

History of Constitutional Review in Brazil (From Foundation to Nowadays)¹

MARCELO CASSEB CONTINENTINO

Introduction

This article addresses the historical formation and evolution of constitutional review in Brazil which, since its Independence in 1822, has been regulated by successive Constitutions (1824, 1891, 1934, 1937, 1946, 1967/69, and 1988).

Constitutional history in Brazil is marked with legal and political breaks, which partly explains the existence of seven Constitutions in only two hundred years of autonomous political life. Every break in the current legal order has been followed by a new Constitution, democratic or not, meant to establish hegemonic parameters, guidelines and values for Brazilian society, which has directly impacted the institutional arrangements of the principle of separation of powers and of the constitutional review².

Brazil's Constitutions have reflected hegemonic political definitions of how the functioning of powers (Legislative, Executive, and Judiciary) was intended to be

limited, even though the constituents or lawmakers in charge of their elaboration performed within the field of mere political expectations of how formal Constitution should entrench and conform material Constitution³.

The evolution of Brazilian constitutional review should be comprised within the historical and political context each of those Constitutions appeared in – including the current 1988's Constitution of the Republic – along with the formal provisions contained in the constitutional texts. Thus, this study has been outlined in nine items, the main thread of them should be the “last word metaphor” and the disputes on the definition of the authority entitled to deliver it in constitutional law matters: in the first two items, methodological issues on the boundaries of a Brazilian constitutional history (item 1) and on the definition of constitutional review (item 2) shall be problematized; in the following seven items (items 3 to 9), fundamental political moments which gave rise to new Constitutions,

since the 1824's Political Constitution of the Empire until the current 1988's Constitution of the Republic shall be addressed.

1. *Is a history of Brazilian constitutional review possible?*

The writing of a constitutional history is always an attempt of undertaking a critical view on legal reality of a certain community in time and space, as well as of reflecting on the possibilities and alternatives drawn up to each current society. That weaves an intertemporal dialogue between present and past generations⁴.

This dialogue should not be a free one; it should be ruled. Constitutional history must not deviate from the epistemological foundations of history, the objective of which is the broad inquiry and the critical reconstruction of the past from the most diverse perspectives, according to Lucca Scuccimarra⁵. The plurality of sources and the various contexts of experience involving the object of study – constitutional review, in our case – should be highlighted as to feature a 'polyphonic constitutional history', which is opposed to the linear, progressive and legislative narratives which are so usual among constitutional law scholars, at least in Brazil⁶.

Brazilian doctrine is largely featured with those linear and progressive narratives, taking the risk of getting confined to an abstract and patterned description of the system of constitutional justice without proper historicization, as warned by Luigi Lacchè⁷, which leaves room for the mythologization of legal experience⁸ or a misuse of legal history, which becomes a way of "le-

gitimising an argument posed in the present" as discussed by George Galindo⁹.

Achieving a 'polyphonic' history of Brazilian constitutional review requires, as advised by Maurizio Fioravanti¹⁰, conceiving constitutional history as a 'meeting point', a 'field of dispute', shared by many specialists, which is always open and to which the most diverse theoretical approaches and interests converge.

In this sense, Joaquín Varela Suanzes-Carpegna¹¹ suggests a double-perspective methodological approach for research on constitutional history: the first of them, a normative-institutional one, based on past norms which organized the functioning of the State as well as preliminary projects, amendments, preliminary versions of regulatory acts, decides the discourses they emanated; the second perspective, a doctrinal one, would be founded in books, articles, journals, parliamentary minutes, and other texts in general, which should be accounted in light of the social and political context in which the constitutional text emerged and was held.

Those methodological premises explain this work's choice of sources. "Which sources for which historians?". That's Pietro Costa's inquiry¹². The answer depends on the questions asked and conceived by the historian. They also depend on time and space peculiarities of the object of study. All those aspects shall be distinctly relevant in regarding historical sources¹³. This study proposes a legal history aimed at the historical comprehension of the solutions institutionalized in terms of constitutional review in each Brazilian Constitution adopted, analyzing each one as the "other" to be historically and constitutionally understood¹⁴.

It assumes the premise that constitutional review sets up the crucial tension between the process of law enforcement and the process of law making¹⁵, between law and politics¹⁶, between constitution and democracy. Consequently, in the process of elaboration of new constitutions, there is a pivotal momentum for the definition of the legitimate authority to deliver the "last word" in constitutional matters. In other words, which body of government or person would be in charge of the 'ultimate interpretation' of law, provided that, for Michael Stolleis¹⁷, the history of institutions and the history of power is, since the middle ages, marked with a contest over the role of the *interpretatio*, which is part of one of the most important phases of legislative process, which is above all the efforts focused in the enactment of law. Thus, by means of interpretation, the competent authority would be able to redefine (or recreate) the valid laws and create new power relations.

Still, if it is certain that the "last word metaphor" has always been in the background of the best way of institutionalizing constitutional review in Brazil, it is also true that the constitutional experience prior to the current constituent scenario provides a substantial repertoire of experience and the substratum of work itself, which allows understanding the exclusions, appropriations, and alterations in the institutes which will originally be defined in the new constitutional text according to members of Constitutional Assembly's horizon of expectation¹⁸; for the process of constitutional change, grounded in social evolution, tends to display the impropriety of the former order in its core, through a process of denial, addition and/or supersumption (process of accretion)¹⁹.

It should be concluded that, in the enterprise of elaborating a history of Brazilian constitutional review, our reading key, which relies on the definition of the legitimate authority entitled to deliver the "last word" in constitutional matters, is a possible and fruitful methodological approach. Such an effort has the potential of conceiving a critical historical narrative aimed at better understanding the Brazilian complex system of constitutional review.

2. *A necessary definition: what is "constitutional review"?*

A vital elucidation is befitting and necessary: to distinguish the notions of judicial review, constitutional review and constitutional jurisdiction.

Constitutional jurisdiction incorporates a safeguarding process aimed at the conservation of the inviolability of the Constitution, which may be performed both by neutral and impartial instances and by politically binding bodies. In its older meaning, as pointed by Gustavo Zagrebelsky²⁰, constitutional jurisdiction had a broader scope: it meant the act of exposing, of saying the right which is in the Constitution; therefore, it encompassed the notion of constitutional review.

The definition of constitutional review refers, in its turn, to the institutional practice of safeguarding the Constitution, by means of which a judicial or a political (non-judicial) body has the role of examining the validity of a law or regulatory act and of, by scolding its inconsistency with the Constitution, applying the sanctions stipulated in their respective legal system.

It is, in fact, a modality of constitutional jurisdiction bounded to the examination of the constitutional requirements of material and formal validity of laws and regulatory acts²¹.

The constitutional review does not, in its turn, intermingle with the judicial review (of legislation). The judicial review is as a species of the constitutional review genre, in which the body vested with the competence to oversee the validity of regulatory acts is one of judicial nature²². Therefore, it is essential to bear in mind the distinction between constitutional and judicial review, the main feature of which, ultimately relies on the judicial nature of the instance in charge of performing it: a political (non-judicial) body, or a judicial body, respectively.

3. *Constitutional review in times of Monarchy: lesson from Europe*

It is usually stated that Political Constitution of the Brazilian Empire, from 1824, did not acknowledge the practice of constitutional review of laws. Even if this sort of review (which does not intermingle with the judicial review) has occurred under the term of the imperial constitutional system, understanding how ideas and institutions related within the imperial constitutional system according to the jurists and politicians who theorized and performed in it reveals to be more important than tracking evidence of the existence of that sort of review, provided the narrow bounds of the present inquiry.

Brazilian constitutional doctrine usually indicates three reasons for concluding the non-existence of constitutional review in

light of the Constitution of 1824²³: (i) the review of laws was exerted by the Legislative Power, given that the Charter of the Empire expressly assigned the competence to interpret the laws and to guard the Constitution to the General Assembly; (ii) the consensus in limiting the action of the judges to the mere enforcement of law; (iii) the advent of the Neutral Power coated with roles which were proper of a constitutional court.

It is true that the Charter of the Empire purposely assigned the power of interpreting laws and watching over the Constitution to the General Assembly. However, in order to avoid miscomprehension of the real sense and reach of those norms, which would lead to anachronism²⁴, it is befitting to take some historiographic caution. In fact, current constitutionalists advocate the non-existence of constitutional review²⁵, as if the concepts of 'interpretation' and 'watching over the Constitution', as stated in the Constitution of 1824, lied within the same semantic field they do nowadays.

It occurs, however, that the concept of interpretation was extremely complex and multifaceted and encompassed the acts performed both by the legislator and by the judge. For 19th century Brazilian jurists, it is detected the inadequacy of concluding that interpreting laws did not fit the judge, for that power was, to some extent, brooked by the legal community of the Empire.

Pimenta Bueno²⁶ deeply studied the nature of the judicial function as well as the act of interpreting laws, without neglecting the political sensibility required. Apart that interpretation assigned to the Legislative, in his point of view, there was the judicial interpretation, or *via* doctrine, which would be performed individually through the study of the foundations of law in or-

der to get to conclusions with certitude, in face of the real impossibility of laws being able to foresee every possible circumstance of the ruled cases. It consists of the «competence which law has given the judge, and that for this reason he has it, to examine the true sense, the precept of statutes, or the principles of law and apply it to the question posed to him, as he understands it, and under his responsibility»²⁷.

For the 'jurist of the Empire'²⁸, the judge's interpretation was conceived as an authentic legislative delegation, so that its scope should be bounded to the concrete case controlled by the legislator, and should never be able to establish a mandatory general rule for other judges or courts.

A similar concern should be reserved to the clause "watch over the Constitution", which conceptually assigned to the Legislative Power the role of interpreting, watching and enforcing the Constitution²⁹. The guard of the Constitution imposed the duty of respecting it and making it respected as established in it, argued Pimenta Bueno in the light of comparative law³⁰. It also imposed the duty of examining and overseeing government compliance, which made it a great force against casual arbitrariness from the Executive Power.

The clause "watch over Constitution", unlike nowadays, was interpreted as a generic entitlement which authorized the Assembly to inspect and to examine if laws were accurately observed³¹, not necessarily meaning a normative foreknowledge for performing the constitutional review of laws³².

The third aspect to be analyzed lies on the fact that some scholars argue that the Neutral Power would be the cause of the non-existence of constitutional review

in the Brazilian system³³. This statement needs, however, further discussion.

A simple analytical collation between the *Project of Constitution for the Empire of Brazil of 1823*, elaborated by the Constituent Assembly of the Empire³⁴, which was dissolved by Dom Pedro, and the Charter of 1824 would weaken such a rationale, for in 1823's Project, there was no mention to the Neutral Power; on the other hand, the institutional configuration of the Judiciary Power was substantially similar in both texts³⁵. There was not in either of them any provision concerning the judicial role of constitutional review, which implies the adoption of a timid outline for the Judiciary Power, essentially based on Montesquieu³⁶, according to whom the judge was only entitled of enforcing the letter of law, and was prevented from resorting to any resource of interpretative or discretionary nature.

Howsoever was the Neutral Power (or "Moderating Power") in charge of watching over the maintenance of independence, balance, and harmony of the other political powers³⁷, his assignments did not fit the performance of the constitutional review of laws by making a law invalid and inapplicable for its inconsistency with the Constitution, as it is the standard nowadays. The Neutral Power put the Emperor in charge of upkeeping the good relations among the political powers and of impeding casual abuse³⁸.

For this reason, Tobias Barreto³⁹ did not forbear the Brazilian constitutional system, which, in his point-of-view, was carved on "theological and metaphysical damages". In imperial constitutionalism, the prevailing image of the legal-constitutional order itself placed the emperor in the apex of the state and normative apparatus, making him



Supreme Federal Court, Brasília

a sacred and mythical figure, unfailingly devoted to achieve the collective interest and the well-being of society. As a consequence, the validity of laws and acts did not lie in the Constitution, but in his imperial fairness and goodness⁴⁰.

It would not be difficult to perceive that, within that political context, there would be no proper environment to the development of judicial review, for the imperial majesty overtook the other powers and functioned as the supreme inspector of the nation.

The constitutional reform promoted by the Additional Act of 1834 introduced a specific supervisory process in the 1824 Constitution, making explicit that the imperial constitutional order moved on to fit the practice of constitutional review (non-judicial though). It was formally assigned

to the presidents of the Provinces and to the General Assembly (and the provincial ones) the power to reject the laws regarded as incompatible with the Constitution.

So, during the Brazilian Empire, there was the constitutional review of provincial laws mechanism, the objective of which was to counterbalance the legislative competence assigned to the Provinces through the creation of the Provincial Legislative Assemblies. In the light of the constitutional order altered by the Additional Act of 1834, there were three distinct constitutional review procedures⁴¹, which confirmed the existence of such an institutional practice in the Empire.

In this context, one should highlight the paramount role of the Council of State, reinstated by the Law 234, from November

23, 1841. Composed by jurists and statesmen of the Empire nominated *pro vita* by the Emperor, the Council of State, known as the “brain of monarchy”, performed high-level political roles by advising the Neutral Power or opining on the edition of projects of law. It also performed administrative roles, assisting the Executive Power by publishing acts and resolutions and by working as an administrative court. During its lifecycle (1841-1889), the Council of State stood out at examining the validity of provincial laws in defense of the competence of the central government and for its intense interpretative activity of laws in general, often in response to doubts forwarded by judges and courts, publishing resolutions and warnings which were followed by the jurisdictional bodies. Thus, it also performed an important institutional role in constitutional review⁴².

Therefore, during the Charter of the Empire term, the political definition regarding the authority legitimated to state the law in last instance did not lie on the judges or on the Judiciary Power. The safeguard of Constitution inviolability was assigned to the political instances, the Executive and the Legislative.

Though it is necessary to understand why the stipulation of the (non-judicial) constitutional review was substantially modified with the advent of the Republic, as, from then on, the judicial review was adopted in the Constitution of the Republic of the United States of Brazil in 1891, which entailed a redefinition of the authority entitled to state the last word in constitutional matters.

4. *Constitutional review in the beginning of the Republican Era: the American parameter*

The introduction of the judicial review in Brazilian legal order was a result of a complex conversion of factors related to the transition from a centralized monarchy to a federalist republic⁴³, notorious as the “First Republic” (“Primeira República”), the emergence of which led to more political and administrative autonomy for the States (formerly called Provinces). From a legislative point-of-view, however, it was necessary to counterbalance the empowering of the new States with the novel role assigned to the judges, in general, and to the Supreme Federal Court (STF) of, by means of the constitutional review, conserving the legislative and administrative powers of the federal government as well as keeping the integrity of national politics⁴⁴.

In order to do so, a new constitutional model was adopted as reference; Brazilian politicians and constitutionalists’ source for inspiration and comparison was to be found in the American liberal constitutional system and not in the French-Iberian European constitutional model⁴⁵. According to Rui Barbosa⁴⁶, “our trail blazer will be the American law” and “Brazilian Constitution is its child”. The Decree n° 848, from October 11, 1890, “which establishes Federal Justice”, took charge of expressing the intended shift in the course of constitutional thought and in the Brazilian judicial practice by setting standards to the application and the interpretation of law based on Anglo-American law⁴⁷.

Paulo Bonavides⁴⁸ highlighted that the Constitution of 1891 was the «great monument of our liberal culture», which performed, at least from a formal perspective,

a break with the constitutional system from the Empire. It rejected the parliamentary way anchored in the unitary and centralized political system and replaced it with the federalist presidentialism. Also, Montesquieu took Benjamin Constant's place, consecrating the separation of the three powers through the extinction of the Neutral Power. The liberal rights were fully protected, specially the property right and the *habeas corpus* – which has become the main instrument of the citizen's defense against government's arbitrariness and illegalities –, not only being restricted to the defense of freedom movement.

The conception of the Judiciary Power invested with more institutional protagonism was assimilated by the Provisional Government, by the Commission which elaborated the Project of Constitution and by the Constituent Assembly of 1890-91, for it was indispensable to the maintenance of the new form of State⁴⁹. Part of the members of Constituent Assembly understood that such an assignment should be vital to secure Brazilian federalism, in the same fashion as the Supreme Court of the United States did as to firmly keep American federalism⁵⁰. Besides, many of them recalled their concrete experience from imperial times; bearing in mind the political lesson from the Empire, when local Legislative Assemblies were prodigal in making laws, especially of fiscal nature as to step up their own tax revenues, usurping central government's power, they thought the new States of the Federation would adopt the very same expedient in order to increment their budget revenues to the detriment of the interests and of the competence of the Union⁵¹.

A subtle redefinition concerning the legitimate authority to state the ultimate

meaning of law was weaved and was distinguished from those in imperial times. Regarding the new system, Carlos Maximiliano⁵² pointed out that "the spirit" of the "supreme code", in line with the positive law and the American law, stated that the constitutionality of laws and acts of the Executive should be judged by the Federal Supreme Court, in the terms of article 59 of the Constitution. Aristides Milton⁵³, attuned to the new course of events, summarized the institutional change undergone by the judicial role precisely in his commentary to the Constitution of 1891: contemplated with the assignment of the interpretation of the Constitution, inspired in the Supreme Court of the United States, the Judiciary Power would reveal all its competence and strength.

Opponents to the republican and federalist project of the revolutionary government were concerned with the gamma of powers to be assigned to the Federal Supreme Court, an institution which was at the concrete risk of being co-opted by the Executive Power and of being converted into an auxiliary body of the President of the Republic, who was in charge of nominating the members of the court unilaterally⁵⁴. Many anti-government constituents stood up against the institutional strengthening of the STF, which was mirrored in the Supreme Court of the United States and broke with the monarchic tradition of its "predecessor", the Supreme Court of Justice of the Empire⁵⁵.

For this reason, Rui Barbosa's proposal consistent with the introduction of the principle of the *stare decisis* in Brazilian constitutional system⁵⁶ ended up being rejected by the "Special Commission of the 21", created to evaluate the merit of the

Project of Constitution of the Provisional Government⁵⁷. The Commission of the 21 showed concern that the STF would become a body submissive to the chief of the Executive Power and, consequently, through the mandatory binding of the courts, the Judiciary could be fully co-opted by the President of the Republic, who would indirectly have the authority of the "last word"⁵⁸.

It is worth noticing that, since the quarrel in the Constituent Assembly of 1890-91, the construction of the competence of judicial review is a result of more or less controllable political prognosis so that one cannot recognize it⁵⁹, as traditionally conceived in Brazilian constitutional literature, as the result of a natural and inherent attribution of the Judiciary Power⁶⁰. A brief compared look reveals that this model was not adopted in other historically consolidated democracies (e.g. England and France).

The Brazilian Republic, committed to the dream of institutionalizing federalism in Brazil, operated such a change of authority. It was necessary, therefore, to reduce the power of the National Congress so that the former art. 15 of the Constitution of the Empire, which assigned broad powers to the General Assembly, including that of interpreting the laws, was not reproduced in the Constitution of 1891⁶¹. The power to interpret the laws and the Constitution was implicitly transferred to the Judiciary Power. The STF, thus, emerged strengthened.

However, the shift in the formal outline did not immediately impact the legal cultural field. The redefinition of the legitimate authority to state the last word in constitutional law, by means of the expressed reception of the judicial review, faced many mishaps. The most important of them is that changes in the legal culture of a certain

community happen in a distinct and longer-lasting temporality from that of politics. The mere change in the constitutional text in republican era was not followed by a change of the judges who were part of the Judiciary or even its upper body, the former Supreme Court of Justice of the Empire which was turned into the STF, composed by fifteen justices, fourteen of them had been working in the late Supreme Court of the Empire⁶².

Prima facie, the practice of 'judicial review', though expressed and constitutionally authorized, stirred up much controversy and even submitted judges to criminal lawsuits, such as the "crimes of hermeneutics"⁶³.

On the other hand, the extension that encompassed the institute of the *habeas corpus*⁶⁴ in the Constitution of 1891, led to the formation of the "Brazilian *habeas corpus* doctrine", which had been consecrated in the courts and in the STF, allowing the Judiciary Power to perform an effective constitutional review of laws and acts of the Executive and Legislative Powers.

Although the Constitution of 1891 formally consecrated the principle of the separation of powers, there was a predominance of the Executive Power, which, in face of political instability of the country, needed to resort to the institutes of federal intervention and the state of siege in order to supposedly maintain governability. It occurs that the only change in this Constitution, promoted by the Constitutional Reform of 1926, had as its main objective, among others, to restrict the scope of the *habeas corpus*⁶⁵ and the competence of the Judiciary Power⁶⁶.

To sum up, the judicial review emerges, above all, from a fundamental political

decision about the definition of the legitimate authority to say the last word in constitutional matters. It does not constitute *conditio sine qua non* to the existence of a democratic and republican constitutional system. And the legal experience of the first Brazilian Republican Constitution should make it clear that the Judiciary Power, as a political body, might pose challenges to the more expansionist intentions of the heads of state.

5. *The Revolution of 1930 and the Social Constitution of Brazil of 1934*

The new period after the fall of the First Republic (1889-1930) and the 1891 Constitution set a blunter break with changes in the course of the country's constitutional history. President Washington Luís was not able to finish his term. Neither did he secure the investiture of his elected candidate, both wiped out by the Revolution of 1930, which drove Getúlio Vargas to the power with the promises of cleaning the country from the illness of electoral corruption, from the domination of the political oligarchies which had deepened the social and economic differences in the country; and of finally promoting the ethical sanitation in the federative republican system⁶⁷.

As the new leader of the country, one of Getúlio Vargas's earliest acts was the Decree n° 19.398, from November 11, 1930, which instituted the Provisional Government and bestowed it with full executive and legislative powers, besides having suspended many constitutional guarantees and established clauses of non-justiciability until the edition of Brazil's new Constitution.

Vargas did not show willingness to convene the Constituent Assembly and to elaborate the new Charter, displaying his first signs of authoritative penchant. He was pushed by some States, led by São Paulo, in the so called "Constitutionalist Revolution" of 1932, hatched on July 9, 1932, which made him commit to the call for elections for the Constituent Assembly, to be held on November 15, 1933. Brazil's new Constitution was finally promulgated on July 16, 1934, but had a very short lifecycle: three years and three months long.

As to assist the duty of the upcoming Constituent, a commission of notables was founded, known as "Commission of Itamaraty", which drafted the Project of Constitution. Although it seems to be natural the elaboration of a document ideologically linked to the leader of the nation's political interests and projects, remarkably centralist and authoritarian, that Commission was composed by jurists adhered to social thought⁶⁸ and elaborated a 'compromiser', heterogeneous from the ideological point-of-view⁶⁹, Project of Constitution in an attempt of implementing the *Welfare State*⁷⁰.

Within the realm of Judiciary Power, the Commission of Itamaraty proposed some limits to the Federal Supreme Court in the performance of constitutional review⁷¹, specially the prohibition of declaring the unconstitutionality of a law which had been applied without complaints five years after its publication and the suspension of effect of the judge's decision which laid aside the law regarded as unconstitutional until the judgement would be confirmed by the court in appeal seat⁷². Oswald Aranha⁷³, member of the Commission of Itamaraty, defended not assigning much power to the Supreme Court in the scope of constitutional review

so that there would not be the "institution of the Judicial Republic of Brazil".

The restraint to the Judiciary seemed a natural course to be followed with the rejection of Themistocles Cavalcanti's⁷⁴ proposal of assigning the power of declaring, in theory, the unconstitutionality of laws by means of direct action to the STF. According to Afrânio de Melo Franco, the creation of this other "dangerous" competence would lead to the subversion of the regime of separation of powers. That deserved from Antônio Carlos⁷⁵, another member of the Commission, the following comment: «The decree in theory of the unconstitutionality of laws by the Supreme Court extrapolates all principles which have, so far, held over the world».

In the Constituent Assembly, the debate on the constitutional review and on the STF endured. There was discussion on the creation of a Constitutional Court following the example of the Austrian Court⁷⁶. However, there were divergent positions on the institutional strengthening of the Supreme Court.

On the one hand, part of members of Constituent Assembly understood the practice of diffuse constitutional review was "flawed" because STF's decision had limited effects to the parties in the lawsuit and did not bind other and future cases⁷⁷. It would neither reduce the volume of lawsuits in the STF and in the Judiciary, nor would make justice faster, cheaper and more effective in protecting the citizens' rights. The decision of the STP would set a sort of "vote without mandatory force" or even a sort of vote "with purely platonic mandatory force"⁷⁸. From such a perspective, it would be indispensable to institute some mechanism to make the declaration

of unconstitutionality vested with effects towards all the people.

On the other hand, it was argued that assigning to the STF the prerogative of judging laws null and void with *erga omnes* effects would bring about the massive risk of the emergence of a "judiciary dictatorship in the Country", according to member of Constituent Assembly Nilo de Avarenga's opinion⁷⁹.

In order to prevent the "inconvenient of judicialism" and an eventual dictatorship of the Judiciary, the solution was to assign to the Federal Senate the attribution of extending the effects of STF's decision, when the court judged for excluding the law from legal order convenient and timely. Even having its competences reduced – the Federal Senate was reduced to a collaborating body of the Chamber of Deputies, and was denominated "Federal Council" in charge of performing the institutional calibration of the powers⁸⁰. The new role, which was assigned within the constitutional review system, can be explained by the constitutional experience gained with the diffuse control since 1891.

If it is certain that the innovative proposal gave way to the force of the tradition of the diffuse review system which had been existed for over forty years, neither could it be denied that it revealed a noticeable conception in the Constituent, which was divergent from the Commission of Itamaraty's understanding: empowering the Legislative against casual abuses from the Executive Power, by giving the former the power to deliver the "last word" in constitutional matters⁸¹.

There was the objective of avoiding the feared judicial expansionism in imposing political counterbalance to the strength of

law, which would extrapolate itself with the gamma of powers concentrated in the STF.

The orientation that the STF's decisions should have *inter partes* effects prevailed in the legal-historical context from 1891 to 1934, leading once more to the rejection of the adoption of the "principle of *stare decisis*". There was the fundamental political decision of not assigning so much power to the STF as to authorize it to rule with *erga omnes* effects, which would be valid to all recipients of the law, bringing about the risk of the dreaded "juristocracy".

Two other innovations within the field of constitutional review are worth remarking: the first, referred to the requirement of the absolute majority of the members of the court in order to declare the unconstitutionality of the laws ("full bench clause"); the second, the representation for federal intervention purposes.

The Senate's competence as adequate instance to perform the judgement of generalization of the effects of STF's decisions, in this context, materialized the denial of the principle of *stare decisis* itself in favor of the upkeeping of the STF's institutional tradition of deciding in concrete as well as the rejection of the attribution of judging the constitutionality of laws in theory.

Therefore, it is ensured that, at that time, the paradoxal relation between politics and law dramatically influenced the institutional engineering of constitutional review and the definition of the legitimate authority entitled of delivering the last word in constitutional matters.

The Constituent Assembly hesitation about empowering the STF, which became one of the fundamental topics debated along the process of elaboration of the 1934 Constitution, reflects how the configura-

tion of constitutional review is intimately linked to the political context of each momentum, when distinct understandings on the relation and functioning of each of the powers are developed.

6. *The 1937 Constitution ("Polaca") and the alleged constitutional review backward*

Brazil's Constitution of 1937 ("Polaca")⁸², bestowed by Getúlio Vargas as he decreed the "New State" (Estado Novo), was featured by the hypertrophy of the Executive Power and by the growing authoritarianism of the government on behalf of 'national salvation'⁸³, shaking the democratic character of the Rule of Law. According to Karl Loewenstein⁸⁴, it was a "Ghost Constitution", which only existed on paper without being a "living reality".

Francisco Campos, the jurist in charge of the elaboration of the Charter of 1937, strived to resignify the concept of 'democracy' in his writings and speeches, attempting to show that the New State intended to achieve the ideal of a "substantial democracy", in which the common good would be the greatest value to be promoted by the government. Although that motto led to the restraint of individual rights and of prerogatives of other powers, specially the Legislative Power, collective interest and national identity should prevail over individuals' (selfish) rights and interests.

Therefore, it was necessary to revoke some options taken in the Constitution of 1934, especially those concerning the empowering of the Legislative⁸⁵. Pontes de Miranda⁸⁶ tried to explain the 1937 Constitution precisely within the context of a

world in crisis and the need of change in the institutions. Thus, he recognized that one of the new Charter's virtues was to restore what the 1934 Constitution had supposedly erased: the personal power of the head of State.

The Judiciary Power and the STF were impacted by the shift of regime, of which the 'anti-judicialism' of the New State is revealing⁸⁷. Concerning the STF, the Charter of 1937 stated that the decisions of unconstitutionality could be reviewed by the Parliament⁸⁸, being the validity of the law maintained regardless the unfavorable decision of the STF, which, in practice, meant the redefinition of the powers of the legitimate authority entitled of delivering the last word in constitutional matters. In the root of such novel institutional design, in spite of the authoritarian bias of the implemented government, a democratic reason⁸⁹ could be glimpsed, for the power to interpret the Constitution encompassed, somehow, the power of (re)formulating it, as explained by the novel institute creator, Francisco Campos⁹⁰.

Nevertheless, in face of the highly centralized legal-political context, that institutional mechanism, which in other constitutional realities is due to a consented and legitimate political decision, took an anti-democratic garb. Once the Parliament was dissolved by the President of Republic, the provision at article 96 of the 1937 Charter, which was a privative duty of the Parliament, was directly and personally performed by the President himself⁹¹. Despite the discourse favorable to popular sovereignty, the power to reverse STF's decisions became a potential instrument of co-optation and control over the STF.

It is true that there is no full dimension of the repercussion in the institutional practice during the New State. The President of Republic, however, came to take advantage of the power assigned by the Charter to reverse STF's decisions, despite the reactions against it⁹². Such an experience allows one to conclude that, in Brazil, the allegedly democratic character of the article 96 of the Charter of 1937 was instrumentalized in favor of the illegitimate concentration of power. For no other reason, according to Paulo Bonavides⁹³, the Polaca brought about a halt in the evolution of constitutional review as it submitted the judicial decision of unconstitutionality to the Parliament's scrutiny⁹⁴.

In fact, by closing the National Congress and taking over its attributions in plentitude, the President of Republic completely wrested the singular procedure of constitutional review as previewed in Charter of 1937. Thus, he was assigned with the power to re-discuss and to alter the STF's decisions⁹⁵, which made his influence and hegemony over the other powers very explicit⁹⁶.

Thereby, two important conclusions could be taken concerning the Polaca. First, it brought about a setback on the institutional arrangement of the constitutional defense which existed until then (1891-1934), provided that, by contradicting the historically consolidated rationale of the principle of separation of powers, it promoted the excessive centralization of powers within the Executive, which was assigned to create, modify, revoke and interpret the laws, including the power to re-assert the validity and the effects of a statute regarded as unconstitutional by a final decision from the STF.

Second, in times of authoritarianism, no institution, even the judicial one, which is independent and *a priori* the most exempted from the volatility of politics, is able to successfully and lastingly contain the violations to law perpetrated by governors and by politics in general. And the long period of Getúlio Vargas's government (1930-1945) was featured with intense intervention within the STF⁹⁷.

Therefore, the Executive Power was assigned with the prerogative to deliver the last word in constitutional matters.

7. *The Constitution of the 're-democratization' of Brazil (1946)*

By the end of World War II, Brazil had joined the 'Allies' due to American pressure. The discourse sustaining the New State lost its strength dramatically. Getúlio Vargas was bounded to return to a democratic normalcy and ended up deposed from his charge even before the end of his term of President. A period of transition back to democracy and of severe political instability was initiated featuring the suicide of a president, presidential depositions, shifts in government regimes (presidentialism and parliamentarism), which came to an end with the 1964 coup d'état.

1946's Constitution of Brazil emerged, therefore, in a political booming momentum around the 're-democratization'⁹⁸, setting the beginning of a new historical time to the Constitutions. Concerning the Brazilian historical constitutional tradition, the new Constitution was a result of a summary of the individual guarantees established in the Constitution of 1891 and of

the social achievements from the Constitutions of 1934⁹⁹ and of 1937¹⁰⁰, as well as the effort to institute effective mechanisms to the bounding of Executive Power arbitrariness, given the prior authoritative political experience¹⁰¹. There was large consensus on the need of imposing severe restraints to the Executive Power¹⁰².

In the Constituent Assembly of 1946, the Judiciary Power and especially the Federal Supreme Court were discussed. It was necessary to fully reestablish its guarantees. The member of Constituent Assembly Rafael Cincurá¹⁰³, aiming to restore its independence, argued: «Strong, as definitive will, annulling acts of the Executive or denying validity to unconstitutional laws, the Supreme Court had preponderant role in the former Constitutions, as the dome of the federative regime. This role has been taken away». Aloísio de Castro¹⁰⁴, also a member of that Constituent Assembly, while speaking on the Judiciary Power, asserted: «From the partly disguised coercion to the practice of ostensive and clamant expedients, by the agents of the Executive and Legislative, not even the Federal Supreme Court is which, just as the remaining Federal and State Courts and judges of lower instances, has suffered, to our sadness, tough coups of contempt, and of disregard which impact in its diminution and in its demotion in face of those other powers».

However, the traumatic experience, due to the hypertrophy of the Executive, did not favor the empowering of the STF, considering Brazilian historical-constitutional tradition so far. Concerning constitutional review, the assignments established in the 1934 Constitution were kept in the 1946 Constitution, specially concerning the scope of the effects of STF's decision of un-

constitutionality, which has always had immediate impact in the role of the Judiciary and in its bonds to the other powers. In this point, the constituent Prado Kelly¹⁰⁵, which was also a member of Constituent Assembly of 1933-34, defended that the effects of the decision of unconstitutionality should be limited to the concrete case, being the Federal Senate, as in the 1934 Constitution, in charge of extending them.

In accordance with limiting the effects of unconstitutional decisions to concrete cases, the member of Constituent Assembly Gustavo Capanema¹⁰⁶ highlighted that: «The decisions of the Judiciary Power only involve the species. If the Judiciary Power decides that a law or decree is unconstitutional, its decision does not imply inexistence of the law or decree». On the same line, the president of the Constituent Assembly, Mr. Nereu Ramos¹⁰⁷, stated that the «declaration of unconstitutionality of laws has always been an assignment of the Judiciary Power», but the «decision only produces effect among the parties».

From the administration of justice point of view, one of the main challenges was to deal with the excessive number of lawsuits. Creating a court of complaints and increasing the number of justices in the STF were considered, as an institutional solution for that problem. And, just like the institute introduced under the aegis of the 1824 Imperial Constitution in the wake of French and Portuguese constitutionalism, it was considered to assign the STF with the prerogative of editing “assentos”, i.e., authorizing that its decisions have force of law with general efficacy and against all, once more attempting to introduce the principle of *stare decisis* in the Brazilian constitutional system. However, such an option did not

prevail, as seen above. The Federal Court of Appeals was instituted and endowed with diverse appealing attributions, saving the almost exclusive appreciations of constitutional and federative issues to the STF¹⁰⁸.

Besides, the Constituent Assembly of 1946 restored the prerogatives of self-government of the Judiciary, like the choice of its presidents and vice-presidents, which had been taken and performed by the chief of the Executive Power in the former constitutional order¹⁰⁹. Nonetheless, they did not suppress the Chamber of Deputies’ attribution to keep the validity of a normative act judged unconstitutional, which would reassure the sovereign competence of the Federal Supreme Court.

The STF, during its nearly twenty years of functioning under the Constitution of 1946, crossed periods of heavy political, economic and legal crisis. In the institutional arrangement of the re-democratization, the STF became a fundamental body to make real Brazilian novel democratic regime. There was awareness of its powerful institutional role as a bastion of democracy and as ultimate interpreter of the Constitution¹¹⁰, aiming to restore the independence lost in the 1930’s as well as vesting it with guarantees which no longer allowed its submission to the Executive Power.

However, this time of re-democratization was marked with various constitutional crisis largely arisen from “compromise solutions” adopted by the Constitution of 1946 (and its social constitutionalism incorporated), which resulted, on the one hand, in the widening of democratic participation of the proletariat, and, on the other hand, in the adoption of programmatic constitutional norms¹¹¹, which would compromise the effectiveness of the Constitu-

tion of 1946 and would lead to deepening the chasm between constitutional structure and political and institutional practice¹¹².

In critical moments, the STF kept a hesitating attitude and neither played a central role nor did it intervene on the course of political debates meaningfully. In times when the sense of a Constitution itself had been among fierce juridical-political disputes, be it for the clamor for substantial change or replacement¹¹³, be it for the defense of its validity¹¹⁴, be it for the strengthening of the Executive Power¹¹⁵, be it for centralizing powers in favor of the federal government over the state governments¹¹⁶, be it for judging the processes of impeachment¹¹⁷, the STF tended to approach the dominating political forces¹¹⁸.

However, Brazilian constitutional order would undergo another break, which came to alter the balance of powers and, consequently, bring about a new perspective change towards the legitimate authority entitled of delivering the meaning of law in ultimate instance.

8. *Constitutional authoritarianism (1964, 1967, and 1969)*

With the military hustle for taking over the power triggered in the dawn of March 31, 1964, a new legal order with a deeply authoritative and centralizing imprint, which reminded the times of the New State, emerged in the national political scenario. The hypertrophy of the Executive Power had been designed through many normative acts, which followed the deposition of president João Goulart.

It is important to highlight a special characteristic of the new regime, which consisted of the enterprise of its institutionalization through ordinary law and, above all, extraordinary (or "of exception"), marking it with "authoritarian legality"¹¹⁹ and ambiguity, with which it was attempted to conciliate democratic institutes and authoritative norms and practices¹²⁰. The degree of intervention within the organization of the Judiciary and of the STF had massive variation during the military regime.

The Institutional Act n^o 1 (AI 1) was published on April 9, 1964, and established initial guidelines to the new government and suspended many constitutional rights and warranties.

At first, the Federal Supreme Court showed a condescending attitude towards the military regime, having its president supported the coup¹²¹ and the other justice not explicitly reproaching it. Although there was distrust, the institutional relation remained friendly¹²². Nevertheless, STF's decisions, such as the *habeas corpus* of Professor Sérgio Cidade Resende, of Miguel Arraes, Governor of Pernambuco, Mauro Borges, Governor of Goiás¹²³, began to displease the revolutionary command, so that legislative proposals were introduced as to 'fit' the STF and the Judiciary Power into the new times¹²⁴.

As to aggravate the tense relationship between the two powers, the president of the STF, justice Álvaro Ribeiro da Costa¹²⁵, published an article ("A reforma do STF") in Folha de São Paulo newspaper, on October 20, 1965, holding an incisive defense of the autonomy of the court against the assaults from the Executive, which led to uneasiness and to a strong reaction from the minister of war and future president,

army general Costa e Silva, anticipating the decree of the AI-2, only seven days after his speech¹²⁶. The AI-2 mirrored the sudden change in the federal government's attitude towards the STF, by the promotion of the reform of the Judiciary Power over the STF's position¹²⁷.

Most significant modifications were those promoted by Institutional Act n^o 2 (AI 2), from October 27, 1965, and by Constitutional Amendment n^o 16 (EC 16), from November 26, 1965, which altered the structure of the Judiciary Power. The AI 2, among other modifications, increased the number of STF members from eleven to sixteen¹²⁸, suspended justicer's prerogatives and impeded the judicial appreciation of government acts based on the "revolutionary legislation", post 1964. Those alterations were assimilated as an unacceptable interference of the Executive Power over the Judiciary, causing massive repudiation from STF justices¹²⁹.

The EC 16¹³⁰ continued the modifications brought by the AI 2 and assigned the STF with the competence of judging actions of unconstitutionality against federal statutes, which configured a "a delicate political assignment in the balance of the other two Powers". With the EC 16/1965, the grounds for the concentrated and abstract constitutional review were set, which became STF's most serious and sensitive competence. The STF was exclusively authorized to recognize the unconstitutionality of laws in a specific suit¹³¹, delivering a decision which should be extended against all, in the fashion of the Austrian model of control, conceived by Hans Kelsen¹³².

Brazilian system of constitutional review, featured as 'diffuse/concrete' – for it predominantly mirrored the American tra-

dition of 'judicial review' –, started being classified as 'mixed', for having incorporated elements from the Austrian tradition of 'concentrated/abstract' constitutional review.

Yet, in order to understand the real meaning of the reception of the concentrated review in Brazil, one should bear in mind that the 1946 Constitution had its rule interrupted and its constitutional and democratic structure disfigured by means of the institutional acts which, since April 9, 1964, summoned the "exercise of the revolutionary constituent power" and fully overwhelmed it¹³³. The political context of authoritative exception allows one to understand that the sense of the concentrated review was different from that shared within the European legal community¹³⁴ (and by Brazilian doctrine after 1988), the understanding of which predominantly links it to the notion of protection of minorities and fundamental rights¹³⁵.

In Brazil, though, the logics of abstract constitutional review, excused by the pragmatic argument aimed at the perfecting of justice administration and of its speed, came to meet the authoritative purposes of centralization and meant the continuity of the constitutional reforms in the realm of Judiciary Power (originated in the AI 2), so that, in practical terms, the novel institute, which gave the constitutional review "total fullness"¹³⁶, came about to contradictorily support and enforce the new political regime in ascension by integrating the Supreme Federal Court to the decision making logics of the authoritative central federal government¹³⁷, for its role of guardian of Constitution would be unsustainable before the several measures taken to co-opt it¹³⁸.

Above all, after issuing of the AI-5, which led to an extreme change in the profile of the Supreme Federal Court by retiring three justices (Victor Nunes Leal, Hermes Lima e Evandro Lins e Silva) nominated by presidents prior to the regime of 1964, when the STF came to be entirely composed by justices nominated by the military regime, adapting it to the most radical moment of the military regime¹³⁹.

The 1967 Constitution aimed to fit the constitutional institutions within the real factors of power, seeking once again to give the new authoritative political regime a "constitutional legal appearance". This Constitution was vested with features proper of the subjacent authoritative political regime, as revealed by the suppression of the direct vote for president of republic, which struck a fundamental pillar of democracy. Later, that Constitution was substantially modified by Constitutional Amendment n° 1, in 1969 (EC 1/1969), which kept with even more rigor the intake of the exercise of political power and of the citizens' rights.

From a formal-legal point of view, the new configuration of the system of constitutional review would no longer undergo any substantial alteration until the advent of the Federal Constitution of 1988. Both the 1967 Constitution and the EC 1/1969, also known as "Constitution of 1969", kept, in the main picture, the structure designed under the rule of the Constitution of 1946, as altered by the AI 2 and by the EC 16/1965¹⁴⁰.

It should be highlighted, however, that in practice the assurance of constitutional review as an instrument of effective grant of fundamental rights and of the federal system was noticeably weakened, given the general mark of this period of severe concentration of powers in the Executive,

whereas the Judiciary and the Legislative were gradually stripped of minimal institutional conditions to resist to government weaning.

On the other hand, one needs to acknowledge that, during the military regime, regardless the hesitating attitude of STF towards the acts of exception from the Executive Power and other interventions, there was room for the development of fundamental questions on constitutional review in Brazil, which helped to shape the institute of concentrated review and the political dimension of the STF, as now previewed in the Constitution of 1988¹⁴¹. There were debates on the nature (political or juridical) of the constitutional review¹⁴², on the creation of a *summula* (decisions with binding effects) as to rationalize and standardize STF decisions¹⁴³, on the president of the republic's prerogative of refusing to apply an unconstitutional law¹⁴⁴, on the power of validation by presidential sanction of a project of law not compatible with the proper procedure specially the right of initiative, on the possibility of constitution review of laws prior to the Constitution. One of the most controversial topics was, however, the effects of the STF decisions (*erga omnes* or *inter partes* and *ex tunc* or *ex nunc*)¹⁴⁵.

However, it is reasonable to admit, in this context, that the AI 2 and the EC 16 served to the political project inherent to the consolidation of the authoritarian government, which looked for the centralization of power and for the elimination of potential spots of inner resistance. The Constitutions of 1967 and of 1969, in their turn, continued the government desideratum, in accordance with the grounding principles of the anti-democratic regime,

although there have been punctual innovations which, from the formal point-of-view of the role of the STF, could represent the widening of its institutional powers¹⁴⁶.

Thus, regardless the textual widening of the Supreme Court's competence through the provision of concentrated/abstract review in the terms of the EC 16, due to the political-historical context, the STF neither was in fact assigned as the legitimate authority to deliver the last word in constitutional matters nor performed the role of guardian of constitutional liberties. It operated as an instrument to endorse the settled authoritarian regime¹⁴⁷.

9. *(Re)Democratization of Brazil in 1988: the unpredictable development of constitutional review*

The year of 1985 was the historical initial mark of Brazil's return to democracy, of which the first steps for the "slow, gradual and safe opening" were given by President Ernesto Geisel (1974-1979). Having become President of Republic in 1979, General João Batista Figueiredo continued the process of political distension.

The resumption of constitutional democracy required a political-legal break up with the authoritarian regime settled in 1964 and later deepened in the Constitution of 1967/69, which implied adopting a new Constitution, to be elaborated by a democratic constituent assembly¹⁴⁸. The Constitutional Amendment n^o 26, from 1985, convoked Constituent Assembly to meet on February 1, 1987.

The Constituent Assembly of 1987-88 was featured with the intense participa-

tion of the people and of organized sectors from civil society. Women, indigenous, workers, quilombos, among other interest groups from the most distinct social and professional sectors, followed, took part, influenced, and pushed the members of Constituent Assembly¹⁴⁹, having become a commonplace to say that the 1988 Constitution was the "most democratic" of the Constitutions promulgated in Brazil.

The historical-constitutional learning benefitted from the formation of a sophisticated system of constitutional guarantees and a wide gamma of fundamental rights, which impacted the institutional organization of the constitutional review. Leaving behind a regime of constitutional authoritarianism imposed the denial of the post-1964 constitutional order, bringing once again the "process of denying" the former constitutional identity¹⁵⁰, which, from the perspective of constitutional review, meant strengthening the Legislative Power and, more than ever, Judiciary Power¹⁵¹.

The creation of a Constitutional Court was considered, but the idea was repelled. Members of the Judiciary Power, specially justices from the STF, were against it, for reasons ranging from judges and justices' secondary and corporatist interests to the incompatibility of an exclusive appropriation of a model of concentrated review with the century long historical-constitutional Brazilian tradition of 'judicial review'¹⁵². The solution was to predominantly save to the STF the competences of constitutional nature¹⁵³.

Nonetheless, it is undeniable that the Judiciary Power has been significantly empowered in the new Constitution, which chose to outline a model of effective judicial protection of fundamental rights¹⁵⁴.

The mixed system of constitutional review was sustained, congregating elements from the American judicial review tradition and from Austrian constitutional review tradition.

The 1988 Constitution went even beyond concerning the changes occurred since the EC 16/1965. There was widening of the active legitimacy *'ad causam'* as to promote the 'direct action of unconstitutionality' (ADI), named 'representation of unconstitutionality' in the previous system, which put an end to the monopoly of the attorney general of republic, which was a post of the president of republic's free nomination. In the rule of the Constitution of 1988, besides the attorney general, the president of republic, state governors, committees of the Senate or Chamber of Deputies, political parties represented in congress, unions and the federal council of Brazilian Bar Association (OAB) are entitled to provoke the constitutional review through ADI. The widening of the list of the legitimated to propose the ADI along the years, came to be one of the reasons for the judicialization of politics in Brazil¹⁵⁵.

The Constituent Assembly of 1987-88, concerned with the applicability of the wide list of rights to be declared by the upcoming Constitution, deeply innovated in Brazilian constitutional tradition by offering two legal process instruments as to actualize the constitutional norms: the writ of injunction and the direct action of unconstitutionality for omission (ADO)¹⁵⁶.

Inspired by Anglo-American law, the writ of injunction was conceived as a special legal action to authorize the judge to issue an order to do or not to do something, even though there is no statute to regulate the concrete case. Explaining its creation, the

member of Constituent Assembly Virgílio Távora¹⁵⁷ recalled Brazilian tough tradition of a constitutional history featured with low normative effectiveness: «Aiming to enforce the subjective public rights, created in generic form by the Constitution, which, if not implemented by the constituted powers through the edition of integrative acts and norms of the Constitution, should bring about the unconstitutionality for omission»¹⁵⁸.

The positivation of the writ of injunction as an instrument of Brazilian constitutional review indicates the 1987-88 Constituent Assembly members' clear intention of breaking up with the 'nominalist' tradition and with the lack of effectiveness in Brazilian Constitutions, by creating conditions able to provide effectiveness to the upcoming Constitution through the strengthening of the Judiciary Power.

Concerning the ADO, which privately allows the STF to perform the concentrated control of normative omissions through direct action, the Constitution of Brazil found inspiration in the Constitution of Yugoslavia of 1974 and of Portugal of 1976¹⁵⁹. It also innovated in this field, though. The Constitution of Portugal assigned the Constitutional Court the competence of only 'to give knowledge' to the legislative authority in charge, evidencing the declaratory nature of the Court's decision. The Constitution of Brazil adopted a wider spectrum than its Portuguese counterpart, not bounding itself to the "omission of legislative measures," but stating that the "normative omission" encompasses normative acts emanated from both administrative and legislative bodies.

Constitutional review was even more strengthened in Brazil with Constitutional

Amendment n° 3, from 1993 (EC 3/1993), which created the 'declaratory action of constitutionality' (ADC). Having accounted for the existence of the diffuse review in Brazil and the boundaries of concentrated review (*via* ADI), the advent of EC 3/1993, enabled the STF to ratify the validity (and binding character) of laws, the presumption of constitutionality of them had been hit due to the existence of diverse opposite decisions by judges and lower courts. The ruling of ADC has *erga omnes* effects and binding efficacy, so that judges and courts could no longer judge against the orientation firmed by the STF¹⁶⁰.

The EC 3/1993 also created the 'claim of non-compliance with a fundamental precept' (ADPF), which also represented a step further in the strengthening of the judicial constitutional review. Regulated by Act n° 9.882, from 1999, the ADPF encompasses the appreciation *in abstract* of the constitutionality of normative acts which are not object of the ADI, the ADC, or the ADO (e.g.: town laws, laws published before the Constitution of 1988), which enabled the STF to, in practice, review the constitutionality of any normative act *in abstract*.

Later, with Constitutional Amendment n° 45, dated 2004, two new institutes were created within the Brazilian Constitutional system, assigning even more power to the STF, by contributing to the concentration of the constitutional review by the STF, in detriment of the attributions of the Legislative Power and of the Executive Power in the realm of constitutional review. The *súmula* ("súmula vinculante") and the general repercussion of the constitutional issues in an extraordinary appeal ("repercussão geral do recurso extraordinário") enabled the STF to issue binding precedents on consti-

tutional matters upon the lower bodies of the Judiciary Power and of the public administration, which has noticeably reduced the institutional role of Federal Senate in the constitutional review as foreseen in the Constitution of 1988, concerning the extension of the effects of the STF's ruling in the judicial review (*inter partes*).

Besides judicial constitutional review, the 1988 Constitution established a political constitutional review by the Executive and Legislative Powers. The President of Republic may perform it directly in two distinct modes: first, through the "legal veto"¹⁶¹, when there is refusal to sanction law projects approved by National Congress in face of their inconsistency with the Constitution; second, if there is refusal to fulfill laws which are manifestly unconstitutional because of the commitment to defend and enforce the Constitution¹⁶².

The Legislative Power, in its turn, performs the constitutional review through the Commission of Constitution and Justice, which examines the constitutionality of law projects in process in the Congress, or through a special committee of deputies and senators which examines the compliance of provisional measures (MP, "medidas provisórias") with the force of law to the constitutional requirements, which is "in important and urgent cases". Besides, the Legislative may reject the president's 'legal veto' or stop normative acts of the Executive Power¹⁶³ which extrapolates the regulation, as well as suspend the enforcement of law declared unconstitutional by definite ruling of the STF by means of the judicial review. Finally, nothing impedes the Legislative from passing a law just to revoke another law considered unconstitutional.

The promulgation of the Constitution of 1988, however, did not have the wandering of abruptly modifying Brazilian legal culture, especially because practically there was no immediate renewal of the members of the Judiciary and of the STF. It took time for the institutions to ripen until the changes of this new constitutional law temporality could be felt.

It is undeniable that the Constitution of 1988 promoted the strengthening of the Judiciary Power as an instrument of granting the rights and of constitutional enforcement¹⁶⁴, generating a true "discovery of the Judiciary"¹⁶⁵. However, its normative provisions were not easily turned into reality, so that the temporality of the Constitutional State is yet to be integrally experienced in Brazil.

On the one hand, old practices and political and government traditions have persisted. Regardless the boundaries of the Constitution of 1988, mainly articulated due to the authoritarianism which had featured the Constitutional period before 1985, the Executive Power, for a long time, kept on enjoying its primacy in detriment of the Legislative and Judiciary Powers. That was very clear with the abuse of the president's prerogative of passing MP with force of law, making it necessary to publish the Constitutional Amendment n° 32, dated 2001, as to limit the use of that expedient.

On the other hand, the Judiciary Power itself has been below its institutional role, as it may be found in the critical evaluations of jurists from that time, including their omission concerning the Executive abuses in the edition of MP. Celso Antônio Bandeira de Mello¹⁶⁶, in his reflection on the 10th anniversary of the Constitution, warned that we were close to its funer-

al, due to the excessive hypertrophy of the Executive Power and to the many constitutional amendments which had disfigured the original text of 1988. This opinion seconded by Fábio Konder Comparato¹⁶⁷, who accused the STF of condoning to the deviations and arbitrariness of the Executive.

For Luís Roberto Barroso¹⁶⁸, ten years after 1988, Brazilian constitutional review had a performance of "ups and downs". The STF, in his point of view, was responsible for the writ of injunction not having lived up, in a meaningful way, to the expectations generated with its creation in 1988, as they understood that action would have a merely declaratory nature of the omission (and not mandatory, enforcing the non-self-executing constitutional norm in the concrete case)¹⁶⁹. Attempting to understand this institutional behavior, he pointed out that the maintenance of all members of the STF who were nominated in the previous regime was decisive, for the new Constitution was victim of an "old and retrospective interpretation", unsuitable for the new times.

Barroso argued for the empowering of the STF, taking over its new constitutional role, so that it could become a strong court with institutional authority and means to actualize the constitutional warranties. Nevertheless, in the twentieth year of the Constitution, after a series of modifications in its normative structure and in the functioning of constitutional review – worth noticing the recognition of the binding effects of the STF's decision in concentrated and incidental control –, he criticized the judicialization of politics, the political and institutional rise of the Judiciary, its political action and the consequent restraint to the formation of a democratic political will¹⁷⁰.

It turns out that, in the last decades, Brazilian constitutional review has required a new understanding of the principle of separation of powers, largely because of the new theses and jurists received in Brazil¹⁷¹. The new dynamics in the relations among powers, with a more incisive participation of the Judiciary, specially of the STF, was brought about questioning on the democratic legitimacy in the exercise of constitutional review and on the STF's supposed authority to deliver the last word in constitutional matters, mainly when the court decides on difficult and highly controversial matters (*e.g.*: abortion, private funding of political campaigns, imprisonment in second instance, criminalization of homophobia, right to strike etc.).

Consequently, judicial activism has been one of the most dominant concepts in political and constitutional language in the analyses on judicial behavior, regardless the semantic problems related¹⁷², evidencing the strong doctrinal and institutional reaction to many judicial decisions¹⁷³. Besides, there have been presentations of many proposals of constitutional amendments aiming to limit the powers of the Federal Supreme Court as well as restructure it, attempting to contain the exercise of constitutional review within the supposed limits constitutionally pre-set¹⁷⁴.

It is certain that, as remarked by Maurizio Fioravanti¹⁷⁵, the historical era of Constitutional State is featured with a new understanding of the Constitution, which breaks up with the Liberal State and institutes the paradigm according to which the fundamental rights are directly founded in the Constitution, no longer depending exclusively on legislative intermediation¹⁷⁶. However, this new temporality of the Con-

stitution involves a new challenge, never figured out by Montesquieu, of seeking a 'balance point' between the realm of rights and the realm of legislation, which are different operating parties of the constitutional system.

Thus, it is inevitable to recognize that the system of constitutional review, instituted by the 1988 Constitution, established a rich and complex mechanism of constitutional safeguard with great emphasis on the Judiciary Power. Nevertheless, both the Executive Power and the Legislative Power have active and relevant participation in it. At the same time, the current constitutional system has set grounds for the constant re-design of Brazilian institutional framework, depending on the constitutional dynamics and on the institutional interactions, which alters the expectations towards the actions of each constituted power, in such a way that each one's legitimacy shall never be *a priori* and shall always depend on the historical and political context¹⁷⁷.

Instead of seeking definitive answers to the inevitable and everlasting question of who is assigned with the authority of delivering the 'last word' in constitutional matters, it is more profitable to focus on the exercise of constitutional review, as it has been the current trend, as an instrument of establishing institutional dialogue, from which the authority of defining the sense of Constitution lies on a dynamic, circular and reflexive, relation among the powers¹⁷⁸. This seems to be the perspective which best addresses the plural and democratic will of the members of Constituent Assembly of 1987-88, predominant in the Constitution of 1988.

Final comments

Brazilian history of constitutional review reveals that this instrument of defense of the Constitution does not set an inherent prerogative to the judicial role. Although there is agreement on the notion that the Judiciary is the most appropriate power to perform the guard of Constitution, it does not allow stating the rule that the Judiciary would have the inherent role of performing it.

The analysis of the constitutional texts, and their respective advancements and setbacks, shows that the Brazilian constitutional history is not the result of a linear and increasing evolution in which the constitutional review has always belonged to the Judiciary Power sphere of assignments. Instead, constitutional review has been defined based on interests and conceptions of hegemonic political forces.

The widest decision on the formal-legal model of how the practice of constitutional review should ideally be performed occurs during the discussion and elaboration of the Constitutions (or their eventual reforms). It is strongly shaped by the legal culture and by the members of Constituent Assembly' experience that, from their experiences and interests, project, in the future horizon, political models in light of which they imagine the perfect action of the Judiciary Power¹⁷⁹.

It is true that all the effort employed at the constituent process is relative. The institutional practice and the constitutional habits might (or not) confirm the political expectations served in each one of the Constituent Assembly. This is, however, a topic to deserve further attention in specific research. By now, it is worth confirming the

premise that the setting of the system of constitutional review is much more shaped by institutional history and by politics than by a proper legal ontology of roles said to be inherent to each of the political powers.

In this sense, as discussed in items 3 and 4, one will find that judicial review's introduction in the 1891 Constitution did not emerge, at first, from the need of granting fundamental rights, but of preserving the incipient federalism and the constitutional competences of the Union in face of the abuses from the State legislative prerogatives. Similarly, the introduction of the concentrated/abstract control by the EC 16/1965, which modified the Constitution of 1946, did not mean a reinforcement in the mechanisms protection of the citizens' constitutional liberties or a maintenance of the federative pact, according to the analysis carried out in items 7 and 8. Instead, it was an instrument used by the government in order to accomplish its authoritarian and centralizing political project, aiming to avoid the interference from other powers and bodies.

Another important conclusion to be taken from the contextual history developed here, which demystifies Brazilian traditional constitutional doctrine, is that the looming of some political powers, specially the Executive, directly and almost immediately influences the functioning of constitutional instruments of defense. It is logical because, regardless whoever is responsible for performing the constitutional review (judicial or non-judicial), it is meant to legitimate the exercise of that power, which authorizes to limit politics by law.

Thus, the hypertrophy of the Executive, of the Legislative or of the Judiciary brings about the exercise of their functions beyond

their legitimate field of action, as to result in a form of exercise of power aside the Constitution and to impede mechanisms of constitutional review and guarantee have any efficacy.

In authoritarian regimes, there is a trend to restraint or suppress the scope of action of constitutional procedures or, even, to co-opt the bodies in charge of their exercise, according to detailed inquiry carried out in items 6 and 8, so that the power in charge of the political conduction of government policy is not contested by the other powers as to keep the form of apparent legality and the constitutionality of the order.

It is also worth noticing the finding that, once a traumatic and authoritarian government experience is overcome, it is envisaged the enacting of a new Constitution adopting the necessary caution as to stand in the return of government abuses during the previous political order. This aspect was particularly highlighted in the items 6 and 7, in which the impact of the article 96 of the 1937 Constitution in the system of constitutional review, altering its historical sense as consolidated up to then.

It is important to understand constitutional review's semantics in its own temporality, which is in a dynamic and mutable process¹⁸⁰. Even in the light of the same constitutional text, as it can be inferred in item 9, by analyzing constitutional review in the 1988 Constitution, it has been a semantical mutation of constitutional review's concept, and the previous claim in favor of a judicial protagonism for enforcing constitutional standards has been nowadays confronted because of judicial activism. In fact, the members of Constituent Assembly's horizon of expectation was

not symmetrical with space of experience of constitutional and political community in the present time.

To sum up, the general objective of this essay consisted of elaborating a critical and contextual history of the constitutional review in order to identify the boundaries of the traditional Brazilian narrative of constitutional doctrine. More specifically, from each of the main constitutional experiences in Brazil, it intended to argue that the history of Brazilian constitutional review reveals that the forms of defending the Constitution emerge from contingencies driven by a complex constellations of factors. One should not conceive constitutional review as an inherent assignment to the province of Judiciary Power, which would have been consolidated due to a natural institutional evolution and ripening of the Judiciary Power.

Brazilian historical constitutional experience has shown that the definition of the legitimate authority (Legislative, Executive or Judiciary) in charge of delivering the 'last word' in constitutional matters sets up a delicate field of political fight in which theory and praxis are to catch endless clashes and in which *a priori* answers are hard to be obtained, because there are many institutional alternatives and, only in accordance with each social and political context, should one get to that answer which seems more suitable to each community, in each historical picture.

- ¹ I would like to express my gratitude to Professors André Melo Gomes Pereira, Diego Nunes and George Rodrigo Bandeira Galindo, who have read and criticized the previous version of this article, as well to two anonymous reviewers of *Giornale di Storia Costituzionale*. Their careful reading and extremely useful comments were essential for the drafting of this article. For suggestions and comments: macasseb@gmail.com.
- ² For an overview on the Constitutional period after 1930, see C. Paixão, *Direito, política, autoritarismo e democracia no Brasil: da Revolução de 30 à promulgação da Constituição da República de 1988*, in «Araucaria. Revista Iberoamericana de Filosofía, Política y Humanidades», n. 26, 2011, pp. 146-169.
- ³ On the concept of formal and material constitution, see: M. Fioravanti, *Las doctrinas de la Constitución en sentido material*, in «Fundamentos (Conceptos de Constitución en la Historia)», n. 6, 2010, pp. 427-438.
- ⁴ Cfr. P. Costa, *In search of legal texts: which texts for which historian?*, in D. Michalsen (ed.), *Reading Past Legal Texts*, Oslo, Unipax, 2006, pp. 158-182.
- ⁵ L. Scuccimarra, *Polifonie costituzionali*, in «Giornale di Storia Costituzionale», n. 17/I, 2009, pp. 5-7.
- ⁶ Unlike the Brazilian tradition, there is, in the foreign doctrine, extensive historical-constitutional literature aimed at the re-writing of the process of formation of constitutional review. As for example, see: L. Lacchè, *Il limite, la garanzia, l'arbitro. La Corte e il costituzionalismo*, in «Giornale di Storia Costituzionale», n. 11/I, 2006, pp. 5-22; M. Meccarelli, *Il grande assente? Controllo di costituzionalità e giurisdizione suprema nell'Italia post-unitaria*, in «Giornale di Storia Costituzionale», n. 4/II, 2002, pp. 173-188; M. Stolleis, *Judicial review, administrative review, and constitutional review in the Weimar Republic*, in «Ratio Juris», vol. 16, n. 2, June, 2003, pp. 266-280; Id., *Judicial interpretation in transition from the Ancien Régime to constitutionalism*, in Y. Morigiwa, M. Stolleis, J.L. Halperin (eds.), *Interpretation of Law in the Age of Enlightenment*, Heidelberg, Springer, 2011, pp. 3-17; M. Lorente Sariñena, *Las infracciones a la Constitución de 1812*, Madrid, Centro de Estudios Constitucionales, 1988; A. Bernal Botero, *Matizando o discurso eurocêntrico sobre a interpretação constitucional na América Latina*, in «Revista Sequência», n. 59, dez. 2009, pp. 271-298. In the American constitutional system, the topic raises endless debates and researches, such as: W.E. Nelson, *Marbury v. Madison: the origins and legacy of judicial review*, Lawrence, University Press of Kansas, 2000; M.S. Paulsen, *The irrepressible myth of Marbury*, «Michigan Law Review», vol. 101, Iss. 8, August 2003, pp. 2706-2743; G.S. Wood, *The origins of judicial review revisited, or how the Marshall court made more out of less*, in «Washington and Lee Law Review», vol. 56, n. 3, Summer 1999, pp. 787-809; J. Rakove, *The origins of judicial review: a plea for new contexts*, in «Stanford Law Review», vol. 49, Iss. 5, May 1997, pp. 1031-1064; M.S. Bilder, *Idea or practice: a brief historiography of judicial review*, in «The Journal of Policy History», vol. 20, n. 1, 2008, pp. 6-25.
- ⁷ Lacchè, *Il limite, la garanzia, l'arbitro*, cit., p. 6.
- ⁸ Ivi, pp. 8-9. On mythologies in law, see: P. Grossi, *Mitologie giuridiche della modernità*, Milano, Giuffrè, 2007, pp. 164-234.
- ⁹ G.R. Bandeira Galindo, *Force field: on history and theory of international law*, in «Rechtsgeschichte», vol. 20, 2012, pp. 86-103.
- ¹⁰ M. Fioravanti, *Sulla storia costituzionale*, in «Giornale di Storia Costituzionale», n. 19/I, 2010, pp. 29-32.
- ¹¹ J. Varela Suanzes-Carpegna, *Historia e historiografía constitucionales*, Madrid, Trotta, 2015, pp. 13-42.
- ¹² P. Costa, *In search of legal texts: which texts for which historian?*, in Michalsen (ed.), *Reading Past Legal Texts*, cit., pp. 158-181.
- ¹³ In Brazil, for example, given the political-constitutional configuration of the Imperial State, the decisions of the Supreme Court of Justice of the Empire did not have the same political impact as the decisions of the Supreme Federal Court have nowadays. Therefore, in a research on constitutional history, the *locus* Supreme Court of the Empire, *ipso facto*, shall not robe the same centrality as the General Assembly or as the Council for the comprehensive reconstruction of the norm.
- ¹⁴ M. Stolleis, *Public law in Germany: a historical introduction from the 16th to the 21st century*. Transl. T. Dunlap, New York, Oxford University Press, 2017, pp. 1-11.
- ¹⁵ Lacchè, *Il limite, la garanzia, l'arbitro*, cit., pp. 5-22.
- ¹⁶ N. Luhmann, *La costituzione come acquisizione evolutiva*, in G. Zagrebelsky, P.P. Portinaro, J. Luther (a cura di), *Il Futuro della Costituzione*, Torino, Einaudi, 1996, pp. 83-128.
- ¹⁷ M. Stolleis, *Stato e ragioni di stato nella prima età moderna*, trad. S. Iovino, C. Schultz, Bologna, il Mulino, 1998, pp. 134-164.
- ¹⁸ M. Cau, *La Costituzione nel tempo. Regimi di storicità di un progetto storico-politico*, in «Giornale di Storia Costituzionale», n. 36/II, 2018, pp. 147-168.
- ¹⁹ M. Rosenfeld, *The identity of constitutional subject*, in «Cardozo Law Review», vol. 16, 1995, pp. 1049-1109.
- ²⁰ It is quite true that the idea of constitutional jurisdiction corresponds nowadays to a specific type of defense the Constitution, which is performed by judicial bodies or specific ones (*v.g.*: constitutional courts) for the solution of social and political conflicts in light of constitutional norms, as

- explained by Zagrebelsky. G. Zagrebelsky, *La legge e la sua giustizia*, Bologna, il Mulino, 2008, pp. 311-322.
- ²¹ J.J. Gomes Canotilho, reserving the concrete specificities of each ordering, distinguishes six main roles of constitutional justice: (a) constitutional litigation, i.e., among the supreme bodies of the State; (b) litigation emerging from vertical (territorial) separation of constitutional bodies; (c) constitutional review of laws and regulatory acts; (d) autonomous protection of fundamental rights; (e) regulatory control of constitutional body generation and other main types of political expression; (f) intervention in the processes of inquiry and canvass of constitutional responsibility, J.J. Gomes Canotilho, *Direito constitucional e teoria da constituição*, Coimbra, Almedina, 1999³, pp. 823-839.
- ²² M. Cappelletti, *O controle judicial de constitucionalidade das leis no direito comparado*, trad. A.B. Gonçalves, ed. Porto Alegre, Fabris, 1999³, pp. 23-44.
- ²³ M. Casseb Continentino, *História do controle da constitucionalidade das leis no Brasil: percursos do pensamento constitucional no século XIX (1824-1891)*, São Paulo, Almedina, 2015, pp. 29-47.
- ²⁴ Q. Skinner, *Visions of politics (regarding method)*, Cambridge, Cambridge University Press, vol. I, 2010, pp. 57-89.
- ²⁵ See, e.g.: C. Ferreira Mendes, P.G. Gonet Branco, *Curso de direito constitucional*, São Paulo, Saraiva, 2016⁴, pp. 1108-1126; C.M. Clève, *A fiscalização abstrata da constitucionalidade no direito brasileiro*, São Paulo, RT, 2000⁵, pp. 80-82; L.R. Barroso, *O controle de constitucionalidade no direito brasileiro*, São Paulo, Saraiva, 2004, pp. 57-62.
- ²⁶ Pimenta Bueno is to be highlighted for the impact his remarkable work, "Direito Publico Brasileiro e Análise da Constituição do Império", had on the political and legal community of the Empire. See also: P. Aufran da Matta Albuquerque, *Elementos de direito publico*, Recife, Typ. Imparcial, 1849, pp. 22-23; J.R. de Sousa, *Analyse e commentario da Constituição Política do Imperio do Brazil*, S. Luiz, Typ. B. de Mattos, vol. I, 1867, pp. 104 ss.; Casseb Continentino, *História do controle da constitucionalidade das leis no Brasil*, cit., pp. 350 ss.
- ²⁷ J.A. Pimenta Bueno, *Direito publico brasileiro e analyse da Constituição do Imperio*, Rio de Janeiro, Typographia Imp. e Const. de J. Villeneuve e C., 1857, p. 78.
- ²⁸ According to Haroldo Valladão, Pimenta Bueno was the «greatest publicist and constitutionalist of the Empire», H. Valladão, *Pimenta Bueno, grande publicista e constitucionalista do Império*, in «Revista do Instituto Histórico e Geográfico Brasileiro», vol. 199, 1948, pp. 176-190. Bueno's "Direito Publico Brasileiro", from 1857, was the first comprehensive reflection on Brazilian positive constitutional law and had a meaningful impact in the national scenario. So great was its relevance it would be Dom Pedro II's "bedside book". E. Kugelmas, *Introdução*, in J.A. Pimenta Bueno, *Direito publico brasileiro e análise da Constituição do Império*, São Paulo, Editora 34, 2002, p. 37.
- ²⁹ Pimenta Bueno, *Direito publico brasileiro*, cit., pp. 38-39.
- ³⁰ According to the "jurist of the Empire", the article 25 of the Belgian Constitution stated that the "political powers should be performed as established by Constitution", *ibidem*.
- ³¹ *Ivi*, pp. 105-108.
- ³² An example of this assignment, among other acts, would be the Law of Interpretation of the Additional Act (Law 105, from May 12, 1840), which restricted the scope of the Additional Act of 1834, decreasing the powers of provincial legislatures and stipulating the hypothesis of constitutional review of provincial laws, which shall be analyzed later.
- ³³ Casseb Continentino, *História do controle da constitucionalidade das leis no Brasil*, cit., pp. 27-47.
- ³⁴ Brasil, *Diário da Assembleia Geral, Constituinte e Legislativa do Império do Brasil (1823)*, Brasília, Senado Federal, tomo II, 2003, pp. 689-700.
- ³⁵ Casseb Continentino, *História do controle da constitucionalidade das leis no Brasil*, cit., pp. 165-185.
- ³⁶ Montesquieu, *Do espírito das leis (1748)*, trad. M. Morgado, Lisboa, Edições 70, 2011, pp. 305-317.
- ³⁷ The article 98 of Imperial Constitution established «Art. 98. The Moderating Power is the key to the whole political organization and is privately assigned to the Emperor, as Supreme Chief of the Nation and its first representative, in order to incessantly watch over the maintenance of independence, balance and harmony of the other political powers». Brasil, *Constituição Política do Império do Brasil, de 25 de março de 1824* <http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao24.htm>, September 2020.
- ³⁸ Perhaps, it would be important distinguishing Neutral from Moderating Power, considering how Benjamin Constant's ideas were appropriated and properly fashioned by Brazilian politicians, in order to maintain the supremacy of the Emperor. It is noteworthy highlighting that besides being the Chief of Executive Power, the Emperor was the head of the Neutral (or Moderating) Power, excessively centralizing the political power in his hands. And, according Benjamin Constant's theory, it would characterize a dictatorial regime. According to the article 101 of the 1824 Constitution, the duties of the Neutral Power were: (1) nominating senators; (2) extraordinary convoking of the General Assembly; (3) sanction and veto of legislative acts with law

force; (4) interim approval and suspension of acts and resolutions of Provincial Councils; (5) prorogation or adjournment of the General Assembly, as well as the dissolution of the Parliament, when required for the salvation of the State; (7) suspension of judges; (8) remission and moderation of imposed penalties; (9) concession of amnesty in urgent cases, when aimed at humanity and the well-being of the State, Brasil, *Constituição Política do Império do Brasil, de 25 de março de 1824*, cit. For Benjamin Constant neutral power's theory, see: B. Constant, *Reflexões sobre as Constituições e as garantias (1814)*, in *Escritos de política (org. Célia Quirino)*, trad. E. Brandão, São Paulo, Martins Fontes, 2005, pp. 191-285.

³⁹ T. Barreto, *A questão do Poder Moderador (1871)*, in «Estudos de direito», I, Rio de Janeiro, Solomon, Sergipe, Diário Oficial, 2012, pp. 96-97.

⁴⁰ Nelson Saldanha correctly perceived the paradox between emperor Dom Pedro and imperial constitutional order, affirming precisely: «That inverted William of Orange meant to fit our Bill to him», N. Saldanha, *História das ideias políticas do Brasil*, Brasília, Senado Federal, 2001, p. 105.

⁴¹ According to the Visconde do Uruguay, the first modality of constitutional review would occur by means of an act from the president of the Province should he refuse to sanction the law project for offense to the Constitution. The second mode of review would give rise to the routing of the vetoed law project, in face of the non-resignation of the Provincial Assembly due to the presidential veto, to the General Government and to the General Assembly, which were ultimately in charge of deciding on the constitutional quarrel. The third procedure of review took place after the detection of the unconstitutionality of

the provincial law already sanctioned and published, enabling the General Assembly to revoke it (art. 20), Visconde do Uruguay, *Estudos praticos sobre a administração das provincias no Brasil*, Rio de Janeiro, B.L. Garnier, tomo I, 1865, pp. 261 ss.

⁴² Pimenta Bueno, *Direito publico brasileiro*, cit., pp. 285-313. For further input in this topic, see: J.R. de Lima Lopes, *O Oráculo de Delfos: O Conselho de Estado no Brasil-Império*, São Paulo, Saraiva, 2010, pp. 111-309; C.E.C. Lynch, *A ideia de um Conselho de Estado brasileiro: uma abordagem histórico-constitucional*, in «Revista de Informação Legislativa», a. 42, n. 168, 2005, pp. 45-64.

⁴³ For the causes of the decay of Monarchy and the republican choice, see: S. Buarque de Holanda, *Do Império à República*, in *História Geral da Civilização Brasileira, (Vol. 7)*, Rio de Janeiro, Bertrand Brasil, 2008⁸, *passim*; E. Viotti da Costa, *Da monarquia à república: momentos decisivos*, São Paulo, Unesp, 2007⁸, pp. 387-492.

⁴⁴ The Exposition of Reasons written by the Minister of Justice, Campos Salles, on the Decree n° 848, from October 11, 1890, which outlined federal justice, assigned to the Judiciary Power new competences concerning the defense of Constitution and the prerogative of declaring the unconstitutionality of laws, making the partial break with the earlier conception towards the Judiciary Power explicit: «Though, what should primarily feature the need of immediate organization of Federal Justice is the high preponderance it is meant to represent, as the body of a power, within the social body. Magistracy as instaurated in the country now, thanks to the republican regime, is not a blind instrument or a mere interpreter in the enforcement of legislative power acts. Before applying the law, it is entitled

to examine it, being able to give or refuse its sanction, whether it seems according to or against the organic law. The power of interpreting the laws, according to the honest and wise American judge, necessarily encompasses the right of verifying whether or not they are according to the Constitution and ultimately state if they are null and void», Brasil, *Decretos do Governo Provisório da República dos Estados Unidos do Brasil (Décimo Fascículo, de 1 a 31 de outubro de 1890)*, Rio de Janeiro, Imprensa Nacional, 1890, pp. 2737-2738.

⁴⁵ R. Barbosa, *Atos inconstitucionais (1893)*, Campinas, Russel, 2004², pp. 11-19; A. Castro, *Manual da constituição brasileira*, Rio de Janeiro, Leite Ribeiro e Maurillo editores, 1918, pp. III-IV e pp. 139-168; C. Maximiliano, *Comentários à Constituição brasileira de 1891*, Rio de Janeiro, Jacintho Ribeiro dos Santos, 1918, pp. 102-103.

⁴⁶ Barbosa, *Atos inconstitucionais*, cit., p. 19.

⁴⁷ The article 386 of the Federal Decree n° 848, from 1890, established: «Art. 386. The former statutes of criminal, civil and commercial law shall be set subsidiary legislation in the cases left out and shall not be contrary to the dispositions and spirit of this very decree.

The statutes of civilized peoples and especially the ones conducting the legal relations in the Republic of the United States of America, the cases of common law and equity, shall also be subsidiary in federal litigation and jurisprudence), Brasil, *Decreto n° 848, de 11 de outubro de 1890*, <http://www.planalto.gov.br/ccivil_03/decreto/1851-1899/d848.htm>, September 2020.

⁴⁸ P. Bonavides, P. de Andrade, *História constitucional do Brasil*, Brasília, OAB, 2006⁸, pp. 257 ss.

⁴⁹ The formalization of this constitutional transformation was translated into the text of the 1891

- Constitution as follows: «Art 59. The Supreme Federal Court is assigned to: [...] § 1º There will be an appeal of the sentences of the State Courts to the Supreme Federal Court, in last instance: a) when there is either questioning on the validity or application of federal treaties and laws, and the State Court's decision is against the former; b) when the validity of laws and acts from the State Governments is contested in face of the Constitution, or of the federal laws, and the State Court's decision regard these acts as valid or those laws confuted», Brasil, *Constituição da República dos Estados Unidos do Brasil, de 24 de fevereiro de 1891*, <http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao91.htm>, September 2020.
- ⁵⁰ Brasil, *Annaes do Congresso Constituinte da Republica (1890-1891)*, vol. II, Rio de Janeiro, Imprensa Nacional, 1924², pp. 148 ss.
- ⁵¹ Casseb Continentino, *História do controle da constitucionalidade das leis no Brasil*, cit., pp. 399-414.
- ⁵² Maximiliano, *Commentarios à Constituição brasileira de 1891*, cit., p. 555.
- ⁵³ A.A. Milton, *Constituição do Brasil: notícia historica, texto e commentario*, Rio de Janeiro, Imprensa Nacional, 1895, p. 275.
- ⁵⁴ The senator José Hygino Duarte Pereira, who would become justice of the Brazilian Supreme Court, challenged the new powers to be assigned to the Supreme Court: «it will be the safeguard or the loss of the Republic». The Supreme Court would be «the key to the dome of the new political building» and would be in the President's hands, which «could compose that Court with creatures of his and throw his Brennus's sword on the scale of the public powers», Brasil, *Annaes do Congresso Constituinte da Republica (1890-1891)*, vol. II, Rio de Janeiro, Imprensa Nacional, 1924², pp. 80-87 and pp. 148 ss.
- ⁵⁵ In this sense, magister and member of Constituent Assembly Amphilophio Botelho Freire de Carvalho's warning is significant in calling the attention of its colleagues in the Constituent concerning the amount of power assigned to the STF, a body «which condenses the highest amount of political power in the new form of government, because it has the faculty of correcting the mistakes of the Executive and of the Legislative, securing the intelligence of constitutional law, and which is the court to judge the President of the Republic in ordinary crimes». In face of the imperial past strongly present (and recalled by the members of Constituent Assembly) in the experience of noticeable intervention of the Executive in Judiciary matters, the creation of the STF with «a more political than properly judiciary role», in which its members were to be "arbitrarily" nominated by the President of the Republic, could turn Brazil into a "Singular Federation!", *ivi*, pp. 86-87 and pp. 167.
- ⁵⁶ Rui Barbosa suggested the following amendment to the article 34 of the Project of Constitution: «Art. 34. The National Congress is privately entitled to: [...] § 18. Create courts subordinate to the Supreme Federal Court», R. Barbosa, *A Constituição de 1891*, in *Obras Completas de Rui Barbosa*, Rio de Janeiro, Ministério da Educação e Saúde, vol. XVII, tomo I, 1946, p. 40.
- ⁵⁷ Brasil, *Annaes da Camara dos srs. Senadores*, vol. I, Rio de Janeiro, Imprensa Nacional, 1891, p. 102.
- ⁵⁸ Casseb Continentino, *História do controle da constitucionalidade das leis no Brasil*, cit., pp. 400-414.
- ⁵⁹ To go further on historiographical topics about temporal dimensions and its relationship with legal transplants, see: C.R. Bandeira Galindo, *Legal transplants between time and space*, in T. Duve (ed.), *Entanglements in Legal History: Conceptual Approaches Global Perspectives on Legal History*, vol. 1, Frankfurt, Max Planck Institute for European Legal History, 2014, pp. 129-148.
- ⁶⁰ F. Pontes de Miranda, *Os fundamentos actuaes do direito constitucional*, Rio de Janeiro, Freitas Bastos, 1932, pp. 394 ss.
- ⁶¹ J. Barbalho Uchôa Cavalcanti, *Constituição Federal Brasileira: commentarios*, Rio de Janeiro, Typographia da Companhia Litho, 1902, pp. 49-50.
- ⁶² P. Macedo Garcia Neto, "O Judiciário no crepúsculo do império" (1871-1889), in J.R. Lima Lopes (ed.), *O Supremo Tribunal de Justiça do Império (1828-1889)*, São Paulo, Saraiva, 2010, pp. 135-136.
- ⁶³ M.F. Salcedo Repolês, *Identidade do sujeito constitucional e controle da constitucionalidade*, Rio de Janeiro, Casa Rui Barbosa, 2010, pp. 113-127. On the difficulties faced by the STF, see also Maximiliano, *Commentarios à Constituição brasileira de 1891*, cit., pp. 592-593.
- ⁶⁴ Habeas corpus was widely used not only to defend the freedom of movement, but also to contest any illegality or state power abuse, perpetrated by public authorities. For a general overview of "Brazilian habeas corpus doctrine", see: F. Pontes de Miranda, *História e prática do habeas corpus*, Rio de Janeiro, Borsoi, tomo 1, 1972.
- ⁶⁵ On the history of *habeas corpus*, the restriction to its use by the advent of the Constitutional Reform (1926) and, specially, the resulting institution of the 'writ of mandamus' for the protection of violated rights by the Public Power, which were not protected by the *habeas corpus*, see G.F. Santos, *A construção do mandado de segurança: por uma história das dimensões jurídicas da justiça no Brasil republicano (1891-1937)* (Dissertação de Mestrado), Uberlândia, Universidade Federal de Uberlândia, 2018, *passim*.

- ⁶⁶ A. Arinos Franco, *Curso de direito constitucional brasileiro*, vol. 2, Rio de Janeiro, Forense, 1968, pp. 155-164.
- ⁶⁷ Bonavides, de Andrade, *História constitucional do Brasil*, cit., p. 270.
- ⁶⁸ Member to the Sub commission, at the 2nd session, on November 15, 1932, João Mangabeira declared that «All modern constitutions are oriented to put out social inequalities. If Brazilian Constitution does not march towards the same direction, it will no longer be revolutionary, but a reactionary one». See J.A. de Mendonça, *Elaborando a Constituição Nacional (Atas da Subcomissão do Anteprojeto 1932/1933)*. ed. fac-similar, Brasília, Senado Federal, 2004, p. 20.
- ⁶⁹ W. Costa Porto, *Prefácio*, in J.A. de Mendonça Azevedo, *Elaborando a Constituição Nacional*, Brasília, Senado Federal, Conselho Editorial, 2004, pp. XXII-XXV.
- ⁷⁰ A. Sampaio de Moraes Godoy, *A Constituição de 1934 no contexto da história do constitucionalismo brasileiro*, in «Revista Jurídica Cesumar», v. 17, n. 1, 2017, p. 184.
- ⁷¹ In the 1920's, there was a major protagonism of the STF in the political field through the so called 'habeas corpus doctrine', which led to the emergence of a movement for institutional refrain. The Constitutional Reform of 1926, as José Duarte recalls, sought, among other objectives, to reduce the scope of *habeas corpus*, minimizing the judicial interference in politics in general. See J. Duarte, *A constituição brasileira de 1946: exegese do texto à luz dos trabalhos da assembleia constituinte*, vol. 2, Rio de Janeiro, Imprensa Nacional, 1947, pp. 319-320. As noticed by Emília Viotti da Costa, such an experience could explain the meaningful alterations proposed for the Judiciary in the draft Project, even as a form of "vengeance" against the court in face of the decision contrary to the revolutionary from the decade 1920-30. E. Viotti da Costa, *O Supremo Tribunal Federal e a construção da cidadania*, São Paulo, UNESP, 2006², pp. 68 ss.
- ⁷² Sampaio de Moraes Godoy, *A Constituição de 1934*, cit., pp. 202-203.
- ⁷³ de Mendonça Azevedo, *Elaborando a Constituição Nacional*, cit., p. 540.
- ⁷⁴ Ivi, p. 537 ss.
- ⁷⁵ Ivi, p. 533.
- ⁷⁶ Hans Kelsen and his ideas were well known in the Constituent. He even elaborated a report on its limits, nature and autonomy. For an analysis of Kelsen's legal opinion about Brazilian Constituent, see M. Losano, *O parecer de Hans Kelsen de 1933 sobre a Assembleia Nacional Constituinte do Brasil – Parecer em alemão, espanhol e italiano*, in «Direito & Práxis», vol. 7, n. 14, 2016, pp. 624-648.
- ⁷⁷ Côes Monteiro's (member of the Commission which drafted the Project of the Constitution of 1934) finding is precisely addressed to the "anomaly" of a "law condemned by the Judiciary Power" keep producing effects in future judgements: «It should not be understood that, having the Supreme Court judged a law as unconstitutional, it could remain valid», de Mendonça Azevedo, *Elaborando a Constituição Nacional*, cit., p. 536.
- ⁷⁸ A. Valdez Ayres Neves de Alencar, *A competência do Senado Federal para suspender a execução dos atos declarados inconstitucionais*, in «Revista de Informação Legislativa», a. 15, n. 57, 1978, pp. 223-328.
- ⁷⁹ For an investigation on the assignments of the Federal Senate within the scope of the Constituent Assembly, and also on the constitutional review, see I.K.G. Gomes Gomes, *O surgimento do controle abstrato repressivo de legalidade (e constitucionalidade) na Constituição Federal brasileira de 1934*, in *Actas de las IX Jornadas de Jóvenes Investigadores en Historia del Derecho*, Mendoza, 2017, vol. IX, pp. 86-112.
- ⁸⁰ The articles 22 and 88 of the 1934 Constitution ruled respectively: «Art. 22. The Legislative Power is performed by the Chamber of Counselors with the collaboration of the Federal Senate. [...] Art. 88. The Federal Senate, in the terms of arts. 90, 91, and 92, oversees promoting the coordination of the federal Powers among themselves, of keeping the administrative continuity, of watching over the Constitution, of collaborating in law making, and of practicing the remaining acts of its competence».
- ⁸¹ R. Poletti, *Constituições brasileiras: 1934*, vol. 3, Brasília, Senado Federal, 2001, pp. 50-51.
- ⁸² D. Nunes, *Beyond Europe: the role of European legal experience in the Brazilian Estado Novo regime (1937-1945)*, in J. Osterhuis, E.G.D. van Dongen (eds.), *European traditions: integration or disintegration?*, Nijmegen, WLP, 2012, pp. 207-220. The 1937 Constitution is known as "Polaca" (or "Polish Constitution") for the alleged influence of the 1935's Constitution of Poland. According to Diego Nunes, «the Polish constitutional reform of 1926 and the new Polish Constitution of 1935 were a model to Brazilian Constitution of 1937 on strengthening the authority of the Head of State», ivi, p. 217.
- ⁸³ F. Campos, *Diretrizes do Estado Nacional (1937)*, in *O Estado nacional: sua estrutura, seu conteúdo ideológico*, Brasília, Senado Federal, 2001, pp. 39-69.
- ⁸⁴ K. Loewenstein, *Brazil under Vargas*, New York, The MacMillan Company, 1944, p. 46.
- ⁸⁵ As accurately highlighted by Diego Nunes, a central feature of the Constitution of 1937 was «the strengthening of the authority of the president in such a way as to escape from the classical tripartite division of powers in view of the possibility that the head of state had to interfere in the legislative and judicial

- activities». See Nunes, *Beyond Europe*, cit., p. 217.
- ⁸⁶ F. Pontes de Miranda, *Comentários à constituição federal de 10 de novembro de 1937*, Rio de Janeiro, Irmãos Pogetti, tomo I, 1938, pp. 14-15.
- ⁸⁷ W. Martins Ferreira, *História do direito constitucional brasileiro*, São Paulo, Max Limonad, 1954, pp. 112 ss.
- ⁸⁸ This is the content of the article 96 of the 1937 Charter: «Art. 96. Only by absolute majority of the votes of its judges may Courts state the unconstitutionality of a law or of an act of the President of the Republic. Single paragraph. In case the unconstitutionality of a law that is, in the President of the Republic's judgement, necessary to the well-being of people, to the promotion of the defense of a high national interest, may the President of the Republic submit it to the Parliament's examination again: if it is confirmed by two thirds in one of each Chambers, the Court's decision shall be null and void», Brasil, *Constituição dos Estados Unidos do Brasil, de 10 de novembro de 1937*, <http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao34.htm>, September 2020.
- ⁸⁹ This model of judicial review is currently called 'weak-form judicial review', the main feature of which is to relativize the binding irreversible character of constitutional interpretation performed by the supreme court. It is present in contemporary democratic systems, such the Canadian and the English, as studied by the constitutionalist Mark Tushnet. M. Tushnet, *Alternative forms of judicial review*, in «Michigan Law Review», vol. 101, Iss. 8, August, 2003, pp. 2781-2802. For a general analysis on the 'weak-form judicial review' and its reception in Brazilian law, see: M. Casseb Continentino, *Revisitando os fundamentos do controle de constitucionalidade: uma crítica à prática judicial brasileira*, Porto Alegre, Sérgio Fabris, 2008, pp. 174-194.
- ⁹⁰ For the jurist of the New State, «in essentially political matter, not only because it is political, but also for the involvement of severe national interest, the Constitution of '37 delivers the last word to the representative bodies of the Nation». F. Campos, *O poder judiciário na Constituição de 1937*, in «Direito Constitucional», Rio de Janeiro, Forense, 1942, pp. 365-371.
- ⁹¹ That was previewed in the 1937 Charter, in article 180: «While the national Parliament does not meet, the President of Republic shall have the power of passing law-decrees on all matters within the legislative competence of the Union», Brasil, *Constituição dos Estados Unidos do Brasil, de 10 de novembro de 1937*, cit.
- ⁹² C.A. Lúcio Bittencourt, *O controle jurisdicional da constitucionalidade das leis*, Rio de Janeiro, Forense, 1949, p. 139.
- ⁹³ P. Bonavides, *Curso de direito constitucional*, São Paulo, Malheiros, 2012⁷, p. 340.
- ⁹⁴ On this topic, see also: Lúcio Bittencourt, *O controle jurisdicional*, cit., p. 30; Ferreira Mendes, Gonet Branco, *Curso de direito constitucional*, cit., pp. 1114-1116; Merlin Clève, *A fiscalização abstrata da constitucionalidade*, cit., pp. 85-86.
- ⁹⁵ Based on this very competence, the President of Republic did not abide by the STF's ruling, having published the Law-Decree nº 1564, from September 5 1939, which "confirms the law texts, decreed by the Union, which subordinated the expenses paid the state and town treasures to the income tax". Brasil, *Decreto-lei nº 1.564, de 5 de setembro de 1939*, <<https://www2.camara.leg.br/legin/fed/declei/1930-1939/decreto-lei-1564-5-setembro-1939-411497-publicacaooriginal-1-pe.html>>, September 2020.
- ⁹⁶ Besides, the Charter of 1937 berated the Judiciary Power from knowing the "exclusively political issues" as well as the acts published during the state of emergency or the state of war, restraining the Judiciary Power's Independence and sovereignty even more, as ruled in the articles 94 and 170, respectively.
- ⁹⁷ According to Emilia Viotti da Costa, «between 1930 and 1945, the Supreme Federal Court would face one of the hardest periods in its history, when it was bounded to passively witness the dismissal of justicer, the alteration of its functioning and the invasion to its prerogatives by the Executive». Viotti da Costa, *O Supremo Tribunal Federal*, cit. pp. 65-104.
- ⁹⁸ For a critical and comprehensive account on the 're-democratization', see: G. Bercovici, *Tentativa de instituição da democracia de massas no Brasil: instabilidade constitucional e direitos sociais na Era Vargas (1930-1964)*, in R.M. Fonseca, e A. Cerqueira Leite Seelaender (orgs.), *História do direito em perspectiva: do Antigo Regime à modernidade*, Curitiba, Juruá, 2009, pp. 345-414; Bonavides, Paes de Andrade, *História constitucional do Brasil*, cit., pp. 353-430; J. Afonso da Silva, *O constitucionalismo brasileiro (evolução institucional)*, São Paulo, Malheiros, 2011, pp. 71-76.
- ⁹⁹ H. Lima, *Espírito da Constituição de 1946*, in *Estudos sobre a Constituição Brasileira*, Rio de Janeiro, Fundação Getúlio Vargas, 1954, pp. 11-18. The author, who would eventually be nominated justice of STF in 1963, stated: «It is appropriate to remark that there is nothing more alike the Constitution of 1934 than the Constitution of 1946. In the fundamental political spirit which guided the drafting of those Constitutions, they are essentially identical. Both the Constituent Assembly of 1934 and that of 1946 were Assemblies mainly concerned

with preventing an overpowering Executive, with a discretionary trend, from dominating the political scenario», *ivi*, p. 14.

¹⁰⁰ M. Correia de Andrade (org.), *A Constituinte de 1946*, Recife, Fundação Joaquim Nabuco/Massangana, 1986, p. 11.

¹⁰¹ A. Baleeiro, *O Supremo Tribunal Federal, esse outro desconhecido*, Rio de Janeiro, Forense, 1968, pp. 80-81.

¹⁰² Duarte, *A constituição brasileira de 1946*, cit., vol. 1, p. 600; vol. 2, p. 135.

¹⁰³ O. Nogueira, (org.), *Constituição: o estado e os poderes do Estado (1946)*, in *Doutrina constitucional brasileira (Constituição de 1946)*, Brasília, Senado Federal, 2006, tomo I, pp. 219-238.

¹⁰⁴ O. Nogueira, (org.), *Organização do Judiciário (1946)*, in *Doutrina constitucional brasileira*, tomo II, pp. 375-385.

¹⁰⁵ These are its asides: «The Judiciary Power only decides in species. It is necessary, though, to extend the effects of the decision, and this is an assignment of the Senate. Concerning the first point, I want to remind that in the 1934 Constitution there is an identical device. I took part in the elaboration of the 34 Constitution. In fact, the creation of a forth power was attempted; however, the Senate had performed the controlling function, inspecting the Executive Power for long», Brasil, *Diário da Assembléia Constituinte*, Rio de Janeiro, ano I, n. 52, 25 de abril de 1946, p. 1199.

¹⁰⁶ *Ibidem*.

¹⁰⁷ *Ibidem*.

¹⁰⁸ Viotti da Costa, *O Supremo Tribunal Federal*, cit., pp. 105 ss.

¹⁰⁹ Martins Ferreira, *História do direito constitucional brasileiro (1954)*, cit., p. 326. The professor from University of São Paulo highlighted: «As the Judiciary Power is, both within the Union and in the States, one of the political powers in the highest sense of the term, it would not be enough to ground the judges' independence, but it

was urgent to consolidate the independence of the courts».

¹¹⁰ For professor Waldemar Ferreira, the STF decided «in one and only instance, ruling the last word, for it was the highest court of the country», performing its role of «remarkably political fashion, as an indefectible guard of federalism, fighting for the supremacy of the Constitution and the federal laws», *ivi*, pp. 350-351.

¹¹¹ Bercovici, *Tentativa de instituição da democracia de massas no Brasil*, cit., pp. 345-414. On this subject, see the original dissertation by J. Afonso da Silva, *Aplicabilidade das normas constitucionais*, São Paulo, RT, 1968, *passim*. If one is interested in a historical account on the concept of programmatic norms, according to one of its main thinkers, Vezio Crisafulli, see R. Sontag, S. Cocchi, «Platônicas manifestações de boas intenções»? *Sobre as disposições constitucionais programáticas em Vezio Crisafulli*, in «Novos Estudos Jurídicos», vol. 18, 2013, pp. 530-550.

¹¹² A. Arinos de Mello Franco, *Curso de direito constitucional brasileiro*, Rio de Janeiro, Forense, vol. II, 1968, pp. 235 ss.

¹¹³ See: N. Ramos, *Reforma constitucional*, in «Revista de Direito Administrativo», vol. 46, 1956, pp. 1-61; C.S. Medeiros, *Reforma administrativa do Brasil*, in «Revista de Direito Administrativo», vol. 45, 1956, pp. 597-600. A. de Sampaio Doria, *Emendas à Constituição para as reformas de base*, in «Revista de Direito Administrativo», vol. 72, 1963, pp. 34-47.

¹¹⁴ H. Lima, *As tensões sociais-políticas e a vida constitucional*, in «Revista de Direito Público e Ciência Política», vol. 4, n. 3, 1961, pp. 23-28. The author, future justice of STF, argued that the political tension is a defining element of any constitutional system, which should provide responses within constitutional legality.

¹¹⁵ A. Machado Paupério, *Delegação*

de poderes, in «Revista de Direito Administrativo», vol. 72, 1963, pp. 23-33. In face of the crisis of the Legislative Power in not providing timely and adequate responses to the changes in the contemporary world, the jurist stands for the delegation of legislative powers to the Executive. In the same sense, see: C. Medeiros Silva, *Delegação de poderes*, in «Revista de Direito Administrativo», vol. 71, 1963, pp. 1-15. In this context, it is recommended Airton Seelaender's critical opinion about jurists aligned with authoritarian regimes: A. Cerqueira Seelaender, *Juristas e ditaduras: uma leitura brasileira*, in R.M. Fonseca, A. Seelaender (orgs.), *História do direito em perspectiva: do Antigo Regime à modernidade*, Curitiba, Juruá, 2009, pp. 415-432.

¹¹⁶ L. Boechat Rodrigues, *História do Supremo Tribunal Federal*, Rio de Janeiro, Civilização Brasileira, 2002, vol. 4, tomo I, pp. 119-139. In this sense, professor Gilmar Mendes highlights that, during the rule of the Constitution of 1946, there was a significant use of the interventive representation, which aimed the protection of the "federative pact" and, specially, the competences of the Union. See G. Ferreira Mendes, P.G. Gonet Branco, *Curso de direito constitucional*, São Paulo, Saraiva, 2016¹¹, pp. 1116-1118.

¹¹⁷ *Ivi*, pp. 165 ss.

¹¹⁸ See C. Paiva Carvalho, *Presidencialismo e democracia no Brasil (1946-1956): sistema de governo, legalidade e crise política* (Tese de Doutorado), Brasília, Universidade de Brasília, 2019, pp. 204 ss.

¹¹⁹ A.W. Pereira, *Ditadura e repressão: o autoritarismo e o estado de direito no Brasil, no Chile e na Argentina*, trad. P. Zimbres, São Paulo, Paz e Terra, 2010, pp. 31-47.

¹²⁰ R. Lemos, *Poder judiciário e poder militar (1964-1969)*, in C. Castro, V. Izecksohn, H. Kraay (orgs.), *Nova história militar brasileira*, Rio de Janeiro, FGV/Bom Texto,

- 2004, pp. 409-438.
- ¹²¹ M. Gamba Torres, *O primeiro Ato Institucional: ministros e imprensa no pós-golpe de 1964*, in «Revista do Arquivo Público do Estado de São Paulo», Disponível em: <http://www.arquivoestado.sp.gov.br/revista_do_arquivo/02/artigo_04.php>, September 2020.
- ¹²² A.D. Zaidan de Carvalho, *Entre o dever da toga e o apoio à farda: independência judicial e imparcialidade no STF durante o regime militar*, in «Revista Brasileira de Ciências Sociais», vol. 32, n. 95, 2017, pp. 1-21. The author states that days after the decree of the coup, the president of the Republic was hosted by the president of STF, justice Ribeiro da Costa, who gave a speech supporting the regime by justifying the temporary sacrifice of some constitutional warranties. Furthermore, it should be noted that, based on AI-1, magistrates were deposed from their roles, such as the judge Ozny Pereira Duarte, from Supreme Court of Justice of Rio de Janeiro State, and the judge José Aguiar Dias, from Federal Court of Appeals. The later was deposed by the Decree of June 10, 1964, according to AI-1. Brasil, *Atos da Revolução (1964)*, available on: <<http://comissaoдавerdade.al.sp.gov.br/upload/010-Decretos-cassacao.pdf>>, September 2020.
- ¹²³ A. Sampaio de Moraes Godoy, *A história do direito entre foices, martelos e togas: Brasil 1935-1965*, São Paulo, Quartier Latin, 2008, pp. 267-294; Viotti da Costa, *O Supremo Tribunal Federal*, cit., pp. 162 ss.
- ¹²⁴ A. Koerner, *Sobre a 'evolução do controle da constitucionalidade no Brasil': uma análise crítica*, in R.M. Fonseca (org.), *As Formas do Direito: Ordem, Razão e Decisão (Experiências jurídicas antes e depois da modernidade)*, Curitiba, Juruá, 2013, pp. 527-568.
- ¹²⁵ Á. Ribeiro da Costa, *A reforma do STF*, in *Folha de São Paulo*, edição de 20/10/1965, p. 3.
- ¹²⁶ R. Mafei Rabelo Queiroz, *Cinquenta anos de um conflito: o embate entre o ministro Ribeiro da Costa e o General Costa e Silva sobre a reforma do STF*. (1965), in «Revista Direito CV», v. 21, n. 1, 2015, pp. 323-342.
- ¹²⁷ It should be noted that the reform of the Judiciary had been discussed between the STF, which created a committee to study its main aspects, and the Executive Power. The president of STF forwarded a document with court opinion: Á. Ribeiro da Costa, *Supremo Tribunal Federal*, in «Revista de Direito Administrativo», vol. 81, 1965, pp. 476-490.
- ¹²⁸ Evandro Lins e Silva, justice of STF in the time of AI 2, on the increase in the number of justices in the Court, minimized its practical effects: «It was said that the increase in the number would be to neutralize the influence of those regarded as opponents. But they were mistaken, because the five were». See E. Lins SILVA, *O salão dos passos perdidos*, Rio de Janeiro, Nova Fronteira, 1997, pp. 393-394.
- ¹²⁹ V. Nunes Leal, *Aspectos da reforma judiciária*, «Revista de Informação Legislativa», ano II, n. 7, 1965, setembro, pp. 15-46.
- ¹³⁰ The Exposition of Reasons of Constitutional Amendment Project 06/1965 (PEC 6/1965), which originated the EC 16, stated that it continued the modifications promoted by the AI 2: «Supervening the Institutional Act nº 2, on October 27 of the current year, the structural points for the reform of the Judiciary Power, included in the amendment to articles 94, 98, 103, 105 of the Constitution, which underwent a new writing, as proposed by that very same Commission, have been instantly incorporated to that constituent edit, and it should be highlighted as predominant feature of this reform, the restoration of first degree federal justice, the competence of which has been outlined, and the increase in the number
- of judges of the Supreme Federal Court, of the Federal Court of Appeals and of the Supreme Military Court», Brasil, *Diário do Congresso Nacional (Seção I)*, Brasília, 5 de novembro de 1965, p. 9296.
- ¹³¹ It is worth noticing that only the general attorney of republic, the nomination of which was privately from the president of Republic, could file that suit, which showed how the chief of Executive intended to control the other powers.
- ¹³² H. Kelsen. *A jurisdição constitucional*, trad. M.E. Calvão, São Paulo, Martins Fontes, 2003, pp. 176 ss.
- ¹³³ R. Machado Horta, *Estudos de direito constitucional*, Belo Horizonte, Del Rey, 1995, p. 63.
- ¹³⁴ In Kelsen's conception, abstract constitutional review would both be employed to avoid the anti-democratic constitutional trend of a "government of judges" and to the defend the legislative minorities and to safe the principle of legal security and of parliamentary primacy, within a context of rise of authoritative, nationalist and ethnocentric thought.
- ¹³⁵ It is worth highlighting, however, the existence of other equally fundamental functions arising from the exercise of constitutional review, such as the defense of structuring principles of the federal pact. See: T. Groppi, *Il federalismo*, Roma-Bari, Laterza, 2004, p. 95.
- ¹³⁶ Viotti da Costa, *O Supremo Tribunal Federal*, cit., p. 167.
- ¹³⁷ The minister of Justice asserted in the Exposition of Reasons of PEC 16/1965: «In order to coordinate the remaining texts, in harmony with Your Excellence's thought and decision, I requested the prompt collaboration of Professor Nehemias Gueiros, who gave it ultimate shape», Brasil, *Diário do Congresso Nacional (Seção I)*, Brasília, 5 de novembro de 1965, p. 9296.
- ¹³⁸ M. Casseb Continentino, *Elementos para uma compreensão histórica do controle da constitucionalidade no Brasil (1891 e 1965)*, in «Revista

- Jurídica da Presidência», vol. 20, n. 120, 2018, pp. 92-116.
- ¹³⁹ H. Fernandes Câmara, *STF na ditadura militar brasileira: um tribunal adaptável?* (Tese de Doutorado), Curitiba, Universidade Federal do Paraná, 2017, *passim*. For this reason, the author regards the STF as an 'adaptable court' and criticizes it, having in mind that, in moments of crisis, the Supreme Court had acted to protect its autonomy and remained silent on the validity of institutional acts, almost always revealing an ambivalent attitude towards the authoritative regime.
- ¹⁴⁰ The 1967 Constitution maintained the constitutional review system outlined previously, altering two specific points: it eliminated the former provision of interposition of representation of generic unconstitutionality in provincial scope; transferred the competence to suspend the provincial act regarded as unconstitutional by the STF in the scope of interventive representation to the President of Republic. Even more timid, the 1969 Constitution limited itself to admit the institution of interventive representation for censoring of district law in face of the sensitive principles of the State Constitution by the States.
- ¹⁴¹ For a general account, see A. Koerner, *Uma análise política do processo de representação de inconstitucionalidade pós-64*, in «Revista da ESMARF», dez., 2010, pp. 299-328.
- ¹⁴² See: *ivi*, pp. 310-324. To go further on this topic: J. Pereira Lira, *A atualidade do pensamento de Pedro Lessa*, in J. Marinho, R. Rosas (orgs.), *Sesquicentário do Supremo Tribunal Federal*, Brasília, UNB, 1982, pp. 63-90; O. Trigueiro, *O Supremo Tribunal Federal no Império e na República*, in Marinho, Rosas (orgs.), *Sesquicentário do Supremo Tribunal Federal*, cit., pp. 7-24; T. Brandão Cavalcanti, *O Supremo Tribunal Federal e Constituição*, in Marinho, Rosas (orgs.), *Sesquicentário do Supremo Tribunal Federal*, cit., pp. 105-130.
- ¹⁴³ This initiative is largely due to the justice Victor Nunes Leal, who aimed to create an institute which could save the institutional memory of STF, and made remarkable and standard the rule of STF in repetitive cases. See S. Legale Ferreira, E. Baracho Dore Fernandes, *O STF nas "cortes" Victor Nunes Leal, Moreira Alves e Gilmar Mendes*, in «Revista Direito GV», vol. 9, n. 1, 2013, pp. 23-45.
- ¹⁴⁴ See T. Brandão Cavalcanti, *Parecer (Lei. Declaração de Inconstitucionalidade pelo Poder Executivo)*, in «Revista de Direito Administrativo», vol. 82, 1965, pp. 376-383.
- ¹⁴⁵ See Brasil, *Supremo Tribunal Federal. Representação de Inconstitucionalidade nº 1016*. Rel. Moreira Alves: ruled on 20/09/1979. Available on: <<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=263791>>, September 2020.
- ¹⁴⁶ Koerner, *Uma análise política do processo de representação de inconstitucionalidade pós-64*, cit., pp. 304-306.
- ¹⁴⁷ Koerner, *Sobre a evolução do controle da constitucionalidade*, cit., pp. 552 ss.
- ¹⁴⁸ José Afonso da Silva, constitutionalist with active participation in the process of re-democratization, in the mid 80's, argued that there was no room for doubt concerning the need of a new Constitution for Brazilian society. The only issue to be discussed would be the best way of convoking the Constituent Assembly, its work method and etc. On this topic, see: Afonso da Silva, (1984). *Poder constituinte e poder popular*, São Paulo: Malheiros, 2007², p. 19 and pp. 29 ss.
- ¹⁴⁹ It is worth highlighting the decisive participation of jurists and representative entities of the magistracy and of the public ministry, which reflected on the strengthening of the judicial control. See: A.D. Zaidan de Carvalho, *Juscorporativismo: os juízes e o judiciário na Assembleia Nacional Constituinte*, in «Revista Brasileira de Estudos Políticos», n. 114, 2017, pp. 31-77.
- ¹⁵⁰ Rosenfeld, *The identity of constitutional subject*, cit., pp. 1049-1109.
- ¹⁵¹ K. Rosenn, *Separation of Powers in Brazil*, in «Duquesne Law Review», vol. 47, 2009, pp. 839-870. According to Keith Rosenn, «The 1988 Constitution provides explicitly for one of the most comprehensive systems of judicial review in the entire world», *ivi*, p. 855.
- ¹⁵² Zaidan de Carvalho, *Juscorporativismo*, cit., pp. 31-77.
- ¹⁵³ Brasil, *Jornal da Constituinte (1988)*, Brasília, ANC, n. 42, 11 a 17 de abril de 1988, pp. 6-8.
- ¹⁵⁴ Ferreira Mendes, Gonet Branco, *Curso de Direito Constitucional*, cit., pp. 401 ss., and pp. 991 ss.
- ¹⁵⁵ See: M. Faro de Castro, *O Supremo Tribunal Federal e a judicialização da política*, in «Revista de Ciências Sociais», n. 34, v. 12, 1997, pp. 147-156; Casseb Continenntino, *Revisitando os fundamentos do controle de constitucionalidade*, cit., pp. 55-73.
- ¹⁵⁶ A. Vicente Pires Rosa, *Las omisiones legislativas y su control constitucional*, Rio de Janeiro, Renovar, 2006, pp. 286 ss.
- ¹⁵⁷ Brasil, *Diário da Assembléia Nacional Constituinte (Suplemento)*, Brasília, April 29, 1988, p. 99.
- ¹⁵⁸ The member of Constituent Assembly Ruy Bacelar argued for the writ of injunction as a *bona fide* instrument in the combat to unconstitutional omission: «The mere enunciation of rights in the Constitutional Text is not enough. What is the use, in fact, for the citizen, of the declaration of the Supreme Law of the Country declaring, expressly, the right, for example, to education or to health, if the State is not compelled to put into practice the constitutional commandment? [...] In practice, however, most of them did not get off the paper for

the impossibility of compelling the State to perform any action. Such an omission by the State, before the text of the Higher Law, has been denominated by the authors as constitutional omission. But, in Brazilian Law, there is no statute able to grant the individual's right against the omission by the State». And he concludes: «In the suggestion we are honored to introduce, we have created the writ of injunction, which, we are sure, shall become an important mark in the history of Brazilian Law. If it comes to be instituted, the constitutional clauses shall cease to be mere enunciation as to truly contribute to the improvement in Brazilians' life quality». See Brasil, *Diário da Assembléia Nacional Constituinte (Suplemento)*, Brasília, April 29, 1988, pp. 158-159.

¹⁵⁹ I. Dantas, *Instituições de direito constitucional brasileiro*, Curitiba, Juruá, 2002², pp. 232-233.

¹⁶⁰ In fact, the ADC met a government need of promoting various legislative reforms (specially in administration, in social security and in taxes), which were judicially contested all over the country. As to enable a definite solution of the judicial controversy spread in thousands of lawsuits with a sole ruling of the STF, the EC/1993 was justified in terms of the need of optimizing the rationality and the efficiency of the administration of Brazilian Justice. See Merlin Clève, *A fiscalização abstrata da constitucionalidade*, cit., pp. 271 ss.

¹⁶¹ Brazil, *Constitution of the Federative Republic of Brazil*, *idem*.

¹⁶² It should be noted, however, that the Executive Power's competence of refusing to enforce the laws is highly controversial. On this subject, see C. dos Santos Serrano Mota, *O Controvertido poder de rejeição de leis inconstitucionais pelo poder executivo*, Rio de Janeiro, Lumen Juris, 2016, *passim*.

¹⁶³ The Senate has recently approved

the stop of president's decree which widened gun bearing and possession. Before the Chamber of Deputies ended its vote, which would bring about the definite cancellation of the decree, the president of republic, revoked it.

¹⁶⁴ For a comprehensive account of the Brazilian system of constitutional review after 1988, see G. Binenbojm, *A nova jurisdição constitucional brasileira*, Rio de Janeiro, Renovar, 2014⁴, *passim*; L.L. Streck, *Jurisdição constitucional e decisão jurídica*, São Paulo, RT, 2014⁴, *passim*.

¹⁶⁵ M. Faro de Castro, *Política e economia no judiciário: as ações diretas de inconstitucionalidade dos partidos políticos*, in «Caderno de Ciência Política da UnB», n. 7, 1993, pp. 16-25.

¹⁶⁶ C.A. Bandeira de Mello, *Funerais da Constituição de 1988*, in E. Grau, D. Fiocca, *Debate sobre a Constituição de 1988*, São Paulo, Paz e Terra, 2001, pp. 35-47.

¹⁶⁷ F. Konder Comparato, *Réquiem para uma Constituição*, in Grau, Fiocca, *Debate sobre a Constituição de 1988*, cit., pp. 77-87.

¹⁶⁸ L.R. Barroso, *Dez anos da Constituição de 1988 (Foi bom pra você também?)*, in «Revista de Direito Administrativo», vol. 214, 1998, pp. 1-25.

¹⁶⁹ L.R. Barroso, *Mandado de injunção: o que foi sem nunca ter sido (uma proposta de reformulação)*, in «Revista de Processo», n. 89, a. 23, 1998, pp. 57-61.

¹⁷⁰ L.R. Barroso, *Vinte anos da Constituição de 1988: a reconstrução democrática do Brasil*, in «Revista de Informação Legislativa», a. 45, n. 179, 2008, pp. 25-37.

¹⁷¹ Besides the renewal of the judges of the Judiciary, it is worth noticing the influence of some foreign authors, which have been legitimating the growing judicial protagonism in political life in Brazilian constitutional law, such as: Ronald Dworkin, Robert Alexy, Konrad Hesse, Peter Häberle, Gustavo Zagrebelsky and Luigi Ferrajoli. For a critical overview

on the reception of foreign theory by Brazilians jurists, see C.E.C. Lynch, J.V. S. de Mendonça, *Por uma história constitucional brasileira: uma crítica pontual à doutrina da efetividade*, in «Revista Direito e Praxis», vol. 8, n. 2, 2017, pp. 974-1007.

¹⁷² See: M. Casseb Continentino, *Ativismo judicial: proposta para uma discussão conceitual*, in «Revista de Informação Legislativa», a. 49, n. 193, 2012, pp. 141-149; G. Salomão Leite, *Juristocracia e constitucionalismo democrático*, Rio de Janeiro, Lumen Juris, 2017, pp. 35-136; L.H. Diniz, *O ativismo judicial e seus limites*, Belo Horizonte, Arraes, 2017, pp. 54-67.

¹⁷³ M. Neves, *Entre Hércules e Hidra: princípios e regras constitucionais*, São Paulo, Martins Fontes, 2013, pp. 171-228.

¹⁷⁴ Among other amendment projects, we should remark: PEC 03/2011, which authorizes the National Congress to stop normative acts from other powers which extrapolate their regulation scope of power, in order to strengthen the Democratic State and to respect the separation of powers; PEC 33/2011, which increases the quorum for declaration of unconstitutionality (4/5 of the members of the court) and submits some the STF's decisions of unconstitutionality to ratification by the National Congress under penalty of not having immediate efficacy. The PEC 33, according to the authors, is aimed at combating the "activism paradigm", which has raised the disgrace of the Legislative Power and the legislative excess from the Judiciary.

¹⁷⁵ M. Fioravanti, *Le dottrine dello stato e delle costituzione*, in R. Romanelli (a cura di), *Storia dello Stato Italiano dall'Unità a oggi*, Roma, Donzelli, 1995, pp. 434-439.

¹⁷⁶ According to Luigi Lacchè, «the Constitutional State is mixed» because it is integrated by the legislative function (elective principle) and also by the

constitutional address function (related with the competence to say and to protect the rights. See Lacchè, *Il limite, la garanzia, l'arbitrio*, cit., pp. 14-15.

¹⁷⁷ As Keith Whittington precisely puts it, the legitimacy of courts in the exercise of *judicial review*, which states the "last word" in constitutional interpretation matters, is linked to the institutional context in which many relations among each of the three political powers occur, so that judicial decisions shall be understood as unfair or unconstitutional and, therefore, challenged by the other powers. K. Whittington, *Political foundations of judicial supremacy (the presidency, the supreme court, and constitutional leadership in US history)*, Princeton, Princeton University, 2007, pp. 28-81.

¹⁷⁸ As already discussed by Mark Tushnet, the formal definition of a certain institutional arrangement in the Constitutions concerning the judicial review, be it a strong-form or weak-form of judicial review, may undergo change and even a complete denaturation, depending on the institutional and judicial practices following the adopted model. M. Tushnet, *Weak courts, strong rights (judicial review and social welfare rights in comparative constitutional Law)*, Princeton, Princeton University, 2008, pp. 43-76.

¹⁷⁹ It is very important to keep in mind the notions of space of experience and horizon of expectative, conceived by German historian Reinhart Koselleck. R. Koselleck, "Space of experience" and "horizon of expectation": two historical categories, in *Future Past (on the semantics of historical times)*, transl. K. Tribe, New York, Columbia University, 2004, pp. 255-275.

¹⁸⁰ L. Lacchè, *Il tempo e i tempi della Costituzione*, in G. Brunelli, G. Cazzetta (a cura di), *Dalla Costituzione "inattuata" alla Costituzione "inattuale? Potere costituente*

e riforme costituzionali nell'Italia repubblicana. Materiali dell'incontro di studio, Ferrara 24-25 Gennaio 2013, Centro Studi per la storia del pensiero giuridico moderno, Milano, Giuffrè, 2013, pp. 365-386.