

**ARE BRAZILIAN COURTS DEMOCRATIC INSTITUTIONS?
AN HERMENEUTIC ANALYSIS OF LEGITIMACY.**

**SÃO OS TRIBUNAIS BRASILEIROS INSTITUIÇÕES DEMOCRÁTICAS?
UMA ANÁLISE HERMENÊUTICA DE LEGITIMIDADE.**

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Abstract: This study about policy and law intends to analyze the behavior of Brazilian Courts in front of the light of the idea of democracy. First of all, this article presents some classic and vanguard conceptions of and about democracy, in order to obtain a common ground to address the central question, moment that this paper uses the ministries of Norberto Bobbio, Robert Dahl and Giovanni Sartori. This paper is sympathetic to a procedural comprehension of democracy, but we do not neglect the inflows of substantial values that come forth from this procedural comprehension. Based on this reflexions of democracy, this work addresses the problems of broken promises of Democracy, notably the failure in banning autocracy, technocracy and the invisible power from government, problems directly related to Brazilian Courts, and these broken promises compose the main axis of critics to the Brazilian Courts, which this paper concludes not being democratic institutions. After that, this study makes an effort to transcend the procedural view of democracy, in order to add at it the substantial values of popular participation and control. Finally, this paper tries to rethink a form of legitimation to Brazilian Courts, mainly concerning their lack of legitimacy for not being elected and for not being controlled by the people.

Key-words: Hermeneutics; Courts; Citizenship; Democracy; Legitimacy.

Resumo: Este artigo, sobre Política e Direito, tem como objetivo analisar o comportamento dos tribunais brasileiros a luz da ideia de democracia. Para tanto, primeiramente o presente trabalho apresenta alguns conceitos, clássicos e de vanguarda, de e sobre democracia, a fim de obter um terreno comum, uma compreensão prévia, de institutos e noções relevantes à discussão da questão central que se propõe, o que se levará termo com referencial teórico nas obras de Norberto Bobbio, Robert Dahl e Giovanni Sartori. O vestibular trabalho é simpático a uma compreensão procedimental da democracia, mas não negligencia os valores e as entradas substantivas que emergem desta compreensão procedimental. Feito isso, o artigo aborda os problemas das promessas não cumpridas da democracia, em particular, o fracasso no combate à autocracia, tecnocracia e ao poder invisível do governo paralelo, que são questões diretamente relacionadas ao comportamento das Cortes Brasileiras. Através do cotejo das promessas não cumpridas da democracia com algumas notáveis políticas judiciárias (estudo de caso), o artigo conclui que os Tribunais brasileiros não são instituições democráticas. Depois disso, intenta-se um esforço para transcender o ponto de vista meramente procedimental da democracia, com vistas a enriquecê-lo com valores os substantivos da

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participação e controle populares. Finalmente, tenta-se levar a termo uma forma de reler a estrutura judiciária brasileira, a fim de lhe conferir legitimação, notadamente diante do problema da falta de legitimidade por ausência de eleição de seus membros e de controle pelo povo.

Palavras-chave: Hermenêutica; tribunais; cidadania; Democracia; Legitimação.

1 INTRODUCTION

The objective of this paper is to think the Rule of Law and Democracy in Brazil, based in the pragmatics of its Courts.

First of all, we need to expose our comprehension of democracy. We do have a procedural approach of democracy, thinking it as the “rules of the game” (BOBBIO, 1998, p. 319-329). So our concept of democracy is that it is an ensemble of rules to guarantee that the process of accessing public positions and the process of participating in the collective deliberations of the community are as transparent and comprehensive as possible. The rules comprehend the following examples:

1) the components of the legislative house must be elected, direct or indirectly, by the people, in elections of first or second degree;

2) Aside from the legislative house of representatives, there must be other institutions whose leaders must also be elected, as in the case of Chief of State, Governors or mayors;

3) all the citizens, with no distinction of race, gender, class or religion, must be electors;

4) All electors must have equal vote (*one man, one vote*);

5) All electors must be free in voting by its own opinion, being such conviction formed also as free as possible, in a free dispute among politic views that struggle to obtain national representation;

6) electors must be free in the sense of having real alternative to vote in;

7) The results in the elections for the legislative houses and for the local administration or Chief of State must abide by the rule of majority, being admitted criteria of opportunity that may vary;

8) No decisions take by the majority can limit or diminish the rights of the minority, notably the right of become majority one day and (for the parliamentarians)

9) the organs of the government must benefit from the trust of the legislative

houses or from the Chief of the Executive Power, elected by the people.

As it can be seen, the rules of the game, registered here, are rules about *how* we should achieve a political decision, but not *what* decide, except for the general rule to not invalidate other rules.

One's claim should be that we confine democracy to a conception of it being "simple" procedural rules. Notwithstanding, each of the procedural rules states one or more substantial values or principles for the democracy, as in the rule of *one man, one vote*, that evokes the very concept of equality among men. Each procedural rule embraces one different kind of struggle for different rights.

The differences between a *substantial* and a *formal* democracy resides more in the pragmatics of the government than in the concept itself of democracy. The formal democracy is a government *of* the people, and a substantial democracy should be a government *for* the people.

The way the political decisions are made, *if of or for* the people, is the distinguish trace of a formal and substantial democracy, and the more effective mean of assuring a government *for* the people is precisely the "rules of the game".

Giovani Sartori (1993, p. 115-134), followed by Norberto Bobbio (1997, p. 18-19), sustains a "negative" concept of democracy, tracing its limits and substance based in *what is not democracy*. By the means of this concept Democracy is a *no-autocracy*. Autocracy is the government where the people in charge are self-empowered in the position of taking political decisions (they claim power for themselves, with no investiture acknowledged or delegated by others), while democracy is a system of government where the power of making political decisions, collective decisions, is bestowed on representatives solely by others.

In the same line of thought of enlightening the elusive limits of democracy, Robert Dahl (1992, chapters 22 e 23), articulates that all governments claims to be democratic, and the is no mean of evaluating the measure of democracy in different countries.

Democracy itself is an "open concept", almost ethereal, so that its substance must be solidified with democratic institutions.

After this theoretic effort, we can say that democracy is the sum of democratic institutions, such as a free press, independent courts, freedom of thought, speech and movement, among other.

With those teachings in mind we will face the proposed problem: to analyze if the

Brazilian Courts belong to the pantheon of democratic institutions, contributing to the general sum of democratic institutions of the country, or if they are not paladins of democracy.

2 QUESTIONING THE BENEFITS OF BRAZILIAN JUDGES.

Aside from their base remuneration, named “subside” in Brazil, the Brazilian judges perceives an array of benefits, such as a *financial help for home*, a *financial help for food*, and a *financial help to raise their children*.

The initial curiosity is that the article 39, paragraph 4th, of Brazilian Constitution clearly states that the remuneration of the members of the Brazilian Judiciary Power are paid in *one* portion named *subside*, being expressively forbidden the addition of other portions of remuneration, including gratifications and other species of financial income.

Initially, the benefit of *financial help for home*, in the value of R\$4.377,73, approximately U\$1.100,00, was destined to judges who exercise some of their activities *outside* the limits of the region where they usually works, such as the case of a judge who woks in two cities that does not belong to the same metropolitan area or the same micro-region. This is the express prevision of the Resolution 413/2009[†] of the Brazilian Supreme Court, that abides by the rules of the Act 8.112/1990, art. 58, §3^o.

The same line of comprehension was followed by the Resolution 04/2008[‡] of the National Council of Justice and the Resolution 50/2009[§] of the Federal Justice Council: only judges with attributions in different cities (counties), *not located* in the same metropolitan area of micro-region, can benefit from the financial help for home.

Notwithstanding, the National Council of Justice, in 2014, October, 7th, decided to guarantee the financial help for home for all judges whose do not benefit from a home provided by the State in the local (county or city) of work^{**}. This means that all judges

[†] Resolução-STF 413/09: Faz jus ao auxílio moradia:

V – o local de residência ou domicílio do Juiz Auxiliar, quando de sua designação, não se situe dentro dos limites territoriais do Distrito Federal ou, em relação a esta unidade federada, não integre a mesma região metropolitana, aglomeração urbana ou microrregião;

[‡] V - o novo local de residência ou domicílio, em relação ao de origem, não esteja dentro da mesma região metropolitana, aglomeração urbana ou microrregião, ou em áreas de controle integrado mantidas com países limítrofes, conforme dispõe o § 3^o do art. 58 da Lei n^o 8.112 de 1990;

[§] Resolução-CJF 50/09:

V – o local de origem de residência ou domicílio não esteja dentro da mesma região metropolitana, aglomeração urbana ou microrregião de Brasília, conforme dispõe o § 3^o do art. 58 da Lei n^o 8.112, de 1990;

^{**} O PRESIDENTE DO CONSELHO NACIONAL DE JUSTIÇA (CNJ), no uso de suas atribuições legais e
R. Fac. Dir. UFG, v. 40, n.2, p. 27 - 46, jul. / dez. 2016 ISSN 0101-7187

in Brazil started to perceive the financial help for home, what implies in a boost of remuneration by illicit means.

For our continuous surprise, the Brazilian Supreme Court^{††} confirmed the expansion of the financial help for home to all Brazilian judges, regardless of existing Legislative Acts, in all spheres of the Federation. In practical terms, the Brazilian Judiciary exercises a legislative function, creating a generic, abstract and innovative rule in the Brazilian legal universe.

3 2. BROKEN PROMISES OF DEMOCRACY.

3.1 *The Persistence of Oligarchies.*

Norberto Bobbio (1997, p. 26), analyzing the broken promises of Democracy, points that democracy failed in defeating the oligarchies. Oligarchies are groups of people whose amass and concentrate political power due to its privileged location in the economic, social or political scene. If democracy is the government for the people and by the people, secured by an ensemble of rules that intend to expand the number of people exercising political power, the very existence of oligarchies shakes the foundations of democracy.

Besides not sharing political power with other, oligarchies are antithetic to democracy most of all because, in order to amass and concentrate political power, they are self-appointed in positions of power: they are autocratic, and there are no means a small number of people maintains themselves as protagonists of power, aside from autocratic behavior.

Norberto Bobbio (1997, p. 26-27) registered that the simple presence of oligarchies does not eliminate the differences between autocratic and democratic governments: the main feature of a democratic government is the presence of many oligarchies, competing among themselves for the popular votes.

constitucionais;

CONSIDERANDO (*omissis*)

RESOLVE:

Art. 1º A ajuda de custo para moradia no âmbito do Poder Judiciário, prevista no art. 65, II, da Lei Complementar 35, de 14 de março de 1979, de caráter indenizatório, é devida a todos os membros da magistratura nacional.

(*omissis*)

Art. 6º A percepção da ajuda de custo para moradia dar-se-á sem prejuízo de outras vantagens cabíveis previstas em lei ou regulamento.

^{††} BRASIL. STF - SUPREMO TRIBUNAL FEDERAL. Actions AO 1649, AO 1.946 and ACO 2.511. Accessible by www.stf.jus.br. Site accessed in 13/02/2016.

Despite the pragmatism of Norberto Bobbio, in which oligarchies can be tolerated if existing in a good amount, we shall address the central problem, analyzing the inner practicals of the Brazilian Courts, towards a system of government that intend to be a democracy, and so, a system where the investiture in power depends on the concession of the others.

3.2 *The Invisible Power.*

The substantial democracy also intends to eradicate the invisible powers, the Double State, the Invisible State beside the Visible State. The Democracy does not abide by decisions taken in secret chambers, by secret negotiations: it revels in the conviction that the government should be transparent, “without a mask” (BOBBIO, 1997, p. 29).

From this principle of transparency comes forth the demand of publicity of the acts of the government (Legislative, Executive and Judiciary), in order to allow the people to know and control those acts, in a dynamic process that permits to distinguish the licit from the illicit.

Instruments of controlling the acts of the public agents are increasingly necessary, notably in times where those who possess power benefits from technical knowledge to alienate most citizens from their day-to-day activities. Robert Dahl (1993, p. 404) speaks of the dangers of a quasi-tutelage, where the citizens cannot control political decisions because they ignores the technical matters involved: the citizens ignores entirely the merits of the discussion because it shares a technical space, inaccessible to them:

Ahora bien: ¿qué ocurre entonces si la enorme complejidad de las medidas públicas trascendentes hace que los ciudadanos comunes ya no sean capaces de discernir cuáles sirven en mayor grado a sus intereses? ¿Se habrá convertido la idea democrática en la visión de un régimen político imposible dentro del complejo universo en que parecemos destinados a vivir?

3.3 *The Government of Technicians.*

In the same line of argumentation exposed over, democracy failed in avoiding a government of technicians. But, as a first contemplation of the issue, could democracy avoid a government of technicians (BOBBIO, 1997, p. 33)? Could democracy avoid that questions such as the concession of financial benefits to judges were made solely by technicians in Law?

The fact is that the democratic project was thought to a much less complex

society. When the means of production changed of familiar standards to market standards, and then to regulated, protected and planned economies, the problems that came with the changes demanded the expertises of technicians.

It is a consensus that technocracy opposes democracy, because if the protagonist in industrial society is the technician, it is impossible that the common citizen could be heard.

Democracy stands by the principle that everybody could decide questions addressing all matters; Technocracy, on the other hand, wishes that only those who possess specific knowledges be summoned to deliberate political questions and to take collective decisions.

Again in the ministry of Robert Dahl (1993, p. 100), we repel such a technocratic understanding:

Es cierto que en un régimen democrático se corre el riesgo de que el pueblo cometa errores, pero esto ocurre en todos los regímenes del mundo real, y los peores desatinos de este siglo lo cometieron dirigentes de regímenes no democráticos. Por otra parte, tener la oportunidad de cometer errores es tener la oportunidad de aprender. Así como rechazamos el paternalismo en las decisiones individuales pues impide el desarrollo de la capacidad moral, rechazamos el tutelaje en los asuntos públicos porque detiene el desarrollo de la capacidad moral de un pueblo íntegro. En su mejor expresión, sólo la concepción democrática, nunca la del tutelaje, puede brindar la esperanza de que, al participar en el gobierno de sí mismos, todos los integrantes de un pueblo, y no únicamente unos pocos, aprendan a actuar en forma moralmente responsable como seres humanos.

Should we proceed with the idea of tutelage, succumbing to its allure, we should consider some implications:

1. What would be the qualifications of the qualified people that will rule?
2. Aside from technical qualification, do they possess moral qualification?
3. Can some “qualified people” claim to know what is the “general good”?
4. Could the “qualified people” separate private interests from collective good?

If we asseverate a “yes” for all answers, are we in front of men or gods (ideal men)?

What we do could conclude is that a decision take by *many* has considerably less chances of incurring in the risks of mixing private and collective interests and of not achieving an acceptable concept of general good.

Also, it is important to register, and to pay tribute for, the idea that all men are capable of distinguishing what is good or bad for themselves, that all men can assign the purpose of public policies. The technical knowledge are destined to assigned the *means* to

achieve the *goals* of public policies (the general good).

4 ANSWERING THE INITIAL QUESTION.

Focusing our attention to the initial question, if “Are Brazilian Courts democratic institutions?”, our answer is no, they are not, for four reasons:

First, they are autocratic institutions, because they incur in the self-empowerment behavior. It is undoubted that if the Courts, in the figure of the National Council of Justice, expanded the benefit of financial help for home to all Brazilian judges, regardless of a real legal need, it implies a self-empowerment: it was not the Parliament, the Executive Power or the popular vote that bestows such a financial advantage to the judges. The Judiciary Institution itself, in a controversial interpretation of laws and of the Constitution, concludes for the legitimacy of expanding the benefit.

So, we can rest assured that it is an autocratic behavior.

Second, the Brazilian Judiciary poses as an oligarchy, because they amass and concentrate power to themselves, and they are the sole responsible for appreciating their own interests. The Courts, in the figures of the Brazilian Supreme Court and National Council of Justice, were the responsible in the judgment of their own interests, a behavior that consolidates the main feature of an autocratic oligarchy.

Third, the Brazilian Judiciary appears as an invisible State aside from the Official State, being, in ultimate analysis, part of the State. Decisions regarding the interests of Brazilian judges are all taken in secret chambers, in secret meetings, forbidden for foreigners (not-judges). It is a return to the classic *ancana imperii* (BOBBIO, 1997, p. 28), when secret societies defined the destiny of nations.

Fourth and last, the Judiciary are sympathetic to tutelage, considering unworthy of opinion people not qualified in legal matters. And even in legal matters, they repute judges the more qualified to appreciate questions concerning themselves. It is important to note that within the National Council of Justice, superior administrative and disciplinarian organ of the Brazilian Judiciary^{††}, there are 15 councils, which nine are judges, two are district attorneys, two are lawyers and two are “qualified” citizens with legal expertise.

The conclusion which emerges from the reasons above is that the Brazilian Courts

^{††} BRASIL. CNJ – CONSELHO NACIONAL DE JUSTIÇA. Accessible in <http://www.cnj.jus.br/sobre-o-cnj/composicao>. Site accessed in 14/02/2016.

are not democratic, and they do not contribute for the general sum of democratic institutions of a country, that would like to be called “democratic”. Under the guise of “independence among the Powers of the Republic”, the Courts perpetrate various sins against democracy, deciding their own interests in isolated private chambers. How can a congregation of technicals decides important matters in the lives of citizens if they are beyond comprehension and control of the population?

5 HOW CAN WE THINK OF DEMOCRATIC COURTS IN BRAZIL?

5.1 *Rethinking Democracy as Popular Participation and Control.*

Ricardo Sanin Restrepo (2009) proposes we separate the "democracy" from a "particular project of democracy" (a tutelage project in our opinion) and wonder about the heart of his ontology. The political philosophy of tutelage surrounded the democracy with a thick cloud of illusions, which consists of fluid concepts such as efficiency, knowledge, expertise and qualification, which intends to associate the substantial idea of democracy to the general idea of technical knowledge.

Ricardo Sanin Restrepo (2009) sustains that Democracy is an ideological combat for filling in the purport of a general and abstract idea named “Democracy” with particular purports of private comprehensions. The Brazilian Judiciary Tutelage wishes to sell the idea that democracy is a political and legal system where judges are independent (left alone to decide their own business as they please), qualified (technicians) and capable of technical, efficient, decisions, which they think to address any problem in the *more qualified way*.

However, tutelage is not democracy, by any means. The true democrat, according to Ricardo Sanin Restrepo, understands that sovereignty is a unique act of popular power. The main obligation to someone who believes in a democracy is to consider that the people are the sovereign who decides about the construction of a political and legal order: democracy would be the government of the people and all political power comes from the people and all the political organizations, including the Courts, comes from the people and should be legitimated and controlled by them.

José Roberto Dromi (1997) comprehends that the objective of consolidating the effectiveness of the exercise of democracy is one of the fundamental purposes of the Future Constitutions, because it prints greater moral energy to the purposes required by the

community. To reach the constitutional effectiveness collimated, it requires the expansion of the political and social participation of the people, to ensure the Separation of Powers, to ensure the Balance of Powers, to ensure effective Legislative and Judiciary Institutions, to consolidate the (necessary) reform of the State, to rebuild the control of Power and to establish decentralization of Power.

In Brazil pragmatics, we can say that only Executive and Legislative institutions have some measure of popular control, notably in the times of elections, while the Judiciary rests far and beyond popular's grasp, mostly because judges in Brazil are not elected and the public institutions of control are composed in majority by judges, in a display of corporatism.

For democracy to be more efficient, it should be a synthesis of government and control, where the State should have power and citizens enough control over it (DROMI, 1997, p.110).

Brazilian people has been demanding something more than representative democracy, they claim for participatory democracy. The fact is that the isolated individual, the "I", concerning only his own interests, ignoring the "other," already realized that he that should be concerned with the "other," because the actions of the other will definitely impact on life in community. Democracy must combat social indifference and political apathy. The need for a more participatory democracy stems from the pluralism imposed by society, because participation is the efficient cause of democracy (DROMI, 1997, p.113).

Democracy shall call the "active, integral, balanced, committed and responsible participation of the people and of their representatives" (DROMI, 1997, p.114)

Democracy calls for full participation, not only electoral but also administrative, economic and social.

Within the Brazilian Courts issue, we must build and incentive means of popular participation, in order to offer the population control over the Courts who will decide their fate in many aspects of life. For instance, we could reformulate the composition of the National Council of Justice, to contemplate less integrands of the own institution and more integrands of the people, inverting the oligarchic order: there should be 15 members, being nine from the people and two from public attorneys, lawyers and judges. With this new compositions, we could speak of democracy in concession of benefits, because it came from the people, from another sphere of deliberation.

5.2 *Rethinking Democracy as Effective Citizenship.*

Citizenship, democracy and participation will become affiliated concepts, reinforcing each other, when we perceive citizenship from the perspective of human rights.

Hanna Arendt (1989, p. 134) understands that human rights are not a full-developed institute, but a process of human construction, in a constant and dynamic cycle of deconstruction and reconstruction, reflecting a symbolic space of social struggle and action.

Costas Douzinas (2011) identifies human rights as an imperative of resistance against domination and public or private oppression. Thus, the concept of "human rights" should be built prospectively to the needs of fighting exclusion, domination and exploitation of man by man.

The citizenship, under the perspective of human rights and, thus, under the perspective of struggle against exclusion and domination, must contemplate the right to participate in formulating, monitoring and controlling of public policies and the consecration of the human being as the central subject of well fare.

But which are the components of the substance of human rights? We advocate that the contents of all human rights are the fulfillment of "basic human needs". Basic human needs, as succeeds from the ministry of Agnes Heller (1990, 238-239), are the set of necessities of life, livelihood and culture. A need is recognized as legitimate if their satisfaction does not include the use of another human being as a means.

With these lessons in mind, we must question if the behavior of Brazilian Courts of self-giving financial benefits harms some human rights.

We think that the mentioned behavior is pernicious to human rights, notably because of its insidious policy. It is necessary to consider the following aspects, in order to think human rights as a struggle to promote the emancipation of human beings from a state of lack of basic rights, that vary from the fights for the right to participate in the political decision to the rights to have a worthy home, health-care and food-care system:

First, the self-given benefit of financial aid for home denies the right of popular participation in formulating, monitoring and controlling of public policies. This means exclusion. No segment of the civil society was consulted prior to the deliberation of adjudicating the benefit to all Brazilian judges.

Second, is the financial aid for home a legitimate human need? Do not the judges

perceive a just remuneration^{§§}? In Brazil, where the minimum wage is R\$788,00 (US\$206,00), judges benefit from a total remuneration of R\$35.000,00 (US\$9.000,00), so that a Brazilian judge perceives 44 minimum wages. In the USA, though the judges have a salary of US\$16.600,00, the minimum wage is about US\$1.400^{***}, which means an American judge perceives only (“only” comparing to Brazilian judges) 12 minimum wages.

In other terms, for a Brazilian judge continues to receive his high salary, 44 Brazilians are fated to a minimum wage that does not fulfill any basic or legitimate need. The pretension of judges of receiving financial help for home is a project of systematic exclusion of those in genuine need, a truly antidemocratic behavior, almost fascist. The people excluded from their basic needs for the high salaries of the judges should not be heard?

Third, as a consequence of the second note above, the interpreters of the Constitution should think about how many people will be deprived from basic needs (minimum food, health-care and home) with the payment of a benefit for judges, whose the legitimacy itself is very questionable. This is because the Constitution must be thought as an harmonious whole, so that the concession of a given right cannot result in the negation of other rights, including rights involving more basic needs.

Fourth, there is a silence struggle between those truly in need, deprived of home, food and health, the poor, the excluded, the marginalized, whose pretensions of a better life were turned invisible by the political influence of a stronger group. They do not deserve human rights? We should think about financial aid for home to the judges only if the majority of the citizens already possesses a worthy home, and this is to think human rights as a fight for human dignity.

5.3 *Rethinking the Constitution as an Hermeneutic Construction of Multiple Interpreters.*

When Brazilian Courts agree with the concession of the benefit of financial help for home to all Brazilian judges, they do interpret the Constitution, notably the article 39, paragraph 4th, that clearly states that the remuneration of the members of the Brazilian

§§ UNITED STATES OF AMERICA. UNITED STATES COURTS. Accessible in <http://www.uscourts.gov/judges-judgeships/judicial-compensation>. Site accessed in 17/01/2016. The base monthly salary of a Brazilian Judge is approximately of R\$24.000,00, or US\$6.266,31, while an American judge perceives US\$16.600,00, a month. But considering the benefits of Brazilian judges, such as financial aids, 60-day vocations and other gratifications, the base monthly salary increases to R\$35.320,00, or US\$9.300,00.

*** DOYLE, Alisson. *2015 Federal and State Minimum Wage Rates*. The Balance Journal. Accessible in <http://jobsearch.about.com/od/increase/fl/minimum-wage-rates-2015.htm>. Accessed in 12/12/2015.

Judiciary Power are paid in one portion, named subsidy, being expressly forbidden the addition of other portions of remuneration, including gratifications and other species of financial income.

Notwithstanding, the Brazilian Courts, specifically the National Council of Justice and the Supreme Court, advocate that the financial help for home stacks with the base remuneration of the judges, with no harm to the article 39, paragraph 4th, of Brazilian Constitution, because the financial benefit has a substance of a indemnification. If the judges's financial aid for home has the features of a the indemnification, it implies that the Collectivity has the duty to provide judges, even those who resides in the same city where they work, with financial support to rent or buy a home.

It is important to say that in Brazil, the judge must live where he works, what makes the benefit even more nonsense.

In addition, this generous interpretation does not benefit other public agents aside from them, some district attorneys and congressmen.

In the case of member of the Legislative Houses, we could imagine to be appropriated the concession of *financial aid for home*, because deputies and senators must have two homes: one in the Capitals (State Capital or Federation Capital) and other in their homeland. And we should be cautious to not guarantee the financial aid for home to congressmen whose homelands are in the capital city where they work.

With all those thoughts, we intend to enforce the perception that if only one institution has the monopoly of constitutional interpretation, we would never achieve democracy. It is symptomatic of this assertive the fact that the concession of the benefit to the judges displeased most Brazilians.

Peter Häberle (2002) points out that the theory of constitutional interpretation has been closely linked to a model of "closed society" (HÄBERLE, 2002, p.12), where the interpreters circle focuses primarily on formal judges and procedures.

Häberle's proposal aims to analyze the issue of participants in the constitutional interpretation process, from a perspective of quantitative and qualitative expansion, transforming a "closed society" of constitutional interpreters in an "open society". The German master proposes that in the constitutional interpretation process are potentially linked both the official state institutions and the citizens and social groups. You can not establish a closed number of interpreters of the Constitution.

What we intend to register is that constitutional judges do not participate isolated in the interpretation process of the Constitution, suffering influences of all interpreters, co-interpreters, in order to build a more just and reasonable result (interpretation).

Peter Häberle (2002) says that with an open society of interpreters of the Constitution, we will achieve a new degree in the democratization of constitutional interpretation - the theory of the constitution must be guaranteed by democratic theory, because you can not think of an interpretation of the Constitution without the *active citizen*.

In the sociological aspect, everyone who lives in (and with) the context set by the Constitution is, directly or indirectly, an interpreter of it.

The destinate person of a constitutional rule is as much a participant of the interpretation process as one would assume: not only the corporate interpreters (judges) live the Constitution, so that any idea of interpretive monopoly by them is illegitimate.

The concept of constitutional interpretation as "living" the Constitution, both by individuals and groups, has the importance of creating a way of linking the constitutional interpretive exercise to the real world, in the *strict* and *lato senso* (HESSE, 1991). The constitutional interpretation should be guided by democratic, plural reality, admitting several interpretations, equally legitimate.

Concerning specifically the question of financial aid for home to the judges, and the corporate constitutional interpretation that extended its benefits to all judges, regardless of the real need of home, it is very important to say that the link between the judge and the law and their so-called *personal and functional independence* cannot elide the fact that the judges interpret the Constitution *also in reality*: it is the reality that provides the judges interpretative elements.

Only the judges are integrands of reality? If not, why do the judges ignores the opinions of the rest of the community? Are the rest of the citizens not qualified to make an opinion? Do not the citizens posses judgment to analyze if the concession of the financial aid for home *is* or *is not* legitimate in a more general context?

All the answers point to the oligarchic view that the Brazilian Courts have of the issue. The people are seen as second-class citizens who need the guidance of a more qualified class (the judges).

If there is only one type of interpreter (or interpretation), the constitutional reality is perceived incomplete, mutilated, and there will *not* be a harmonious integration between

constitution and constitutional reality. If monopoly of interpretation will most surely destroy the constitution.

The constitutional practice of social life and the social forces we call "people" are the elements of legitimation of the constitutional theory and legal interpretation, and not the contrary.

People is a concept that must be understood not just as a quantitative measure expressed on the election day; it must be seen as a pluralistic element for legitimate interpretation in the constitutional process. The competence of the people for constitutional interpretation is a *right of citizenship*.

It follows that fundamental rights are part of the democratic legitimacy to the open interpretation: the citizen and the groups are holders of the right to be an interpreter of the Constitution.

Citizenship is the right to have rights (ARENDR, 1989), and among them, we think that the right to be an interpreter of the Constitution, to participate in the process of interpretation, is the most prominent.

In the ministry of Peter Häberle (2002, p.12), democracy is citizenship, and citizenship is participation in all processes of constitutional interpretation; we think beyond, considering citizenship and democracy as a system of government where the people can participate in the elaboration, choice, change and control of political decisions.

In conclusion, in the analysis of the constitutional legitimacy of the interpretation that worked the concession of the financial aid for home to all Brazilian judges, the people should have been heard, because they are an integrand element of constitutional reality, aside of being capable of taking conscious opinions regarding justice, equality and need.

6 CONCLUSIONS: TRYING TO SOLVE THE PROBLEMS OF LEGITIMATION OF A NON-ELECTED JUDICIARY POWER.

The question concerning the *financial aid for home* is just the most recent question involving the Brazilian Judiciary. There are many other questions, such as vocation of 60 days^{†††} and many kinds of financial help (home, health, education, food, etc...^{‡‡‡} that are

^{†††} There is an legislative act, the Complementary Law 35/1979, who offers a 60-day vacation to judges, but this law is prior to the present Brazilian Constitution of 1988, but the Judiciary refuses to give a constitutional interpretation to the
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symptomatic of the central problem of this work: the Brazilian Courts are not democratic.

Given the problem, can we offer some suggestions to solve it?

We think we can somehow contribute with an agenda that promotes the democratization of the Brazilian Judiciary, with the following criteria:

1. The society and the Judiciary Institutions must realize that the constitutional judge does not interpret the Constitution alone: the people, the society, the intermediary bodies (such as associations and Unions) plays important roles in the process, so that is imperative to democracy that they are heard and participate in the public decisions.

2. A non-elected constitutional Court or judge which verifies the legitimacy of the constitutional interpretation of another institution, notably the elected Legislative and Executive Institutions, should be extremely cautious to assess that legitimacy. By examining laws egressed form those institutions, the Constitutional Court should pay special attention to the democratic discussion that legitimizes those laws. Thus we have the following hypotheses:

a) When faced with *less controversial laws*, constitutional courts would not need to exercise *strict control* and

b) however, before laws that cause *deep controversy* in the community, the Court *must* exercise strict control, making using, therefore, of its functional and personal independence.

3. The citizen must have means to *control* the Judiciary administrative acts, specially those acts that involves direct interests of the judges, such as the concession of financial benefits and other prerogatives. In this aspect, we advocate a new composition for the members of the National Council of Justice, in order to extend the popular participation, making the presence of the people the majority in the council: we strongly encourage that people have nine of the 15 chairs, being the remaining six seats divided equally among judges, lawyers and public attorneys.

4. In the case of the Supreme Court, where the decisions are more *legal* than *administrative*, (but still can contemplate matters of collective interests of the Judiciary or some other strong groups), we point that would be desirable a more strong technical

previous law within the light of the new legal system who adjudicates only a 30-day vocation to the majority of workers.

††† CONJUR – CONSULTOR JURÍDICO. Novo Estatuto da Magistratura incorpora benefícios alvos de questionamento. Boletim de Notícias de 21 de dezembro de 2014. **Conjur**. Accessible in <http://www.conjur.com.br/2014-dez-21/estatuto-magistratura-incorpora-beneficios-questionados>. Accessed in 20/12/2015. This is a law project that intends to create all sorts of benefits to judges, virtually making their overall remuneration to increase in 200%.

perspective. But it does not exclude the possibility of revision of the Supreme Court's decisions. In Brazil, the Supreme Court is a political and technical institution, that does not benefit from direct legitimation from the people, so that is completely possible and advisable that we imagine an institution with the power to reanalyze its decisions in some circumstances, such as serious deadlocks in decisions or laws that concerns public administration or the direct interests of the Judiciary as a whole. The National Council of Justice, in the way we imagine it, with a boosts in popular participation, could play the role.

5. If the members of the Supreme Court benefit from a life-mandate, they would be more inclined to corporatist decisions. However, if we wonder about a mandate of four or eight years, the decisions would be more impartial, aiming for the collective point of view rather than the point of view of groups.

6. The National Council of Justice would have full authority to dismiss any judge of the office, even those form the Supreme Court, and to apply the respective penalty.

7. The deliberations of the National Council of Justice, concerning disciplinary and corporatist matters, would take place in open sessions, hearing representatives of the State and of the collectivity, notably Unions, Associations and Political Parties.

8. The 9 popular members of the National Council of Justice would be chosen randomly, by a lottery process, using the number of identification, in the same way that already occurs in the choice of jurors for prosecuting crimes in Brazil.

9. All the members of the National Council of Justice would have a mandate for a fixed period, being forbidden any renewal of mandates.

With the suggestions over, we intend to purge the Brazilian Judiciary from its autocratic, corporatist and technician corruptions, making it more transparent, participative, controllable and, thus democratic. The measures proposed are possible of implement, but it will depends from the political will of a society that must fight its way to a substantial democracy. After all, we just have proposed more rules to the democratic game, and each rule reflects a particular struggle for rights, rights that translate a need for participation, a need for effectively helps in the process of debating, choosing, changing and controlling political decisions.

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