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THE DEFENCE OF THE RULE OF LAW IN THE AGE OF CONSTITUTIONAL EROSION: THE ROLE OF CONSTITUTIONAL COURTS

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On October 11th, 2022, the first introductory lecture for 1st year law students of the Faculty of Law of Roma Tre was held by Justice Gilmar Mendes, *Ministro* of the Brazilian Federal Supreme Court, the *Supremo Tribunal Federal*, and Professor of Constitutional Law. The lecture was mainly focused on the analysis of the Brazilian system of constitutional justice and Brazilian constitutionalism augmented with a comparative perspective.

The Justice opened the session with an utterly peculiar comparison between the Italian and the Brazilian constitutional experiences: he reminded that just as the pillars of the newly established Italian Constitutional Court in 1947 were the Republic and the Democracy, likewise in Brazil Democracy and Republic were the two "vectors" that guided the development of constitutional jurisdiction. The Brazilian Republic was proclaimed in 1889 and the first Constitution (1891)[1] established the *Supremo Tribunal*, by taking inspiration from the North American Constitution[2]. The Republican Constitution of 1891 introduced a new concept of the Judiciary: the powers of the State were divided into three independent branches, with the aims of 1) equalizing the Judiciary to the other branches of the government, and 2) making Justices and judges independent and impartial[3].

But, as Justice Gilmar Mendes recalled, in 1892, due to the resignation of

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[1] G.F. Mendes, & P.G. Gonet Branco, *Curso de direito constitucional*, Saraiva (Série IDP), São Paulo 2017, p. 98.

[2] A. Baleeiro, *O Supremo Tribunal Federal, esse outro desconhecido*, Forense 1968, p. 19.

[3] Brazilian Constitution of 1891, Artt. 56-62.

President Deodoro da Fonseca on the 23rd of November, the first President of the Brazilian Republic, a crisis erupted. Indeed, a question arose: could the Vice-President serve out the remaining part of the term, or did the Constitution require a new election? In fact, the new Constitutional Text gave rise to doubts as to the legality of the vice-president taking office less than two years after the incumbent was elected with the promulgation of the Constitution on February 25, 1891. Indeed, a group of civilians and military launched a manifesto demanding a new election, but ultimately Vice-President Floriano Peixoto assumed the presidency and arrested and banished all the signatories of the manifesto – all by means of decrees –.

In this context, the jurist Rui Barbosa, whom Justice Mendes described as "one of Brazil's greatest jurists so far", played a crucial role in the process of the formation of the *Supremo Tribunal Federal* in the 1892 Court's session[4]. More specifically, he advocated for the necessity of investing the Tribunal with the power of judicial review, since the Constitution of 1891, as well as the U.S. Constitution of 1787, was silent on the issue. Nevertheless, according to Barbosa this silence did not prevent the exercise of judicial review, since the judicial review is "a natural and obvious result of every written Constitution"[5]. But his claims were not taken into account until 1898 when it was officially embraced the Barbosa doctrine by the *Supremo Tribunal Federal* itself[6].

Much as the Tribunal at the end of the XIX century was endowed with the power of judicial review, the use of such power was enhanced with the Federal Constitution of 1988. The advent of the Constitution of 1988 marked the beginning of a period of re-democratization of the country.[7] After the experience of the authoritarian regime between 1964 and 1985, the Constitution of 1988 was enacted with the primary aim of reconstructing the democratic order. As highlighted by the Justice, the Constitution of 1988 was born with the "arduous mission of gathering the

[4] O. Dias Corria, *O Supremo Tribunal Federal, Corte Constitucional do Brasil*, Forense, Rio de Janeiro1987, pp. 19-20.

[5] R. Barbosa, *Os atos inconstitucionais do Congresso e do Executivo perante a Justiça Federal*, in «*Trabalhos Jurídicos*», Vol. XI, Rio de Janeiro, 1962, pp. 54-55.

[6] With the Habeas Corpus HC 1.063, of 1898, the Federal Supreme Court embraced the doctrine of Rui Barbosa. The Brazilian doctrine of habeas corpus forged a faster procedural means than extraordinary appeals, so that constitutional issues sensitive to the rule of law could be promptly brought before the Supreme Court. (J.E. Teixeira, *The doctrine of political issues in the Supreme Federal Court*, Sergio Fabris Editor, Porto Alegre 2005, pp. 93-99)

[7] Mendes & Gonet Branco, *Curso de direito constitucional*, cit., p. 1125.

aspirations of a society that was moving away from more than two decades of repression. This explains its focus on a social agenda that far transcends merely formal aspects".

The Constitutional Text of 1988 at Article 102 assigned to the *Supremo Tribunal Federal* the role of "*guardião da Constituição*", the guardian of the Constitution. This expression underlines the central position given to the Court: not only does the *Supremo* have the last words in constitutional interpretation and application, but it also ensures other institutions observe the Constitution. As above mentioned, with the new Constitutional Text, the Tribunal was officially endowed with the power of judicial review over all legislative acts either on appeal (*controle concreto)*, or in first instance (*controle abstracto*)[8]. More specifically, since 1981 the control of constitutionality within the Brazilian constitutional system is both decentralized and centralized. On one hand, the decentralized control of constitutional review is exercised by each inferior court judge[9]. This type of control could be activated during the course of litigation (review *incidenter*) before any lower court by a party, by the members of the *Ministerio Publico* or by the Court itself. The declaration of unconstitutionality via review *indicidenter* has an *inter partes* efficacy, which means that the decision will affect only the case at issue. On the other hand, centralized and abstract control is exercised by the *Supremo* whose decisions have an *erga omnes* efficacy. The Court has an original jurisdiction (Review *Principalitur*) when it is appealed through the *Ações Diretas de Inconstitucionalidade*, *Ações Declaratórias de Constitucionalidade*, *and Ação Direta de Inconstitucionalidade por omissão*[10]. It is interesting to note that before 1988, in Brazil, the Attorney General of the Republic was the only entity with the authority to file a direct appeal (*Ações Diretas de Inconstitucionalidade*) to the Court. But in 1988, in order to ensure the effectiveness of access to constitutional justice, the National Constituent Assembly created a whole new system of adequate judicial means aimed at protecting different legal interests[11] by widening both the number of constitutional actions that could be enacted to access the

[8] Brazilian Federal Constitution of 1988, Art. 103.

[9] The decisions rendered by the inferior courts may be directly appealed to the *Supremo* through a special remedy called *Recurso Extraordinario*.

[10] Mendes & Gonet Branco, *Curso de direito constitucional*, cit., p. 934 ss.

[11] *Ibid.,* p. 987.

Court and the number of subjects entitled to activate such actions[12].

The Federal Constitution of 1988, as highlighted by Justice Mendes, took on the perspective of the "Constitutional State" along the lines outlined by Peter Häberle. In general, a Constitutional State by definition is avulsed from a merely formal perspective of democracy, and it is instead committed to substantial democracy, founded on "non-negotiable values"[13] and specifically: (i) human dignity as an anthropological-cultural premise; (ii) popular sovereignty and division of powers, (iii) fundamental rights and tolerance; (iv) plurality of parties and independence of the courts, that is, as pluralist democracy, as an open society[14]. In other words, as Mendes recalled, the main function of a Constitutional State is to place the power of the State in the condition of defender of these fundamental rights[15]. And it was such attention to fundamental rights, the protection of which inspired the creation of specialized constitutional courts in many civilized countries, such as Italy and Germany, that made them overcome a period of authoritarianism after the Second World War. In this regard, the Justice pointed out that after all the atrocities committed during the war, the West found another way to balance the political need to create a territorial unit with effective command power with the need to restrain states' power.

Justice Gilmar Mendes concluded this comparative-historical analysis with a brief mention of the German Constitutional experience, due to its huge influence on the study of comparative law. In his book *Jurisdição constitucional* he argued that the abstract judicial review exercised by the *Bundesverfassungsgericht*, endowed with such power from its very first establishment, enjoyed a firm stability thanks to the political relevance of the issues brought in front of the Court.[16] In referring to such abstract control Justice Mendes talks about the "dual function of judicial review" of the

[12] Art. 103 Brazilian Federal Constitution of 1988: For instance, currently, if a political party has at least one member that has been elected to the Parliament it could directly appeal to the *Supremo Tribunal Federal* through the direct action of unconstitutionality.

[13] Justice Gilmar Mendes here quoted G. ZAGREBELSKY, *Il Diritto Mite*, Il Mulino, Bologna 1992.

[14] P. HÄBERLE, *El Estado Constitucional*, Trad. Hector Fix-Fierro, Universidad Autônoma de México, México D.F. 2001, p. 7.

[15] M. KRIELE, *Introducción a la teoría del Estado: fundamentos históricos de la legitimidad del Estado constitucional democrático.* Trad. Eugênio Bulygin, Depalma, Buenos Aires 1980, pp. 149-150.

[16] *See* generally, MENDES, *Jurisdição Constitucional*, Saraiva, São Paulo 2004.

Bundesverfassungsgericht: in fact, if on one hand, the Court acts as a defender of the Constitution, by eliminating unconstitutional laws from the legal system (*função de defesa*)[17], on the other hand, it affirms the "existence of unconstitutionality, beating doubts about the [*certezza del diritto*] (*segurança jurídica*)[18]. This point was specifically re-addressed by the Justice during the lecture where he noted, quoting Peter Badura, that the nature of the constitutional body of the *Bundesverfassungsgericht* derives from "its own political responsibility to maintain the rule of law and its regular capacity to function"[19].

The second part of the lecture was opened by Justice Gilmar Mendes with a quote from the former President of the *Bundesverfassungsgericht* : "Skepticism and discredit toward the law are widely echoed whenever political debate becomes radicalized, where the struggle for balance and compromise gives way to mere vilification of the political opponent, and the political and social factors of order in society are fundamentally challenged"[20]. Mendes used this quotation as a trigger for addressing a crucial issue that has been affecting Brazil in the last years: the enormous polarization of the entire country. At the end of 2018 the polarization between the *Partido dos Trabalhadores* and the supporter of former President Jair Bolsonaro, who was defeated on the 30th of November 2022 by Ignacio Lula da Silva, raised a peak. In the elections of 2018, Jair Bolsonaro, by embracing the values of the far right[21], presented himself as the alternative to the establishment after Lula's conviction for money laundering in 2017 to 18 months in prison as a result of the investigation "*Lava Jato*"[22]. Lula, who

[17] *Ibid.*

[18] *Ibid.*

[19] In the original version: "Aus der Verfassungsorganqualität des Gerichts desseneigene politische Verantwortlichkeir fiir die Erhaltung der rechtsstaatlichen Ordnung und ihrer Funktionsfähigkeit", P. BADURA*, Die Bedeutung von Präjudizien im öfffentlichen Recht*, in U. BLAUROCK & W. FIKENTSCHER, *Die Bedeutung von Präjudizien im deutschen und im französischen Recht*, 1985, p. 49.

[20] A. VOSSKUHLE, *Die Zukunft der Verfassungsgerichtsbarkeit in Deutschland und Europa,* Berlin 2021, p. 350.

[21] For further references *see generally* T.G. DALY, *Populism, Public Law, and Democratic Decay in Brazil: Understanding the Rise of Jair Bolsonaro*, (March 11, 2019). This paper was prepared for the 14th International Human Rights Researchers' Workshop: 'Democratic Backsliding and Human Rights', organized by the Law and Ethics of Human Rights (LEHR) journal, 2-3 January 2019, available at SSRN: <https://ssrn.com/abstract=3350098>.

[22] Bloomberg, 'Lula Hunkers Down in Union Office After Arrest Deadline Passes' <https://www.bloomberg.com/news/articles/2018-04-05/brazil-s-former-president-lula-ordered-arrested-by-judge-moro?leadSource

represented and still represents the left wing, despite his conviction, tried to run again for Presidency in 2018, but his candidacy was rejected almost unanimously by the *Supremo Tribunal Eleitoral* [23]. Eventually, in 2021 the *Ministro Relator* of the *Supremo Tribunal Federal* Edson Fachin annulled all Lula's convictions, by declaring the incompetence of the judge who prosecuted and tried Lula da Silva[24].

In such a chaotic context, the paradigm of 2018's political campaign was subject to a radical change: political propaganda shifted from dominating TV and Radio to social media. As well explained by the Justice during the lecture with a tone of harsh criticism for such phenomenon, the development of technological processes related to the (ab)use of social media and big data analysis undermined the reliability of information and put in doubt the ability to govern ourselves as reasonable democracies. And it comes as no surprise that this huge polarization, augmented with the spreading of social media as a primary channel of communication, led to the spread of fake news on the Judiciary, and especially on the *Supremo.* But the inertia of the competent institutions that were supposed to persecute such dissemination of fake news induced the *Supremo Tribunal Federal* to act. In 2019, as reminded by the Justice during the session, Justice Dias Toffoli opened an inquiry[25] to investigate and repress this fraudulent news, threats, and slanderous accusations made by the supporters of Jair Bolsonaro against the honorability and safety of the *Supremo*, its members, and family members. Nevertheless, it was particularly difficult to differentiate criticism an inherent part of democracy, and threats that can fall under the label of "crimes". The situation got more complicated when Justice Alexandre de Moraes became the *Ministro Relator* of the

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[23] Supremo Tribunal Eleitoral, 'TSE Indefere Pedido de Registro de Candidatura de Lula à Presidência Da República' <https://www.tse.jus.br/comunicacao/noticias/2018/Setembro/tse-indefere-pedido-de-registro-de-candidatura-de-lula-a-presidencia-da-republica>.

[24] Reuters, 'Brazil's Supreme Court Confirms Decision to Annul Lula Convictions' <https://www.reuters.com/world/americas/brazils-supreme-court-confirms-decision-annul-lula-convictions-2021-04-15/>.

[25] Supremo Tribunal Federal, Portaria GP Nº 69, de 14 de março de 2019, available at: <https://www.conjur.com.br/dl/comunicado-supremo-tribunal-federal1.pdf>. *See also*: Consultorio Juridico, 'Toffoli Abre Inquérito Para Apurar Ameaças a Ministros e Ao Supremo' <https://www.conjur.com.br/2019-mar-14/toffoli-abre-inquerito-apurar-ameacas-ministros-tribunal>.

investigation[26]. Although this very last issue was not discussed in the panel, it is worthwhile to say a few words on the matter by reporting one of the most controversial events as a matter of example.

On the 11th of April 2019, the Journal Crusoè published a reportage[27] in which the Brazilian entrepreneur Marcelo Odebrecht, during the trial against him in the Federal Court of Curitiba related to the inquiry *Lava-Jato*, exhibited a document in which he clarified that a person mentioned in an email as the "friend of my father's friend", was Dias Toffoli, a Justice of the *Supremo Tribunal Federal,* who, at the time, was the *Advogado Geral da União*. In brief, by making this claim, the entrepreneur accused Justice Toffoli to be engaged in the huge corruption scheme of *Lava-Jato*. As a consequence, Justice Toffoli who argued that such claims were "... lies and attacks... disseminated by people who want[ed] to attack Brazilian institutions"[28], asked Alexandre de Moraes to verify the truthfulness of the information. Indeed, de Moraes subsequently order the removal of all reports and notes that mentioned Justice Toffoli and summoned those responsible to testify within 72 hours: he explained that such measures could not be classified as censorship and that there was "clear abuse in the content of the matter conveyed"[29]. It goes without saying that de Moraes' decision was highly controversial and strongly criticized by several organizations as the National Newspaper Association (ANJ) and the National Association of Journal Editors (ANER), which express their profound objection to press censorship[30]. Eventually, Justice de Moraes revoked the

[26] Gazeta do Povo, 'Alexandre de Moraes é o Novo Relator Do Inquérito Que Apura Interferência Na PF' <https://www.gazetadopovo.com.br/republica/breves/alexandre-de-moraes-novo-relator-inquerito-interferencia-policia-federal/>.

[27] Crusoè, 'O Amigo Do Amigo de Meu Pais' <https://crusoe.uol.com.br/edicoes/50/o-amigo-do-amigo-de-meu-pai/>. For a detail explanation *see also* O Globo, 'Entenda o Inquérito de Toffoli Sobre Ameaças e Fake News Contra o STF e a Crise No Judiciário' <https://oglobo.globo.com/politica/entenda-inquerito-de-toffoli-sobre-ameacas-fake-news-contra-stf-a-crise-no-judiciario-23604184>.

[28] O Globo, 'STF Censura Sites e Manda Retirar Do Ar Reportagem Que Cita Dias Toffoli' <https://oglobo.globo.com/brasil/stf-censura-sites-manda-retirar-do-ar-reportagem-que-cita-dias-toffoli-23600856>.

[29] *Ibid.*

[30] Folha de S. Paulo, 'Entidades de Imprensa Criticam Censura Do STF a Reportagem Sobre Toffoli' <https://www1.folha.uol.com.br/poder/2019/04/entidades-de-imprensa-criticam-censura-do-stf-a-reportagem-sobre-toffoli.shtml>. Some scholars also criticized the *quomodo* in which the investigation was conducted. For instance a Professor of Constitutional law of the Fundação Getúlio Vargas,Michael Mohallem, pointed out that "[it was] a

decision that censored Crusoè's reportage, excluding its unreliableness[31].

Now, returning to the spread of fake news, Justice Mendes could not fail to mention in the discussion also what happened with the outbreak of the Covid-19 pandemic, where, using his words, the *Supremo Tribunal Federal* once again found itself in the "crosshairs of extremists": social acceptance of the measures restricting individual liberties, and thus public policies, such as the obligation to wear masks in public or the banning of mass events, were attacked and discredited by extremist political groups. Within this political context, the *Supremo* developed the so-called "*jurisprudência da crise*": the constitutional control of laws and administrative measures required the *Supremo* to employ a "constitutional hermeneutic" that was open to social understanding and in accordance with the economic and social reality at hand. In particular, the Court delivered judgments on issues concerning mandatory vaccination and vaccine imports. Interestingly, as Justice Mendes recalled, there was a case in which the *Supremo* decided on the deadline for the National Health Surveillance Agency to issue an opinion on vaccine imports directly by Member States, since the Federal Government was manifestly omissive on the matter[32]. Another case concerned the adoption of measures restricting freedom of movement during the pandemic.

In general, in accordance with Article 196 of the Federal Constitution (1988), health is a right of all and a duty of the State, guaranteed through social and economic policies that aim to reduce the risk of disease […]. Therefore, theoretically, the competence in issuing such measures should be of the Central Government. In the case at hand, the central Government (Union) was trying to prevent Member States and

risk to open an inquiry like this, where the investigator himself is the alleged victim. The judge of the case cannot be the victim himself"(O Globo, 'STF Censura Sites e Manda Retirar Do Ar Reportagem Que Cita Dias Toffoli' <https://oglobo.globo.com/brasil/stf-censura-sites-manda-retirar-do-ar-reportagem-que-cita-dias-toffoli-23600856>). Further, Adriana Rocha Coutinho, Professor of Constitutional Law at the Catholic University of Pernambuco, interestingly underlined that "[…]in this investigation, [there was] an excessive concentration of powers in the Supreme Court and the usurpation of a function that was not granted to it and that [belonged] to the Public Prosecutor's Office (BBC News Brasil, 'Vítima, Investigador e Juiz Em Um Só: Inquérito de Toffoli Deixa Fraturas Na Relação Do STF Com Os Outros Poderes' <https://www.bbc.com/portuguese/brasil-47992337>).

[31] 'Inquérito 4.781 Distrito Federal', Ministro Relator Alexander de Moraes, *Brasília, 18 de abril de 2019* <http://estaticog1.globo.com/2019/04/18/INQ478118abril.pdf?_ga=2.85749917.507926723.1668012123-1199409009.1667315638>.

[32] ACOs 3497, 3500 e 3505, Rel. Min. Ricardo Lewandowski, Plenário Virtual, julg. em 24.5.2021.

Municipalities from adopting measures restricting the liberty of movement of people, since it claimed to have an exclusive competence under the Constitution. The issue was ultimately brought in front of the *Supremo* which ruled that the task of fighting the pandemic, and therefore the competence of enacting such measures was not exclusive of the Union (*União)*, but rather of all federal entities[33]. Justice Gilmar Mendes, in his final remarks, underlined that this case is particularly interesting also because it shows how the dynamics of fake news work in the Brazilian political process: after the decision of the *Supremo*, former President Jair Bolsonaro deceitfully claimed that the reason why he failed to fight the Covid-19 pandemic was that the *Supremo Tribunal Federal* "did not let him act in accordance with his plans"[34]. With no surprise, the *Supremo Tribunal Federal* denied those claims by firmly stating that: "the Plenary decided, at the start of the pandemic in 2020, that the Union, the states, the Federal District, and the Municipalities have concurrent competence in the area of public health to carry out actions to mitigate the impacts of the new coronavirus. This understanding has been reaffirmed by the Justices of the *Supremo Tribunal Federal* on several occasions"[35]. In this regard, Justice Mendes closed the session by pointing out the need to be alert to the harassment that governments launch against the Judiciary, especially Constitutional Courts. In his words, "the survival of civilization against barbarism requires resolutely fighting movements that defend a simplistic understanding of constitutional jurisdiction; the Republic and democracy, today, make us a call: they demand that we are always vigilant".

At this point, it is worth making a few more remarks[36] on this very last case that was mentioned by Justice Gilmar Mendes at the end of the lecture. Indeed, what the

[33] ADIs 6341 e 6343, Rel. Min. Marco Aurélio, Red. para acórdão Min. Edson Fachin, Plenário, julg. em 15.4.2020.

[34] In his words, "If the Supreme Court hadn't prohibited me, I would have a different plan than what was done, and Brazil would be in a completely different situation" (Consultorio giuridico, "Bolsonaro tenta imputar ao STF omissão do governo federal para agir na epidemia", <https://www.conjur.com.br/2021-jan-15/bolsonaro-tenta-imputar-stf-omissao-governo-epidemia>).

[35] Supremo Tribunal Federal, Esclarecimento sobre decisões do STF a respeito do papel da União, dos estados e dos municípios na pandemia, <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=458810&ori=1>.

[36] It has to be noted that the issue that is about to be addressed in the following lines was not expressly analyzed by the Justice during the session.

Court did on that occasion was essentially creating a new legal norm: in fact, if under the Brazilian Federal Constitution the competence over health issues is a matter of the Central Government, the *Supremo*, in order to contrast the pandemic, extended this power to all federal entities. This type of ruling can fall under the label of what scholars have defined as "judicial activism". In general, Elival Silva Ramos has defined judicial activism as a dysfunction of the legislative process, that is the result of the exercise of Judicial Powers beyond the limits that have been imposed by the Constitution, interfering in the legislative function[37]. Hence, judicial activism would be realized mainly when the Constitution is directly applied in non-expressly provided circumstances[38]. In order to avoid such crossing of demarcation lines of the judicial function, to the detriment mainly of the legislative function, the 1937 Brazilian Constitution expressly provided the incompetence of the Judiciary to analyze political issues. But with the advent of the Federal Constitution of 1988, the new transformation of the relations between democracy and constitutionalism lead to the attribution to the Tribunal of new powers. In fact, with the Constitution of 1988, the Brazilian democracy went from being more constitutional than democratic, and the *Supremo* moved to occupy the position of "*órgão de cupula*"[39]. Subsequently, from 2000 society continued to grant the *Supremo* even more powers not originally provided by the Constitution[40], and therefore the Court started to influence the agenda of Congress, by deciding issues of competence of the Legislative Branch[41]. Thus, it is safe to say that in the last years the legitimacy crisis that the Legislative Branch has been facing has led to the expansion of judicial powers, particularly of the *Supremo* in the name of the Constitution[42].

Former Justice of the *Supremo Tribunal Federal* Celso de Mello – during the

[37] In his view, "por ativismo judicial deve-se entender o exercício da função jurisdicional para além dos limites impostos pelo próprio ordenamento que incumbe, institucionalmente, ao Poder Judiciário fazer atuar, resolvendo litígios de feições subjetivas (conflitos de interesse) e controvérsias jurídicas de natureza objetiva (conflitos normativos)", Elival Da Silva, Ramos, *Ativismo judicial: parâmetros dogmáticos*, Saraiva, São Paulo 2010, p. 129.

[38] L.R. Barroso, *Judicialização, ativismo judicial, e legitimidade democrática*", in «*Anuario Iberoamericano de Justicia Constitucional*», 2009, p. 22.

[39] O.V. Viera, *Império da lei ou da Corte*?, in «*Revista USP*», 1994, pp. 71-77.

[40] Brazilian Federal Constitution of 1988, Art. 102.

[41] S.T. Leal, *Ativismo Ou Altivez? - O Outro Lado Do Supremo Tribunal Federa*, Editora Forum, 2010, p. 159.

[42] Barroso, *Judicialização, ativismo judicial, e legitimidade democrática*, cit., p. 24.

speech held within the establishment of Gilmar Mendes to the presidency of the *Supremo Tribunal Federal* – claimed the need the judicial activism in order to make the Constitution prevail. In his belief, judicial activism is a "*necessidade institucional*", when inaction of public powers occurs, offending and disregarding the Constitution and the principles on which it is based[43]. Contrarily, the opponents of judicial activism often claim that it implies: 1) a weakening of the other branch of the government; 2) a lack of political and democratic participation; 3) an overexposure of the Judiciary[44].

Nevertheless, as it is known, the truth is in the middle: as long as judicial activist decisions are rendered by the *Supremo* as a reaction to the need for the protection of fundamental constitutional values, and thus in order to prevent a potential violation of such principles[45], it is the Constitutional Text of 1988 itself that legitimates the use of judicial activism, through the granting to the Court of wider powers[46], which also "allows the Tribunal to adapt and update the Constitution to the new historical circumstances and social demands, acting as a co-participant of the modernization process of the Brazilian State"[47].

[43] Speech given by Minister Celso de Mello on behalf of the Supreme Court, at the inauguration ceremony of Minister Gilmar Mendes, as President of the Supreme Court of Brazil, pp. 11-13, 29/04/2009.

[44] *Estado de Direito e Ativismo Judicial*, edited by Josè Levi Mello do Amaral Jr., Quartier Latin, Brazil 2010, p. 170.

[45] *Ibid.,* p. 168.

[46] "Não é por razoes ideológicas ou pressão popular. E' porque a Constituição exige. Nós estamos traduzindo, até tardiamente, o espírito da carta de 88, que deu a corte poderes mais amplos", Gilmar Mendes, *Jornal Folha de São Paulo*, 10/08/2009, primeiro caderno.

[47] Interview of Justice Celso de Mello to Marcio Chaer, director of the journal *Consultroio Juridico*, available at: <http://www.conjur.com.br/2006-mar-15>.