo) aniversario el 5 de octubre (quinto) este año. Además, este artículo buscaba responder a la siguiente pregunta: ¿Qué modelo representa la mayor garantía y la materialización de los anhelos más soberanos de la ciudadanía brasileña, expresada en la Constitución de 1988? La metodología elegida fue la investigación bibliográfica detallada y el análisis exegético y dialéctico de varias disposiciones constitucionales, legales y jurisprudenciales, sin embargo, todas relacionadas con el tema principal, abordando los temas, a veces en el nivel más abstracto y en la doctrina internacional, a veces aplicando y pensando en los conceptos expuestos a la realidad brasileña. En este esfuerzo, el objetivo es demostrar cómo el sistema de supremacía judicial en la hermenéutica constitucional del país ha estado en vigencia*

inadvertidamente sin ninguna crítica sustancial y cómo un sistema de diálogo entre las diferentes instituciones representaría un mayor y mejor respeto a la democracia y a Las decisiones populares y el consenso.

Palabras clave*: Supremacia judicial. Diálogos institucionales. Interpretación. Constitución.*

1 INTRODUCTION

The premise of the tripartition of powers in a Democratic State ruled by Law is linked to the idea that any and all state-owned power must be controlled and limited, so that it does not turn into oppression over the population and the citizens. As a general rule, the competence and prerogatives of the republican institutions are disciplined in a national or federal constitution that assigns typical and atypical functions to the constituted powers, so that they can perform harmoniously and independently of each other, either cooperating in favor of order and social progress, or mutually preventing themselves of any of them - or the incumbent holders - from superimposing one another or the popular sovereignty.

In this context, far from being a purely technical matter, to deliberate on who should interpret the constitution, the major and fundamental law of a State and where the very substance of power and its limitations are defined, is, as the Brazilian jurist and politician Francisco Campos used to say (1983, p.172): "[...] a political supremacy, because the function of interpreting, which results in the function of formulating the constitution, is the highest or the most eminent of political functions." Thus, following the quote above is the argument that all republican and democratic institutions, and not just the Judicial Branch, should be, on behalf of the people, interpreting the federal constitution, under penalty of this branch to superimpose the others, dictating, without any type of control or limitation, their functions, revoking their acts and/or invalidating their accomplishments.

This article will find its purpose by explaining the reason why, up to the present moment, the system of supremacy of the judicial interpretation prevails over the constitutional provisions, with a special focus on Brazil; by demonstrating how the system that promotes a constitutional dialogue between the different institutions is more guarantist[4] to the population itself; and by revealing that such system finds shelter in the Brazilian constitutional order when the constitutional text is more correctly interpreted.

Although it is not what can be called a thematic novelty, it was noticed, during the research developed for this work, how the approach of the subject in the Brazilian constitutional order has been systematically ignored by the more traditional national doctrine and by the jurisprudence of the Brazilian Federal Supreme Court; for this reason, it was waived both of the best international doctrine, such as the works of Larry Kramer and Cristine Bateup, and of the new Brazilian doctrine that already sketches vigorous and innovative theses, well represented in the productions of Conrado Hübner Mendes and Juliano Zaiden Benvindo, and also recovering stillborn proposals, such as João Mangabeira's proposal for the 1934 Constitution.

2 REGARDING THE JUDICIAL SUPREMACY IN THE CONSTITUTIONAL INTERPRETATION AS A PARADIGMATIC RULE

In the last few years there has been a growing debate in the constitutional doctrine field about who should interpret the constitutional rules of/in the State. In fact, ever since the modern constitutionalism, inaugurated by the Constitutional Letters of the United States (1787) and France (1791), outcomes of liberal revolutions in both countries, and since the contemporary constitutionalism of the postwar period, the Constitutions have assumed a structural role never seen before in the history of the State, when they came to serve as foundation, limits and mark both for politics and for the legal system.

In a Rule of Law that intends to be democratic, it is more than logical, it is indeed imperative, that all public bodies provide obedience and fidelity to the constitutional rules in their respective functions. Nevertheless, it seems to be in common agreement in virtually all contemporary constitutional States that the supreme task of interpreting the country's Constitution belongs to the Judiciary Branch, as a rule, through its Supreme Court (American model) or a Constitutional Court (European-Austrian model), which in the latter case, although it does not always properly belong to a judicial framework, methodologically and procedurally, it is very much the same.

Hence, before going to the analysis of the legal-constitutional basis pointed out by the Brazilian Supreme Court as a catalyst for the supremacy of its interpretation in the Brazilian constitutional order, it is imperative to appreciate the rhetorical arguments that are usually argued in defense of the jurisdictional constitutionality

[4] According to Ferrajoli, the garantist State is understood as the one capable of respecting individual and/or social guarantees conceived in its Constitution or in its own legal function, even when exercising punitive claim of the State for an unlawful act or legal contravention that justifies it. Therefore, it refers to a state-owned characteristic of self-restraint insofar as the State undertakes to limit its power over individuals and/or society by safeguarding entrenched guarantees.

control because it is common to virtually all legal systems that adopt this kind of control, as well as the objections that are filed to them.

2.1 Main Defense Arguments of the Superiority of Judicial Interpretation and Their Respective Objections

It is understood that there are three main arguments in favor of judicial supremacy when interpreting constitutional rules:[5]

> 1 - The judicial interpretation, given its counter-majoritarian character, is more guarantist, therefore, more democratic;
> 2 - The judicial interpretation is more deliberative and technical, therefore, safer;
> 3 - The judicial interpretation is apolitical and/or depoliticized, and therefore, less biased (MENDES, 2008).

The text now turns to a brief detention for the abstraction of each one of these premises.

2.1.1 The judicial interpretation, given its counter-majoritarian character, is more guarantist, therefore, more democratic

The "counter-majoritarian difficulty" was the expression used by Alexander Bickel in his work "*The Least Dangerous Branch: The Supreme Court at the Bar of Politics"* to describe the dilemma of the existence of a body or public agent that is not elected by the people – in this case, judges and courts – with the power for departing or confirming laws and measures drawn up or executed by the representatives chosen by the will and popular vote – that is to say, by the Parliament and the Administration (BARROSO, 2005). In justification of the counter-majoritarian nature of judicial decisions:

> Over the last two centuries, two major lines of justification for this role of the Supreme Courts/Constitutional Courts have been doctrinally imposed. The first one, more traditional, is rooted in popular sovereignty and the separation of Branches: the Constitution, the most significant expression of the people's will, must prevail over the laws, manifestations of the parliamentary majorities. Thus, the Judiciary Branch is accountable, in the performance of its function, of applying the law, to assert such supremacy, denying validity to the unconstitutional law. The second one, which deals with the more complex reality of the new legal interpretation, seeks to legitimize the performance of constitutionality control in another ground: the preservation of the essential conditions for the functioning of the democratic State. The constitutional court is responsible for ensuring

[5] For a longer list of arguments and their respective objections, refer to: MENDES, Conrado Hübner. **Direitos Fundamentais, Separação de Poderes e Deliberação.** Doctoral Thesis – at "Departamento de Ciência Política", Universidade de São Paulo (USP), São Paulo, 2008, pp. 55-96.

> certain substantive values and the compliance to appropriate procedures regarding participation and deliberation. (BARROSO, 2005, p.47)

The premise here is that a judicial court would guarantee the rights of the minorities[6] in face of the abuses and tyranny of the majorities, furthermore, the judicial supremacy would be a precondition for democracy itself, which is not restricted to the choices of the majority[7], as it ensures a process of democratic willingness where everyone may equally participate. In other terms, the Judiciary Branch, precisely because it is not elected by a majority, has the necessary impartiality to safeguard the rights of minorities before possible abeyances of those same rights endeavoured by the majorities, and as a result, it guarantees the protection of interests, as well as the participation of minorities in a democracy; hence its "counter-majoritarian" and at the same time "democratic" character.

The difficulty with such a doctrine would be that, under the pretext of preventing itself against a "tyranny of majorities", the Judiciary Branch, occasionally and through an unbridled activism, would dissolve what is the most basic and elementary principle of a democracy, namely, the "rule of majority", which would be much more than mitigated, it would turn out to be almost totally relativized to the personal understanding of the bench member, resulting in a true subversion of the democratic order.

Also, it is not for certain, or at least not an inexorable consequence, that a democracy would necessarily become oppression of minority groups, since equality and the equal participation of all can – and must – be a concern of the majority, as a proper assumption for the characterization of a truly democratic regime, as Robert Dahl (2001) explains in his classic work "On Democracy".[8]

Finally, and on the contrary to what is being said about the Judiciary Branch as guardian and guarantor of the prerogatives of minority groups and fundamental rights, episodes of court decisions that rule for the restriction and/or invalidation of

[6] The term "minorities" here should not be understood only as numerical expression, that is, groups of individuals quantitatively less expressive, but also "minorities" in the sense of vulnerability, groups of individuals that, although numerically expressive, do not have any representativeness and/or are more vulnerable in their rights and prerogatives. Within this framework, "minorities" – at least in most Western societies – are framed as women, Afro-descendants, employed workers, etc.

[7] Ronald Dworkin (1931-2013), like Jean Jacques Rousseau (1712-1228), conceived an idea of community democracy rather than statistics. The latter, although it is the most popular conception, would not be justified to the extent that, in fact, there would be no real equality between citizens – as it is the objective in a democratic regime – but a forced submission by majorities' numbers over minorities. The community democracy, on the other hand, would better reflect the democratic ideal in the sense that everyone, despite belonging to minority groups, would have the same right and participation in the democratic deliberation, voluntarily submitting themselves to the majorities, insofar as these ones in respect for the general will – which in accordance with Rousseau, cannot be confused with the will of the majority – would safeguard fundamental rights and even some essential interests of those. To go further into the author's argument, see: DWORKIN, Ronald. **Is democracy possible here?** Principles for a new political debate. New Jersey: Princeton University Press, 2006.

[8] Dahl sees the "norm of inclusion" as one of the essential assumptions for the characterization of a true democratic regime. In this regard, see pp. 91-92 and chapter 3 of the referred author's work.

rights recognized by Parliament are not rare, as it is known, for instance, in the historical records of decisions of the US Supreme Court.[9]

2.1.2 The judicial interpretation is more deliberative and technical, therefore, safer

Perhaps the strongest of the arguments in favor of constitutionality control by the Judiciary Branch, the idea that the interpretation by judges and courts is more deliberative, it means, the decision will be given after an constitutional analisis and, at the courts, after a majority opinion based, given the qualification of its interpreters and prescribed procedures for such a more technical deliberation, is a *sine qua non* condition of its legitimation, in the words of the Federal Supreme Court Minister Gilmar Ferreira Mendes (2011: p. 11): "One cannot forget that the Constitutional Jurisdiction legitimizes itself democratically by the reflection and argumentation produced according to the proper rationality of the rules and procedures that lead the judgments".

The core premise of this second argument is that judges and courts, because of having an eminently technical and deliberative approach, would be the safest and most capable guardians of the constitution. Here the ideal of objective legal reason is preponderant.

A criticism that is commonly woven about this justification of the final word by the courts is that such an understanding, by alienating the constitution interpretation from the other powers and particularly from the people, would conceal a certain "judicial paternalism", which distrusts the suitability – and even the capacity - of other instances to equally perform the constitutional interpretation, as though such monopoly belonged to an "elitist class of judges and constitutional courts", so, some have also coined such a proposal "juristocracy"[10], that is, a government of "philosophical judges", which would evidently be incompatible with a regime of democratic government, resembling the proposal of a Platonic republic.[11]

Moreover, it would not be imperious to say that the method used by the courts in the interpretation of the constitutional rule would be more rational than any other only because it is done by the use of arguments from "law professionals", which, by the way, are not always clearly and convincingly demonstrated (BENVINDO, 2014).

2.1.3 The judicial interpretation is apolitical and/or depoliticized, and therefore less biased

Closely related to the latter – and also to the former – this argument advocates the thesis that judges and courts, because they are apart from the politics of

[9] Among the most emblematic ones, *Lochner v. New York* (1905) and *United States v. Morrison* (2000), when the Supreme Court of the country, in theory, would have decided against rights and guarantees granted by the state and federal Parliament to the class of workers and women protection, respectively.

[10] Legal scholars of national renown have used the terminology, such as Luiz Lênio Streck (UNISINOS) e Glauco Salomão Leite (UNICAP), among books, articles and other publications.

[11] According to Plato (428 BC-348 BC), the State should be governed by a noocracy, that is, government exercised by sages and more enlightened people (or philosophers). To know more, see the author's own work: PLATÃO. **A República.** Tradução: Enrico Corvisieri. São Paulo: Editora Nova Cultural Ltda., 1997.

the majorities, they could decide with more impartiality and independence, and thus, in a less biased way.

However, use caution with the concept of apolitical and/or depoliticized decisions. This is not to say that judicial decisions are not projected into a political dimension, quite the contrary. The exercise of the jurisdictional function is also a political function as it is understood as being "the activity which bodies established by the Constitution exercise within the scope of their competence, with the aim of preserving political society and promoting the common good" (PAIXÃO, 2007: p. 51). Otherwise stated, the Judiciary Branch does have a political function insofar as it functionally performs its constitutional competences, that is, the pacification of the social conflict in an impartial and personally non-biased form. What is meant to say then is that the judge or court would not be bound to an electorate that demanded a direct correspondence between their desires and the decisions and positions of those.[12]

On the other hand, while not participating in the so-called "party politics" or "electoral politics", individuals and/or bodies that are Judiciary Branch members can – as in fact it has happened – assume several political positions, as more conservative or more liberal, more activists or more self-centered, depending on the historical moment and the circumstances of the real factors of power[13], which puts at stake their almost always presumed neutrality.

2.2 Supreme Court Case: Interpretation of article 102, *head provision* of 1988 Brazilian Constitution

The Brazilian Federal Supreme Court subsidizes its thesis that, because it is the constitutional court, it would have the final word on the interpretation of the rules and constitutional principles, in article 102 of the Constitution of 1988, which reads as follows: "Art. 102, head provision. ccccccccccccccccccccccccccccccccccccccccccc [...]".

Interpreting the aforementioned provision, the Federal Supreme Court, in its publication "The Constitution and the Supreme Court", which consists of a commentary on constitutional provisions through the jurisprudence and the precedents of the Court

[12] This is why the prohibitions in the various legal systems on the participation of judges and other bench members (judges, supreme-court justices, etc.) in party politics. In the Brazilian legal system, the matter is constitutionally disciplined: Federal Constitution. article 95, paragraph one, item III of the Federal Constitution/88.

[13] The concept of "real facts of power" appears in the work of Ferdinand Lassale (1825-1864) to represent the true socio-political conjuncture of a society which the constitution must express faithfully, otherwise it will be a mere written document without any real effectiveness; this is called "sociological concept of constitution". Although this work is better aligned with the constitutional concept of Konrad Hesse (1919-2005), for whom the constitution has a concrete character of being an agent of the change of reality by the transition from "being" (current state of things) to "ideal being" (ideal state of affairs), Lassale's expression is used here only to mean that the real state of affairs does not always correspond to its ideal. To know more, refer to the works of the two authors, respectively: LASSALLE, Ferdinand. Tradução: Walter Stönner. **O que é uma Constituição**. São Paulo: Edições e Publicações Brasil, 1933 e HESSE, Konrad. **A Força Normativa da Constituição**. Tradução: Gilmar Ferreira Mendes. Porto Alegre: Sérgio Antônio Fabris Editor, 2009.

itself, advocates the thesis of the jurisdictional monopoly of the last word about the Constitution. In these terms:

> THE NORMATIVE STRENGTH OF THE FEDERAL CONSTITUTION AND THE FINAL WORD MONOPOLY BY THE FEDERAL SUPREME COURT IN THE ISSUE OF CONSTITUTIONAL INTERPRETATION. The exercise of constitutional jurisdiction – which aims at preserving the supremacy of the Constitution – highlights the essentially political dimension in which the institutional activity of the Supreme Court is projected, considering that in the process of constitutional inquiry, it is based on the great prerogative of deciding, in the last analysis, about the very substance of power. Within the power of interpreting the Constitution, the extraordinary prerogative of (re) formulating it is set. Therefore, the judicial interpretation is comprised among the informal processes of constitutional mutation, meaning that "The Constitution is in permanent elaboration in the courts responsible for enforcing it". Doctrine. Precedents. The constitutional interpretation derived from the decisions handed down by the Federal Supreme Court – which received the eminent function of "safeguarding the Constitution" (Federal Constitution, <article>. <102>, *head provision*) – assumes a essential role in the institutional organization of the Brazilian State, justifying the recognition that the current political-juridical model in our country confers on the Supreme Court the unique prerogative of having the monopoly of the final word on the subject of interpretation of the rules inscribed in the Constitution text. [ADI 3.345, rel. min. Celso de Mello, j. 25-8-2005, P, *DJE* de 20-8-2010.] = AI 733.387, rel. min. Celso de Mello, j. 16-12-2008, 2ª T, *DJE* de 1º-2-2013 Vide HC 91.361, rel. min. Celso de Mello, j. 23-9-2008, 2ª T, *DJE* de 6-2-2009 Vide RE 227.001 ED, rel. min. Gilmar Mendes, j. 18-9-2007, 2ª T, *DJ* de 5-10-2007" (FEDERAL SUPREME COURT, 2017: DOC. 14 OF 25).[14]

By the abovementioned syllabus, from the underlined text, it is possible to conclude that the Brazilian Supreme Court assigns to themselves:

a) Projection of its institutional activity in the political dimension;
b) Power to reformulate the meaning of constitutional rules through interpretation of the texts;
c) Exclusive function - or at least more eminent - of safeguarding the Federal Constitution of 1988; and
d) Prerogative to have the monopoly of the final word on constitutional interpretation.

There does not seem to be any problem or even any restriction on the projection of the Court's activity in the political dimension. As already explained, "political function" must be understood as a function exercised by a person or body in obedience and within the limits of the competence attributed to them by the constitution, and,

[14] The brazilian doctrine habeas corpus and judicial review (concrete constitutional control) teachs us that the decisions made at that kind of process are not bidding. So, they are not part of the staring decision doctrine.

according to the Federal Constitution of 1988, it is without any impediment that the exercise of the constitutional jurisdiction with the aim of preserving the supremacy of the Constitution is clearly and evidently assigned to the Supreme Court that can exercise it both in the european model of judicial review and the north american judicial review (Federal Constitution, article 102, I, "a" and II, "a", "b" and "c").

There is also no difficulty in admitting, especially after the hermeneutic turn undertaken by the doctrine of Hans-Georg Gadamer (2004)[15], that the interpretive activity produces the formulation and even reformulation of the rule extracted from the text. Thus also, in the Brazilian constitutional context, incorporating North American constitutional doctrine, it is possible to declare the unconstitutionality of a rule without reducing its text, through the technique of "interpretation according to the constitution" that can work both conferring the contested rule meaning that preserves the constitutionality of it and excluding that interpretation which would imply the unconstitutionality. However, such interpretation finds limits in the semantics of the rule's text (MORAES, 2012). It can be said that the rule can not have an interpretation "according to the constitution" when its text is expressly incompatible with the text of the constitutional rule.[16]

Still, regarding the role of major interpreter and the resulting monopoly of the "final word" in constitutional terms, referring to the command verb of the article ("to safeguard") and its object ("the Constitution"), there seems to be an inadvertent reversal of the juxtaposed expressions "the Federal Supreme Court" (subject) and "primarily" (adverb). In other words, where the text of the rule says: "The Federal Supreme Court is responsible, primarily, for safeguarding the Constitution", the Supreme Court seems to read "Safeguarding the Constitution is primarily, a Federal Supreme Court responsibility".

Before understanding how the aforementioned inversion jeopardizes the interpretation of the article, it is necessary to understand the semantics of "primarily".

> The Priberam dictionary of Portuguese defines:
> **pri·ma·ri·ly**
> (*primary* + *-ly*)
> *adverb*
> For the most part; mainly.
>
> And "primary" means:
> **pri·ma·ry**
> (from Latin *primarius*)
> *adjective*
> 1. Main.

[15]The "hermeneutic turn" presented in the work of the legal scholar defends the thesis that interpretation, comprehension and application of the text are not stalled and independent moments, but rather are logical-sequential stages of a single process where the rule is achieved before a case. See: GADAMER, Hans-Georg. Truth and Method: Fundamental traits of a philosophical hermeneutics. 3ª Edição. Tradução: Flávio Paulo Meurer. Petrópolis: Editora Vozes, 1999.

16In the opposite direction and in favor of an "interpretation according to the Constitution", even though beyond the semantic limits of the text, in line with the Italian doctrine of "additive decisions with a manipulative effect", see: MENDES, Gilmar Ferreira e BRANCO, Paulo Gustavo Gonet. Curso de Direito Constitucional. 6.ed. São Paulo: Saraiva, 2011, pp. 1366-1375.

It is proposed the simple task of swapping the expression by its meaning in the text of the rule, as it folows:

> "The Federal Supreme Court is responsible, the most part (or mainly), for safeguarding the Constitution."

Now, how the Supreme Court reads the text:

> "Safeguarding the Constitution is for the most part (or mainly), a Federal Supreme Court responsibility."

Is it possible to notice any relevant difference between the expressions? The understanding here is that yes. As it is known, in the Portuguese language, the adverb modifies a verb, an adjective or even a phrase with the purpose of expressing some circumstance (time, manner, place) and its juxtaposition can matter in the definition of the meaning intended. In this context, saying that "someone has happily arrived" is not the same of saying "someone has arrived happily".

Once "primarily" is placed between "Federal Supreme Court" (subject) and "safeguarding the Constitution" (object), the term must refer to the relation of the subject to its object, that is to say, in "The Federal Supreme Court is responsible, the most part (or mainly), for safeguarding the Constitution", it means that guarding the Constitution is the main task of the Court, which would fit in better with the following items of the constitutional text, where the ways the court can be brought to exercise its primary function of guarding the constitution are presented.

In contrast, if "primarily" is placed after "safeguarding" as a subject and the verb, as in The Federal Supreme Court is, primarily, responsible for safeguarding the Constitution", now it would fit the idea that mainly to the Federal Supreme Court is given the safeguarding of the Constitution.

In short:

> By the original Text: "The Federal Supreme Court is responsible, primarily, for safeguarding the Constitution" = The primary function of the Federal Supreme Court is safeguarding the Constitution.
>
> By the Federal Supreme Court Interpretation: "Safeguarding the Constitution is primarily a Federal Supreme Court responsibility" = The Constitution safeguard is mainly attributed to the Federal Supreme Court.

It is from this interpretation that the Federal Supreme Court claims to be the main interpreter of the Constitution and to have the monopoly of the final word on constitutional matters, which seems precipitate and dangerously reductionist in a democratic state ruled by law (BENVINDO, 2014). This democratic state ruled by law has expressed in the Constitution both its political aspirations and its legal limits, and whoever possesses such a "final word" has, under the terms of the abovementioned document authored by the Supreme-Court Justice Celso de Mello, "the great prerogative of deciding, in the final analysis, about the substance of power itself", which with due respect, it is understood that no absolute power can be given to any of the constituted

Powers, whether elected or not, under serious threat to the fundamental principle of popular sovereignty.

Therefore, although the interpretation defended here by the hermeneutic rule does not prevail, since the prerogative of interpreting the Constitution in a definitive way is according to the Federal Supreme Court a political supremacy, and every political supremacy is constitutionally attributed to the people by the paragraph one of the article one of the same Brazilian Constitution of 1988, an interpretation in accordance with the law and in proper jurisdictional terms must be given to the constitutional provision in order to reconcile the Supreme Court primary responsibility with the principle – an entrenched clause in the current constitutional order – of popular sovereignty and legitimation of power by the people to deny the idea of a "monopoly on final interpretation" of the Constitution by the Court.

The concept stated by the constituent based on the *head provision* of article 102 of the FC/88 that the Supreme Court would be exclusively responsible for safeguarding the Constitution doesn't seem to be accurate either, because other branches and instances of power and their agents are also called upon to defend the Constitution, even under oath, for instance the presidency of the Republic when the elected Chief Executive takes office:

> Brazilian Constitution of 1988: Article. 78, *head provision.* The President and the Vice-President of the Republic shall take office at the National Congress, with the commitment to maintain, defend and comply with the Constitution, to observe the laws, to promote the general good of the Brazilian people, to sustain the union, integrity and independence of Brazil.

Similarly, the lawyer, considered indispensable to the justice administration by the constitutional order itself (cf. art. 133 of FC/88), must swear the defense of the Constitution, according to the provisions of the General Regulation of the Law and the OAB (Brazilian Bar Association):

> General Regulation of the Law and OAB: Article 20, Head provision. The applicant for principal enrollment in lawyers chart makes the following commitment to the Sectional Council, the Board or the Council of the Subsection: “I pledge to practice the law with dignity and independence, to observe ethics, professional duties and prerogatives, and to defend the Constitution, the legal order of the Democratic State, the human rights, social justice, good law enforcement, rapid administration of justice and the improvement of culture and legal institutions”

And:

> General Regulation of the Law and OAB: Article 44.The Brazilian Bar Association (OAB), a public service, endowed with legal personality and federative form, has as its purpose: I - to defend the Constitution, the legal order of the democratic State of ruled by law, human rights, social justice, and fight for good law enforcement, the rapid administration of justice, and the improvement of culture and legal institutions.

It is important to notice that, in both instances, the appointees (President of the Republic, lawyers and even the OAB) are necessarily interpreters of the Constitution because of their own attributions and competences. Moreover, since the Federal Constitution is a document formed by texts that demand a hermeneutic system of its own, it is logical to think that there is no way to "defend" it without first having to "interpret it". Therefore, all those who are called upon to "guard" the Constitution are, necessarily, its interpreters.

3 CONCERNING THE INSTITUTIONAL DIALOGUE AS A MORE DEMOCRATIC ALTERNATIVE OF CONSTITUTIONAL INTERPRETATION

The theory of the institutional dialogues (also called “theory of constitutional dialogues”) arises in this horizon as one of the most promising alternatives for the feasibility of the democratization of constitutional hermeneutics, as it seeks to decentralize the interpretation of the constitution, removing it from the judicial exclusiveness, and, at the same time, it aims at promoting a system of cooperation, refinement and correction among the several participants in the interpretative process of constitutional rules, principles and commands, all in the name of popular sovereignty.

The theories, the theorists and draft proposals on institutional dialogue are many and diverse, although all of them aim to relativise the last word given about constitutional matter by the Judiciary Branch, either strengthening the role of the needed dialogue with other institutions, which for all intents and purposes makes the judicial decision less monergist and more synergist, or completely and openly denying the possibility of the existence of a “last word given”:

> Dialogue theories try to escape the ‘last word given’ trap and defend a theoretical attitude that tears up that straightjacket. It is proposed as a “third route”, a middle-ground agreement. This perspective defense is done by a multifaceted literature composed by a large number of authors. Besides these nuances and versions of different dialogue theories, it’s necessary to realize what they have in common and how they contrast with last word given theories. They have two main common denominators: the refusal of legal-centered view and the judicial monopoly over the constitution interpretation, which is and must be legitimately applied by other public branches; the rejection of the existence of a last word given or at least that the court hold it by means of judicial review (MENDES, 2008, pp. 98-99).

Nevertheless, with the diversity found in the doctrine, undoubtedly these theories are better systematized in the essay “The Dialogic Promise: Assessing the normative potential of theories of constitutional dialogue” published by the New York School of Law and written by Cristine Bateup (2005).

Bateup proposes to analyze each and every one of the proposals and arrangements which somehow are identified as institutional dialogues, making viability judgments, creating obstacles to implementation, negative and positive points on each theory. This paper refers to the author’s work specially for the division and

systematization made by her, not reproducing the problematizations raised by the author, either because they were thought under other perspective, that is, from American Law, or because many of the compatibilities and incompatibilities described seem not be applicable to *terrae brasilis* reality.

3.1 Institutional Dialogue Theory by Cristine Bateup

Bateup divides her theories in two big categories which are theories of judicial method and structural theories of dialogue. The first ones are more prescriptive and have an endogenous nature referring to the possibilities on *judicial review,* thereby highlighting the role of the Judiciary Branch as a promoter and conductor of the dialogues on constitutional matter by other instances. On the other hand, the structural theories of dialogue have a more exogenous approach, addressing to describe effectively the interinstitutional relation among the Branches in the construction and interpretation of the texts meanings and constitutional provisions (CARDOSO, 2014). Thereafter, it is referred the synthetic form, the main subdivisions and shades of each one of the groups of institutional dialogue raised in the mentioned essay.

3.1.1 Theories of judicial method

The author divides the theories of judicial method in:

1) judicial advice-giving;
2) process-centered rules; and
3) judicial minimalism.

The judicial advice-giving theory suggests that judges during decisions, they use techniques able to instruct the other Branches on the jurisdictional view about certain constitutional matters, in order to avoid possible and future reviews of policies of Administration or normative acts from the Legislative Power, especially these late ones. Bateup offers two main ways:

> There are two main ways in which the judges can apply the judicial advice-giving in specific cases. First, they can invalidate the legislation based on unconstitutionality, but concomitantly providing advice to the politic branches considering the constitutional methods able to reach the same goal. The legal scholars referred such methods as "constitutional maps", allowing judges to revoke regulations, but also offer a "route map" so legislators follow when elaborating new laws. Second, the judges can support the legislation as constitutional while at the same time use techniques that encourage political actors to review regulations in order to eliminate ambiguities and inaccuracies on the law[17]. (BATEUP, 2005, p. 18)

[17] Free translation.

Unlike the previous theory, the process-centered rule theory, as its own name suggests, are not concerned about the resolution content, but the procedures related to it. They aim to aid the Branches – once more especially the Legislative – to optimize the resolution dynamics of legislative production or public policies, especially when they concern to fundamental rights jurisdiction. Bateup highlights a subspecies in that theory known as second look, applied especially when the "legislative acts 'hastily or unconsciously' in fundamental rights 'concealment'." (BATEUP, 2005, p. 23). In these cases, the judges and constitutional courts could refer political actors to repeat the process of formation of the normative act, this time observing the due formalities and considering the seriousness of matters in discussion.

Finally, the judicial minimalism theory which has the legal scholar Cass Sustein as one of its more prominent contemporaneous defenders, proposes that judges and courts allow as much opening and abstraction as possible from their ruling by not pronouncing beyond the necessary to solve cases in particular.

To Cristine Bateup, such theory can be classified among the dialogical theories of judicial method because although it is not categorized this way by its main scholars – such as Alexander Bickel and Cass Sustein himself – its proposal and intention is precisely to promote the acting of the other bodies, Legislative and Executive Branches, responsible for rule or administrative act subject of the impugnation which led to dispute in matter of law, in order to avoid that a more creative judicial decision on more contentious or socially sensitive matters leads to "political contraction". It is discussed here a "silence" from the Court that "invites" other public instances to the dialogue in order to "pacify" these issues (BATEUP, 2005).

3.1.2 Structural Theories of Dialogue

The structural theories of dialogue also have sub-categorisation as it follows:

1) Coordinate construction theories;
2) Theories of judicial principle;
3) Equilibrium theories; and
4) Partnership theories.

The coordinate construction theory advocates for an effective decentralization of constitutional interpretation of the courts , bringing out the extra judicial interpretations (by Legislative and Executive Branches), within the limits of their own attributions, claiming not to exist any judicial interpretation supremacy and states that all branches of the government act independently and coordinately to build the constitution meaning. Cristine Bateup argues this model to be most ancient institutional dialogical one, relating it to James Madison beliefs – claimed to be the "father" of American Constitution by many – and Thomas Jefferson – third president of the United States of America and known by his republican and decentralized government view:

> The coordinate construction is the oldest conception of constitutional interpretation as a project shared by courts and government political branches, being the first model embraced by James Madison. Although

> one realizes that the matters of constitution interpretation usually has the Judiciary Branch participation during the normal government act, Madison rejected the view that judicial decisions held a singular status, once the constitution did not foresee specific authority to determine the limits of powers division among different branches. In the same way, Thomas Jefferson considered that every branch of the government must be "coordinated and independent" from others and each branch has the primarily responsibility for the Constitution interpretation concerning its own features[18]. (BATEUP, 2005, p. 34).

Differently from the coordinate construction theory that sees the interpretation of Judiciary Branch just as one more view, the judicial principles theory presumes that judges and courts count on skills and capacities which are more special and excellent concerning the task of dealing with the general principles of Law, but since they can eventually fail in their hermeneutics, they must undergo some kind of control from other branches of the State. Bateup summarizes the desideratum searched by the scholars of this category:

> The scholars of legal principles argue that the combination of these curbs and counterweights in different systems result in judicial decisions which are provisory, starting this way, a continuous dialogue about constitutional meaning. First, the government branches electorally responsible make a political choice about a certain issue. The Court assess it and then accepts it or rejects it for reasoned motives. moderating it or even. Finally, if the Court rejects the political choice, the political branches may respond to that decision by "tolerating it, or, if the decision is not accepted or accepted partially, moderating it or remaking it", by using political controls. As a result of this dialectical process and due to ideological role of the Court in the process, "what emerges is a political moral much more self critical than it would be otherwise, and therefore probably an also more mature political moral [...] searching for the right answers.[19] (BATEUP, 2005, p. 45).

The equilibrium theory – which is related to Barry Friedman and Post and Siegel[20] works by Bateup – emphasizes the role of judges and institutional courts as enablers and promoters of constitutional debate and of courts as privileged stages of constitutional debate as far as it is capable of catching different interpretative contributions, filtering them and still be susceptible to criticism and contrasts coming from the people and other Branches, which enables a desirable refinement of the constitutional hermeneutics as far as "the participants help (the constitutional courts) to search for answers more widely accepted and lasting for matters of constitutional

[18] Free translation.

[19] Free translation

[20] The authors are better known for their works on "theory of popular constitutionalism". To learn more, consult: FRIEDMAN, Barry. Constitucionalismo Popular Mediado. **Revista Jurídica de la Universidad de Palermo**, 2005?. Available in: http://www.palermo.edu/derecho/publicaciones/pdfs/revista_juridica/n6N1 e POST, Robert C. e SIEGEL, Reva B. **Roe Rage:** Democratic Constitutionalism and Backlash**.** Harvard Civil Rights-Civil Liberties Law Review**,** vol. 42, 2007, pp. 373-433.

meaning" (BATEUP, 2005, p. 65). The "equilibrium" would be therefore on the non-dismissal of judicial review and at the same time on the negative of the solipsistic supremacy of judicial interpretation of the constitution.

Finally, the partnership theory searches for methods and ways of integration among the other institutions and their contributions in the process of construction and interpretation of the semantic meaning of the constitution and in which all are proportionally and collectively responsible for such construction in a dialectical and intersectional way.[21] (BATEUP, 2005).

3.2 Legislative and Executive legitimacy to interpret the Constitution

In a constitutional State is more than logical, actually, it is imperative that all public instances obey and be faithful to constitutional rules in their respective functions, afterall, as Lenio Streck teaches: (2014: p. 399): "A democracy only establishes itself when all the Republic Branches learn that the Constitution is the explanation of the social contract and the politician's legal regulation". The 1988 Brazilian Constitution, for instance, prescribes the elections methods, verifies prerogatives and foresees congressmen attributions (from art. 44 to 75), and it also provides elementary actions concerning the legislative procedures (from art. 59 to 69); talks about Executive organization and function (from art. 76 to 91); it states the competences and guarantees of judicial institutions and members of the Judiciary Branch (from art. 92 to 126); and yet brings basic principles and basis to Public Administration to any of the Branches (from art. 37 to 43). Besides that, its laws of fundamental material right (individual guarantees, social rights, etc.) intend to be object for improvement by complementary and ordinary laws promoted by Public Administration – particularly the Executive Branch – and safeguarded by judicial measures and decisions.

Therefore it is highlighted that, as it was previously argued, to exercise excellently and competently any of its attributions, it is necessary that all institutions – and not only the Judiciary Branch – interpret the Constitution. Indeed, there actually are at least two attributions to the Brazilian Legislative and Executive Branches which requires from them a direct and substantial interpretation of constitutional rules. In the first, such interpretation occurs necessarily[22] in the Commissions of Constitution and

[21] The theory can be associated to "Open Society of Constitution Interpreters" by Peter Häberle as far as it proposes the opening of constitutional hermeneutics to other instances and allows third-party collaboration in process of theoretical foundation and decisions on constitutional matter. The relation between Häberle and Bateup doctrines as well as the contributions given by the German jurist to the democratization of Brazilian constitutional jurisdiction are better described in: SANTOS, Natanael Lima. **Constitucionalismo Popular e Diálogos Institucionais:** discussões sobre a legitimidade e a legitimação dos intérpretes da Constituição. Trabalho de Conclusão de Curso. Faculdade Sete de Setembro (FASETE). Paulo Afonso/BA, 2017 e OLIVEIRA, Jadson Correia de. **Controle de Constitucionalidade pelo STF:** participação e Democratização por meio de Audiências Públicas e do Amicus Curiae. Curitiba: Juruá Editora, 2015, respectively.

[22] Especially in the past few years it is noticed the use of the mentioned Commission as strategic post to the so-called "political game".

Justice (CCJ) present in the Chamber of Deputies (Lower House)[23] and in the Federal Senate (cf. art. 58 from FC/88), while in the second it occurs by executive veto, more known for being more midiatic as "presidential veto" (art. 84, V, from FC/88).

In summary, it is attributed to the Commissions of Constitution and Justice the analysis of formal constitutionality (enquiry on obedience to formal prescriptions in the legislative process) or material (consonance with the matter and content of established fundamental rules by constitutional order) of the laws and general normative acts which intend to enter the legal system. The so-called executive veto which can be political (when it goes against the public interest to the Executive chief understanding) or legal (when a law or rule is seen as contrary to the Constitution), when it is done according to the second type, it evokes a genuine exercise of constitutional interpretation.

Both interpretations, for being performed in previously to the rule application, are called "preventive control of constitutionality"[24]. However, "the repressive control of constitutionality", that is, the power of expunging the rule from the legal system, it is set as a rule to the Judiciary Branch.[25]

Also, unlike the legal control of constitutionality, such constitutional control measures by the Legislative and Executive Branches don't count on the attribute of definitivity; CCJ resolution is not binding, being possible to appeal to its own plenary (fc. art. 101, I c.c. art. 254 from Internal Regulation of Federal Senate and art. 54, I c.c. 132, § 2° from Internal Regulation of House of Representatives), not being assured any guarantees that once the assessment is approved, the rule is not undergoing legal presidential veto or even control of constitutionality by the Judiciary Branch; yet the executive veto can be overthrown by the absolute majority of the National Congress (art. 66, §4° from FC/88).

Thereby, it is implied that there is a legitimacy constitutionally recognized for the interpretation made by the Legislative and Executive Branches, although until the present moment such interpretations have not had such absolute and binding power considering the legal interpretation.

3.3 Institutional dialogue in Brazil: History and possibilities

It is true that the theories presented by Bateup, may them be prescriptive theories of judicial method or in fact descriptive theories of institutional dialogues, they

[23] In the Chamber of Deputies (Lower House) this commission is called "Commission of Constitution, Justice and Citizenship" and has practically identical attributions as the CCJ from the Senate.

[24] In recent years, particularly because of the political upheaval and the polarization in the parliamentary benches of the National Congress, it has become common for the STF to enforce a writ of mandamus to ensure due legislative process in the formation of certain rules, which also enables the Judiciary Branch to carry out a preventive control of constitutionality.

[25] In these controversies, the constitutional doctrine has been increasingly tending to understand that, in cases of control exercised by the Legislative Power on delegated laws and normative rules from the regulatory power (cf. art. 68, §2° c.c. o art. 49, V from CF/88)and provisional measures (cf. art. 62, *caput* c.c. o § 5° from CF/88), from the President of the Republic, one has the hypothesis of repressive constitutional control by the Parliament.

find larger or smaller reflex on different legal systems and international constitutions, such as the USA and Canada.[26]

According to Larry Kramer, the American Constitution, systemically interpreted, establishes a model named "departmentist theory":

> Each branch could express its opinions as the questions came to them during the normal course of its activities; the Legislative branch by enacting laws, the Executive by vetoing them, and the Judiciary by reviewing them. However none of the opinions of the branches were definitive or authorized. The regulatory entities actions make an effort to follow the legislation that rule them, under the continuous supervision of their common superior, the own people.[27] (KRAMER, 2004, p. 109).

It is noted that according to Kramer line of thought, both Parliament when enacting laws, and the Republic Presidency when vetoing laws under unconstitutional allegations, are so interpreters as the Supreme Court when it removes the validity of a rule or law by constitutionality control, in which, however, all the interpretations of these State government branches would undergo a final review by the major authority of the American democracy, to be known, their own citizens. Consequently, it is safe to talk about a "coordinated institutional dialogue" in Larry Kramer, in which the last word simply does not exist, once according to the same author it would belong to the people.[28]

If such conception regarding the American Constitution is possible, not without some abstraction, the Canadian Charter of Rights and Freedoms of 1982 (Canada's Constitution) is more explicit when in its section 33 refers to the possibility of the Parliament overcome a judicial opinion on certain law or normative act.[29] A thorough study of the document will disclose the incorporation of the doctrine of the legal principles theory once it undergoes the judicial review to some kind of "parliamentary review", enabling in some occasions, a review of the judicial constitutionality control by the Parliament.

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[26] It is also common to state the existence of institutional dialogues in the constitutional orders of Israel, New Zealand and South Africa, however they will not be analyzed due to the example scope proposed in the section of this work, as well as for the wider complexity this analysis would demand.

[27] Free Translation

[28] Larry Kramer is nowadays one of the biggest opposers to the judicial supremacy doctrine in the American constitutional order. His work is specially identified with the popular constitutionalism, although it has traits of what could be identified as institutional dialogues theory.

[29] Where it refers to: Canada's Charter of Rights and Freedoms of 1982. Section 33. (1) The Parliament or a province legislative power will be able to enact a law where it is clearly declared that the law or one of its dispositions will be enacted regardless what disposition is included in article 2 or articles 7 to 15 of the present Charter. (2) The law or the law disposition that is prevailing under a declaration of its content will have the same effect, except for reference to disposition to this Charter referred in the declaration..(3) The declaration made under the paragraph 1 will not be valid 5 years after it was enacted or in a previous date specified in the declaration. (4) The Parliament or the provincial legislative power will be able to enact again the declaration made under the paragraph 1. . (5) The paragraph (3) is valid to all repeated enactment under the paragraph (4). Available in <http://brazilians.ca/faq_direitos.htm>. Access in 29/09/2018.

As surprisingly as it seems, proposals of institutional dialogue have already been cogitated in Brazilian constitutional order since the Constitution – and respective constituent assembly – of 1934 when it did not even had this name.

João Mangabeira, a prominent Brazilian politician and legal scholar, member of the Itamaraty Committee, created by the provisional government of Getúlio Vargas to design a draft for the 1934 Constitution, already had shown acute reservations to the proposal of constitution that, with influence of the European-Kelsian models of concentrated constitutionality control, intended to materialize a system of supremacy of the judicial interpretation:

> By giving the Supreme Court the incomparable attribution of decreeing the unconstitutionality of the laws, and ultimately setting limits on the competences of other Branches, the Government and the States, it is obvious that the Nation should be against the possible abuses of this formidable faculty. Because no dictatorship would be more abominable than the dictatorship of those lifelong and irresponsible judges before the Nation. And this Nation in many cases, would not find any other resource against the excesses of such ministers, than revolution. So long and complicated, in a day of crisis or danger, the day of the constitutional reform, the people angered before the crimes of the judicial oligarchy. (MANGABEIRA, 1934, p. 112)

For this reason, Mangabeira proposes the following institutional design, conceived to appear as constitutional provision in the Constitution of 1934:

> A law of the National Assembly can only be declared unconstitutional when at least two-thirds of the Supreme-Court justices vote in this regard. Once this case has been verified, the President of the Supreme Court shall, within 48 hours, send a copy of the decision to the President of the Republic. If he agrees with the decision, he shall issue, within 48 hours, a decree declaring the law revoked. If he does not agree, he will report his opinion, with the copy of the sentence to the National Congress or to the Standing Board in case of his absence. And if one or the other, by two thirds of the votes, disagree with the sentence, the divergence between the Supreme and the other branches of the State will be solved by a plebiscite. If the Congress or the Board complies with the sentence or don't refuse it by two-thirds, the law shall be ipso facto repealed.

Note the complexity and completeness of such an arrangement that already in the 1930s proposed a series of measures and mitigations to the control of jurisdictional constitutionality, namely: i) requirement of a qualified quorum of votes of the Supreme Court board for declaration of unconstitutionality of a law or rule ; ii) possibility of equal consideration of the case by other Branches, in this case, the Presidency of the Republic and the National Congress. The first (President of Republic) serving as initial recipient and mediator of the declaration of unconstitutionality of the Supreme Court, and the second (National Congress) acting as reviewer body.*; and* iii) the possibility of holding plebiscites to definitely decide the matter in dispute. It is possible to state that the

proposal of João Mangabeira is as closely related to the theories of institutional dialogue as to popular constitutionalism (CARDOSO, 2014).

The system proposed by Mangabeira was not adopted by the Integralist Constitution of 1934, actually, it did not even appear in the preliminary draft (CARDOSO, 2014). However, an institutional design of some similarity was adopted by the "Polish" Constitution of 1937:

> Constitution of the United States of Brazil, 1937. Article 96, paragraph one. In case of declaration of unconstitutionality of a law that according to the President of the Republic is necessary for the well-being of the people, for the promotion or defense of a high national interest, the President of the Republic can submit it again to the Parliament: if the Parliament confirms it by two thirds of the votes in each of the Boards, the decision of the Court shall be declared null and void.

The most significant difference lies in the discretion given to the dissonant interpretation of the President of the Republic that could disagree with the Court's declaration of unconstitutionality because it is contrary to "the well-being of the people, the promotion or defense of high national interest", and also in the closure of the controversy when surpassed by two thirds of the votes of the National Congress. Therefore, the submission of the controversy to popular consideration would be suppressed.[30]

In the current constitutional order, even though - as it has already been shown - most of the doctrine and constitutional jurisprudence interpret the article 102, head provision as a main subsidy of judicial supremacy, one could mention an "open clause" for the institutional dialogue in art. 23, I of FC/88 which states:

> Art. 23. It is a common competence of the Federal Government, the States, the Federal District and the Municipalities: I - ensure the safeguarding of the Constitution, democratic laws and institutions and preserve the public patrimony.

It is well known that the Legislative, the Executive and the Judiciary are Branches present at the state and partly at the municipal level[31], harmonious and independent of each other, and for that reason, it is not incorrect, on the contrary, it is logical , the understanding that includes the binding and duty of all the Republic Branches to safeguard the Constitution, as it has been insisted and systematically defended here.

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[30] In the drafting of João Mangabeira's proposal, despite the fact that there are no clear and evident prescriptions to subsidize the disagreement of the President of the Republic with respect to the interpretation given by the Federal Supreme Court, it seems implicit a greater commitment to the content of the rule that had its unconstitutionality declared. Actually, unlike João Mangabeira, who supported the dialogical system fearing a possible power abuse from the Judiciary Branch, the insertion of the presidential control of judicial declarations of unconstitutionality model of presidential control was eminently political and fascist (as it is known, the "Polish" Constitution of 1937 is fascist-inspired).

[31] While states have, in their respective constituencies, self-organization and Branch-autonomy of the Legislative (legislative Board), Executive (state government) and Judiciary (state judge and Court of Appeals), municipalities and the Federal District, only have those first two, by their respective city council and legislative Board and City Hall and government of the Federal District.

As a matter of fact, it is even possible to admit the existence of a kind of institutional dialogue system in Brazil that permeates all Branches and in a hypothetical event, the President of the Republic, which cumulates powers of legal veto to the ordinary legislation produced by the National Congress and ordinary legitimacy for the proposition of a direct action of unconstitutionality before the Federal Supreme Court, try to execute both powers in relation to the same controversial action. The following scheme explains what is being expressed:

> Act 1. Legislative Process by the National Congress (Art. 65) → Act 2. Presidential legal veto (Art. 66, §1st) → Act 3. Overturning of Veto by Congress in joint session (Art. 66, § 4th) → Act 4. ADIN filed by the President of the Republic judged by the Federal Supreme Court (Art. 103, I)

Thus, note that even if it is in order to keep the last word in the Judiciary Branch, there is a "draft" of institutional dialogues in the current Brazilian Constitution and, note this as well, as it is in João Mangabeira's 1934 proposal and also in the implemented one by Francisco Campos in 1937, it has in the President of the Republic "the motive of the dialogue", although he is not able to pronounce the final word himself.[32]

On the other hand, according to the adopted understanding, there seems to be no "heresy" to the constitutional doctrine to think of arrangements, as the one idealized for the 1937 Constitution, which alternatively offers the last word, in constitutional terms, to another Branch. Nevertheless, Mangabeira's design indeed seems more excellent, which, in addition to consolidating a system of institutional dialogues along the lines of the theory of legal principles, described by Cristine Bateup, it also enables the undertaking of a civic plebiscite, capable of materializing popular constitutionalism through veto or ratification of judicial decisions as in the Tom Donnelly model.[33]

In this context, there is (although it is filed) the Constitutional Amendment Proposition ("PEC") 33/2011, that:

> Changes the minimum number of votes of members of courts for the declaration of unconstitutionality of laws; it conditions the binding effect of precedents approved by the Federal Supreme Court to the approval by the Legislative Branch and submits to the National Congress

[32] The reason for this seems to be in the history and the resources conferred on this Branch, it seems rash to provide it with such prerogative, also, as it was legitimized in at least three Brazilian Constitutions (literal sense) a strong and/or authoritarian Executive Branch in the history of the country, namely, the Constitution of the Empire of 1824, the Constitution of the New State in 1937, and the Constitution of the Military Regime in 1967. In all these constitutional orders, there were notices of episodes, or at least testimonials that, to a greater or lesser extent, violated what is currently agreed as fundamental rights, with the hampering of individual freedoms.

[33] Donelly is the author and creator of the essay *Making Popular Constitutionalism Work*, in which he pointed out ways and methods through which he believes that popular constitutionalism could be accomplished; at times, the theory is strongly criticized for being considered excessively abstract and impracticable. To learn more about it, see: DONNELLY, Tom. Making Popular Constitutionalism Work. **Wiscosin Law Review**, 2012**.** Havard Public Law Working.

> the decision on the unconstitutionality of Constitutional Amendments.[34]

Including the provision for popular consultation.

Finally and more recently, Justice Dias Toffoli, in his inaugural address to the Supreme Court, supported a greater cooperation and coalition among the constituted Branches of the Republic in the fulfillment and accomplishment of the constitutional precepts as representatives and guarantors of popular sovereignty, which brings the justice's speech closer to the ideal of coordinated construction within the theory of dialogues.[35]

4 FINAL CONSIDERATIONS

Therefore, considering all facts exposed, it is concluded that the model that nowadays prevails over interpretation of constitution and having the Judiciary Branch as its final stage of constitutional hermeneutics, while more traditional, it is not necessarily the most garantist for democracy and minorities, previously and *argumentum a contrario*, it has been responsible for counter-orders and misconceptions from the State judicial segment that not having a external control to its interpretative activity, it has perpetuated hasty and harmful interpretations for more vulnerable groups of citizenship and to the democracy itself.

It is also clear that a system of institutional dialogues that shared the interpretative competence of the constitution among different institutions of the republic would show to be more democratically legitimate and republican as it is relativized in the name and guarantee of popular sovereignty the prerogative of "last word" given in constitutional matter, that from time to time refers to subjects of popular interest such as fundamental rights and public policies.

Finally, concerning Brazilian reality, it is proved that the system of judicial supremacy established does not come from other source that is not a mistaken interpretation of art. 102, head provision of FC/88 by the Federal Supreme Court, and that this same constitution supports, using other mechanisms, a system of institutional dialogues that would guarantee wider democratic legitimacy which seems to connect

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[34] Authored by former congressman Nazareno Fonteneles (PT / PI) and written by other parliamentarians. The Proposal for Constitutional Amendment in its full text can be checked at <http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=3C2D4C05D77822F3F29CE7E182F2A7A6.proposicoesWebExterno1?codteor=876817&filename=PEC+33/2011>. Nevertheless, it can not be forgotten that it had been proposed at the climax of the judgment of the political scandal that would come to be known as "Mensalão"; a scandal that has given great prominence to the jurisdictional seat of the Supreme Court, the body responsible for judging the actions that involved numerous parliamentarians and political parties. The party of the author's amendment had been one of the main cores of the scandal, fact that arises suspicions about the motivations that led the political agent to idealize such a proposal at that moment.

[35] Speech delivered on the occasion of the Solemn Session held at the Plenary of the Federal Supreme Court on September 13th, 2018, broadcast live on *TV Justiça*. Posted on September 14th, 2018 on YouTube digital platform. Available at <http://www.youtube.com/watch?v=-Dqx7EhzHzY>. On the occasion, Chief Justice Toffoli himself has repeatedly had his dialogical characteristic highlighted by his colleagues from the Federal Supreme Court, both in the interviews that preceded the moment he took office, and in the opening speech of justice Luís Roberto Barroso.

better with the "spirit" of the Constitution of Brazil Federative Republic from 1988, named "Citizen Constitution" because it was designed to be legitimated by citizenship on all subject matters.

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