ORIGENS DA JUDICIALIZAÇÃO DA POLÍTICA NO BRASIL – ASPECTOS HISTÓRICOS E INSTITUCIONAIS[1]

ORIGINS FOR THE JUDICIALIZATION OF POLITICS IN BRAZIL – HISTORICAL AND INSTITUTIONAL ASPECTS

Sandro Luís Tomás Ballande Romanelli[2]

Fabrício Ricardo de Limas Tomio[3/4]

Resumo

O fenômeno da judicialização da política tem sido objeto de intenso debate na academia nos últimos vinte anos, envolvendo diferentes abordagens que divergem quanto à existência do fenômeno, suas razões e a extensão de seus efeitos. A literatura jurídica sobre o tema discorre sobre suas origens sociológicas (como o desencanto da democracia), políticas (como o enfraquecimento do legislativo) e jurídicas (como o aumento do acesso à justiça e a justiciabilidade dos direitos sociais), enquanto estudos na ciência política dão ênfase em aspectos institucionais, descrevendo a judicialização como resultado das opções estratégicas dos atores envolvidos diante das contingências institucionais existentes. Este artigo se situa na última corrente, tendo como objetivo descrever a construção da variável institucional, isto é, da estrutura político-normativa que dá subsídio ao comportamento dos diversos atores envolvidos. Assim, propõe-se uma revisão da literatura sobre as origens da judicialização da política no Brasil que explicitam o contexto do surgimento do controle de constitucionalidade no modelo institucional norte-americano e sua posterior recepção no desenho constitucional brasileiro. Concluímos que as sucessivas modificações constitucionais levaram ao funcionamento, no Brasil, de um controle de constitucionalidade com tendências centralizadoras (âmbito federativo), com um súbito alargamento no número de legitimados na Constituição de 1988, variável institucional que poderia explicar o incremento no volume e na extensão do controle de constitucionalidade abstrato exercido pelo STF.

Palavras-chave: Controle de Constitucionalidade. Supremo Tribunal Federal. Suprema Corte norte-americana. Judicialização da Política. Origens.

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2 Doutorando em Direitos Humanos e Democracia (UFPR); Professor no Instituto Federal do Paraná (IFPR) em Coronel Vivida, PR. sandro.romanelli@ifpr.edu.br

3 Doutor em Ciência Política (UNICAMP). Professor dos Programas de Pós-Graduação em Direito (UFPR) e Ciência Política (UFPR), em Curitiba, PR. fab_tom@hotmail.com

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Abstract

The judicialization of politics has been subject of intense academic debate in the last two decades. There are different approaches diverging about its extent, reasons and even about its own existence as phenomenon. Mainstream legal literature describe judicialization as outcome for sociological (e.g. delusion with democracy), political (e.g. weakening of legislative power) and legal changes (e.g. increased access to judiciary and social rights), while political scientists tend to focus on institutional aspects, describing judicialization as resulting from strategic choices made by political actors within institutional constraints. This paper relies in the latter case, aiming to describe where those institutional rules came from and how they were enforced. Therefore, we make a brief review of academic literature about the origins of judicialization in Brazil, describing its origins on the American Constitution and its influence on Brazil's constitutional design. Finally, we conclude that successive constitutional changes led to a judicial review highly focused on federal disputes and that after 1988's new democratic constitution, broad numbers of petitioners received standing rights in judicial review cases before Brazil's Supreme Court (STF), leading to strong increase in judicial review cases before the STF and thus explaining the judicialization phenomenon.

Keywords: Judicial Review. Brazilian Supreme Court (STF). U.S. Supreme Court. Judicialization of politics. Origins. Control of constitutionality.

1 INTRODUCTION

The search for the origins of the phenomenon described as judicialization of politics is not a simple task, going through areas that permeate sociology, political science and law.

The available literature often treat indistinctly[5] institutional origins (in the legal institution arrangements), sociological phenomena (as reflection of the disenchantment with democracy), political (such as the weakening of the legislative power) and legal (such as increasing access to justice and the justiciability of social rights).

On the proposed approach, this article aims at highlighting the institutional variable, namely the political and legal framework that gives subsidy to the behavior of the various actors involved (politicians, judges, civil society).

[5] Praiseworthy exceptions should be highlighted in the work of Maria Teresa Sadek, Ernani Carvalho and Marjorie Correa Marona, which formed the basis for this article´s organization.

Given that a large number of research point out to the study of judicialization as a result of the activity of constitutionality control of laws and normative acts, with emphasis on the study of concentrated control exercised by the Brazilian Supreme Court (STF), we propose a detailed look at the institutional model that laid the foundation for the possibility of judicial review to be exercised by the judiciary.

2 JUDICIARY IN THE NORTH AMERICAN CONSTITUTIONAL MODEL

> I do not think, so far, any nation in the world has made the judiciary the same as the Americans. The most difficult for a foreigner to understand in the US is the judicial system. There is no, so to speak, political event that does not invoke the judge's authority; and from that one concludes naturally that in the USA the judge is one of the strongest political powers. (Tocqueville, 2002, p. 89)[6].

The narrative of Alexis de Tocqueville, the French aristocrat who recounts his journey to the United States in 1831, clearly points out the judges' political activities in that country.

By opening a separate chapter to address the relevance of the judiciary in the US, "such its political importance,"[7] Tocqueville describes that the magistrates have the prerogative to base their decisions on the Constitution, instead of laws[8]: "The cause lies in this simple fact: Americans granted the judges the power to set out their legal reasoning based on the Constitution rather than laws. In other words, they allowed them not to apply laws which seem to be unconstitutional."[9](Tocqueville, 2002, p. 90-91).

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6 Author´s translation. In the original version : "(...) *je ne pense pas que, jusqu'à présent, aucune nation du monde ait constitué le pouvoir judiciaire de la même manière que les Américains. Ce qu'un étranger comprend avec le plus de peine, aux États-Unis, c'est l'organisation judiciaire. Il n'y a pour ainsi dire pas d'événement politique dans lequel il n'entende invoquer l'autorité du juge; et il en conclut naturellement qu'aux États-Unis le juge est une des premières puissances politiques*."

7 Author´s translation. In the original version: "*J'ai cru devoir consacrer un chapitre à part au pouvoir judiciaire. Son importance politique est si grande qu'il m'a paru que ce serait la diminuer aux yeux des lecteurs que d'en parler en passant.".It is the chapter IV, which is entitled "Du pouvoir judiciaire aux États-Unis et de son action sur la société politique"*

8 Such a possibility is the structure now known as review by general courts (diffuse)

9 The author´s translation. In the original version : "*La cause en est dans ce seul fait: les Américains ont reconnu aux juges le droit de fonder leurs arrêts sur la constitution plutôt que sur les lois. En d'autres termes, ils leur ont permis de ne point appliquer les lois qui leur paraîtraient inconstitutionnelles."*

In Maria Tereza Sadek´s explanatory work summary to Brazil, the author (2011, p. 4) indicates that such scenario did not originate by chance. As she argues, the role of judges in the North American public arena reflected the determinations implied in the institutional model.[10]

In this context, the increased importance of the judiciary would be inherent in the presidential model created by the United States Constitution of 1787; the judiciary would have been constituted as an institution with equal importance and weight given to the Executive and Legislative branches with ability to exercise the power of judicial review of law and normative acts. According to Maria Tereza, such a possibility of judicial review was "counter-majoritarian creation without parallel in the European world." (SADEK 2011, p. 5).

To support her claim, Sadek makes a historical analysis of the role of judges in Montesquieu's Theory of the Separation of Powers, placing it in the context of the fight against absolutism:

> Thanks to Montesquieu for the characterization of the judiciary as a neutral power, in charge of applying the immutable cold letter of the law. In the eighteenth, this revolutionary assertion was identified with the institutionalization of guarantees for the preservation of individual freedom against state abuses. The Theory of Separation of Powers is guided by rigorous fight against absolutism. The prevalence of law is seen as the most appropriate defence solution against arbitrary exercise of discretion and against the risks inherent in concentration of power. The exercise of power according to the law prescription distinguishes the Republic from a despotic government. (SADEK 2011, p. 11).

Yet according to the author, the separation of powers and the supremacy of law imply the rise of the judge's figure. However, in this traditional sense, the judge would be a dull character, "in the classic definition, he is nothing but the ‘bouche de la loi’ [...] The implicit neutrality in judging and punishing requires 'inanimate beings', without passions, far from the ills of everyday life."

The classic Montesquieu's definition stated in the Book XI of his monumental work of 1748, "The Spirit of Laws," says that from the three powers of which we speak, the judiciary is somehow null."[11] (MONTESQUIEU, 2005, p. 169).

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[10] Her exposition passes through historical origins of parliamentary and presidential models, demonstrating that the judiciary institutional position is related to the liberalism and its concern to fight arbitrary discretion.

[11] The context in which the phrase is removed deals with the tripartite separation of powers: “*Tout serait perdu, si le même homme, ou le même corps des principaux, ou des nobles, ou du peuple,*

However, when it goes on reading up to the final chapter[12], the apparent absolute rule of distribution of the three powers is not shown as invariable or strict in Montesquieu. The second segment which is rarely mentioned also deserves to be highlighted as the previous one.

> I wish I had researched in all moderate governments we know what the distribution of the three powers, and then calculate the degree of freedom that each of them can enjoy. However, not always one should allow exhausting the issue to the point that nothing is left to the reader to also endeavour. It is not to read, but to think.[13] (MONTESQUIEU, 2005, p. 195).

Thus, in harmony with Montesquieu's guideline, we think how is the interaction between the institutions of our Republic by observing presidential regime model in the USA.

The classic model of the supremacy of law implies a neutral, apolitical judge. However, as taught Maria Tereza Sadek, the American presidential system came to reverse this logic; the entry of judges in the political arena becomes the defining attribute of the power structure:

> The rule of law, with independent courts against the royal power, was largely inspired by this model. In the presidential system, however, the separation of powers, the constitution of the judiciary as state power and the consequent entry of magistrates in the political arena have gained extraordinary force and are converted to defining attributes this power structure. (SADEK 2011, p. 11).

It is in the Ernani Carvalho´s work (2007) which deals with the genesis and development of Judicial Review that we find political explanations for the origin of the Supreme Court and the judicial review in the US.

By dealing with the emergence of the Constitutional Court, Carvalho said that the institutional formula of the US Constitution treated it as a political branch, which alongside with the Senate and the increase of veto power in the Executive Power, "were constituted in the most efficient institutional checks and balances mechanism to the power of the majority. " (CARVALHO, 2007, p. 164).

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exerçaient ces trois pouvoirs : celui de faire des lois, celui d'exécuter les résolutions publiques, et celui de juger les crimes ou les différends des particuliers." (MONTESQUIEU, 1964, p. 360).

12 Chapter 20 of the book XI.

13 In the original language, one can perceive the touch of irony of the emphasized phrase. *"Mais il ne faut pas toujours tellement épuiser un sujet qu'on ne laisse rien à faire au lecteur. Il ne s'agit pas de faire lire, mais de faire penser."* (MONTESQUIEU, 1964, p. 598).

This institutional search which opposes the power of the majority can be historically situated in the need of a central power that could mitigate the freedom of States General Assemblies, strongly independent.

Ernani Carvalho also tells that in post-revolutionary America "there was an overly ardent enthusiasm for freedom that was easily reversed in autonomy in the former colonies":

> One of the most famous cases appearing in the historical literature of the time, clearly demonstrates how radicalism wielded by some General Assemblies in the post-revolution accelerated the discussion on the creation of a federation. The case of the state Rhode Island was exemplary. The General Assembly of that state, and besides not sending any delegate to the Continental Convention of 1787, also did not agree to transfer to the Interstate Congress 5% of customs tariffs on industrial products. The institutional structure of the American confederation paid basically attention to two principles: the power was decentralized and was on the periphery. This power was concentrated mainly in popular legislature. (CARVALHO, 2007, p. 163-164).

Carvalho points out that after the American Revolution of 1776, the General Assemblies were strengthened as great representatives of popular aspirations locations with intense political participation. However, alongside with economic crisis occurred a process that took most of the traders and farmers into debt. These formed the "class of borrowers" and pressed the General Assemblies through the Public Assemblies searching for ways to solve your debts.

During this period (1780-1790), as a political consequence of this situation of economic instability, there has been the accession of several State General Assemblies in favor of the debtors. Once in power, the "class of debtors" aimed at legislating on behalf of themselves by forgiving debt, abolishing taxes and making ineffective judicial collection of creditors.

To illustrate the precise historical fact, Carvalho transcribed excerpts from the work of the Argentinian jurist Roberto Gargarella that reports Jonathan Hazard´s election to the government of the State of Rhode Island:

> In this sense, the most prominent case was that of Rhode Island, where the large group of debtors came directly to control the state government. Indeed, in 1786, the debtors chose Jonathan Hazard (who acted as his chief spokesman) as governor of Rhode Island. His government program consisted almost entirely on measures to alleviate the debt problems, which began to be implemented as soon as Hazard came to power. In Rhode Island, not only coins were issued, but were set fines for those who refuse to accept that currency. Moreover, it was established that judges should

> publicly call for creditors who refused to receive the new currency, and cancel the obligations, in case those persist in their refusal. (GARGARELLA, 1996, p. 23, apud CARVALHO, 2007, p. 164)

As stated above, the debtors and their representatives have formed political majority that came to occupy political space, transforming the decision-making arena of General Assemblies in obstacles to enforcement of debt judgments . The attempt of debtors to escape the financial obligations generated a strong reaction by creditors, but these could do nothing in the face of local political power.

This scenario has generated a disbelief in the existing institutional system, especially among lenders and raised fears about the possibility of a legislative despotism. Also according to Carvalho (2007, p. 165), it was in this disturbing institutional environment that federalists thesis gained weight and extension. On October 27th, 1787 was published the first article in the Independent Federalist Journal in New York. In it, the authors James Madison, Alexander Hamilton and John Jay remained anonymous, signing with pseudonym Publius.

For the federalists, the Union should be provided with enough force to control the possible damages caused by factions, as highlighted by Ernani Carvalho quoting James Madison:

> One of the main arguments used by federalists to justify the institutionalization of mechanisms that controlled the power of the majority was the need to restrain the violence and factionalism. "I understand faction as a group of citizens, representing either a majority or a minority of the group, united and acting under a common impulse feelings or under interests contrary to the rights of other citizens or permanent and collective interests of the community".
> For Madison, the causes of factionalism could not be "cut off from social environment"; Therefore, the only alternative would be to look for ways to control its effects. The solution, in his view, would be the establishment of an effective union of States (a Federation). (CARVALHO, 2007, p. 164).

Institutional stability (governance) was the major concern of Madison and the growing fear of decisions taken by States legislatures would have intensified those concerns.

As a solution against such irrational majority, the institutional structure idealized in the federalist articles improved Montesquieu´s teaching, proposing mutual control of the state powers.

The central idea was that the proposed innovations generated greater centralization of power by strengthening the "constitutional supremacy at the

expense of legislative supremacy that reigned at the time." (CARVALHO, 2007, p. 165). From a practical point of view, the intention was that the Institutions with veto power (Supreme Court, Presidential veto and the Senate), established in the Philadelphia Congress, would actuate as barriers to factions impulse and possible dictatorship of the majority.

Concluding with the basic assumptions of institutional design opened in the US Constitution of 1787, Ernani summarizes:

> With regard to the North American institutional design, the measures were intended to reverse the situation that had been installed. In this sense, mechanisms were created in order to restrain the "evil thought" actions from the lobby of the debtors. The argument developed in that direction was based on two basic assumptions:
> 1) the belief that in politics, there are few true principles and these are not perceived by the common people and
> 2) the belief that majorities can at any given time, act irrationally. (CARVALHO, 2007, p. 165).

The same thesis - the countermajoritarian strength of the Judiciary in the North American institutional design - can be found in the description made by Alexis de Tocqueville in 1835:

> But the American judge is taken against his will, in the political terrain [...]. Closed at its limits, the power granted to US Courts to issue an opinion on the unconstitutionality of laws still forms one of the biggest barriers that were never erected against the tyranny of political Assemblies[14]. (Tocqueville, 2002, p. 93).

However, the judiciary's role as the institutionalized political power was not restricted to the United States. This is what sustains Maria Tereza Sadek´s statement that "all countries that were inspired by the presidential archetype, somehow, also imported the Judiciary as state power and the possibility of its participation as institution and of its members in the public arena." (SADEK 2011, p. 12).

But if the judiciary´s powerful role would be the result of the presidential model, how to explain why judicialization has been seen as a recent process? Maria Tereza Sadek stresses that:

[14] Author´s translation. In the original version "*Mais le juge américain est amené malgré lui sur le terrain de la politique [...].Resserré dans ses limites, le pouvoir accordé aux tribunaux américains de prononcer sur l'inconstitutionnalité des lois forme encore une des plus puissantes barrières qu'on ait jamais élevées contre la tyrannie des Assemblées politiques.*"

> Indeed, although the Latin American countries have adopted the presidential system, the political instability, almost chronic, on the one hand, and marked hypertrophy of the Executive, on the other, hampered for a long time the potential development inherent in the presidential system. Thus, the manifestation of the separation of three powers and the consequent expression of judicial role remained latent, implicit in this model of government. (SADEK, 2011, p.12).

Explaining his argument that the highlight in the faculty of magistrates' political activity would be an intrinsic component of the presidential institutional model, Sadek exemplifies:

> It is about, we reaffirm, potentiality. So much so that, in the United States, the Judiciary's political Power was not revealed immediately after the promulgation of the Constitution (1787). The transformation of virtual in real resulted from process of strengthening the judicial institution, an achievement that was being consolidated in the political game. (SADEK 2011, p. 13).

His statement can be confirmed by the reading the Federalist Paper no. 78 (1788), whose authorship is attributed to Alexander Hamilton. Although the Federalists have idealized the existence of a Supreme Court as a brake against the factions and a possible dictatorship of the majority, they did not consider the Judiciary as dominant in relation to the other branches. This is what is extracted from the passage quoted in the introduction.[15]

Thus, the preponderance of the Judiciary in the public arena was not a result from the Constitution of 1787 immediately, but was the result of several judicial decisions which may be dated. Exactly 16 years have passed from the Philadelphia Congress until the case Marbury vs. Madison[16] in 1803:

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[15] (Federalist Papers nº 78): "The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment (...)." (HAMILTON, 1961)

[16] As explained Paulo Klatau Filho, the Marbury vs. Madison case involved a major political controversy over nominations made by President John Adams (1797 mandate to 1801), the Federalist Party that having lost the campaign for the presidential re-election in 1801 for Thomas Jefferson, enacted laws creating more federal sets of judges and justices of the peace, naming and inducting virtually all on the penultimate day of his term. However, once Thomas Jefferson became president, he refused to induct the missing judges – John Adams' party members – claiming that the appointments were void. Marbury, one of the appointed justices of the peace, was prevented from taking office, filed a lawsuit against James Madison, Secretary of State of Jefferson, before the Supreme Court.

The Court´s conclusion was that the Supreme Court itself was legitimate to invalidate the appointment Marbury Act. In the Minister of the Supreme Court John Marshall´s phrase: "(...) the particular wording of the US Constitution confirms and strengthens the principle, considered

> The first major success of the Judiciary in the direction of taking up space in the public arena, filling the role of guardian of the Constitution, was given in 1803 in Marbury vs. Madison case. The Supreme Court was then chaired by Marshall. After the Civil War (1861-1863), with the victory of the Union, the Supreme Court started working to control the constitutionality of laws, both federal and state. Since then, the participation of judges in public life - a possibility - has turned increasingly into concrete phenomenon. (SADEK 2011, p. 13).

About how the judicial review was inaugurated, Ernani Carvalho said that the great irony is that the American judicial review was not foreseen constitutionally.

The representative power does not expressly provide that the Supreme Court has the power of judicial review, as it occurred in other countries with such control, the institution of judicial review was established by the US Supreme Court itself.

> Although the US Constitution provides the principle of separation of powers classically established by Montesquieu and have enhanced the doctrine of checks and balances in the political system (providing inter alia the Supreme Court) work of the Federalist Papers, the institution of judicial review was a feat of the US Supreme Court itself, in other words, it was not foreseen by the constituents of Philadelphia.
> Therefore, the pillars that raised the possibility of the judiciary to intervene in the decision-making process of the Western countries were established in Marbury vs. Madison by Chief Justice John Marshall in 1803. (CARVALHO, 2007, p. 165).

Finally, Maria Tereza Sadek concluded illustrating with examples the richness of situations in which the American Judiciary Power has been called to influence on country's political life.

> Indeed, **judges participated in the major political debate**. It would suffice to recall, for illustration only, the dispute between the president of the republic Abraham Lincoln and Chief Justice Roger Taney, about the power limits of the chief executive in times of war; support for racial segregation, denying citizenship to blacks in the first half of the nineteenth century; the invalidation of social laws that aimed to limit working hours in 1905[17]; opposition to the New Deal of President Roosevelt; permission for black and white children to attend the same class; the decisions in favor of minorities, affirming the equality between men; decisions in favor of the contraceptive pill and abortion. (SADEK 2011, p. 13, emphasis added).

essential to all written constitutions, that a law that conflicts with the Constitution is void and that the Courts, as well as other departments, are bound by the Constitution. The law should be void." (KLATAU FILHO, 2003, p. 271).

[17] The reference case for the time is the Lochner v. New York, 1905, in which the court invalidated a New York law limiting the working hours of bakers to 10 hours a day and 60 hours per week, ruling that the state act was interfering arbitrarily in the constitutional law and individual freedom to contract .

In summary, Sadek says that an examination of US history shows unquestionably that the Supreme Court has played a prominent role in key events in that country, **and the judicial prominence is a significant factor in American history**, and it would not be no coincidence that the first studies of a political nature on the Judiciary have arisen in the United States, on a literature **marked by the debate between those who are in favor and those who are opposite and to judicial activism.**

As it was demonstrated the relevance of the Judiciary Power as the result of the presidential institutional arrangement, since the second half of the twentieth century, the increase in participation and importance of the judiciary has become a global movement, regardless of the distinctions between the systems of government and legal system.

Even more relevant becomes the perception that the phenomenon is not just restricted to the presidential republics, since the European countries, usually in parliamentary regimes, also created judicial review:[18]

> Strictly speaking, one can say that from the twentieth century, the controversy about the limits of the judicial activism and the need to ensure the Constitution was universalized and extended to the European democracies.
> The dispute between Kelsen and Smith [*rectius*, SCHMITT, Carl Schmitt] is paradigmatic. The outcome for the establishment of Constitutional Courts, as advocated Kelsen, reaffirms the plurality of solutions to protect democracy from threats such as Nazism.
> These Constitutional Courts, especially after the 2nd World War, have been established in almost all countries.[19] It is, however, independent of the Judiciary and institutions with clear party political nature. (SADEK 2011, p. 14).

Thus, judicial prominence has also been manifested in parliamentary countries, although, as highlighted Sadek (2011, p. 15), "with a lower vitality within different parameters and therefore, with a narrower margin of *manoeuvre*."

[18] Sadek says that "European models are very varied. The French Constitutional Council, for example, is made up of elected and fixed-term members, exercising prior control of constitutionality only of bills and not laws. Already in Italy, judicial review occurs mainly by incidental control of constitutionality, and not by direct action of unconstitutionality or are subject to appeal to the Constitutional Court " (SADEK 2011, p. 14).

[19] Except for the United Kingdom, the Netherlands and Luxembourg, where there is the model of the supremacy of Parliament, without constitutional control system, as highlighted by the author.

About this universalization of the judicial role, Maria Tereza Sadek concludes:

> The universalization of the judicial role - despite its greater or lesser degree - suggests that the strict conception of the judge identity, as it is idealized in the concept Judge 'bouche de la loi', lost power and space. The magistrate of recent times considerably increased its participation and has become a political actor, varying, however, its expression. (SADEK 2011, p. 15).

Still, the distinction between legal systems (is English, common law or the European continent, Civil Law) is nor relevant [20] to determine the degree of judicialization of a society.

Maria Tereza Sadek and George Tsebelis agree about it:

> It is noteworthy that the strength of these changes was of such magnitude that propelled changes in justice institutions, regardless of the government system - presidentialism or parliamentarism - and also the legal system- civil law or common law. (...) In this sense, the differences between the judicial branches, although remain significant, become smaller than those in the past. (SADEK 2011, p. 10).

In the same tone, says Tsebelis:

> The usual distinction in Comparative Law is among countries with common law and civil law traditions. In common law countries (UK and all its former colonies, including the United States, Australia, New Zealand, Ireland, Malta etc.), the legal rules are seen less as acts of Parliament and more like the accumulation of decisions and interpretations of the judges. (...) In countries that follow the tradition of civil law, the reasoning of the law is a comprehensive and authoritative legal code. (...) In countries with Civil Law, judges interpret the legal rules , but do not make them. **According to this basic distinction, the judiciary's role should be more important in countries with common law. However, more recent analysis have indicated a convergence of the two systems.** (Tsebelis, 2009, p. 315-316, emphasis added).

Therefore, it is observed that although the institutional model of the American presidential system is the source of our control of constitutionality, he only partially explains the origins of judicialization in Brazil. Thus, according to the proposed approach, we will continue with the analysis of the transformations of constitutional norms that structured the national judicial review.

[20] It is worth noting that Ernani Carvalho expressed opposite opinion by defending the need of a differentiated study of the legalization processes of politics occurred within the Constitutional Courts of the main systems of Western law:. Roman-Germanic and *Common Law* (CARVALHO, 2007, p. 162).

3 JUDICIAL REVIEW PATH IN THE BRAZILIAN CONSTITUTIONAL DESIGN

> **The Executive Branch lacks a power greater than itself.** Not only to arbitrate its disputes with other power, the Legislative. [...] The third power is enriched by the discord of the first two, and the judge runs risks, as Raminagrobis[21], to finish devouring those who turn to him. (Garapon, 1999, p. 44, emphasis added).
> **The changes in the Brazilian control of constitutionality were articulated mainly by the Executive**. [...] The Executive, in its various historical faces, was the real architect of judicial policy. Through decrees, he created and regulated for a long time the highest court of the Republic. (CARVALHO, 2010, p. 200-203, emphasis added).

Observing the philosophical field, Antoine Garapon attributes to the Executive the increase of the Judiciary Power. The same conclusion was obtained in other historical conditions and other hemisphere by Ernani Carvalho, using as a method the observation of the Brazilian constitutional laws.

This topic has its name and much of its content from other work of Ernani Carvalho (2010), in which the author draws a history of institutional rules that delimited the role of the Brazilian Supreme Court in concentrated control of constitutionality . Carvalho argues that the increased incidence and importance of control of constitutionality by the Brazilian Supreme Court follows directly the deployment trajectory and development of control of constitutionality over the Brazilian republican constitutions. (CARVALHO, 2010, p. 177).

As already explained in the method, this work seeks to expose the phenomenon of judicialization from the institutional structure, to demonstrate that the markedly active role of the Brazilian Supreme Court dates back to the constitutional design inaugurated in 1988. Similarly, Ernani Carvalho argues that such constitutional design became the great protagonist of the changes occurred in the judicial decision-making process and that the expansion of the Judiciary Power can be attributed largely to institutional changes that "have strengthened the independence of the Judiciary and increased the possibility of society participation in abstract review litigation ." (CARVALHO, 2010, p. 177-178).

[21] Fable character "Le chat et la belette le petit lapin" by Jean de La Fontaine, Raminagrobis is a wise old cat, called to solve the intrigue between Jean Lapin and Dame Belette, resolves the dispute devouring both contenders. Although this is a children's fable, the final sentence contains strong social criticism: "Ceci ressemble fort aux débats qu'ont parfois les petits souverains serapportants aux Rois." In author's translation: "this looks a lot like the debates that little lords have when they address to Kings. "

The magistrate´s position in the Empire was characterized by its absorption by the political system. In the words of Ernani Carvalho (2010, p. 179), "if the magistrate plays a relevant role in the Crown, he would have a good chance to occupy a good position in the imperial government and even to join a political career." The large inflow of magistrates in political and administrative career encouraged the judiciary to play the role of informal mediator between local policies and the center of imperial power.

In the first Republican Constitution (1891), the control of constitutionality by general courts (diffuse) model imported from US shifted the judge from an informal position, in which there was no legal rule that attested its political role, to a formalized and constitutionally structured position in the separation of powers, in the federalism and in the control of constitutionality. (CARVALHO, 2010, p. 179).

From political actors, the judge became the true arbiters of public conflicts, that is "the judge formally asserts the power to issues of public interest. Theoretically, his condition as mediator is coated with constitutional prerogatives[22] that supposedly would break the chains of existing dependence in the monarchy." Carvalho explained in detail:

> By formalizing the role of the judge as a political arbitrator, with the establishment of control of constitutionality by general courts (diffuse), the Republican Constitution of 1891 decreases significantly, the political action sphere of the judges. However, the formalization produces a greater independence of the judiciary in relation to the representative powers. (CARVALHO, 2010, p. 179).

The effect of such measure was the framework of the judge in the classical doctrine of separation of powers, changing the political relations between them. Carvalho points out that, on the one hand, there was a decrease in the importance of judges in the national political scene - as the judges failed to be recruited to form the political and bureaucratic elite of the country - on the other hand, the institutional autonomy paved the way to a more discreet and theoretically impartial political participation. In the words of Carvalho (2010, p 179-180.): "Despite being away from the traditional political system, the Brazilian judiciary is invited to participate in this

[22] Nowadays, the judges'individual guarantees are the tenure, irremovability and irreducibility of subsidies provided for items I, II and III of art. 95 of the Constitution of 1988. Of these, the tenure and irreducibility of subsidies were already provided for art. 57 of the 1891 Constitution.

system by other way which is more inclined to liberal doctrine of the time and then coated with functional guarantees."

Although political participation has decreased, Aliomar Baleeiro (2001, p. 38) states that it still had not completely closed, "There was no law prohibiting judges' political or party activity and, some judges practised them. There was constitutional guarantee of life tenure (...) and irreducibility of compensation "Another important rule to ensure autonomy was also highlighted by Baleeiro, " it has abolished the placement of judges. In the Brazilian Empire Era, the Executive could do it by act of the Emperor. "

Regarding the Brazilian Supreme Court, since the installation of Casa da Suplicação do Brasil[23] on May 10th, 1808 which was transformed into the Brazilian Supreme Court of the Empire of Brazil by the Constitution of the Brazilian Empire (1824) and later in the Brazilian Supreme Court (STF) with the Republican Constitution of 1891, the judiciary branch had its role modified and expanded (CARVALHO, 2010, p. 178).

Although the Brazilian Supreme Court has been established[24] in Brazil from the first Republican Constitution of 1891, the use of a court to solve institutional impasse had already been considered in the time of empire, as highlighted by Oscar Vilhena Vieira:

> **The idea of putting a court in the center of our political system is not new. As noted by Leda Boechat Rodrigues, Pedro II himself, at the end of his reign, wondered whether the solution to the institutional deadlocks of the Empire would not be in the replacement of the moderating power by a Supreme Court like that of Washington.** The epigraph to this text, written by Rui Barbosa[25] ,in 1914, also advocates a political centrality of the Supreme, as an organ of conciliation between the powers. The institutional history of the Republic, however, followed roughest routes. The role of ultimate arbiter of major institutional conflicts in the Empire, fell to moderating power, it was exercised mostly by the army, as

[23] Casa de Suplicação do Brasil 1808

[24] In the Constitution of 1824 there was a prediction of a Supreme Court of Justice (art. 163). However, the judicial structure of the empire, such court had no jurisdiction over the constitutionality of laws and normative acts and could either examine the appeal to the "Tribunais de relação" in the provinces, as shown Octaciano Nogueira. The author also states that "the most serious, however, was the widespread practice of virtually all judges to raise doubts about the interpretation of laws, in cases under its judgment, submitting the case for consultation to the executive organs, through the Province presidents. "(NOGUEIRA, 2001, p. 40).

[25] As says Oscar Vilhena Vieira (2008, p. 441), Rui Barbosa would have drafted grand part of the Constitution of 1891 and later would have regretted that the intended function had not been effectively implemented. Here are the words of Rui Barbosa contained in the heading of Vieira´s text: "The Supreme Court is candle in a dome of state"

> claims Alfred Stepan, and only secondarily by the Supreme, as stated by José Reinaldo Lima Lopes and myself. (VIEIRA, 2008, p. 445, emphasis added).

In 1891, there was only control of constitutionality by general court, " the Justice did not repeal the unconstitutional law nor declared it in abstract *erga omnes*, as can be done today." (BALEEIRO, 2001, p. 39).

In previous Constitutions of 1988, the manner how to express the judicialization proved to be very limited. The Constitution of 1934 expressly contained the prohibition of the judiciary to decide on political issues, according to the article 68: it´s forbidden to the courts receive and examine political issues.

Among the restrictions on judges and on the judiciary steady in the 1934 Constitution, Ronaldo Poletti states:

> The judge even in availability, otherwise charge of the loss could not exercise any other public function, except for the teaching (art. 65). It forbade to him also the political party activities (art. 67); and the judiciary, "know the exclusively political." (POLETTI, 1999, p. 53).

The Constitution of 1934 sharply limited the control of constitutionality by general courts (diffuse) by stating that the declaration of unconstitutionality could only be declared in court by an absolute majority vote of its judges[26]. Ronaldo Poletti emphasizes that the Constitution's draft was even more strict with the Judiciary Power, stressing that the preliminary draft established [...] that the unconstitutionality could only be decided by votes of two thirds of the Ministers of the Brazilian Supreme Court." (POLETTI, 1999, p. 29).

Regarding the control of constitutionality by special court (concentrated), this came even modestly, only the possibility of petition for federal intervention[27], as explains Marcos Aurélio Pereira Valadão:

> The petition for federal intervention was introduced in the Brazilian constitutional order by the Constitution of 1934. In its text, the it was limited

[26] Here is the text of art. 179 of the 1934 Constitution: "Only by an absolute majority vote of all its judges, the courts may declare the law and the government act unconstitutional ."

[27] The Constitution of 1934 "Art. 12. The Union will not intervene in States´public affairs, except: (...)

V - to ensure compliance with the constitutional principles specified in letters 'a' to 'h' of art. 7, I, and to provide for the enforcement of federal laws; (...)

§ 2. In the first case of n. V, the intervention will only be effected after the Supreme Court, on the initiative of the Attorney General of the Republic, becomes aware of the legal rule that has decreed and to declare it the constitutionality.

> to the control of state laws. The petition was made by the Attorney General of the Republic (requested by the Federal Executive or on its own initiative), and it was for the Supreme Court to declare whether or not it is unconstitutional, what would be necessary for the intervention in the state whose law was considered unconstitutional. With the constitution of 1937, the petition for federal intervention was suppressed, and the federal intervention passed to the control of the Executive Power, typical aspect of a dictatorial government that concentrates power in the hands of the central executive (VALADÃO, 2010, p. 33, emphasis added).

It was only in the Constitution of 1946 that initiated a process of expansion in the powers assigned to the STF. For Carvalho, the expansion of the constitutionally bestowed judiciary power is the result from the exit of totalitarian to democratic regimes:

> It is interesting to note that the Constitutions of 1946 and 1988 have not been elaborated based on preordained projects that were offered prior to the Constituent Assembly. Perhaps, not by chance, both were pioneers in delegation of control powers to the judiciary. The preceded political opening of a dictatorial regime created an enabling environment for institutional changes that mitigate the strong power exercised by the Executive. (CARVALHO, 2010, p. 186).

The Constitution of the military regime from 1967, although created the possibility of direct actions of unconstitutionality, this was a restrictive initiative of the Attorney General of the Republic. In the words of Carvalho (2010, p. 187) this meant that "the power to judicialize was in the President's hands, bearing in mind the affinity of the Attorney General of the Republic with the Presidency."

Yet, according to Carvalho (2010, p. 188), there would have been a real fragile judicialization, as the participation of the Supreme Court as a privileged mediator of the political debate occurred only under strict control of what could be judicialized, to attribute legitimation in direct actions of unconstitutionality to act to a sole body (Attorney General of the Republic).

Thus the debate on the exclusivity of actuation by the Attorney General of Republic proved controversial, mainly due to the "legitimacy of the previous judgment that he made on conflicting issues before presenting them in the form of the process of federal intervention. This problem has become more evident after Amendment No. 16 of 11.26.1965." (CARVALHO, 2010, p. 188, emphasis added).

In the context of the military regime, political authorities with no legal legitimacy to file a direct action of unconstitutionality wanted that the Attorney General of the Republic became spokesman of their interests. Ironically, Carvalho

(2010, p. 191) states that as "institutional engineering mounted by the military did not include this generosity, did not take long for this to generate much political uproar and extensive legal discussions."

The highly centralized institutional framework imposed by the military would be characterized by strong political bond that the Attorney General of the Republic had with the President, ensuring, through the monopoly of filing direct actions of unconstitutionality (ADIs), strong control by the Executive of the matters assigned to the Supreme Court. For this controversy institutional structure strongly criticized by opponents of the military regime, notes Carvalho (2010, p. 191), "the constituents of 1988 gave the answer."

The answer came in the form of expansion of active legitimation for filing direct actions of unconstitutionality. That is the major change introduced for democracy and the 1988 Constitution to the active participation of the judiciary in political life:

> In general, one cannot deny the increasingly activeinvolvement of the judiciary in the politics. [...] If we consider the control of constitutionality as the key point of this process, the main change in this sense was undoubtedly the expansion of the capacity of filing direct action of unconstitutionality, or more specifically, the art. 103 of the Federal Constitution[28]. (CARVALHO, 2010, p. 195).

Carvalho (2010, p. 196) points out that the Congress did not adopt the existing model in most countries that had the review of constitutionality in abstract. In the prevailing control of constitutionality in Europe[29], the legitimacy to file actions of direct unconstitutionality is restricted to 1/3 of parliament, so that the matters control

[28] According to the article 103 of the 1988 Constitution, the legitimized to file direct action of unconstitutionality are: the President of the Republic, the Attorney General of the Republic, the directing board of the federal Senate, the directing board of the Chamber of Deputies, the Directing Board of a State Legislative, Assembly or of the Federal District Legislative Chamber, a State Governor or the Federal District Governor, the Federal Council of the Brazilian Bar Association, a political party represented in the National Congress and confederation of labour unions or a professional association of a nationwide nature.

[29] Notable exception is the model adopted in Germany, which allows the Federal Constitutional Court to decide on constitutional complaints filed by anyone (when injured in his or her fundamental rights). So, it contains in the text of *Grundgesetz* (Art. 93, abs. I, 4a): *Das Bundesverfassungsgericht entscheidet* [...] *über Verfassungsbeschwerden, die von jedermann mit der Behauptung erhoben werden können, durch die öffentliche Gewalt in einem seiner Grundrechte oder in einem seiner in Artikel 20 Absatz 4, 33, 38, 101, 103 und 104 enthaltenen Rechte verletzt zu sein*;

over what can be judicialized is maintained by the Legislature Power more closely than the model of the 1988 Constitution.

As an explanation for the significant increase in the model adopted by constituent of 1987-1988, Ernani Carvalho (2010, p. 191) notes that the widespread dissatisfaction of political leaders not to have their complaints forwarded to the Supreme Court by the Attorney General of the Republic during the military regime would have boosted the impetus of the constituent to amplify the list of legitimized.

By way of illustration, Bruno Zilberman Vainer narrates the case of the controversy surrounding the (un)constitutionality of the censorship law and dissatisfaction of the Brazilian Democratic Movement (MDB):

> It was during the dictatorial period that began - and bubble - discussions concerning the entitlement only of the Attorney General of the Republic for filing of direct action of unconstitutionality, especially after the Decree - Law of the Federal Government established the prior censorship of books, magazines and newspapers in the country.Indeed, the decree originated such outrage that the political opposition party, the MDB, asked the then Attorney General of Republic to conduct the control of constitutionality. (VAINER, 2009, p. 221).

However, after the response of the Attorney General of the Republic, who argued not to be required by law to conduct the review of constitutionality in abstract, there was extensive uproar about the matter, with views of important lawyers defending the two sides of the issue. (VAINER, 2009, p. 221).

In short , Ernani Carvalho states that the control of constitutionality history in Brazil has undergone significant changes since it was imported from US in form of control of constitutionality by general court in Constitution of 1891 to the current form of judicial review in the Constitution of 1988. As it is relevant, one transcribes below the timeline proposed by Ernani Carvalho:

> 1) In the 1891 Constitution, we can say that the implanted **diffuse control of constitutionality by general court (copy of which operated in the United States) in its pure aspect, prevents any kind of control by the Executive,** despite the absence of interference by the Executive, the model was implemented in Brazil, probably because the importance of the judiciary in the political scenario at the time was little;
> 2) **In the 1934 Constitution, the freedom given to the judiciary by the Constitution of 1891 is reviewed, it is crystallized the notion of non-interference of the judiciary in political affairs by prescribing that the decision of unconstitutionality could only be made by a majority of the totality of the members of courts**, restricting thereby their field of action. In the same direction, that constitution also brought in its article 68 an explicit message from a constituent to the courts: "It is forbidden for the Judiciary to

> examine issues which are exclusively political." While restricting the diffuse control of constitutionality, the constituent extended the participation of it for a more centralized and strategic way. We are talking about the most significant change, which was the petition for federal intervention entrusted to the Attorney General of the Republic who talked about federal conflicts. **However, it was clear the design of a strict control to which constraints were created, whether by limiting the decisions by the majority or by prohibiting the examination of political conflicts, or even by entrusting the Attorney General of the Republic, confidante of President, the petition for federal intervention**.
> 3) The 1946 Constitution, as has been said, has preserved some aspects of the 1934 Constitution as: a) the requirement of an absolute majority of the Court's members to the effectiveness of decisions on direct actions of unconstitutionality b) maintained the assignment of the Senate to suspend the law enforcement declared unconstitutional by the Supreme Court. The Federal Constitution of 1946 also changed the petition of federal intervention made by the Attorney General of the Republic, establishing explicitly the principles on which the Attorney General of Republic could base its petition of unconstitutionality. This could be interpreted as a restriction, since in the previous format there was no formal indication. All this indicates that **there weren´t, with regard to control of constitutionality, significant changes [**...].
> 4) **In the 1967 Constitution there was a significant increase in the jurisdiction that could be activated by direct action of unconstitutionality by the General Attorney of the Republic. As we have seen, beyond the abstract control of constitutionality of state and federal laws**, the Attorney General of the Republic had its petition for intervention expanded for purposes. [...].
> 5) **The 1988 Constitution breaks off any prospect of control or constraint by the Executive.** The list of the legitimated of Article 103 of the Federal Constitution: the President of the Republic, the directing board of the federal Senate, the directing board of the Chamber of Deputies, the Directing Board of a State Legislative, Assembly or of the Federal District Legislative Chamber, a State Governor or the Federal District Governor, the Attorney General of the Republic, the Federal Council of the Brazilian Bar Association, a political party represented in the National Congress and confederation of labour unions or a professional association of a nationwide nature, together with the infinite capacity that the 1988 Constitution offers to be questioned in court, these are resistible ingredients to any form of centralization of the political process. (CARVALHO, 2010, p. 200-201, emphasis added).

Thus, according to Carvalho (2010, p 203.), The increase in the number of legitimated active for filing actions of direct unconstitutionality in the 1988 Constitution - breaking the monopoly of the filing of abstract control of constitutionality by the Attorney General of the Republic - "resulted in an increase also significant for control of constitutionality of proceedings. "

Similarly, Oscar Vilhena Vieira, said the expansion to other political actors, the possibility of control of constitutionality provocation would have transformed the Supreme Court into a "chamber of appeals of majority decisions":

> The politicization of the Court's sphere of jurisdiction was expanded from the previous constitutional period, insofar as the legitimacy to file direct actions was given to new political and social actors, as provided by Article 103 of the Federal Constitution, surpassing the stage in which the keys of access to the control of constitutionality by the Supreme were only conferred on the Attorney General of the Republic. This openness of the Supreme to other political actors have transformed the Court, in many circumstances, in a review chamber of majority decisions, from the complaint of those who were defeated in the representative arena. (VIEIRA, 2004, p. 447-448).

But for Vieira, the increase in control of constitutionality proceedings would be mostly the result of constituent´s overlegislative ambition. According to Vieira (2008, p. 446), the distrust of ordinary legislators would have led the 1987-88 constituent to legislate on everything. Thus, Vieira continues, the Constitution "transcended the strictly constitutional issues and regulated obsessively precisely a wide field of social, economic and public affairs, in a sort of maximizing commitment."

> This process, called by many colleagues as constitutionalization of the legal system, led by the 1988 text, created, however, a huge sphere of constitutional tension and, consequently, generated a constitutional litigation explosion. The equation is simple: if it is a constitutional matter, the freedom given to the political body is very small. Any more sudden movement of the administrators or legislators generates an incident of unconstitutionality which as a rule flows into the Supreme Court. (VIEIRA, 2004, p. 447).
> For Ernani Carvalho, another remarkable effect of institutional change would have been to reduce the significance of incidental control of constitutionality by general courts (diffuse). For the author, by expanding significantly the circle of legitimated actives who are able to file actions of constitutionality the Supreme Court in the abstract control of constitutionality of laws, the constituent ended up restricting, in a radical way, the amplitude of the general review by general courts.[30]

This emptying of the control of constitutionality by general courts (diffuse) has been largely due to the advantages of concentrated control of constitutionality in two points of views:

1) political point of view: no political cost for those who propose the possibility of veto to a proposal from the Executive or the legislative majority, the character of greater visibility of a direct action of unconstitutionality and its media effect caused by the extension *erga omnes* of the case;

[30] A necessary explanation: Diffuse control, considered mitigated here, refers to control of constitutionality by the form of extraordinary appeal to the Supreme Court. It is therefore the analysis that the concentrated control (of actions of direct unconstitutionality and the like) would have mitigated the importance of incidental control in the STF. It is noteworthy that the control of constitutionality by general courts (diffuse), conducted by judges of other instances was not Ernani Carvalho´s analysis target in the consulted article (2010).

2) legal point of view: the wide legitimacy, agility and expeditiousness of this procedural model, which also includes the possibility of immediately suspending the effectiveness of the legal rule in question, at the petitions of provisional remedy. (CARVALHO, 2010, p. 196).

However, it should be noted that such a preponderance of concentrated control of constitutionality receives criticism. Extensive empirical study guided by researchers Alexandre Costa and Juliano Benvindo[31] reproves the emptying the diffuse control:

> These conclusions, which stem from direct empirical reference[32], show that there is a severe mismatch between the judicial activity and the theory that the Constitution of 1988 by expanding the list of legitimated, would have built a 'Constitution defense system so complete and so well structured that, in particular, nothing is owed to the most advanced legal systems of today. " It is shown in this analysis, that this well structured and well comprehensive system **has not actually developed a real defense of fundamental rights and guarantees, nor the expansion of the list legitimated favored this movement.** On the contrary, the Constitution and subsequent legal and judicial decisions movements favored the construction of a gradual process, but effective, **withdrawal of other ways, such as judicial review by general courts (diffuse) and concrete control of constitutionality, as a tool for this defense of fundamental rights and guarantees.** The expansion of the concentrated control of constitutionality, less citizen and effective in defense of fundamental rights and guarantees, has been accompanied by the discourse subtraction that takes place in the in the judicial review by general courts (diffuse) systems. In short, there is a clear problem that has been diagnosed and we need a strong civic debate on the role that we should expect of a constitutional court. (COSTA *et. al*., 2010, p. 43, emphasis added).

[31] The article, entitled "A quem interessa o controle concentrado de constitucionalidade? Um perfil das decisões de procedência em ADIs " was presented at the 7th. Meeting of the Brazilian Political Science Association, in Recife, Pernambuco.

[32] The data collected by the authors show that "this control performed by direct actions of unconstitutionality does not interest most of the legitimated, given that they did not use it neither frequently nor effectively. The President of the Republic, the directing board of the federal Senate, the Directing Board of a State Legislative, Assemblies of the States rarely use direct action of unconstitutionality. Together, these four legitimate account for less than 2% of direct action of unconstitutionality filed either in the universe analyzed in this research or in the total universe of processes. Directing Boards of the Chamber of Deputies never even come to propose any direct action of unconstitutionality, since its creation, and Directing Boards of the Chamber of Federal Senate only took a matter to the Supreme Court by direct action of unconstitutionality. (...) Different situation is in the other four legitimated groups, which have a very active participation, answering each of them by 20 to 30% of the total direct actions. They are: political parties, the Attorney General of the Republic, class entities and State Governors. Among them, those who benefit most directly from direct actions of unconstitutionality are the governors, who have the highest success rate and the higher gross amount of deferred decisions and processes. And the decision profile indicates that the direct actions of unconstitutionality directly benefit the governors involved, inasmuch as they result from political conflicts between the governors and Legislative Assemblies. "(COSTA *et. al*. 2010, p. 39-40)

Despite the worrying conclusions of the research regarding the ineffectiveness of concentrated control of constitutionality in the defense of fundamental rights and guarantees (COSTA *et. al.*, 2010), for the continuation of this work we are specially interested in the advantages pointed out by Carvalho (2010, p.196), since they will provide the explanation for the intensive use of the concentrated control of constitutionality by political actors that we will see in the third chapter.

4 FINAL CONCLUSIONS

We have seen that the American constitutional design of 1787 left the Judiciary branch in a prominent position in an institutional arrangement in which it sought protection against eventual legislative majorities, but contrary to the interests of the constituents. The effective implementation of judicial review, however, did not appeared by delegation of powers to the Judiciary, but by the power of judicial decision, being the case of Marbury v. Madison in 1803 the major milestone.

In Brazil, the 1891 Republican Constitution imported from the US system the control of constitutionality. The control of constitutionality exercised over concrete individual cases as judicial review by diffuse control of constitutionality, had no major impact on political issues, since the Brazilian legal system did not adopt any method for linking the preceding decisions by the Federal Supreme Court - unlike the common legal system from where it originated.

Over the successive constitutional changes, Brazil progressed towards the adoption of the concentrated control of constitutionality, first only with centralizing goals (petition for federal intervention), then also to monitor whether state laws comply with the Constitution and, finally, in abstract, but only at the initiative of the Attorney General of the Republic.

It was from 1988, with the extension of the legitimated (art. 103 of the Constitution in 1988) to 9 different categories that control became widely exercised.

However, maintaining the possibility of judicial review by general courts (diffuse) and by incidental control of constitutionality - either by any judge, or by appeals to the Supreme Court, but always in the concrete case - our system expresses originality in relation to other existing systems. It assembles wide

possibilities to raise question relating political issues examined by the Judiciary Power and thus to judicialize political debates.

The peculiarity that interests us particularly is that unlike the American case (in which the judicial review was "created" by the Supreme Court), in Brazil the control of constitutionality-powers obtained by the Judiciary were expressly delegated by the political powers. Along the Brazilian constitutional history, one can see that the assignment of control of constitutionality has been progressively extended by the initiative of the other branches of the republic - Executive and Legislative - which shows that the current institutional arrangement occurred as a result of the political will.

With regard to the institutional changes brought by the 1988 Constitution, we can synthesize three elements of outstanding importance for reflection:

1- The strengthening process of the Judiciary in comparison with other Powers was slow and **strategically authorized by the Executive**. In Brazilian political history, full of authoritarian political passages, the courts´ dependence in relation to the Legislative Power, and especially to the Executive Power, only weakened in the 1988 Constitution.

2- Still, the search for greater autonomy and independence of the Judiciary, although it has been constant in constitutional history, **only showed strong contours in the 1988 Constitution.** In Ernani Carvalho's words (2010, p. 203), "the conquered autonomy will be an important explanatory vector of the legalization process of politics."

3- Finally, the judicial authority expansion process becomes more intense with the adoption of detail-oriented constitutions, or "ambitious", as Vieira prefers (2008, p. 443) by stating that "many contemporary constitutions are suspicious of the legislator, opting for deciding everything and leaving to the Legislative and the Executive only the function of implementing constituent will." In this respect, the task of ensuring that the Constitution transforms the Judiciary in the privileged room for deliberation of the great political debates.

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