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THE APPLICATION OF THEORY OF THE INSTITUTIONAL DIALOGUE IN BRAZIL AS A COMPROMISE SOLUTION, IN THE LIGHT OF THE SUPREME COURT'S CASE LAW

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ABSTRACT: The question of the last word has been subject to doctrinal criticism for some time. There is an undeniable need to carry out judicial review by politically impartial institutions; however, the quantitative increase in control parameters makes constitutional courts protagonists in a political discussion, in an insult to the democratic-majority logic. This work assumes that the institutional dialogue – technique that aims harmonizing the need to protect the Constitution with respect for popular deliberation, through a model in which judicial decisions are deferential to the work of the legislator – does not have a previously established political structure, and may be the result of a model for the exercise of political power based on compromised solutions between the legislature and the judiciary. Based on this premise, the article seeks to analyze the practice of institutional dialogue in Brazil as decision-making methodological technique regarding judicial review.

KEYWORDS: institutional dialogue; judicial review; constitutional jurisdiction; Federal Supreme Court; democracy.

A APLICAÇÃO DA TEORIA DO DIÁLOGO INSTITUCIONAL NO BRASIL COMO UM SOLUÇÃO DE COMPROMISSO, À LUZ DA JURISPRUDÊNCIA DO SUPREMO TRIBUNAL

RESUMO: A questão da última palavra vem sendo objeto de críticas doutrinárias. É inegável a necessidade de realização do controle de constitucionalidade por instituições politicamente imparciais; no entanto, o aumento quantitativo dos parâmetros de controle torna as cortes constitucionais protagonistas na discussão política, em verdadeiro insulto à lógica democrático-majoritária. O presente trabalho pressupõe que o diálogo institucional – técnica que visa virtude harmonizar a necessidade de proteção à Constituição com o respeito à deliberação popular, através de um modelo no qual as decisões judiciais são deferentes à obra do legislador – prescinde de uma estrutura política previamente estabelecida, podendo ser o resultado de um modelo de exercício do poder político baseado em soluções de compromisso entre o legislativo e o judiciário. A partir de tal premissa, o artigo busca analisar a prática do diálogo institucional no Brasil enquanto técnica metodológica de tomada de decisão em sede de controle de constitucionalidade.

PALAVRAS-CHAVE: diálogo institucional; controle de constitucionalidade; jurisdição constitucional; Supremo Tribunal Federal; democracia.

1. Introduction

Criticism towards to the judicial activism are virtually ubiquitous in Brazilian constitutional doctrine. The Brazilian Supreme Court, based on its prerogative of use of the last word, is actively engaged in the creation of public policies and the expansion of rights, often doing it so without any hermeneutical support in a plain reading of the Constitution[1].

What occurs is that, to each new decision not in accordance with the constitutional text, the Court reaffirms a tendency of expanding its competence, quite often doing so with arguments based on the supposed protection of rights founded on a type of *common good*: refer to the individual rights as they were uncontroversial and based on a universal moral. Sometimes disregarding the fact that the court itself presents disparities in respect to the content of such rights, the Supreme Court calls up the possibility of implementing them, without having, for such, democratic legitimacy. Nonetheless, the legal innovation through judicial decisions often does not allow its overcome, due to the so-called privilege of the last word[2], in a notable problem regarding legitimacy.

On the other hand, the absence of judicial review brought us nefarious consequences: the possibility of exercising the legislative creation without an external con-

1 About this, Rodrigo Brandão teaches us that: "The small adherence to the constitutional text and its past decisions reveals that the legitimation of the jurisprudence of the Supreme Court in its function as Guardian of the Constitution, in the will of the constituent, or in analogous arguments, is unsatisfactory. It should be noted that such perspectives have as premise the 'legalistic' model on judicial behavior, which, in its classical formulation, considers that the legal rules have clear meaning in routine cases, so that the judicial function is significantly linked to law (normative texts, precedents, legal doctrines, etc.). After criticism of legal realism about the law not truly constituting an external limit to judicial activity, the legalist model assumed a more sophisticated guise, according to which law would consist of an internal limit to the judicial function, because, by virtue of the legal training and the ethos of judges to apply in good faith the legal norms relevant to the case, the influence of law would be far more significant than that supposed by critics." *In*: BRANDÃO, Rodrigo. *Supremacia Judicial* versus *Diálogos constitucionais: a quem cabe a última palavra sobre o sentido da Constituição?* 2nd Edition. São Paulo: Lumen Juris, 2017, p. 277.

2 Conrado Hubner Mendes says that "*The buck of this debate is invariably framed by the following question: can unelected and unaccounted judges have the last word upon the meaning of the constitution and overrule the acts of elected legislators? Other formulations have also been common. Who should have the final say, parliaments or courts? Who should be the ultimate democratic authority? 'Last word', 'final say' and 'ultimate authority' are radical expressions. They all abound in the literature. They revel a desire to locate the internal sovereign, the source from which definitive answers for the demands of collective action and coordination will emerge. The imperatives of order and stability call for such settlement. Democracy and the rule of law need that" In*: MENDES, *Is it all about the last word?*, *op. cit.*, p. 69.

trol capable of ensuring the social pre-commitments incorporated into the Constitution jeopardizes the protection of minorities and the guarantee of the fundamental rights. The twentieth century provided some historical evidence in which democratic bodies committed autophagy, permitting the establishment of totalitarian regimes through their lawmaking procedures.

The balance between the majority principle and judicial review presupposes mutual respect between the parliaments and courts: When there is creation of rights by the legislative body, and in case of legal recognition of the constitutionality of that rule, we have a triple legitimacy: (a) the subjective legitimacy presumes the identity between rulers and the ruled, typical of the majority principle associated to the a Democratic State; (b) the objective legitimacy indicates compliance with the procedure set forth for lawmaking, ensuring the quorum and the formalities constitutionally provided and, therefore, protecting minorities; and (c.) the substantial legitimacy, by which – based on assumption or by virtue of the intervention of the Federal Supreme Court – recognizes the normative content, pursuant to the Constitution.

In this sense, the compatibility of judicial review mechanisms with instruments of democratic self-determination – that together constitute the Democratic and Constitutional Rule of Law – is placed as an assumption for a healthy exercise of the political power, from the State point of view.

Therefore, a good development of democratic institutions occurs when there is compatibility between the enforcement of the Constitution and the deference to the legislative, through which the Judiciary recognizes having a lack of legitimacy for innovation in terms of rights.

Especially in the countries of common law, doctrine has tried to develop compromise solutions by which, through a higher interaction among the decisions from each of the powers, a supremacy of the courts to the detriment of the parliaments is avoided. In this sense, we have the theory of institutional dialogue that, initiated in Canada, suggests that the analysis of the interaction between legislative and judiciary branches should occur in an extended timeline, in which, by successive procedural rounds, there will be the occurrence of a mutual influence in the production of the acts performed by each of the powers involved in that dialogue.

The Canadian theory of institutional dialogue was developed in a context where the need of judicial remedies related to fundamental rights had to accommodate itself

in a parliamentary tradition averse to judicial review[3]. The creation of a *bill of rights* (the *Charter of Rights and Freedoms)* was only possible with some constitutional arrangements that allowed the parliamentary branch of government to politically reply Supreme Court decisions considered politically inconvenient. Both by hermeneutical limitations[4] and institutional privileges[5], the Canadian legislative bodies can oppose their views about the rights against the rules of the judicial courts.

The dynamics proposed by the Canadian *Charter* implies a structural model of dialogue, where institutional procedures are previously designed to allow an interaction between courts and parliaments. However, the existence of previously established institutional paths is not mandatory to allow the institutional dialogue: through a self-restraining behavior by the judiciary, it is possible to develop successive rounds of discussion between courts and parliaments, as can be seen in some Brazilian cases.

2. The institutional dialogue as a compromise solution: interaction between branches and deference to the legislative

In a context that lacks a formal and previously arranged framework of interaction, as it happens in Canada, we can say that institutional dialogue consists of an *instrumental technique that can be adopted in* judicial-*decision processes*, by *which the Supreme Court self-restrain its last word privilege* in order to pay deference to the majority decisions taken in the parliament. Dialogue as a methodological instrument of decision lacks a normative character in its application: there will be dialogue only if the Court spontaneously considers the democratic will in its rulings, behaving itself in a deferencial mode to the parliamentary choices.

3 In Canada, the judicial review was introduced with some mitigations, to avoid breaking up with its parliamentary system, aligned to Westminster's tradition. The constitutional reform introduced by the promulgation of the *Charter of rights and freedoms* sought to implement some institutional innovations capable to maintain in the Legislative, if not the supremacy it practiced, at least some level of prevalence in its relation with the Judiciary. The analysis of the development of institutional dialogue in Canada can be found in: LOBREGAT, Rodrigo Rabelo. *O STF e sua atuação no processo legislativo: Uma análise a partir da teoria do diálogo institucional.* São Paulo: Editora Tripla, 2019.

4 Section 1 of the Charter indicates that rights therein protected can be limited by law if its reasons "can be demonstrably justified in a free and democratic society". This provision allows the parliament to impose its understanding about rights in the laws it promulgates. In other words, the legislative branches are free to decide how to materialize rights as long as the general framework imposed by the Charter is observed.

5 Section 33 of the Statement of Rights is known as the *notwithstanding clause*, by which the legislative branches may immunize its legislation from the judicial review during the period of 5 (five) years.

We may consider that "studies of constitutional dialogue should take into account the ways the courts may seek both their decisions more acceptable to legislatures and to structure the legislative replies"[6]. However, it demands an *act of will* from the Supreme Courts, which recognizing that legislative bodies hold the vocation to innovate in the legal system, grants to them the possibility of overcoming its decisions. Thus, the achievement of a dialogical position requires from the Federal Supreme Court, a self-restraining behavior that, in deference to the other Branches recognize its lack of democratic legitimacy to, thereafter, provide greater deference to the majority decisions made by the Congress.

As the incorporation process of institutional dialogue follows an act of will, we may admit that it has a mere descriptive force, lacking instruments to bind the Supreme Court decisions. Dialogue must rely in the interpretation of the Court about the legislative reply, which is an instrument of democratic *reply to controversial and divided Supreme Court, or an illegitimate defiance, depending of the court position regarding this judicial decision-making method.*

For purposes of concepts, we have as institutional dialogue an *interaction minimally balanced between two or more political agents that, through own deliberative and mutually respected* loci, *act in sequence and consciously to legitimate the practice of the construction or of the constitutional review in a specific enactment.*

In this sense, the assumptions for its occurrence would be:

a. Plurality of institutions involved;
b. Minimum balance in interactive relations;
c. Fulfillment of the uninvolved decision-making locus;
d. Conscious procedural sequence;
e. Search for increase legitimacy;
f. Constitutional nature of the dialogue object.

This is what we will see.

6 ROACH, Kent. *Dialogue or defiance: legislative reversals of Supreme Court decisions in Canada and the United States. In*: *I-CON*, Volume 4, Number 2, 2006, p. 348. Available at: https://academic.oup.com/icon/article/4/2/347/722125. Access on: 9 may 2020.

a. Plurality of institutions involved

Institutional dialogue is defined as modality to overcome interpretative conflicts between two different institutions. In view of the inertial nature of the Judiciary Branch, which only speaks up in the political and legal discussions when urged by actor procedurally eligible[7], what happens is that the lack of dispute regarding the lawmaking activity of the Legislative Branch shall give rise to an absence of dialogue.

This is because the interlocution between the Judiciary and the Legislative shall only occur in face of a dispute as to the compatibility of specific rule with the Law (while complex legal order, composed of a number of rules hierarchically arranged and integrated by the necessity of substantive observation of specific ontological aspects constitutionally accepted); such hermeneutics dispute, however, shall not necessarily occur by virtue of a divergence of understanding among Judiciary and Legislative.

It is possible that the dialogical interface between them occurs via an agreement, through which the provoked Judiciary shall agree with the controversial legal act; in these cases, the conflict that shall give rise to the dialogical interface shall occur between the expression majority from the Legislative Branch and some minority actor procedurally eligible[8].

In other words, in the event of judicialization of an enactment, caused by a minority defeated in the parliamentary arena, there shall be institutional dialogue. Such dialogue, however, can be held in order to constitute an agreement between the positions of each of the branches, by which the Judiciary, to the detriment of the minority political party forwarded to it, shall understand the enactment under analysis as compatible with the constitutional text in force.

Thus, the requirement of the *plurality of institutions*, which the dialogue assumes, necessarily results in a constitutional doubt; such doubt, on the other hand, shall not necessarily constitute the existence of conflicting positions among each of the branches, being perfectly possible that both institutional actors involved in the dialogical inter-

7 Principle of *nemo iudex sine actore*.

8 "This openness of the Supreme Court to other political actors have transformed the Court, in many circumstances, in a review chamber of majority decisions, from the complaint of those defeated in the representative arene. In this respect, it is curious to note that the political party that most brought cases to the Supreme Court in the Fernando Henrique Cardoso's period was the Workers' Party (PT) and currently, in Lula's administration, the Democratic Party (DEM) is leading the position among the Court's users, followed by the Brazilian Social Democracy Party (PSDB)." *In*: VIEIRA, Oscar Vilhena. *Supremocracia. In: Revista Direito GV* 8, São Paulo, p. 448.

face have a same construction regarding the constitutional application in that normative situation, particularly.

b. Minimum balance in interactive relations

An institutional relationship based on dialogue necessarily assumes the awareness, by each of the branches, of the importance of the other in the organization of a debate. On the other hand, the use of mechanisms through which the conclusion of the discussion occurs, without allowing the other branch to perform new procedural round, results in the use of the so-called "privilege of the last word".

However, it is important to emphasize that the assumption of the minimum balance does not result in a relationship between equals. It is known that Brazil has a judicial review system, in which the Federal Supreme Court can, if so willing, hold an outstanding position in the interinstitutional relations, by using, for such, the prerogative of Guard of Constitution and the use of the last word. This overview is even more characteristic, when the possibility of judicial review of the constitutional amendments is observed, whose parameters are the provisions contained in art. 60 of the Constitution.

Such outstanding position, initially, would completely forestall the occurrence of dialogue, if full equality among political institutions were necessary.

What occurs is, when we understand the need of a minimum balance for the dialogue to depend on, we do not want a full institutional equality to take place, but within a prior institutional interface and by deference from one branch to another, mutual discursive rounds may happen.

More than a structural assumption, balance is a behavioral issue that enables an openness of the jurisdictional body to the democratic inflows originated from the Congress. Should there not be an activist attitude, it becomes possible to combine the fulfillment of the Constitution – ensured by the Federal Supreme Court – with the judgment of political convenience, assessed and decided by the majority bodies.

Thus, what is placed as an assumption to the dialogue is the fulfillment of the democratic resolution, through the Federal Supreme Court, far from adopting activist attitude, understands that the fulfillment of the constitutional rules can comprise multiple possibilities, among which the choice is eminently political.

The relevance of the adoption of specific choice to the detriment of other, when not previously performed by the Constitution framer, in the light of the separation of

branches, should fall on the majority body; it is necessary for the existence of dialogue, a deference to such overview, the Supreme Court ceasing to proceed in an activist manner, simply because there is no controlling body capable of constraining its decisions.

c. Compliance with the uninvolved decision-making locus

The different branches have their own spaces for discussions, in which they have procedural legitimacy to act.

Constitutional Democracy assumes not only that the decisions are significantly appropriate, but also that the procedures to exercise political power are followed accordingly to what has been established by the Constitutional framer.

The fulfillment of quorums, procedural instruments and proceedings for political interaction among the Established Branches is placed as the minimum parameter to perform a dialogical resolution; on the other hand, the exercised based on the prerogative of the last word, through which the Constitutional Jurisdiction is imposed on issues that are completely unusual, is placed as a form of political predominance that removes the other branches from the field of state action granted to them by the Constitution.

d. Conscious procedural sequence

As a logical result of the previous requirement, the dialogue results in a procedural sequence, by which one of the branches involved shall end up to, alternately, present its solutions to the normative and interpretative conflict that gave rise to that discussion.

In this sense, the response from one branch to another takes place with the occurrence of continuous procedural rounds: the Legislative, by the enactment of regulatory acts, brings specific political majority discussions; the Judiciary, in turn, expresses itself whilst taunted by the jurisdictional control of that act which, in turn, can give rise to a new normative preparation by the Legislative, in order to overcome what has been declared as unconstitutional[9]. In other words:

9 "(...) the National Congress can keep resolving on the object subject of court order, editing a new regulatory act with substantial change of the legislative discipline, or editing a new enactment similar to the invalidated, in the

> [...] the judiciary does not have necessarily the last word with respect to constitutional matters and policies; the legislatures would almost always have the power to reverse, modify, or void a judicial decision nullifying legislation and, therefore, to achieve their social or economic policy ends", in a way that "an institutional dialogue may occur anywhere legislatures are able to reverse, modify, avoid or otherwise reply to judicial decisions nullifying legislation[10].

Thus, by different responses to a constitutional issue, Legislative and would Judiciary alternate on a procedural form, until there would be a compatibility between their two wills, even such compatibility results from the inertia, in a way that "the proper balance between constitutional principles and public polices and the existence of this dialogue constitutes a good reason for not conceiving of judicial review as a democratically illegitimate"[11].

By the way, it is relevant to point out that the openness of a new procedural round imposes on the legislative, by definition, an argumentative burden[12] (or, at least, it should be). The temporary closure of a procedural round results in the achievement of a solution that has potential for definitiveness.

Well, the resumption of the discussion in order to cause a review of the previous solution should be based on a grounded reason that can minimally justify where the

light of new reasons, or changing by amendment to the Constitution the new constitutional parameter that served as basis for the court order. It is also relevant to note that, even the decisions of the Federal Supreme Court with efficiency against all and binding effect to the Public Administration do not prevent the edition by the National Congress of enactment similar to what was declared unconstitutional, if deemed that there are reasons for that. The coverage of such decisions of the Federal Supreme Court does not constitute formal obstacle to the legislative activity of the National Congress, although the new edited enactments are also subject to the judicial review, which may affect the edition or not of the new similar regulatory act." Finally, "(...) the final and unappealable decision of the Federal Supreme Court declaring unconstitutionality of specific enactment does not prevent the continuation of the dialogue, even it can be postponed or restrict its content. The passage of time reveals that the final decision of the Federal Supreme Court in specific case is not constituted as the final word in the decision-making process, but within the limit only as the end of a procedural round, which causes modifications in the political scenario, but it can be succeeded by new procedural rounds." *In*: RESENDE, Fabricio Contato Lopes. *Diálogo Institucional entre os Poderes Legislativo e Judiciário por meio do controle de constitucionalidade dos atos normativos do Congresso Nacional pelo STF no período de 1988 a 2013*. 2017. Thesis (Ph.D. in Law) - Department of Public Law – *Faculdade de Direito* of *Universidade de São Paulo*, pp. 40-41.

10 TREMBLAY, Luc B. *The legitimacy of judicial review: the limits of dialogue between courts and legislatures*. *In*: I-CON, v. 3, n. 4, 2005, p. 617-618. Available at: https://academic.oup.com/icon/article/3/4/617/792021. Access on: 9 may 2020.

11 TREMBLAY, Luc. B. The legitimacy of judicial review: the limits of dialogue between courts and legislatures. *In*: I-CON, v. 3, n. 4, 2005, p. 617.

12 "A position of greater or lesser deference to the resolution of other Branch shall depend on the quality of the reasons justify it. The reaction to the resolution of other Branch should be justified upon sufficient reasons. Thus, it should be noted that the presented dialogue proposal meets the respect requirements to authority and is compatible with the necessity of stability of a moment of decision." *In*: RESENDE, *op. cit*., p. 21.

error of the judicial *decisium* is or, at least, explains what the new intended legislative of the law declared unconstitutional differs in the previous dialogical sequence[13].

On the other hand, it should be emphasized that the simple fact of the political response of the interlocutor branch being different from that one giving rise to the new procedural openness is not, in itself, enough to justify a new procedural round. The legal order has different solutions for the same issue, and such diversity is legal. Thus, especially in respect to the second analysis of the cases by the Courts, it should be in mind an openness to the new solution proposed by the Legislative must be kept in mind, instead of simply trying to uphold the legal position previously taken. After all, it is not inappropriate to reiterate that, if there is a profusion of solutions that can be comprised by the legal order, the Legislative Branch is responsible, through a majority resolution, for choosing the option that seems to be more politically appropriate, at the expense of a hateful invasion by the Judiciary to the Legislative power space.

e. Search for increased legitimacy

The institutional dialogue, whilst mechanist for overcoming constitutional conflicts, does not have as an assumption the improvement of resolutions, by virtue of consent. The compositional logic is covered by the parliamentary environment; on the other hand, the courts are not responsible for analyzing the convenience of one or another political path to, based thereon, add opinion to the majority lawmaking.

Courts are not responsible for doing politics. The duty of the courts is to protect the Law, and when there is a normative conflict between non-constitutional law and constitutional rule, it means enforcing the Constitution Supremacy. And, it is undeniable, the framer of the constitution has included in the constitutional text a series of public policies, defining the paths in relation to which there is no alternative to public agents, other than the compliance.

In this sense, it is natural that the courts ended up complying with such public policies; however, it entitles them to make choices of convenience and opportunity, replacing the lawmaking resolution. On the contrary, in such event, the choices have

13 Moreover, such necessity is based on reasons of practical order. The resumption of the dialogue gives rise to the expenditure of public resources, in such a form that only upon a grounded reason the discussion should be resumed, which discussion is, precariously, resolved.

already been pre-established by the constitution-maker, and when enforcing constitutional rules, the Judiciary does not manage the public policies, or create rights, but only maintains the Constitutional Supremacy; after all, "the equation is simple: if everything is constitutional matter, the amount of freedom provided to the political body is very small"[14], so that, should there be express provision in the Federal Constitution, the Judiciary should ensure its compliance by the other branches[15].

Thus, the courts extract their legitimacy from the recognition that mechanisms of protection to the rights contained in the Constitution. They justify their counter-majoritarian performance as guarantors of the substantive laws that were pre-established by the framer of the constitution as basics in our positive legal order. In this sense, with regards to the accomplishment of the constitution precepts by ordinary laws, whose delineation has already been established by the framer of the Constitution, it shall be considered desirable and welcome to the courts performance, so that the accomplishment is ensured, in the ordinary laws, of the substantive decisions contained in the public policies set forth by the constitution.

On the other hand, the impossibility of making political choices, instead of simply enforcing the constitution, results from the fact that there is lack of representative support. It is legitimate in the eyes of the society that there is a counter-majoritarian performance of a non-elected court in favor of the maintenance of the constitutional order; on the other hand, such situation is not supported if it considers appropriate to make judgments of political convenience to determine social choices. Its strengths and weaknesses have the same origin: the exemption combined with technical knowledge, which makes it, otherwise exempt, less susceptible to passions of each political moment.

The legislative bodies, in turn, have their basic development completely associated to the civil society, which organized in groups, is mobilized to be represented in the lawmaking bodies. This such popular majority that has succeeded in making itself present there, in turn, seeks by the logics of the composition of interests, bargain and negotiation, to assert own their political project, reaching new majority (or rather an

14 VIEIRA, Oscar Vilhena. *Supremocracia. In*: *Revista Direito GV* 4, São Paulo, p. 447.

15 However, it is important to say that "the fact that the law serves as a limit to judicial activity seems to contrast with the reduced binding of the jurisprudence of the Supreme Courts to the constitutional text and its precedents (as is the case of the Supreme Court)" *In*: BRANDÃO, Rodrigo. *Supremacia Judicial* versus *Diálogos constitucionais: a quem cabe a última palavra sobre o sentido da Constituição?* 2nd Edition. São Paulo: Lumen Juris, 2017, p. 278.

internal parliamentary majority to that social majority represented in the parliament) capable of approving specific legislative projects[16].

It is evident that the legislatives branches should meet and fulfill the Constitution. However, by virtue of its popular proximity (that makes them susceptible to claims and needs of the social moment), as well as the mechanisms of ideological dispute inherent to the parliamentary operation, the Legislative becomes more susceptible to result in outrages to the Constitution, *testing the hermeneutical limits*, in order to try to carry out specific politics convenient to the social group that is in the power.

Well, Oscar Vilhena states that:

> In a system in which the 'political powers seem to have lost the ceremony with the Constitution', nothing can seem more positive than its legitimate guardian to exercise its political role in order to preserve it. However, even though it can be seen as desirable, we all know that this is a task full of obstacles. There is no consensus among jurists on how to best construe the Constitution, or in how to solve the several collisions among its principles. Which does not mean that the task should not be carried out in the most efficient and controllable way possible, according to Hesse. However, there are difficulties that exceed the strictly hermeneutical problems resulted from the enforcement of a Constitution. Such difficulties refer to the dimension itself of authority that is understood appropriate to be exercised by a court within a regime that is intended to be democratic.[17]

Consequently, we have the fact that methods of composition of the courts made them more likely to reasonably comply with the constitutional commandments, but less qualified, in a self-government logic, to make political choices. The legislative bodies, in turn, have in the representation as their grounds to choose political platforms and make normative creations; on the other hand, they are more susceptible to produce innovations contrary to the constitution.

16 As to the logics of the double majority and the existence of minorities that are not even represented in a parliament, José Afonso da Silva teaches us that: "The parliamentary legislative process serves to accept and resolve the contradictions of the interests represented in the Legislative Chambers in a summary that becomes the law. (...) The representative regime tries to resolve the conflict of social interests by decisions of the parliamentary majority – which not always expresses the representation of the majority of people, because the electoral system places major barriers to the ponderable part of population as to the right of vote to compose the Legislative Chambers. (...) But such defects do not distort the conception that the legislative process has as purpose to cease the conflict by pre-organized debate, by act of the parliamentary Majority. Only here the conflict ceases with the law voted by the Majority, imposed and ensured by the force, and not by its content of justice". *Processo constitucional*, *op. cit.*, pp. 44-45.

17 VIEIRA, Oscar Vilhena. *Supremocracia. In: Revista DireitoGV 8*, São Paulo, p. 457.

The different sources of legitimacy of courts and of legislative bodies cause the strengths and weaknesses of one or another are, to some extent, inverted[18]. And, as Conrado Hubner Mendes teaches us, "*the question is to demand a theoretical approach of the separations of powers that does not ignore any of the interdependent variables of legitimacy*"[19]. Furthermore, "*Courts take decisions that have a particular incremental, both forward and backward-looking rationality, as opposed to legislation, which usually corresponds to a prospective and general rule*"[20].

Thus, in order to minimize the institutional weaknesses related to each of these powers, in the need of resolution by virtue of conflict, it makes sense to search for dialogue, by which the occurrence or successive procedural rounds would enable, partly by trial and error, and in other part by the incorporation of the institutional reasons of the respective interlocutor, the search for a optimal point in which the state resolution is, among the options acceptable by the constitution, that most appropriate to the majority social claims[21]. After all, "(...) *the growth of dynamic demands more active participation by the judiciary in a dialogue with legislature and executives about the proper balance between individual rights and common purposes*", as mentioned by Manfredi and Kelly[22].

The instrument of dialogue is placed as mechanism of legitimization increase, by which the incorporation of the legal rational by the parliament can increase the level of fulfillment of the Constitution, while the incorporation of the parliamentary political rational by the court makes it more sensitive to the popular demands, which,

18 In this sense, Resende states that: "The dialogue, in strong sense, may contribute to increase the quality of the State decision, because the conscious interaction based on reasons and appellee´s briefs allows to mitigate the tendency to failures related to each Power (resulted from its blind spots and burden of inertia)". *In*: *Op. cit*., p. 20. Moreover: "The performance of the Federal Supreme Court and of the National Congress ranges among the positions of greater or lesser deference from one to the resolutions of the other. The control exercised by the Federal Supreme Court can mitigate blind spots and burden of inertia in the legislative activity of the National Congress. Besides, the existence of the judicial review encourages the National Congress to consider as a relevant element in the legislative resolution arguments related to the law and to the Constitution". *In*: Idem, idem, p. 63 In the same sense: "the debate should permit a performance in team of the powers, in which weaknesses (myopia) compensates of the other". *In*: VICTOR, *op. cit*., p. 151.

19 *In*: MENDES, Conrado Hubner. *Is all about the last word?*, *op. cit*., p. 74.

20 *Idem*., p. 72.

21 Well, "The interaction resulted from the openness for re-discussion of constitutional issues by those interested provides better conditions to correct the failures, which are inevitable, and to reach solutions for the social problems that use the best justification and higher acceptance. Such interaction regarding the meaning of the Constitution involves successive expressions, both of legislators (upon edition of laws) and judges (upon judicial review)." *In*: RESENDE, *op. cit*., p. 80.

22 *In*: MANFREDI, Christopher P.; KELLY, James B.. Six Degrees of Dialogue: A Response to Hogg and Bushell. *In*: *Osgoode Hall Law Journal 37.3*, 1999, pp. 513-514.

including, shall permit to adopt hermeneutical techniques capable of improving the compatibility of the social claims[23].

f. Constitutional nature of the dialogue object

Institutional dialogue shall occur, necessarily, by virtue of a constitutional interpretation potentially conflicting among the institutions (I mean potentially, once already pointed out, eventual conflict taken to the Federal Supreme Court by actor procedurally eligible that has as a result, the *recognition of the constitutionality of the majority resolution* shall have an *identity between the expression by the court and by the legislative body*). "Courts do not hold a monopoly on the protections and promotion of rights and freedoms"[24], so there will be natural conflicts in the interpretation of the constitutional law.

In the lack of occurrence of any constitutional argument, the parliamentary resolution shall not collide with the Court, in such a form that, within the square of each of the branches established by the Constitution, its will shall prevail.

Thus, the conflicts that tend to give rise to a potential dialogue reflect a hermeneutic divergence of the Constitution or a reformatory claim thereof (which could, by virtue of the limitations of art. 60 of the Constitution, be analyzed by the Federal Supreme Court). On the other hand, and in view of the large variety of subjects brought to the Constitution of 1988, it is undeniable that the limitation subject to the occurrence of institutional dialogue is mitigated, allowing the institutional bodies to interact in the most different subjects related to the Brazilian legal system[25].

3. Institutional dialogue in Brazil: examples and considerations

Upon the theoretical perspective that has been presented, it is time to analyze the context in which the institutional dialogue occurs in Brazil. For such, we will analyze the

23 "The institutional dialogue, when brought to the buck of the constitutional debate the Legislative Branch with its content of popular representation, certainly increase the democratic levels of the model of judicial review and interpretation" VICTOR, p. 185.

24 Canadian Supreme Court's ruling in R. v. Mills [1999] 3 S.C.R. 668.

25 Well, "the Constitution transcended the subjects properly constitutional and regulated in detail and obsessively a broad field of the social, economic and public relationships, in a sort of *maximizing commitment*. This process, called by many colleagues of constitutionalization of law, leaded by the Text of 1988, however, there was a massive sphere of constitutional stress and, consequently, gave rise to an explosion of constitutional litigation". *In*: VIEIRA, Oscar Vilhena. *Supremocracia*. *In*: *Revista Direito GV* 4, São Paulo, p. 447.

role of the judiciary in the Federal Constitution of 1988, as well as some cases in which there was an interaction between Supreme Court and the Congress.

a. Instruments of dialogue: changes in the control parameter and hermeneutical techniques

Within the context of the use of successive procedural rounds, we observe that the most common model of institutional dialogue in the Brazilian context takes place by the enactment of constitutional amendments by Congress, who changes the constitutional parameter previously analyzed by Supreme Court by exercising its Reformer Constitution-Maker Power[26], overriding Court's decision.

On the one side, such overcoming modality would be considered, initially, as an anti-dialogical attitude, given its intention of preventing any new resolution on the subject at issue. After all, the amendment to the constitutional rule that would serve as parameter to remove specific legislative resolution, would have the prerogative to remove the possibility of the Federal Supreme Court to issue expression against that policy, once the performance of such body results exactly from the necessity of protecting the constitutional text, which amended in its core, would change the substantive scope, by virtue of which gave rise to its constitutional jurisdiction.

However, by virtue of the possibility of a material review of the constitutional amendments, set forth in art. 60, §4, of the Constitutional Text, what we have is that, even such form of resolution by the congress is open to new interpretations by Supreme Court, which enables a new relationship of dialogue. On the other hand, if in

26 It should be pointed out that, for instance, the constitutional amendments are not properly work of the National Congress, notwithstanding the Reformer Constitution-Maker Power presenting subjective identity with that body. After all, "Is the constitutional amendment work of legislator? To admit that constitutional amendment is work of the legislator does not imply in confusing Constitution-Making Power with Constituted Power? The Constitution supremacy on the other enactments is a fundamental principle in our legal system. The judicial review of the laws results therefrom. Actually, this statement is that dismissing demonstration, even because it would only consist of in listing the consistent opinions of all our jurists, alive and dead. Well, such supremacy results from the distinction between Constitution-Maker Power, which gives rise to the legal order, and Constituted Powers, which unfold within the limits and as established by the Constitution. However, being predictable the need to change, in non-fundamental points, of the Constitution, the Constitution-Maker Power itself establishes, or constitutes, a Constitution-Maker Power for the changing of the constitutional rules, the Review Power, in the same form that establishes other powers which action is subject to the constitutional rules, either the original ones or those edited in replacement." And continues: "it can(not) confuse Power to Review with Power to Make Law. Indeed, both act in different circles and their acts have different reach. The amendment changes the fundamental political and legal organization; the law only other laws. That may contradict the Constitution, and do it so, necessarily, to change it; it is only valid if it does not contradict the Constitution." *In*: FERREIRA FILHO, Manoel Gonçalves. *Do Processo Legislativo*. 6th Edition. São Paulo, Saraiva, 2012, pp. 293-294.

this second analysis by the Federal Supreme Court it the unconstitutionality is maintained, Congress options for the maintenance of the discursive continuation shall appear very limited. After all, the tendency is that there is understanding that the change of parameter of rule would be, by itself, unconstitutional, by virtue of breach of the constitutional principles that, in the light of the material limitations of reform, would be very strict.

In any case, it should be emphasized that the overcoming of court orders by amendments is, according to the accepted constitutional order, indispensable. The constitutional convention brought to itself a series of issues that, seen according to the concept of material constitution, should not reflect on rules of constitutional nature.

To some extent, it can even be said that there was a trivialization of the constitutional rules, resulted from an impetus of constitutionalizing of the ordinary law that, in turn, imply in the necessity of using the constitutional amendments. Well,

> The Brazilian Constitution of 1988 stands out for being extremely analytical, therefore, enshrines a series of subjects, which in other countries would never be put at the level of constitutional stature. Thus, many of the public policies deemed ordinary involve constitutional issues and require the enforcement by constitutional amendments[27].

Consequently, and by virtue of our positive Constitution, the preparation of ordinary policies undergoes through necessary reforms to the Constitution; in this sense, the possibility of making use of the last word by the Congress would not be considered authoritarian, once the changes of parameter would focus on the issues in which, effectively, the Federal Supreme Court should not have jurisdictional interference.

On the other hand, in the cases involving effective constitutional matter, in the event of the constitutional reforms be related to restrictions and limitations to the individual rights and guarantees, or to the institutional structuring of the State, the dialogue shall be preserved, being maintained the possibility of judicial review of the constitutional amendments.

27 *In*: VICTOR, *op. cit.*, p. 307.

b. Instruments of dialogue: hermeneutical techniques

The openness of the Federal Supreme Court to the possibility of dialogical interaction with the National Congress has been faltering. On the one hand, there is a tendency to search the institutional predominance by the Federal Supreme Court, which has developed its jurisdictional activities in such a way to be placed in an outstanding position before the other political bodies.

On the other hand, there are judgments in which the Federal Supreme Court deliberately understood it should make way to the political inflows from Congress. Such situation seems possible, by virtue of the use of hermeneutical techniques, though which, the parliamentary will is preserved, at least partially, recorded in a potentially unconstitutional legislation.

It is not meaningless to point out that, in the lack of instruments of dialogical channeling previously accepted, the possibility of a dialogue interaction relationship between Congress and Supreme Court depends on an act of will and self-restriction of the latter, once its privileged position in the separation of powers nowadays existent in the country, as well as its role of main guardian of the Constitution, granted by the framer of the Constitution.

Once there is no instrumental means to control the jurisdictional decisions carried out by the Federal Supreme Court, the openness to the democratic inflows arising from the bodies of popular representation depends on a respectful attitude towards the legislator. Caselaw studied throughout this work demonstrates that, despite the self-restriction moments of the Federal Supreme Court, in which the body demonstrates awareness of the lack of its legitimacy for political resolutions, there are several cases in which there is a real jurisdictional lawmaking, without openness for inflows coming from the bodies of democratic resolution. Let us see below.

i. The judicial advice-giving technique

The judicial advice-giving technique consists of an express note, by the Federal Supreme Court, on the circumstances in which there would be unconstitutionality of specific political and legislative claim, furthermore, indicating the behavior to be followed by Congress, in order to overcome it.

In this regard, Christine Bateup considers that:

> First, judges may invalidate legislation on constitutional grounds, yet also provide advice to the political branches regarding constitutionally acceptable methods for achieving the same end. Commentators have referred to such methods as 'constitutional road maps' enabling judges to strike down statutory provisions, but then offer a 'road map' for legislators to follow when they draft new legislation. Second, judges may uphold legislation as constitutional, while at the same time using techniques that encourage political actors to revise statutes in order to remove ambiguities and vagueness from the law[28].

Such overview, was especially used in Brazil when the Federal Supreme Court, initially, uncomfortable in judicially making law in the cases of omission by the legislator, merely indicated the unconstitutionality resulted from that lack of action, instigating the National Congress to act in accordance with the constitutional text, however, without fulfilling its political willingness[29].

Generally, every statement of unconstitutionality indicates the possibility of it being overcoming, as well as points related to the incompatibility of the rule analyzed with the applied constitutional parameter. After all, every jurisdictional acts need justification, and when the ministers of the Federal Supreme Court do it so, they expose the reasons why an inconsistency between the nullified law and the constitutional order was observed.

On the other hand, it is not common to have a clear conversation with the legislator, in which the paths constitutionally appropriate to the specific political and legislative claim would be indicated. A demonstration of mere inadequacy of the rule model from the express indication of political alternatives that would be constitutionally accepted by the order should be distinguished.

28 *In*: BATEUP, Christine. The dialogic promise: assessing the normative potential of theories of constitutional dialogue. *In*: *71 Brooklyn Law Review*, 2006, p. 1124.

29 Impedes to point out that the possibility of incorporation in effects amending the decisions of MI and ADO was consolidated in the precedents of the Federal Supreme Court, only after the Judgment of the MI 721 (concerning the special retirement of public servants, of Rep. of the Min. Marco Aurélio), in such a form that the Federal Supreme Court still considered appropriate and only to recognize the lawmaking default, indicating to the Parliament the need of lawmaking regarding a specific matter. For instance, in this sense, see MI 278, in which the lawmaking default was recognized, concerning the proportional prior notice, in which the Judge-Rapporteur was defeated (who promptly intended to correct the omission). As to the subject, it should be analyzed the excerpt of the opinion of Min. Ellen Gracie, who categorically affirms that: "The precedents of this Court is guided in the sense of announcing that the purpose to be accomplished by the writ of injunction can be resumed to the mere declaration, by the Judiciary Branch, on the occurrence of constitutional omission, to be informed to the defaulting state body, so that it promotes the integration of rule of the constitutional provision invoked as ground of the right held by the petitioner of the writ.". MI 278, min. judge-rapporteur Carlos Velloso (defeated), opinion of Min. Ellen Gracie, judged on 10/3/2001, *DJE* of 12/14/2001.

The use of the judicial advice-giving technique assumes the adoption of a frank and open attitude by the Supreme Court, through which there should be awareness regarding the institutional interaction; however, such situation has not occurred repeatedly in the precedents of the Federal Supreme Court.

As an example, and the instability of the precedents concerning the subject without being analyzed, we have the Supreme Court decision delivered in the judgment of the ADC 43, which concerned the constitutionality of art. 283 of the Code of Criminal Procedure. In such event, granted the claim and resumed the understood by the impossibility of detention before the final and unappealable decision of a criminal action, the Supreme Court President, Min. Dias Toffoli[30], clarified his understanding that the discussion in that case would not involve any subject supported by art. 60, §4 of the Federal Constitution of 1988 and, consequently, the reversion of that judgment could occur by the enactment of the ordinary law.

On the other hand, the same judgment showed the lack of openness of dialogue by some of the ministers. In this sense, we have the speech of Min. Marco Aurélio (judge-rapporteur of the case at issue) who, asked about the subject, was clear when affirming that the approval of a law against what had been decided within the scope of the ADC 43 would constitute an attempt to "exceed the decision of the Supreme Court"[31-32].

With all due respect to Min. Marco Aurélio, a good operation of the institutions depends on a greater democratic maturity of the Supreme Court, by which it deems that the confrontation of its decisions by a legislative discussion, provided that through

30 ARBEX, Thais; CARVALHO, Daniel, TUROLLO JUNIOR, Reynaldo. *Toffoli abre brecha para Congresso regatar 2ª instância por via mais rápida* (Toffoli opens the possibility for the Congress redeem appellate court by swiftest method). *Estadão conteúdo*, São Paulo, November 9, 2019. Available at: https://www1.folha.uol.com.br/poder/2019/11/toffoli-abre-brecha-para-congresso-resgatar-2a-instancia-por-via-mais-rapida.shtml. Access on: 13 dec. 2019.

31 MOURA, Rafael Moraes. Marco Aurélio: *PEC da 2ª instância é tentativa de ultrapassar decisão do Supremo* (PEC of the appellate court is an attempt to exceed the decision of the Supreme Court). *Estadão conteúdo*, São Paulo, November 12, 2019. Available at: https://www.terra.com.br/noticias/brasil/politica/marco-aurelio-pec-da-2-instancia-e-tentativa-de-ultrapassar-decisao-do-supremo,7dcd2653868765955b047eb0fddca869ewyhgdl2.html. Access on: 13 dec. 2019.

32 Considering that institutional dialogue depends on an act of will, and as so the openness to the legislative response will depend on the composition of the court, the ambivalence hence regarding parliamentary replies will be observed also in other countries. In the United States, the American Supreme Court stated both openness and discomfort regarding legislative replies about the same core concern: first, in the emblematic Miranda's rule, Chief Justice Warren stated that the ruling "in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of individual while promoting efficient enforcement of our criminal laws. [303 U.S. 467 (1966)]". However, just after legislative replied with new statute related to the subject, Chief Justice William Rehnquist was emphatic saying that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution (United States v. Dickerson, 166 F.3d 667, 692)".

constitutionally provided paths, might mean an improvement of legal order and an increase of legitimacy of a decision that, if liable to resolution, is eminently political.

Furthermore, it should be emphasized that the action itself, by which the subject was taken to confrontation by the Federal Supreme Court, is an indication of the possibility to exceed the jurisdictional decision by new resolution of legislative policy. Well, the statement of constitutionality of a law does not result, necessarily, in the unconstitutionality of a political decision replacing it, once a constitutional provision might potentially admit more than one a solution possible in its regulation.

ii. Interpretation accordingly and unconstitutionality without text reduction

Based on the view of institutional deference to the Legislative, the Federal Supreme Court has used the techniques of *interpretation regarding the constitution and unconstitutionality without text reduction*. Such hermeneutical modalities, indeed, are very similar: they refer to interpretative mechanisms by which it seeks to assess, in accordance with a constellation of rules originated from the same lawmaking provision, a form of compatibility of the legal text with the constitutional order. It is not by chance that Carlos Blanco de Morais classified them as a same type, that of the *conditional interpretative judgments*, alleging thereof that:

> After all, we are facing two sides of the same coin with one common effect: in both institutes interpretative operations are carried out, which assume the non-application of the unconstitutional sense of a rule.
>
> More than simple hermeneutical operations, the described conditional interpretations are inseparable from the constitutionality inspection system. And, more than the taxonomic product of mere academic or theoretical elucubrations, these decisions came up due to the concrete requirements imposed by the order to the said inspection system.
>
> If in the interpretation according to the Constitution primarily counts the effect of a decision of rejection (that is, prevails the non-unconstitutional sense of a precept), in the qualitative partial unconstitutionality counts the effect of a granted decision (prevails the declaration of unconstitutionality of the rule, while construed in a specific sense).[33]

33 MORAIS, Carlos Blanco. *Justiça Constitucional – Tomo II.*, *op. cit*, p. 377.

It is known that the concept of a rule involves the existence of a provision related to an interpretation. Before the hermeneutical modality of compliant interpretation[34], the Federal Supreme Court maintains the provision unscathed, however, indicating what is the interpretative form capable of permitting its integration to the legal order, without it challenging the Constitution. In other words, in order to recognize the constitutionality of the law, it is necessary to comply with specific conditions, extracted from the constitutional text.

Example of interpretation as it would have occurred in the judgment of the verticalization of the coalitions, occurred in the ADI 3685[35]: there was an understanding that the amendment to the electoral rules established by EC 56/06 would breach the material limitations of the power of reform contained in art. 62, §4, by virtue of the non-compliance with the electoral anteriority provided in art. 16 of the Federal Constitution. On the other hand, should there be an interpretation of EC 56/06, in compliance with the said art. 16, the possibility of pronunciation of constitutionality has been considered, provided that the electoral anteriority is fulfilled. Or, in other words, there shall be constitutionality to be observed the condition of non-enforcement of the rule to the elections of 2006.

The unconstitutionality without text reduction, in turn, instead of being related to an interpretation of the rule itself, concerns the exclusion of its application in factual hypothesis in which, *a priori*, it would be applied. Example of its use was in the judgment of ADI 1946[36], through the Federal Supreme Court understood that the provisions contained in art. 14 of EC 20/98[37] would not be applicable to the event of social security benefit related to the maternity pay. Such hermeneutical modality is, in the work of Carlos Blanco de Morais, referred to as "qualitative partial unconstitutionality". Let us see:

34 As Carlos Blanco de Morais teaches us, it refers to "negative judgment with interpretative content not speaking up on the unconstitutionality of a rule, as long as it is construed with the sense or senses that the same Court, for this reason, considers constitutionally admissible. It can undergo through the identification of a single interpretation or of alternate interpretations of non-unconstitutional character." *In*: MORAIS, Carlos Blanco de. *Justiça Constitucional – Tomo II*., *op. cit*., p. 74. Still regarding the subject, the Portuguese professor affirms that "This type of interpretative decision starts from the assumption that a precept of rule, strictly embodied in its dimension of textual wording, can have different senses of rules, the Constitutional Court should opt for that or those guided by the Constitution. Thus, the Constitutional Court tries to save the validity of the syndicated provision of rule, in view of the safeguarding of a collection of implied constitutional principles and principles related to logics and procedural system (...)". Idem, p. 915-916.

35 ADI 3685, min. judge-rapporteur Ellen Grecie, j. 3/23/2008, *DJE* 9/26/2008.

36 ADI 1946, min. judge-rapporteur Sydney Sanches, j. 4/3/2003, *DJE* 4/10/2003.

37 Such provision established that the social security benefits would be limited to a ceiling in the amount of one thousand and two hundred Reais (R$ 1,200.00), which would be readjusted in compliance with the indexes applied on the General Regime of the Social Security.

> It is excluded from such comparative relationship of general order, scarce variant of 'impure' or improper morphology of the qualitative partial unconstitutionality, which is outside the regime rule of this type of unconstitutionality and that is characterized for not assuming conditional content, because removes one among several ideal rules of simultaneous effectiveness that emerge from the rule. Actually, the judgment does not opt for one, among several of the senses of rule with alternative character, but removes a sense of rule combined with others that results from the provision.

Thus, in this case, there is no condition the constitutionality of the rule itself, which, however, shall become unconstitutional if applied in a specific and given factual situation.

On the one side, it cannot be denied that such criteria of interpretation have as assumption an effort by the Federal Supreme Court in enforcing the rule issued by the National Congress to be kept integrated to the legal order. In this sense, Carlos Blanco de Morais pointed us the so-called "principle of use of the legal-public acts, translated into the necessity of preservation, as much as possible, of the laws produced by the democratic decision-maker"[38].

On the other hand, there are doubts if such attitude effectively consists of institutional deference, once the limitation of the application of rule changes the balance of the political composition that originated that rule, which was originated by a parliamentary consensus that shall not necessarily reflect on the praetorian position.

In fact, Carlos Blanco himself affirms that:

> The interpretative sentences of rejection are surely those that most relativize the legislator's subjective will and, sometimes, the own objective will. Actually, when they remove an unconstitutional sense of a precept, they end up to, somehow, establish its content.
> Without achieving the confirmation of the extreme and large minority understanding, according to which, neither the letter of the law, nor the law-maker's will would decisively be counted in face of the creating and actualist will of the jurisdictional interpreter, the interpretation according to the Constitution, to let the normative precedent unscathed, relativizes or sacrifices partially the end that the legislator tried to provide to the challenged provision.

38 MORAES, *op. cit.*, p. 916.

> The interpretative solution not being obtained through method under analysis, that one that most evidently results from the reading of the text or of the force-ideas of the preparatory works, the fact is that the interpreter cannot go so far that might lose the view, in essential terms, the end contemplated by the author of the rule.[39]

Thus, there is the risk of a denaturation of the political choice covered by the rule under analysis, which reflects on an insult to the majority principle.

It is true that, should there be parliamentary discomfort as to the result of specific judgment issued by the Federal Supreme Court, the preparation of response is possible via a new procedural round. However, it should be emphasized that such overview comprises some undeniable political burden, especially when implying a reduction of rights, in such a way that, in practical terms, it is possible that specific judgment of the Federal Supreme Court, instead of reflecting effective deference to Parliament, results in a decision against the majority legislative interests of difficult reversals via political paths.

4. Conclusion

The sketch of duties among the constituted branches is imposed as something dynamic, and the existence of a privileged locus occupied by the Federal Supreme Court causes that it is the delimiter of its own political power, once the external reviews are few and, most often, limited. Such situation results directly from the privilege of the last word that, in turn, can be exercised even in *absentia* of what is provided by the constitutional text itself.

The concern on such privilege has been questioned by the opinion of jurists, in a context in which the theory of the institutional dialogue was developed. In it, the expansion of the temporal spectrum in which the relationship between the branches is observed enables the development of dynamics of successive procedural rounds, in which each branch, interacting with the others, shall be capable of generating a response to the decisions submitted to it. Therefore, it is sought a summary that incorporates both the wills mostly established as, equally, the compliance with the pre-compromised constitutional outline.

39 Carlos Blanco de Moraes, *op. cit.*, p. 387.

The development of a dialogical attitude enables the Federal Supreme Court, on the one hand, to ensure the supremacy of the Constitution and the legal foundations established therein, and on the other hand, admit greater freedom to Congress, so that it produces its legislative acts.

The openness of the Federal Supreme Court to dialogue consists of a model that provides an increase legitimization to the state decisions: the legitimacies of Supreme Court and of Congress result, each of them, from a different origin: while the first has substantive legitimacy, based on the pillars ontologically established in a political previously committed document that binds the State and protects people, the second has the source of justification of its power in the popular representation and in the identity with voters.

Constitutional practice has shown that there is space to combine the performance of the Federal Supreme Court with a model of Constitutional Democracy capable of ensuring respect to the majority decisions: in the court precedents of the Federal Supreme Court there is a series of decisions in which the hermeneutical paths adopted by the Court respected the space of Congress' resolutions (or at least tried to do so). On the other hand, several other decisions were issued in a way to remove the Parliament (and its will) from a political discussion, exacerbating the competences granted to each of the bodies by the institutional engineering adopted by the framer of the Constitution and, consequently, causing a deficit of democratic legitimacy in the legal order issued by the State.

Only via a self-restriction capable of understanding the existence of different legitimating inflows in each of the bodies and of recognizing the parliamentary capacity of also appearing as interpreter institution of the Constitution, will it be possible to hold the dialogue and the consequent improvement of the state resolutions. In this sense, both the substantive rules provided in the constitutional text and, equally, the majority resolution that was conveniently chosen among the paths that were left opened by the framer of the Constitution are guaranteed.

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