

Emperor or president? Understanding the (almost) unlimited power of the Brazilian Supreme Court's President

Imperador ou presidente? Compreendendo o (quase) ilimitado poder do Presidente do Supremo Tribunal Federal

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Abstract

This research's question is "is it possible to explore the constitutional and internal norms that regulate the actions of STF's President in order to identify: decision-making process in the court and/or accountability according to the principles of the rule of law?" Primarily, it is necessary to acknowledge STF structure. There were 57,056 actions – up until August 24, 2015 – awaiting appreciation at Brazilian Supreme Court, according to data provided by the institution itself. Later, one needs to comprehend how the internal procedure to organize its schedule works. Internal rules grant the President of the Supreme Court the power to decide about what will be heard by the ministers, although normative responses about criteria taken into account are obscure or, at least, insufficient, for their lack of objectivity. This paper posits that, if "first come, first heard" is not the most important criteria in scheduling, the course of the cases in the court are subjected to the President's whim, and hence there are no legal limits for his or her decisions. Furthermore, the President is not selected for this specific task by any authorities, but elected by his or her peers – according to a tradition that dictates that the oldest in court should be president. The social accountability of a court renowned for the wide publicity – live broadcast on TV and radio, Twitter e Youtube, and others – contrasts with the comparative lack of control over its trial schedule. This research describes the consequences of these factors over the court's schedule and reflects upon its democratic accountability.

Keywords: Brazil's Chief Justice. Brazilian Supreme Court. Scheduling.

Sumário

Esta pesquisa propõe a seguinte pergunta: "é possível explorar as normas constitucionais e internas que regulam as ações do Presidente do STF a fim de identificar: o processo de tomada de decisão no tribunal e / ou prestação de contas de acordo com os princípios do Estado de Direito?. Inicialmente, é necessário reconhecer a estrutura STF. Houve 57.056 ações - até 24 de agosto de 2015 - aguardando apreciação no Supremo Tribunal Federal, de acordo com dados fornecidos pela própria instituição. Depois, é preciso compreender como funciona o procedimento interno para organizar seu cronograma. As regras internas conferem ao Presidente da Suprema Corte o poder de decidir sobre o que será ouvido pelos ministros, embora as respostas normativas sobre os critérios tomados em consideração sejam obscuras ou, pelo menos, insuficientes, por sua falta de objetividade. Este artigo postula que, se "primeiro a chegar, primeiro ouvido" não é o critério mais importante na programação, o curso dos casos no tribunal estão sujeitos ao capricho do presidente e, portanto, não há limites legais para suas decisões. Além disso, o presidente não é selecionado para esta tarefa específica por quaisquer autoridades, mas eleito por seus pares - de acordo com uma tradição que determina que o mais antigo no tribunal deve ser presidente. A responsabilidade social de um tribunal reconhecido pela ampla publicidade - transmissão ao vivo na TV e rádio, Twitter e Youtube e outros - contrasta com a falta comparativa de controle sobre o cronograma do julgamento. Esta pesquisa descreve as conseqüências desses fatores sobre o cronograma do tribunal e reflete sobre sua responsabilidade democrática.

Palavras-chave: Presidente do STF. Supremo Tribunal Federal. Agendamento.

1 Introduction: An overburdened court, able to interfere widely in the political system, at the discretion of a single person

Brazil, after its independence, converted into a hereditary monarchy, as posited by the 1824's Political Constitution of the Empire of Brazil, bestowed by the heir to the Portuguese crown D. Pedro I – who afterwards became (additionally) “Constitutional Emperor and Perpetual Defender of Brazil”¹. This constitution established that the “Person of the Emperor is inviolable and Sacred: He is not subjected to any responsibility” (art. 99) (BRASIL, 1824).

The monarchical period was relatively long, considering the country's customary political instability and the seven constitutions it has had throughout its history. With the end of monarchy and the establishment of the republic in 1889, the American-style democratic institutions were set up: federalism, the presidential system, and constitutional preeminence (with the adoption of judicial review). At the top of the judicial branch, there was the Supremo Tribunal Federal (STF), created by the Decree n. 848 from October 11, 1890; modeled after the American Supreme Court. We may consider that the adoption of the republican model indicates the end of any imperial impulses that could have been present in the system, since there were now clear attributions, prerogatives, and channels of accountability. However, is this really the case?

The institutional design of 1988's Constitution (BRASIL, 1988) introduced a new characteristic: as the purpose was strengthening constitutional democracy, the Judiciary branch was conceived as a regulator and restrainer to the acts of the Legislative and Executive branches. Although the “juristocratic” model (HIRSCHL, 2004, p. 5-16) is not exclusive to Brazil, it reinforces the prominence of the judicial branch, despite its appeals to impartiality in the enforcement of the law.²

Besides the classic judicial review instruments, concrete and abstract constitutional controls (respectively, the North American and European models), the 1988's Constitution establishes in the 102 article an extensive list of powers to the Federal Supreme Court. Well-known institutions were maintained, such as the possibility of filing a writ of mandamus³ against the President of the Republic and the chairs of the Chamber of Deputies and the Federal Senate. In addition, new instruments were created, such as the injunction mandate, which allows the court to supply the norms as necessary for the exercise of constitutional liberties and rights, as well as the inherent prerogatives to nationality, sovereignty, and citizenship.

1 The tension between absolutism and liberalism in Brazilian Imperial Constitution and the wide powers of Dom Pedro is described by Rosenfield et al. (2015, p. 133).

2 “Ministers do not deny their political role, but they attempt to set themselves apart by framing their actions under values of impartiality, transparency, and judicial security – all typical values of the judicial world, associated to professionalism.” (OLIVEIRA, 2011, p. 27).

3 Provision in the 1988's Constitution intended to protect individual rights in case there has taken place, or it there is rightful concern there will take place, an illegal or abusive act by a public authority against a private citizen or corporation. (art. 5, LXXI) (BRASIL, 1988).

Thus, we can state that the constitutional text itself paves the road for the political interference by the judicial branch, eventually filling in the gaps left by the elected authorities, even if left for purpose. To do so, it only needs to be called upon by one of the judicial instruments provided by the Constitution. There are many ways to provoke it into action. Such a large amount of legal actions indicates that STF cannot be regarded as a regular court. It should be analyzed as a complex organizational structure, given its institutional imperatives. The court's competencies are listed in the 1988's Constitution and in the internal regiment developed and approved by a plenary organ⁴, which regulates its protocols, determining competencies and responsibilities of each minister, including the President's.

Thus, each month the STF receives thousands of legal actions. Nevertheless, one question remains: when will they be appraised? As such, the President has wide powers, for they can determine the schedule of the court, directly influencing not only the relationship between the court and society, but also the balance between the branches of the state. It is worth noticing that, despite the prominent role the STF occupies in the public arena given the intense judicialization of politics (VIANNA, 1999, p. 48-53), its decision dynamics have received little attention by academia⁵.

The present paper attempts to mitigate that problem. We will explore the constitutional and regimental norms, which regulate the actions of STF's President in order to identify their role in shaping the court's decision-making process. We will also try to verify whether the court's ministers are adequately accountable according to the principles of the rule of law.

Here, we will propose a normative investigation of how such an important piece is chosen in the Brazilian political chess match, highlighting the actions the President of the STF is allowed to take and establishing (at least initially) how this actor is able to articulate his or her own goals just by setting the schedule of the court.

2 Judicial accountability and the extent of power: The multiple competencies of the Supremo Tribunal Federal (STF)

Accountability is fundamental to democracy and to the rule of law, since it entails that a state agent or institution should inform or otherwise justify themselves to the

4 Organ of which all Federal Supreme Court's ministers are part, and whose main competencies are the judging of penal legal actions for common crimes and crimes against the President of the Republic, the Vice-President of the Republic, the President of the Federal Senate, the President of the House of Deputies, the Ministers of the Federal Supreme Court themselves, the General Prosecutor of the Republic; the litigations between foreign states or international bodies and the Federal government, the States, the Federal District, and the Territories, or between one of the aforementioned; any injunction or mandamus against the Presidency, or the boards of the House of Deputies, the Federal Senate, the Federal Supreme Court; actions by the Federal government against state governments, or by one of the states against any other; as well as the so-called direct action of unconstitutionality (DAU), the direct action of constitutionality by omission (DAO), the arguing of infringement of fundamental principle (AIFP), and the declaratory action of constitutionality (DAC) (BRASIL, 2016).

5 We should highlight Falcão et al's (2014, p. 11-ss) research, which explores the role of time and the relevance of monocratic decisions in STF's functioning.

public when exercising their functions and roles, delegated by the state. Failure to do so may result in political, public, institutional or judicial sanctions (TOMIO; ROBL FILHO, 2013, p. 30-32).

The checks and balances system present at state level, through oversight bodies, should be able to force the public agent to make decisions that are adequate to their functions, driving out the extraneous interests to the performance of public duties according to the law.

It should not be different in the judicial branch. However, in this instance, accountability is limited by judicial independence (administrative and decision autonomy) – another important feature of democracy. Thus, accountability mechanisms should be balanced against the protections afforded by the Constitution to judicial independence. Naturally, it is very difficult to establish such a balance. Indeed, power and accountability are inherently related to the notion of judicial responsibility (CAPPELLETTI, 1989, p. 17).

Accountability can be either typical vertical or social vertical. Typical vertical accountability is fulfilled through elections, which afford the citizen the ability to punish or reward public actors with their vote. Its efficacy is dubious, however, since in many electoral systems, high volatility of voters and parties, ill-defined public discussion, and sudden political upheavals may prevent it from working adequately (O'DONNELL, 1998, p. 40). Social vertical accountability, on the other hand, takes place whenever society and the press publicly expose, or otherwise denounce, state agents, whether elected or not (TOMIO; ROBL FILHO, 2013, p. 30). To do so, they use their ability to influence the public agenda, creating a faux environment where they can emphasize certain issues, or highlight an otherwise unimportant fact, generating significant consequences (MCCOMBS, 2009).

Now, horizontal accountability takes place whenever the state agents or institutions themselves request information from other state agents or institutions in order to exercise oversight and enforce sanctions. According to Guillermo O'Donnell (1998, p. 40), this type of accountability is only ever effective in a scenario where there are state agencies able and willing to supervise, control, and punish actors from other agencies. Being able to do so requires not only the existence of legal authority, but also sufficient autonomy between the overseers and the overseen.

However, these two factors may not be sufficient to bring about effective accountability. Despite the ability by the overseers to mobilize public opinion with their procedures, without the courts' or the legislators' commitment to enforce their ultimate decisions, offending state parties would not be reprimanded and, consequently, their social punishment would not fit their actions.

According to Fabrício Tomio and Ilton Robl (2013, p. 30), horizontal accountability can manifest itself in four different ways: (i) decisional, as it allows

the request of information and justification of judges concerning their decisions; (ii) behavioral, as it pertains to the receiving of information and justification about the behavior of judges (including their honesty, integrity, productivity, etc); (iii) institutional, regarding information and justifications about non-judicial institutional actions; and (iv) legal, which covers information and justifications about the enforcement of the law. In each of these cases, there is the possibility of sanctioning the actors in the event of failure to act properly.

Horizontal accountability is the most applicable to the Brazilian judicial system, given the extensive constitutional guarantees⁶ created to secure the judicial independence after redemocratization.

That is why the Conselho Nacional de Justiça (CNJ) was created: to promote a “partial redesign to the relations between the administrative, disciplinary, budgetary, and financial powers” (TOMIO; ROBL FILHO, 2013, p. 41-42). It does not possess, however, any supervising powers over the STF.

Even before the President of the Republic sanctioned the constitutional amendment n. 45/2004 (BRASIL, 2004), the Brazilian Magistrates Association (AMB) filed the direct unconstitutionality action n. 3,367 (BRASIL, 2005), wherein it was decided unanimously that the CNJ would be merely administrative in nature – being hierarchically below the STF, and without power to oversee the STF or its ministers. The decision maintained that judicial independence requires such arrangement.

For those reasons, the STF is not accountable to neither typical vertical instruments nor horizontal. There is no interference in any of its administrative or judicial decisions, especially regarding their scheduling arrangements for trials and votes at the Plenary. There is also no regulation of the specific criteria that justify the order in which cases are heard. In addition, why would that be necessary?

The STF is more than a regular court responsible for judicial review according to the Constitution. It has multiple competencies that, combined, concentrate power in a way that enables it to influence directly the many political actors in society.

Besides judicial review – concentrated and diffuse –, the STF is responsible for judging common penal infractions and responsibility crimes committed by ministers of state, Army, Navy, and Air Force commanders, members of higher courts, of the Federal Accounts Court, and permanent mission diplomatic chiefs. It also judges common penal infractions committed by the President of the Republic, the Vice-

6 The 1988's Constitution established institutional and functional guarantees for the Judicial Branch. The institutional guarantees are: (i) self-governance (courts elect their board of directors and write their own internal regulations, as well as set up public tenders to hire new judges); (ii) the competence to introduce laws to regulate the activities of the agents of the judicial branch, being able to set the number of members of lower courts, the creation or abolition of lower courts, and changes to the organization of the judicial system; (iii) financial administration, presenting their own budget. In addition, there are functional guarantees to the judges' work: (i) lifetime employment; (ii) immovability – that is, the impossibility of taking them off their duty without their agreement; and (iii) irreducibility of pay (TOMIO; ROBL, 2013, p. 40-41).

President of the Republic, members of the National Congress, its own ministers, and the General Attorney of the Republic. Additionally, the Court judges writs of mandamus and injunctions against acts of the Presidency and the boards of the two houses of Congress. These are, however, just a few of the attributions of Brazil's highest court. Combined with an expansive jurisprudence, supported by the principle of unwavering jurisdiction (that means the court is called upon to judge several demands that go well beyond the general "guardianship of the Constitution"), it speaks on public policy, on procedures of the houses of the National Congress, on their powers, and so on.

According to the "Supremo em Números" report, after analyzing 1,222,102 processes at the STF between 1988 and 2009, we are able to identify 52 types of actions that are able to reach the court. The response to such a varied array of demands is that the STF works as three types of different "courts," having three personalities (persona) in a single institution: it is at the same time a constitutional, appeals, and common court. (FALCÃO; CERDEIRA; ARGUELHES, 2011, p. 16). As such, research about the "time" factor has attracted many researchers and papers, which identify the obstacles to the employment of a "reasonable timetable" at the Supreme Court (FALCÃO; HARTMANN; CHAVES, 2014, p. 20-21; ARGUELHES, 2014; LIMA, GOMES NETO, 2016, p. 9-12).

Given the thousands of important actions and themes that await closure, much attention is directed towards STF's schedule. Following the court, we can clearly see that the Plenary sessions judge actions of many types, but in a court that concentrates the Brazilian "social consciousness in Justice" – a phrase coined by Ingeborg Maus (2000, p. 128-129) –, disregarding traditional democratic representative institutions, it is urgent to understand the criteria used by the Court's President and how their schedule works.

Despite the strengthening of the STF and the creation of normative conditions by the 1988's Constitution for STF's appraisal of the most important themes of national politics (CARVALHO NETO, 2010, p. 177), there is no regulation over the Court's exercise of its responsibilities. Such regulation would have to come from common legislation, as it would establish rules to the several judicial institutions that are available to the actors able to provoke STF into action. Undoubtedly, we should also turn to the Court's internal regiment to understand its procedures (BRASIL, 2016).

Nevertheless, there are no rules establishing clear guidelines to the court's schedule. Current procedural law only establishes that cases where there are parties over the age of 60 should have priority (article 1048) (BRASIL, 2015), as should a few other instances covered by the Child and Adolescent Statute (BRASIL, 1990).

The 145 article of the internal regiment establishes a few judging priorities: habeas corpus, extradition requests, criminal cases – and, among these, the ones where

the defendant has been arrested –, jurisdiction conflicts, appeals from the Superior Electoral Court, writs of mandamus, complaints, representations, callback requests, and called back cases. However, it does not set objective requirements or criteria for the inclusion of a given process at the Plenary session, or at a Group session (where the President of the Group determines the order) (BRASIL, 2016).

Hence, the scheduling becomes a tool used by the Court to prioritize and select certain demands – something denied by the institutional design of the Court, since it is unable to waver jurisdiction. As such, the STF decides strategically what and when it judges whatever action, regardless of the time the action was introduced.

3 Designing competencies and the absence of limits: a super President

1988's Constitution ascribes President of the STF many roles. Besides their position at the Court, they manage the Judicial Branch itself, since they are at the apex of the complex Brazilian judicial system.

Among their many attributions as the main manager of trials at the court, the President of STF concentrates a relevant power over judges, because he or she holds the power to propose (complimentary) law bills to set rules for the members of the judicial branch career. They are able to establish the number of members of the lower courts; they can define the creation or extinction of lower courts; and generally alter the structure and divisions of the judicial system (article 93, II, Federal Constitution) (BRASIL, 1988).

Still, Brazilian Constitution also sets general salary regulations for all public agents – the payment in judicial branch; standards for minimum and maximum payment; the necessity of specific law, among other dispositions. At the top of the payment chain – for all government officials, including the President and the Members of Congress – stand STF ministers salary, whose wages are set by law proposed by the President of the institution him or herself.⁷

In this scenario, the president is not only an individual able to regulate the judicial branch, but also a representative of a specific class of officials – the judges. As such, they are able to effectively regulate the class' payments and benefits with other representative powers since they have at their disposal several tools of direct

7 The concern over the public agents' pay, above all the judges' pay, seems to be something specific to the Brazilian constitutional system and has been subjected to several changes by amendment. The pay scale for every level of the judicial branch is a constitutional matter as well. Article 93 states that “the wages for the Higher Courts ministers will be 95% of the monthly stipend set to the Federal Supreme Court Ministers, and the wages for the other magistrates will set by law and scaled, at federal and state level, according to the respective categories of the national judicial structure. The gaps may not go above 10% nor below 5%, nor go over 95% of the Higher Courts ministers' monthly stipend, according, in any case, to dispositions in articles 37, XI, and 39, § 4.” (BRASIL, 1988).

interference to the social life in the court. Such an arrangement may indeed distort the checks and balances of the system.

In addition to his or her regulatory roles, the STF President, by constitutional mandate (article 103-B, I § 1), is also the president of the CNJ – an exclusively administrative body, hierarchically below the Federal Supreme Court⁸ – responsible for financial and administrative oversight of judges. The Council submits a yearly report to Congress and proposes measures to take regarding judicial institutions.

Additionally, the President of the Federal Supreme Court may temporarily occupy a position in executive and legislative branches. He or she can be the last possible replacement to the President of the Republic after the Vice-President, the President of the House of Deputies, and the President of the Senate (article 80, Federal Constitution). For precisely that reason, the Constitution stipulates that only Brazilian-born citizens can be STF ministers (article 12, § 3, Federal Constitution) (BRASIL, 2016).

As for the latter case, they can hold a position in Congress only in an extreme scenario: in case of impeachment of high officials of the country. According to the article 52 of the Constitution, after a preliminary vote in the House of Deputies, the Federal Senate is responsible for judging members of the Executive branch, such as the President and the Vice-President, state ministers, and military commanders. The higher house (the Senate) is also responsible for the judgment process of judicial authorities: STF ministers themselves, the Prosecutor General and the Attorney General, and members of overseeing bodies (the National Justice Council and the National Prosecutor's Office Council). In these cases, the President of the STF occupies the Presidency of the Senate (article 52, single paragraph) to ensure the fulfilment of a “judicial-like’ function, in order to process and judge the accused.” In doing so, the process would be submitted to “judicial rules, however peculiar, that the legislator set previously and that are part of the political process” (BRASIL, 1993).

We should note that, given the judicial character of the actions for crimes of responsibility and a system that guarantees wide access to justice, it is possible to trigger the STF into action – by virtue of a privileged jurisdiction enjoyed by some parties – in order to control the procedures adopted in the Senate.

In short, the President of the STF is a party to the process to ensure it follows due legal process, and the Court itself evaluates the legality of the procedures. That much is especially relevant when we consider that the country recently finished the second impeachment process after the adoption of 1988's Constitution. The first one took place

8 “Exclusively administrative body. Responsible for administrative, financial, and disciplinary measures concerning magistrates. Its jurisdiction extends solely over judges and bodies hierarchically below STF. The later, being the most powerful institution in the judicial branch, has power over the Council, whose acts are subject to its jurisdiction. Intelligence from articles 102, caput, I, r, and 103-B, § 4, Federal Constitution. The National Justice Council doesn't have any competence over the Federal Supreme Court nor its ministers, being the latter the greatest power in the national Judicial Branch, to which it is subjected.” (BRASIL, 2006).

in 1992 and ousted Fernando Collor de Mello; now, Dilma Rousseff also left presidency before time.

This issue highlights the importance of the Court's actions, and hence the President's actions, in the Brazilian judicial system. The institutional arrangement proposed by the Constitution intended to redesign the "ways to decide the paths of national politics," strengthened the judicial branch in comparison to the executive (CARVALHO NETO, 2010, p. 177-186). The Constitution allows "political demands to be translated into judicial claims, enabling many different expectations and doctrines to arise in its name" (LIMA, 2014, p. 221).

Procedural responsibilities are not absent or less important. As a judge, the President of the STF is supposed to evaluate suspension requests⁹, bills of review, extraordinary appeals, and habeas corpus, until they are passed on to other ministers, in addition to deciding urgent issues during recess or vacation periods (article 13) (BRASIL, 2016) and tie-breaking votes as needed. Lastly, the President is responsible for the scheduling of the plenary sessions, and hearing cases of greater importance in the Court.

In managing this complex array of activities, there is only one individual: the Federal Supreme Court President.

4 Just another minister? The STF President and the Court's schedule

Having so many responsibilities, one would expect that the Supreme Court's President should be chosen specifically for the position, by vote or otherwise. In other case, it should be demanded of them not only a law training, but also education in management, human resources, and so on. However, that was not a concern of the actual Constitution apparently.

Interestingly, the United States' Supreme Court Chief Justice, which inspires the Brazilian model, also occupies the formal role of the head of the judicial branch. They preside over public sessions, signs the majority opinion when justified and oversees general administration of the judicial institutions. Much like the Brazilian counterpart, he or she is the leader of the federal justice in that country, and reports to Congress with the State of the Judiciary Address (BAUM, 2010, p. 13). Curiously enough, in the American system – aligned to the common law –, the Constitution did not stipulate a rule for the election of the Chief Justice, who may or may not be elected by his or her peers (BAUM, 2010, p. 13).

⁹ The suspension request is a tool of exclusive use by the Public Treasury and the Public Prosecutor's Office. It is judged by the presidents of the courts and intends to nullify the effects of immediate efficacy decisions against the government whenever such decision entails major damage to the public order, economy, security, or health (VENTURI, 2005, p. 26; NORTHFLEET, 2000, p. 183).

On the other hand, the Brazilian Constitution, in its article 101, established that the Court should be composed by “eleven ministers, chosen among citizens over 35 years of age and less than 65 years of age, notable for their judicial knowledge and pristine reputation” (BRASIL, 1988). The ministry is a lifetime position, but retirement is mandatory for ministers – as for other public officials – at 75 years of age¹⁰ That way, an individual may spend 40 years as minister of the Federal Supreme Court.

The Constitution replicates a complex historical rule for the STF: the President indicates a name that should be approved by a simple majority in the Senate after arguments (article 84, XIV). Differently from other judicial systems, the appointment to the STF is relatively stable, as the Senate usually ratifies the decision. Most recently, appointments have received a more intense scrutiny, due to a greater public participation and strengthening of the Court’s role in the country. An example of such scrutiny would be the appointment of well-known legal scholar Luís Edson Fachin.

There are no particular rules to the election of the Supreme Court’s President, since the Constitution left to the internal regiment the regulation of the procedures. Accordingly, the President is chosen among ministers by secret vote at the second ordinary session of the month prior to the end of the mandate, or at the second ordinary session immediately after vacancy of the post for any other reason. The mandate lasts two years, and the minimum quorum for the election is eight ministers.

Traditionally, the oldest minister who never has been President is selected for the position. Only President Getúlio Vargas attacked this tradition during the New State when he signed the Law-Decree n. 2,770/40, turning over to the President of the Republic the right to appoint, indefinitely, among the ministers, the President and the Vice-President of the Federal Supreme Court (VIEIRA, 2002, p. 121).

In analyzing the internal mechanism of the judicial institutions, the literature concludes that judges act strategically to get the best results out of their individual choices. The composition of the groups of judges in the courts can “amplify” or “weaken” individual preferences in the deliberations, which affects the ideology of judicial decisions (SUNSTEIN *et al.*, 2006, p. 147-150).

More than just uttering sentences, many opportunities to influence results allow judges to determine a specific schedule, taking up cases at the very moment they understand the court will align itself to their position. This “scheduling” may also imply a refusal to take cases that are too controversial. The procedures of the Federal Supreme Court open up possibilities such as: the guarantee of *certiorari* (court hearing), *conference vote* (definition of the procedures of the case), the decision of the reporting judge, in their own vote (to guarantee a majority), and, lastly, the decision to join the vote, presenting a concurring or dissenting opinion (BAUM, 2010, p. 92-95). Naturally,

10 In 2015, the Congress passed the Constitutional Amendment n. 88/2015, known as the Cane Project, which raised the age of mandatory retirement for public officials to 75 years of age, preventing President Dilma Rousseff from appointing new ministers for the positions currently filled by Celso de Mello (69) and Marco Aurélio (69) (BRASIL, 2015).

we, then, should conclude that an understanding of the judicial mechanisms has to take into account internal procedures of each court in addition to the interactions the court establishes with other judicial bodies, weighing the specificities of each procedural law system (WHITTINGTON; KELEMEN; CALDEIRA, 2008, p. 41-42)¹¹.

In Brazil, there is a lack of effective debate on how a minister will handle his or her duties as President, or even if their election would be convenient or not for the Court, taking into account his or her personal traits, and his or her relationships with other officials and institutions. No doubt, that is a strategic decision by the ministers who chooses to follow tradition, even though the internal regiment goes against it.

Not only does this election influence the management of the Court, but it also deeply affects the country's social life, which depends heavily on the schedule of the sessions. Neither the Constitution nor the internal regiment regulate how such scheduling occurs, so the President may exercise his or her discretion to determine what should go first.

Absent any rules, the need for transparency should be recognized, at least to follow the article 93, IX, Federal Constitution of 1988 (BRASIL, 1988), the article 165 of the Civil Procedural Law Code (CPC) (BRASIL, 2015), and many others, since the inclusion of a case for judgment results invariably in the "blocking" of other legal actions.

If the scheduling of the court is evidently strategic for the judicial, political, and social actions of the Federal Supreme Court, it should at least be supported by constitutional procedural guarantees, without prejudice to the normative provisions, transparency, and accountability. The need for a change in the regiment is indispensable, since every political decision should be subject to democratic control. As Minister Luis Roberto Barroso (2009, p. 2) stated, "public visibility contributes to transparency, social control, and, ultimately, to democracy."

5 Concluding remarks

The system of checks and balances created for the protection of constitutional democracy establishes the mutual interaction and supervision of the state branches, in a perpetual political chess match wherein the powers attempt to occupy political void. In this context, the Judicial Branch emerges as a significant power from the 1990s on, following a worldwide trend.

In Brazil, the 1988's Constitution establishes stark independence for the Judiciary, to the detriment of accountability instruments, more readily available in the Executive

11 In Italy, for instance, there is a strong interaction between ordinary judges and the higher court, for whatever issue is defined by the ordinary judge. The Constitutional Court, since the ruling n. 3 of 1956, has stipulated as its object the definition of a norm according to interpretations already established in the ordinary instances, avoiding possible dissent between magistrates and ordinary judges. Such doctrine has been called *diritto vivente* – living law, or law in action (ZAGREBELSKY, 1988, p. 504).

and Legislative branches, where officials are elected via vote. Such scenario has been identified as an issue that needs addressing, especially since STF, as the highest judicial body in the country, is much more than a constitutional court. It has a wide array of competencies and is an important political actor, capable of tilting the scales of the interplay between state branches.

With such an importance in the political sphere, the public tends to turn their attention to internal regulations in order to ascertain more clearly the Court's responsibilities and the limits to its powers. It is then where we find the holder of such a large amount of power: the President of the STF.

The President of the STF is responsible not only for the management of the highest court, but also for the judgment schedule of the plenary. The cases examined by the Court can impact deeply the social life of Brazil, affecting the criminal, international or constitutional spheres.

Schedules are determined by discretion of the President, without any possible sanction or oversight. Despite the Judicial Reform (BRASIL, 2004) having focused on the application of accountability instruments to the Judiciary, it was not enough to limit the powers of the President to define which cases should be examined. Thus, the President remains able to block some themes from discussion, since a simple omission – or even a postponement of a decision – has consequences in the political and judicial arena. That, in the words of Alexander Bickel, is the “wonderful mystery of time.” (BICKEL, 1962, p. 26). But, it is always important to emphasize the concern of the constitutional theory about the replacement of the political judgment of the legislator by the discretion of the judges, not elected by majorities, which implies the problem of the lack of democratic legitimacy of the judiciary (BREGA FILHO; ALVES, 2015, p. 133).

While it is possible to put administrative sanctions in place against judges, including the President of the STF (through the Law 1,079/1950 or the Complimentary Law n. 35/1979 – Organic Law of the National Magistrature), certainly the absence of regulation to procedures, including how they get to be included in hearing sessions, is an obstacle to effective oversight both by state bodies and by the population.

The immense powers the President of the Federal Supreme Court possesses without any rigid checks brings the head of the judicial branch closer to the maxim, “the king can do no wrong” – or, as the Brazilian Empire Constitution put it, they are “inviolable” and “not subjected to any responsibility” (BRASIL, 1824). In other words, Brazil's chief justice could well be addressed as “your majesty,” rather than “your honor.”

Hence, it should be clear that there is a need for a deeper analysis of such an important figure in Brazilian Justice. This article is but a first step in an effort to shed light on the actions that shapes the decisions of the President of the STF.

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