THE JUDICIALIZATION OF POLICY AS A PHENOMENON OF NEOCONSTITUTIONALISM AND THE LIMITS OF REPRESENTATIVE DEMOCRACY

A JUDICIALIZAÇÃO DA POLÍTICA COMO FENÔMENO DO NEOCONSTITUCIONALISMO E OS LIMITES DA DEMOCRACIA REPRESENTATIVA

Camila Leonardo Nandi de Albuquerque[1]
Sandro Luiz Bazzanella[2]

ABSTRACT

This article has as its theme the imbricated relationship between the judicialization of politics and democracy and its general objective is to analyze, in the light of Brazilian law, how political decisions migrated to the judicial sphere, intensifying the process of judicialization of politics in Brazil after the redemocratization. The hypothesis suggested is that in the context of neoconstitutionalism, there was an amplification of the subjective interpretation of the constitutional charters, which culminated in the expansion of the decision-making power of the legal field in relation to the other powers, thus corroborating the rise of the phenomenon of political judicialization. Furthermore, the crisis of representativeness of political powers adds to the phenomenon of judicialization, which led to the protagonism of the judiciary from the phenomenon of judicialization. The research used the deductive method, which starts from a generalization for a particularized question, and as a research technique the bibliography, which is developed from primary and secondary sources, that is, from the Federal Constitution and sparse norms and from literature available regarding the issue. It was found that the judicialization of politics is a worldwide phenomenon, of which judicial activism is one of its consequences. If, on the one hand, urgent political issues are getting a faster response from the Judiciary, on the other hand it must be pointed out that these decisions have a democratic deficit.

Keywords: Neoconstitutionalism; Judicial activism; Judicialization of politics; Representative democracy.

1 Mestre em Desenvolvimento Regional pela Universidade do Contestado. Mestranda no Programa de Pós-Graduação em Direito da Universidade do Extremo Sul Catarinense (Unesc), com taxa Prosuc/CNPq. Especialista em Direito Empresarial. Graduada em Direito pela Unisul. Vinculada ao grupo de pesquisas Pensamento Jurídico Crítico Latino-americano – Unesc. ORCID iD: https://orcid.org/0000-0003-3466-6209. E-mail: camilanandi_@hotmail.com.

2 Graduado em Filosofia pela Faculdade de Filosofia, Ciências e Letras Dom Bosco, Santa Rosa (RS); Mestre em Educação e Cultura pela UDESC; Doutorado Interdisciplinar em Ciências Humanas UFSC. Professor do Programa de Mestrado em Desenvolvimento Regional da Universidade do Contestado. ORCID iD: http://orcid.org/0000-0002-9430-8684. E-mail: sandroluizbazzanella@gmail.com.

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RESUMO

O presente artigo tem como tema a imbricada relação entre judicialização da política e democracia e tem como objetivo geral analisar, à luz do direito brasileiro, de que maneira as decisões políticas migraram para o âmbito judicial intensificando o processo de judicialização da política no Brasil após a redemocratização. A hipótese aventada é a de que no âmbito do neoconstitucionalismo, houve uma amplificação da interpretação subjetiva das cartas constitucionais, o que culminou na expansão do poder de decisão do campo jurídico frente aos demais poderes, corroborando assim para a ascensão do fenômeno da judicialização política. Ainda, acresce como causa explicativa ao fenômeno da judicialização a crise de representatividade dos poderes políticos o que acarretou o protagonismo do poder judiciário a partir do fenômeno da judicialização. A pesquisa utilizou o método dedutivo, que parte de uma generalização para uma questão particularizada, e como técnica de pesquisa a bibliográfica, que se desenvolve a partir de fontes primárias e secundárias, ou seja, a partir da Constituição Federal e normas esparsas e da literatura disponível atinente à questão. Constatou-se que a judicialização da política é um fenômeno mundial, do qual o ativismo judicial é um de seus desdobramentos. Se por um lado questões políticas urgentes estão tendo uma resposta mais célere por parte do Poder Judiciário, por outro há que se pontuar que essas decisões possuem um déficit democrático.

Palavras-chave: *Neoconstitucionalismo; Ativismo judicial; Judicialização da política; Democracia representativa.*

1. INITIAL CONSIDERATIONS

The central object of this article is to analyze the factors related to the judicialization of politics and judicial activism, after the redemocratization of institutions and Brazilian society with the removal of the military from power in 1984, which contributed and contribute to the worsening of the crisis of representative democracy, the rule of law, or also called the welfare state under the aegis of the state of exception. The study is justified by the importance of knowing the nuances present in the intertwined relationship between the judicialization of politics and representative democracy.

In this sense, a dialog is established with Giorgio Agamben's theory of the state of exception to verify whether this crisis, resulting from the superposition of one State power over the others, could be related to the beginning of a permanent state of exception, in which the exception becomes the rule.

The context of judicialization of politics expressing aspects of a state of exception finds in the Brazilian context specificities circumscribed in the scope of its representative democracy, as well as its institutions and, above all, in relation to the demands, if not impositions of the financial capital in relation to the contractual guarantees by the Brazilian State, so that the phenomenon of the decision contrary to the constitution, materialized in activist decisions, had an outflow through its legal, political and economic configuration.

In the legal context, what has been defined as neoconstitutionalism has been characterized by the possibility of integrating subjective elements into the interpretation of constitutional charters, so as to give the Supreme Court, the ultimate interpreter of the Constitution, greater decision-making autonomy. This conjuncture, conceived from the possibility of enforcing rights and public policies not made possible by the other branches of government through judicial decisions, had as a secondary result the prominence of this branch of government in relation to the others.

As to the political aspect, the limits of the representativeness of the legislative branch in relation to the demands of Brazilian society and, by extension, its substantial lack of credibility in relation to the citizens, as well as even its strategic evasiveness, inherent to the political game, in legislating on issues considered controversial, have contributed to the judiciary's being called upon to resolve political issues that should be instrumentalized by law.

The hypothesis of the present article is that democracy is disconnected, if not disqualified and, as a logical consequence, delegitimized from its representative condition. Reduced in its institutional condition, it presents itself as a mere technique of government in an emergency context, of political crisis, which allows the sovereign power to act in a state of exception under the argument of defense of democracy. This context would reflect the neoconstitutionalism phenomenon, which has promoted the amplification of subjective interpretation in constitutions, increasing the decision-making power of the legal field in relation to the other powers, thus corroborating the rise of the political judicialization phenomenon. Added to this factor is the crisis of representativeness of the political powers, which has led to the leading role of the judiciary through the judicialization phenomenon.

Under these assumptions, the political issue unfolds in the delicate question of representativeness. This remarkable feature of the modern State, guided by efficiency and effectiveness in the management of natural and human resources, individuals and populations (biopolitics) has as a result the emptying of politics, resulting in the limitation, if not in the stampede of citizens from the public agora and the isolation of individuals restricted to the demands of full production and consumption whose ultimate goal is mere survival.

For the discussion of the theme proposed here, the article is structured as follows: The first topic seeks to understand the phenomenon of neoconstitutionalism and its unfolding in Brazilian law. The second topic presents some considerations about representative democracy and its limits, in order to substantiate arguments so that, in the third topic, we can discuss the relationship between representative democracy and the expansion of the judiciary's role in the Brazilian political scenario. The present research used the deductive method, which starts from a generalization for a particularized question, and the bibliographical research technique, which is developed from primary and secondary sources, that is, from the Federal Constitution, and sparse norms and the available literature related to the issue under analysis.

2. NEOCONSTITUTIONALISM: BRIEF CONSIDERATIONS ON ITS EFFECTS ON BRAZILIAN CONSTITUTIONAL LAW

The term 'neoconstitutionalism' incorporates in itself a plethora of authors and theoretical stances that cannot always be lumped together in the same sense" (STRECK, 2013, p. 12). That is why one should have reservations with the nomenclature[3] -. Neoconstitutional-

3 "North American political science, for example, calls new constitutionalism the redemocratization processes that have taken place in several countries of the so-called peripheral modernity in the last decades. Among these countries are Brazil, Argentina, Colombia, Ecuador, Bolivia, Eastern European countries, South Africa, and others. In the case of legal theory, it is possible to list a number of authors, mainly Spanish and Italian, who seek to frame the intellectual production on law since the second post-war period as neoconstitutionalism, to refer to a model of law that no longer professes the same perspectives on the foundation of law, on its interpretation and its application, as they were thought in the context of the first constitutionalism and the positivism prevailing until then. Thus, jusophilosophers like Ronald Dworkin and Robert Alexy (among others) would represent, in its best light, the great theoretical turn operated by neoconstitutionalism" (STRECK, 2013, p. 12).

ism[4] to some extent can be read in parallel with post-positivism and, therefore, they can be grouped, despite their differences, in the same category with respect to some of their common characteristics, namely those related to the postulate of the normativity of principles. And it is on this common point that our reflection will focus.

Neoconstitutionalism is approached in legal doctrine in different ways. It is the nomenclature given to a new movement in constitutional law composed of thoughts that coincide at one moment and diverge at another. That is why Carbonell (2003), when dealing with the theme, does it in a plural way: "neoconstitutionalism(s)". For the jurist:

> [...] cuando se habla de neoconstitucionalismo, ya sea en singular o en plural, se está haciendo referencia a dos cuetiones que deben estudiarse por separado. Por una parte [...], a una serie de fenómenos evolutivos que han tenido evidentes impactos en lo que se há llamado el paradigma del Estado constitucional. Por otro lado, com el término <neoconstitucionalismo>; se hace referencia también a una determinada teoría del Derecho que há propugnado em el pasado reciente por esos cambios y/o que da cuenta de ellos normalmente em términos bastante positivos o incluso elogioso (SÁNCHEZ, 2003, p. 8-9).

This plural characteristic permeates the whole dynamics of neoconstitutionalism, since there is no consensus about this movement. The historical framework of the new constitutional law in continental Europe was the post-war constitutionalism, especially in Germany and Italy. In this sense, the place of the Constitution was redefined. The approximation of the ideas of constitutionalism and democracy gave rise to a new form of political organization, which goes by different names: democratic state of law, constitutional state of law, or even democratic constitutional state.

The new constitutional law has as its philosophical framework the post-positivism, which has in its central debate the confluence of the two currents of thought that offer opposite paradigms for Law, namely, the jusnaturalism and positivism (BARROSO, 2005). In this sense, Sarmento argues:

> Until World War II, an essentially legicentric legal culture prevailed on the old continent, which treated the law enacted by parliament as the main source - almost the exclusive source - of law, and did not attribute normative force to constitutions. These were basically seen as political programs that should inspire the legislator's actions, but that could not be invoked before the Judiciary, in defense of rights. Fundamental rights were valid only insofar as they were protected by laws, and did not, in general, involve guarantees against the discretion or disregard of the political majorities installed in the parliaments. In fact, for most of the time, parliamentary majorities did not even represent all the people, since universal suffrage was only achieved in the course of the 20th century. (SARMENTO, 2009, p. 113-146).

In other words, the centrality of the constitutions came as a response to the atrocities committed in the context of World War II. For this reason, the return of values and ethics was perfected in the positivization of fundamental principles and rights in the constitutions in the second postwar period, and the Constitution came to be perceived as the representation of a universal moral ideal that supports the legal system (POZZOLO, 2010). In other words, "instead of a theory of the sources of law focused on the code and formal law," within the context of

4 The term was widely spread through the work organized by the Mexican jurist Miguel Carbonell called Neoconstitutionalism(s).

the European constitutions of the 2nd postwar period, "the centrality of the Constitution in the legal system, the ubiquity of its influence on the legal order, and the creative role of jurisprudence are emphasized" (SARMENTO, 2009, n.p.).

Such condition was outlined from the fact that values and political options started to be inserted in the Constitutions by means of principles that gradually gained recognition of their normative character. In this sense, there was an opening for the introduction of constitutional principles and the limits between morality and Law became imprecise. From this perspective, neoconstitutionalism confronts the positivist reading of law.

In this context, creativity in judicial interpretation is encouraged to the extent that a significant portion of the most relevant norms of these constitutions are marked by semantic openness and indeterminacy, since they are formed by principles and not rules. For this reason, their direct application by the Judiciary has led to the "adoption of new hermeneutic techniques and styles, beside the traditional subsumption" (SARMENTO, 2009, n.p.).

> The need to resolve tensions between conflicting constitutional principles - frequent in compromising constitutions, marked by richness and axiological pluralism - gave way to the development of the weighting technique, and made frequent recourse to the proportionality principle in the judicial sphere. And the search for legitimacy for these decisions, in the framework of plural and complex societies, has driven the development of several theories of legal argumentation, which incorporated elements to Law that classical positivism used to disregard, such as considerations of moral nature, or related to the empirical field underlying the rules (SARMENTO, 2009, n.p.).

Within this new order, the Judiciary gains space, because "with increasing frequency, controversial and relevant issues for society have been decided by judges, and especially by constitutional courts" (SARMENTO, 2009, n.p.).

This is why, as Sarmento argues, under the neoconstitutionalism paradigm, "the classic reading of the separation of powers principle, which imposed rigid limits on the Judiciary's actions, gives way to other views more favorable to judicial activism in defense of constitutional values" (SARMENTO, 2009, n.p.).

In Brazil, the landmark of neoconstitutionalism was the 1988 Constitution and the redemocratization process it helped to lead. According to Barroso, the 1988 Constitution "was able to successfully promote the transition of the Brazilian State from an authoritarian, intolerant, and sometimes violent regime to a democratic State of law" (BARROSO, 2005, p. 3). Under its aegis, Brazilian constitutional law went from relative insignificance to apogee in less than a generation (BARROSO, 2005). The justification for this political ascension is explained by Barroso as follows:

> The methods of acting and argumentation of judicial bodies are, as is known, juridical, but the nature of their function is undeniably political. [...]. Notwithstanding the fact that it exercises a political power, the Judiciary has characteristics different from those of the other Branches. It is that its members are not invested by elective criteria or by majority processes. And it is good that this should be so. Most countries in the world reserve a portion of power to be exercised by public agents selected on the basis of merit and specific knowledge. Ideally preserved from political passions, the judge must decide with impartiality, based on the Constitution and the laws (BARROSO, 2005, p. 37).

For Barroso (2005), despite being a counter-majoritarian power, the political power of judges and courts still has the characteristic of representativeness, since it is exercised on behalf of the people and, in this condition, needs to be accountable to society. It was based on these prerogatives that, since the re-democratization, Brazilian judges have felt more comfortable to judge in a way unrelated to the normative system, using for this expedient the basis of their decisions in principles.

According to Dimoulis (2009) this strengthening of the judiciary may lead to abuses or imbalances. According to the author "these theories allow the Supreme Court to unduly appropriate powers that the Constitution has recognized to the Federal Senate, the legislatures of various federal entities and the courts that perform diffuse control" and, for this reason, these theoretical options translate into an "attempt to monopolize the control of constitutionality, succumbing to the ambition that the U.S. doctrine criticizes as judicial exclusivism" (DIMOULIS, 2009, p.10).

In a similar vein, Sarmento (2009) points out that the judicialist slant is anti-democratic, since "judges, unlike parliamentarians and chief executives, are not elected and are not directly accountable to the people" (SARMENTO, 2009, n.p.).

> This democratic critique is based on the idea that in a democracy it is essential that the most important political decisions are taken by the people themselves or by their elected representatives, and not by wise men or technocrats in robes. It is true that most contemporary theorists of democracy recognize that it is not exhausted in the respect of the majoritarian principle, but presupposes the observance of the rules of the democratic game, which include the guarantee of basic rights, aiming at the citizen's equal participation in the public sphere, as well as some protection to minorities. However, we have here a question of dosage, because if the imposition of some limits to the decision of majorities can be justified in the name of democracy, the exaggeration tends to prove antidemocratic, by restricting too much the possibility of the people to govern themselves (SARMENTO, 2009, n.p.).

For Sarmento, the central issue does not reside in the mere division of powers over time, but in the recognition that, "given the vagueness and openness of many of the most important constitutional rules, those who interpret them also participate in their creation process" and, therefore, judges would have a "kind of permanent constituent power" (SARMENTO, 2009, n.p.). This feature led, according to Sarmento, to the rejection of constitutional jurisdiction, or at least of judicial activism in its exercise, "from the French revolutionaries of the 18th century, through Carl Schmitt, in the Weimar Republic", since this power would allow molding the Constitution according to their political and value preferences, to the detriment of those of the elected legislature (SARMENTO, 2009, n.p.).

Still on neoconstitutionalism, the author criticizes the preference for principles and weighting over rules and subsumption.

> If, until not so long ago, principles were not treated as authentic norms here - only those who could invoke a clear and precise legal rule in favor of their claim had good law - with the arrival of post-positivism and neoconstitutionalism, in a few years we have gone from water to wine. Today, an intellectual environment has been installed in Brazil that applauds and values decisions based on principles, and does not appreciate those based on legal rules, which are bureaucratic or positivist - and positivism today in the country is almost

> a dirty word. In this context, law operators are encouraged to always invoke very vague principles in their decisions, even when it is unnecessary, due to the existence of a clear and valid rule governing the hypothesis (SARMENTO, 2009, n.p.).

Under such assumptions, the problem would reside in the fact that, for a functional and stable legal system, consistent with the values of a Democratic State of Law, it is necessary to apply both rules and principles. According to Sarmento (2009), rules are indispensable because, among other reasons, they generate greater legal security and predictability for their addressees; they reduce the risk of error in their application; they involve lower costs in their application process, and do not imply, to the same extent as principles, a transfer of decision-making power from the Legislative branch, which is elected, to the Judiciary, which is not[5].

Finally, Sarmento asserts the fact that the exacerbated constitutionalization of constitutional law can generate a pan-constitutionalization of Law, that is, in the face of the arbitrary constitutionalization of Law, the legislator's freedom is undermined (SARMENTO, 2009). As Sarmento explains:

> One of the characteristics of neoconstitutionalism is the defense of the constitutionalization of Law. It is argued that the irradiation of constitutional norms throughout the entire legal system contributes to bring it closer to the emancipatory values contained in contemporary constitutions. The Constitution is no longer seen as a simple normarum norm - whose main purpose is to discipline the process of producing other norms. It is now seen as the embodiment of the higher values of the political community, which should fertilize the entire legal system. (SARMENTO, 2009, n.p.)

This conjuncture would give room for the interpreter to, in addition to directly applying the constitutional dictates to social relations, reread all the institutes and rules of law in the light of the Constitution, providing them with the meaning that is most in line with the Charter's axiology (SARMENTO, 2009). It is precisely in the unfolding of this point that Sarmento raises the case of extreme theses on this process, "which end up cutting too much the legislator's space of freedom, to the detriment of democracy". However, the author exposes that at least in Brazil some constitutionalization of Law is positive and even welcome, for giving it the humanitarian values of the Constitution. That is why, for Sarmento, the crux of the matter concerns excesses, since "the excess of constitutionalization of Law is, therefore, anti-democratic" (SARMENTO, 2009, n.p.).

Still with regard to the issues under analysis, one could not fail to mention the approaches and criticisms of jurist Streck (2014), for whom the term "neoconstitutionalism" conforms, since its origin, a theoretical ambiguity, or even misunderstandings. For this jurist, the import of the term and some of its proposals had strategic importance for Brazil and Latin America as a whole, to the extent that they entered the "new constitutional world" late. In this sense, neoconstitutionalism meant to go beyond a constitutionalism with liberal characteristics "[...] which, in Brazil, was always a simulacrum in years interspersed by authoritarian regimes -

5 It is important to emphasize that with regard to this aspect, Sarmento makes a caveat: "I do not intend to argue that we should go back to the time when principles were not applied by Brazilian judges. Principles are also essential in the legal system, because they give more plasticity to the Law - which is essential in a hyper-complex society such as ours - and allow a greater opening of the legal argumentation to Moral and to the underlying empirical world. I think the time has come for a return of the pendulum in Brazilian Law, which, without discarding the importance of principles and weighting, also takes rules and subsumption seriously" (SARMENTO, 2009, n.p.).

towards a compromising constitutionalism that would enable [...] the effectuation of a democratic regime" (STRECK, 2014, n.p.).

However, according to Streck (2014), given the specificities of Brazilian law, neoconstitutionalism ended up causing conditions that contributed to the corruption of the constitutional text itself. Therefore, facing the adoption of voluntarist postures made possible by this new design in Brazil, he started to use the term with reservations, in parentheses or in quotes, since the author understands the term neoconstitutionalism as the compromise constitutionalism of the second post-war period, this untied of activism or discretionary practices. Therefore, the author started to designate the post-World War II constitutionalism as Contemporary Constitutionalism.

This is because, under the banner of neoconstitutionalism, as well as the moralization of law, one defends "[...] at the same time, a constitutional right of effectiveness, a right haunted by the weighting of values, an ad hoc concretization of the Constitution and a so-called constitutionalization of the order" (STRECK, 2014, n.p.). This is all because, according to Streck, it was believed that the jurisdiction was responsible for incorporating the supposed true values, i.e., those defining a fair law, elevating the jurisdiction.

It is a paradoxical question that arises in the light of the theory of law: in order for it not to be undermined by politics, economics and morality, it is necessary for the law to have autonomy, which is a condition of its possibility. On the other hand, in the face of increasingly analytical constitutional texts, and greater openness to constitutional jurisdiction (which leads to greater control of constitutionality), the legislature's space for freedom decreases, which may "represent a narrowing of democracy, a central issue of the democratic rule of law itself" (STRECK, 2010, p. 163).

As Streck (2010, p. 164) argues, "autonomy of law cannot imply indeterminability of this same democratically constructed law", because this would leave democracy exposed to a constant risk, since the replacement of autonomy by political pragmatism in its various aspects has been putting the law in a permanent state of exception, which, for Streck, means the very decline of the Empire of Law.

> [...] the law of the Democratic State of Law is under constant threat. This is because, on the one hand, it runs the risk of losing its autonomy (hard won) due to the attacks of external predators (from politics, from the corrective discourse arising from morality and from the economic analysis of law) and, on the other, it becomes increasingly fragile in its internal bases, in view of the discretionary/arbitrary nature of judicial decisions and the consequent decisionism that inexorably emerges from this (STRECK, 2010, p. 164).

This discussion is the core of the present text, and through it we can list some of the contradictions of liberal democracy. These contradictions and impasses will be addressed in the following topic.

3. CONSIDERATIONS ABOUT REPRESENTATIVE DEMOCRACY

It is necessary, preliminarily, to make some comments on political representation, since one of the most convincing criticisms of the judicialization of politics concerns this very question, in such a way as to suggest even a "juristocracy"[6]. The aim of this topic is to demonstrate, in general terms, the polysemy that permeates the concept of democracy and to provide theoretical and conceptual subsidies to reflect on the relationship between the judicialization of politics and democracy.

In the definition of democracy the terms *people and power* are inserted. Therefore, the people will always play a fundamental role when it comes to democracy[7].

The concept of democracy has been changing throughout history. For Santos and Avritzer (2002), in fact, the 20th century was a century of intense disputes regarding the issue of democracy. According to the authors, at the end of each of the world wars and during the cold war period the debate about the desirability of democracy became central, and was resolved in its favor as a form of government. However, the proposal that became hegemonic at the end of the two world wars led to "[...] the restriction of expanded forms of participation and sovereignty in favor of a consensus around an electoral procedure for the formation of governments" (SANTOS; AVRITZER, 2002, p. 39-40).

After World War II a specific debate around democracy gained strength, this time about its structural conditions, and therefore the debate also orbited the compatibility or not between democracy and capitalism (SANTOS; AVRITZER, 2002). This tension was resolved in favor of democracy, which tended to place limits on property that implied distributive gains for disadvantaged social sectors.

However, from the 1980s on, with the dismantling of the welfare state and the cutting of social policies, the discussion about the structural meaning of democracy was reopened, especially about developing countries, or countries of the South (SANTOS; AVRITZER, 2002). In this context, Joseph Schumpeter argued that the problem of democracy building stems from the problems in building democracy in Europe in the interwar period. This answer founded what Santos and Avritzer (2002) define as the hegemonic conception of democracy, which has as some of its assumptions the positive valuation of political apathy, the concentration of the democratic debate on the issue of electoral designs of democracies, the treatment of pluralism as a form of party incorporation and dispute among elites, among other aspects.

6 Termo oriundo do artigo "Rumo à Juristocracia": The origins and consequences of the new constitutionalism", de Ran Hirschl, publicado em 2004.

7 The idea of democracy originated in ancient Greece. It was there that the idea of democracy developed most profoundly. The outstanding characteristic of this period, that is, what distinguishes the coexistence of men in the polis from all other forms of coexistence is, according to Hannah Arendt, something well known to the Greeks: freedom (ARENDT, 2012). However, this does not mean that the political thing or even politics would be a necessary condition to enable men to be free (ARENDT, 2012). This is because being-free and living-in-a-polis were, according to Arendt, the same thing in a certain sense, because to live in a polis, man should be free, that is, not be subordinated as a slave to the coercion of another nor as a worker to the necessity of the daily breadwinner (ARENDT, 2012). That is, politics in the Greek world orbits around freedom, understood negatively as the not-being-dominated and not-dominating, and also positively as a space that can only be produced by many, in which each one moves among equals (ARENDT, 2012). It is worth noting that, according to Ferreira (2020), the Athenians considered themselves free because they were equal before the law, of which they felt they were the authors, and only obeyed it. However, it was only the citizens who enjoyed these prerogatives and had political rights, and this characterized a small portion of the population of Athens (FERREIRA, 2020).

All these elements can be pointed out as constituents of a hegemonic conception of democracy that cannot deal with its problems, giving rise to the paradoxical situation that the extension of democracy has brought with it an enormous degradation of democratic practices (SANTOS; AVRITZER, 2002). It is for this reason that Santos and Avritzer (2002) state that the hegemonic form of democracy, which is elitist representative democracy, proposes to extend to the rest of the world the model of liberal-representative democracy in force in societies of the northern hemisphere, ignoring the experiences, as well as the discussions arising from the countries of the South.

It is notorious that the meanings suggested above as a conception for the word democracy have in common the notion that democracy is a fertile ground for its own dismantling. Democracy demands constant vigilance, for it can easily lead to the establishment of a state of exception, as historical facts such as totalitarianism, which emerged in the bosom of liberal democracies, prove. With this argument in mind, it is important to verify the role of the judiciary in representative Brazilian democracy.

As the Italian philosopher Giorgio Agamben (2007) points out, there is an intimate solidarity between democracy and totalitarianism. At first, it should be emphasized that by pointing out the complicity between democracy and totalitarianism, Agamben does not intend to devalue the achievements and difficulties of democracy. The philosopher's intention is to try to demonstrate how democracy, at a moment when it seemed to be at its peak, proved incapable of saving from an unprecedented ruin that *zoé*[8] for which it had put all its efforts (AGAMBEN, 2007).

Democracy is a political regime that has as its premise that all power emanates from the people and is exercised by them, either directly or indirectly, and is a barrier that tries to keep oppression of all kinds at bay. Its ideals and principles are based on freedom and equality. As Agamben points out, modern Western politics should be read based on what Foucault called biopolitics. This is because, for the philosopher, the theories about politics have in their core the idea of calculation and manipulation of life, that is, a technique of administration and management of bare life[9]. It is from this perspective that Giorgio Agamben reflects on the idea of democracy:

> We use this concept as if it were the same thing in fifth century Athens and in contemporary democracies. As if it is everywhere and always clear what it is about. Democracy is an uncertain idea because it means, first of all, the constitution of a political body, but it also simply means the technology of administration - what we have today. Today, democracy is a technique of power - one among others. I don't want to say that democracy is bad. **But let us make this distinction between real democracy as the constitution of the body politic and democracy as a mere technique of administration** that relies on opinion polls, elections, manipulation of public opinion, management of

8 The Greeks defined life from two terms: *zoé* and *bíos*. This separation is because the Greeks did not have a single definition to express the concept of life. *Bios* indicated the form or manner of living proper to an individual or a group. *Zoé* referred to the simple fact of living common to all living beings (AGAMBEN, 2007). That is, *zoé* refers to unqualified life, mere biological existence, and, for this reason, "simple natural life is, however, excluded, in the classical world, from the polis proper and remains firmly confined, as mere reproductive life, to the sphere of the *oîkos*" (AGAMBEN, 2007, p. 10), the house. In turn, *bios* concerns ethical life, political life, the qualified form of life and, therefore, is constituted in the sphere of the polis, the city-community.

9 The concept of bare life in the Agambenian sense, refers to human life in its merely biological apprehension, so that the insecurity resulting from this situation is the obscure threat of death that transforms living into mere survival"[...] which would be equivalent to exterminable, in the sense that the life of homo sacer could be eventually exterminated by anyone, without committing a violation" (AGAMBEN, 2007, p. 195).

> the mass media, etc. The second version, the one that rulers call democracy, does not resemble at all the one that existed in the fifth century B.C. If that is what democracy is, I simply do not care (emphasis added) (AGAMBEN, 2014, n.p.).

The Italian philosopher points out an intimate complicity between democracy and totalitarianism insofar as both have in common the exercise of political power through a biopolitics. This is because democracy in its contemporary form, according to Agamben, is merely a technique of governmental administration, which is affirmed through narratives of endless crises. This crisis is nothing more than "[...] the normal way in which the capitalism of our time functions" (AGAMBEN, 2014, n.p.). In this sense, crisis is, for contemporary democracy, necessary and even desired, since it constitutes a technique of government.

The arguments that "justify" this non-application of the norm are, as a rule, related to emergency measures brought about by exceptional situations. In this way, the crisis is fertile ground for the exercise of sovereign power that establishes the exception. In other words, it is as if the perilous situation demanded a decision outside the law for the preservation of order, the order in which the perilous situation has been established. The cyclical and increasingly intense crises of the financialized economy give rise to a state of emergency that justifies exceptional measures, a state of exception[10].

It is precisely a matter of "[...] letting the events take place in order to later orient them in the most opportune direction. It is in this sense that today everything can be governed, managed and normalized" (AGAMBEN, 2014, n.p.). It is from this situation that the primacy of economics and law over politics stems, for "where everything is normalized and everything is governable, the space of politics tends to disappear" (AGAMBEN, 2014, n.p.).

This logic is based on the assumption that the State of exception coexists within contemporary Western democracies as a biopolitical pertinence, which tends to treat large contingents of the population as "bare life". About the concept of state of exception,

> If what is proper of the state of exception is the suspension (total or partial) of the legal order, how can this suspension still be understood in the legal order? How can an anomie be inscribed in the legal order? And if, on the contrary, the state of exception is only a factual situation and, as such, foreign and contrary to the law; how is it possible for the legal order to have a lacuna precisely as to a crucial situation? And what is the meaning of this gap? (AGAMBEN, 2004, p. 39).

Agamben points out that the legal system within the democracies of the 20th century is not founded on a legal suspension of the law, but simply on anomie. In his conception, the state of exception is inserted in a zone of indifference, in which inside and outside are not excluded, but are indeterminate. Therefore, the suspension of the norm does not mean its abolition, as well as "[...] the zone of anomie established by it is not (or, at least, does not pretend to be) devoid of relation to the legal order." (AGAMBEN, 2004, p. 39).

10 What Giorgio Agamben defines as permanent state of exception stems from the practice of contemporary states of voluntarily creating a permanent state of emergency that justifies exceptional measures, even in the face of the dictates of constitutional democracy. This phenomenon is presented as "[...] the dominant governing paradigm in contemporary politics" (AGAMBEN, 2004, p. 12-13).

The politicization of life and, consequently, the exception transformed into a technique of government give rise to the emergence of a structure designated by Agamben as field[11], which is characterized as a space of manifestation of anomie in which human life is deprived of the right, thrown out of the legal order that was constituted and legitimized from the promise of the protection of life, "[...] the structure in which the state of exception, on whose possible decision the sovereign power is founded, is stably realized" (AGAMBEN, 2015, p. 43). Therefore, whoever occupies the sovereign's seat institutes the exception through the suspension of the norm as a way to preserve a certain order that preserves the interests that confer sustainability to the sovereign power. This is, therefore, the intertwining between the concept of democracy in Agamben and the discussion about the judicialization of politics and judicial activism.

4. THE DUSK OF POLITICAL POWERS AND THE DAWN OF THE JUDICIARY

The expansion of the spheres of composition of representative democracy, especially with regard to the social and institutional democratic assumptions of the post-war period, reached the end of the military regime (1964 to 1984) and the national political opening of the 1988 Constituent Assembly and were presented as a legal expression in the Constitutional Charter itself.

However, when we take a closer look, from the mid-1990s on, in the context of the implementation of the demands of the neoliberal prescription in the governments of Fernando Henrique Cardoso (FHC) and, especially after the 2008 crisis and, the deepening of the assumptions of the financialized economy, we realize that the Brazilian representative democracy faced difficulties, as well as being weakened by several factors, among them the disarticulation of social movements that are incorporated by the State's institutionality and are no longer movements; the emptying of political debate inside the political parties, attenuating what is defined as party ideology, which has transformed the parties into mere electoral associations; more and more the National Congress to be composed of benches linked to the defense of private groups' interests. Still in this direction, we can add to this scenario, the fact that the Executive Branch uses, if not governs from the use of provisional measures (MP's), beyond what is stated by the Brazilian Constitution itself, that is, without the presence of the requirements of relevance and urgency of the matter addressed[12]. In this way, political agendas that should be debated with broad sectors of organized civil society, with social movements, are decided by provisional measures, by decree laws, with the legislative branch being responsible for the

11 The Nazists concentration camps are the brutal expression of the anomic logic of the camp with full state of exception inside which naked life is produced, as well as "[...] as much the Bari stadium, in which, in 1991, the Italian police provisionally crammed the Albanian illegal immigrant before returning him to his country, as the winter velodrome in which the Vichy authorities collected Jews before handing them over to the Germans; as much the refugee camp on the border with Spain, [...] as the zones d'attente in the French international airports, in which foreigners requesting refugee status were kept. In all these cases, an apparently anodyne place [...] delimits, in reality, a space in which the normal order is, in fact, suspended and in which whether or not atrocities are committed does not depend on the law, but only on the civility and ethical sense of the police who act provisionally as sovereign [...] (AGAMBEN, 2015, p. 45).

12 Art. 62 - In cases of relevance and urgency, the President of the Republic may adopt provisional measures, with the force of law, and must immediately submit them to the National Congress, which, being in recess, will be extraordinarily summoned to meet within five days (BRASIL, 1988).

approval of such measures and impositions. These factors contribute to the emptying of the legislative power. And it is in this political gap that the Judiciary is called upon to act. All these aspects, as well as other situations and variables that can be listed in this context unequivocally demonstrate the emptying of representative democracy within Brazilian society.

Under such assumptions, according to jurist Campos (2014) we are experiencing the constitutional and infra-constitutional moments of greatest formal opportunities for the judicialization of politics and judicial activism in the history of the Supreme Court. However, it should be noted at the outset that there is a huge legal debate about the concepts of judicialization of politics and judicial activism and their effects.

For the present analysis, we adopt the perspective of judicialization of politics as a broad phenomenon in which there is a transfer of power from the Legislative to the Courts and other legal institutions. Judicial activism, in turn, can be considered a stricter phenomenon that corresponds to the "[...] expansive, not necessarily illegitimate, exercise of political-normative powers by judges and courts vis-à-vis other political actors (CAMPOS, 2014, p. 164). In a similar sense, the jurist Ramos (2015, p. 119) claims that judicial activism refers to "[...] the crossing of demarcation lines of the jurisdictional function, to the detriment, mainly, of the legislative function, but also the administrative function and even the government function.

The judicialization of politics, demarcated by a constitutional arrangement that elevated the Judiciary to the position of the core of politics, has as a consequence the performance of a political role that relates to the exercise of sovereign power.

After the 1988 Constitution the Brazilian legal system went through a process of juridicization that impacted the functioning of the State and of Brazilian society. This process has elevated the judiciary to the heart of the political debate.

The neoconstitutional context, discussed above, has led to a rearrangement in the constitutional model, to the extent that it has made possible the irradiation of the constitutional rule to governmental policy. Thus, the Judiciary has taken on a role in the realization of constitutional rights not fulfilled by the other branches of government. Added to this factor is the social complexification and its consequent increase in litigation, which ends up in the Judiciary. This perspective is described in the work "Judicialization of politics and social relations", by Luiz Werneck Vianna, published in 1999.

According to jurist Vieira (2008), the expansion of the authority of the Supreme Court and the courts in general is a global phenomenon, about which there is a vast literature that seeks to understand this phenomenon of the advancement of law over politics and the consequent expansion of the sphere of authority of the courts to the detriment of parliaments.

According to Vieira (2008), the process of expansion of the courts' authority around the world has become even more pronounced in Brazil, because the ambition of the 1988 Constitution and the gradual concentration of the Supreme Court's jurisdictional powers led to an imbalance in the system of separation of powers in Brazil.

> The Supreme Court, which after 1988 had already accumulated the functions of constitutional court, apex judicial body and specialized forum, in the context of a normatively ambitious Constitution, had its political role further reinforced by the amendments no. 3/1993, and no.45 /2005, as well as by the

> laws no.9.868/99 and no.9.882/99, becoming a unique institution in comparative terms, either with its own history, either with the history of existing courts in other democracies, even the most prominent (VIEIRA, 2008, p. 444).

This conjuncture was denominated by Vieira (2008) as Supremocracy. This terminology has two meanings: the first concerns the authority of the supreme court in relation to the other instances of the judiciary. Created in 1891, the Supreme Federal Court has always had difficulties in imposing its decisions, taken in the diffuse control of constitutionality, on the lower courts. This is due to the inexistence of a doctrine such as the common law *stare decisis*, which would bind the other members of the Judiciary to the decisions of the STF. This made the Court weakened. However, in 2005, with the adoption of the binding precedent, there was a concentration of powers within the Supreme Court. Thus, it aimed to remedy its inability to frame judges and courts resistant to its decisions. From this point of view, Oscar Vilhena Vieira (2008) points out that the term "supremocracy" refers, in the first place, to the authority acquired by the Supreme Court to rule the judiciary in Brazil.

In a second sense, the jurist indicates that the term supremocracy refers to the expansion of the supreme's authority to the detriment of the other powers. With the 1988 constitution the Supreme Court moved to the center of the Brazilian political arrangement, so that, in view of the enormous task of guarding such an extensive constitution, its institutional position has been gradually occupied in a substantive way. Thus, the increase of instruments given to constitutional jurisdiction has made the Supreme Court not only exercise a kind of moderating power, but also become responsible for "[...] issuing the last word on countless issues of a substantive nature, sometimes validating and legitimating a decision by representative bodies, other times substituting majority choices" (VIEIRA, 2008, p. 446).

The Brazilian case is unique because of its scale and nature. Scale because of the number of issues that, in Brazil, have a constitutional nature and that, therefore, are recognized by the doctrine as susceptible to judicialization; and nature, because there is no obstacle for the Supreme Federal Court to appreciate acts of the reforming constituent power (VIEIRA, 2008, p. 446).

In this direction, it is essential to note that the Supreme Federal Court not only exercises, in the current historical period, a political function, but also exercises, even if subsidiarily, the function of "rule-making". That is, it accumulates the exercise of authority, inherent to any constitutional interpreter, with the exercise of power reserved for representative bodies (VIEIRA, 2008).

This strengthening and expansion of the courts' authority can be read, as for example in Hirschl (2009), as a consequence of the global expansion of the market system, so that the courts would constitute, in the eyes of investors, a more reliable means to ensure legal certainty, stability and predictability than democratic legislators, since the latter would be pressed by "populist" demands and, therefore, not very efficient, in light of an economic perspective (VIEIRA, 2008). In this sense, the Israeli jurist notes "[...] the increasing use of courts and judicial means to face important moral dilemmas, public policy issues and political controversies" (HIRSCHL, 2009, p. 140).

Another current argues that the expansion of the protagonism of the judiciary is a consequence of the retraction of the representative system as well as of its deficiency in fulfilling the promises of equality and justice, arising from the democratic ideal and inserted in contemporary constitutions (VIEIRA, 2008). This perspective, exposed in the work "The

Judge and Democracy", by Antonie Garapon (1999), qualifies the judiciary as the guardian of democratic ideals, giving rise to a paradoxical situation, since by seeking to fill the gaps in the representative system, the judiciary has contributed to the expansion of the crisis of authority of democracy.

Still in this direction, the displacement of authority of the representative system to the judiciary is, for many constitutionalists, a consequence of rigid constitutions that have systems of constitutionality control, because this phenomenon becomes more acute when in the perspective of ambitious constitutions in detriment of liberal ones, and in this context the judiciary acts as guardian of the constitution.

> Unlike liberal constitutions, which established few rights and favored the design of political institutions aimed at allowing each generation to make its own substantive choices, through the law and public policies, many contemporary constitutions are suspicious of the legislature, opting to decide everything and leaving to the legislative and executive branches only the function of implementing the constituent will, while the judiciary is given the ultimate role of guardian of the constitution (VIEIRA, 2008, p. 443).

In a similar vein, jurist Roberto Barroso defines the phenomenon of Judicialization as the situation in which relevant issues from a political, social or moral point of view are being decided, in a final character, by the Judiciary, so that there is a "transfer of power to judicial institutions", to the detriment of the Legislative and Executive branches (BARROSO, 2016).

For this jurist, this expansion of jurisdiction operates a drastic change in the way of thinking and practicing law in the Roman-Germanic world, but even in countries that traditionally followed the English model it is possible to verify this phenomenon (BARROSO, 2016). As causes, Barroso (2016) lists the recognition of the importance of a strong and independent judiciary, as an essential element for modern democracies, which led to a vertiginous institutional rise of judges and courts, as well as a certain disillusionment with majority politics, due to the crisis of representativeness and functionality of parliaments in general. Also pointed out by the jurist as a cause is the fact that, many times, political actors prefer to elect the Judiciary as the decisive instance of issues in relation to which there is reasonable moral disagreement in society, in order to avoid their own weariness in the deliberation of issues that divide opinions, such as: homosexual unions, termination of pregnancy or demarcation of indigenous lands (BARROSO, 2016).

For this jurist, the phenomenon has assumed such proportions in Brazil due to the comprehensive and analytical constitutionalization, since to constitutionalize is, in the final analysis, to remove a topic from the political debate and bring it to the universe of judicially enforceable claims, as well as due to the system of constitutionality control in force in the country, which provides ample access to the Supreme Court via direct actions (BARROSO, 2016). The consequence of this is that "almost all issues of political, social, or moral relevance have been discussed or are already before the courts, especially before the Supreme Court" (BARROSO, 2016, p. 386). As an example of this statement, Barroso mentions a number of political issues that have already been judicialized:

> (i) creation of the National Council of Justice in the Reform of the Judiciary (ADI 3.367-DF); (iii) embryonic stem cell research (ADI 3. 510-DF); (iv) freedom of speech and racism (HC 82.424-RS - Ellwanger case); (v) interruption of pregnancy of anencephalic fetuses (ADPF 54/DF); (vi) restriction on the use

> of handcuffs (HC 91. 952-SP and Súmula Vinculante n. 11); (vii) demarcation of the Raposa Serra do Sol Indian reservation (Pet 3.388-RR); (viii) legitimacy of affirmative action and social and racial quotas (ADI 3.330); (ix) prohibition of nepotism (ADC 12-DF and Súmula 13); (x) non-receipt of the Press Law (ADPF 130-DF). The list could go on indefinitely, with the identification of cases of great visibility and repercussion, such as the extradition of the Italian militant Cesare Battisti (Ext 1.085-Italy and MS 27.875-DF), the question of the importation of used tires (ADPF 101-DF) or the prohibition of the use of asbestos (ADI 3.937-SP). It is worth mentioning the holding of several public hearings before the STF to discuss the issue of judicialization of health benefits, notably the provision of medicines and treatments outside the lists and protocols of the Single Health System (SUS) (BARROSO, 2016, p. 386).

However, for Vieira (2008), the hyper-constitutionalization of contemporary life does not occur because of democracy, but because of distrust of it. According to the author, the institutional option for expanding the scope of constitutions and strengthening the role of the judiciary as guardian of constitutional commitments contributes to the weakening of the representative system.

Still, the jurist Cappelletti (1993) in his work "Legislative Judges? (1993) hypothesizes as a hypothesis for the case the decline in confidence in parliaments, as well as the fact that the "third power" cannot simply ignore the profound transformations of the real world, so that judicial control of the constitutional legitimacy of laws is one aspect of this responsibility. And a characteristic of these new responsibilities "[...] was the unprecedented growth of administrative justice, that is to say (more precisely), of the judicial control of the activity of the exercise and its derivatives" (CAPPELLETTI, 1993, p. 46).

For Tate (1995), the judicialization of politics is the expansion of the field of action of the Courts or judges to the detriment of politicians and/or administrators, as well as the dissemination of judicial decision methods outside the judicial field itself. For the American sociologist and jurist Ferejohn (2012, p. 63), judicialization of politics is "a profound transfer of power from the legislature to courts and other legal institutions around the world.

The discussion about the democratic character within this institutional arrangement is intense. The protagonism of the Judiciary induces, in a way, a construction of Law by judicial means and not guided by legal criteria (TASSINARI, 2012). According to jurist Tassinari (2012), one should not deny the democratic conception that includes the counter-majoritarian premise, in which the performance of courts and tribunals acts in the protection of constitutionally guaranteed rights in the face of the existence of eventual majorities. However, even in the face of this situation, it was not expected that the permanent appeal to jurisdiction and political apathy would be experienced so intensely in the political context (TASSINARI, 2012).

On the other hand, the judicialization of politics has given effectiveness to fundamental rights, with the possibility of giving content to human rights. The jurists Estefânia Maria De Queiroz Barboza and Katya Kozicki (2012) argue that, despite the criticism leveled at the political actions of the Brazilian judiciary in violation of the principle of separation of powers, the transfer of decision making from the parliament to the judiciary is due to the phenomenon of the judicialization of politics. Furthermore, the lawyers claim that the 1988 Federal Constitution gave a new role to the Brazilian judiciary, which now plays an important role in the realization of fundamental rights. Thus, the principle of separation of powers should be analyzed

based on the Constitution, "[...] with the idea of reciprocal controls between the powers and no longer the idea of rigid separation between them" (BARBOSA, KOZICKI, 2012, p. 80). Still, he argues that the Constitution is presented as a political document, so that "[...] it is up to the judiciary to take some political options, which, however, should be based on principles chosen by the people themselves at the constituent moment" (BARBOSA, KOZICKI, 2012, p. 80).

It is worth pointing out that, according to the lawyers, it is difficult to find a single cause to justify the judicialization of politics and that "[...] many of the political issues that are transferred to the courts are transferred by political parties or interest groups and, therefore, this cannot be seen as a legal phenomenon or as a phenomenon of usurpation of functions of one power over the other, but as a political phenomenon" (BARBOSA, KOZICKI, 2012, p. 65). The authors find that the judiciary has been used as another political arena, in which political minorities in the scope of parliamentary deliberative discussion have the possibility of having their rights safeguarded.

Still, Andrei Koerner (2013) argues that after 2003 there was a major renewal in the Supreme Court, so that external incentives found internal renewal to facilitate a new jurisprudential orientation. Thus, this new court "[...] with judges with another training and conception about the role of constitutional justice and the interpretation of the Constitution, acted in a convergent manner with the government on issues concerning the greater effectiveness of rights and the promotion of social policies" (KOERNER, 2013, n.p.). Therefore, one can promote the effectiveness of the Constitution, through the realization of principles of the 1988 Constitution not realized by omission of the legislature, conforming a new jurisprudential regime (KOERNER, 2013).

In a similar vein, the jurist Anderson Teixeira argues that beyond the debate about the conceptual definition of judicial activism, it should be recognized that "[...] it is an increasingly necessary constitutional pathology - provided that it is in its positive aspect - for the protection of the individual against omissions or excesses of the State" (TEIXEIRA, 2012, p. 52). The jurist inquires about the possible scenario that would result if the judiciary decided to abandon an activist posture and began to omit itself before the offenses to fundamental rights that are often perpetrated by the state itself (TEIXEIRA, 2012)

What can be seen is that in the face of this transfer of power to the judiciary, or even the expansion of judicial power, there are many criticisms. If for some the expansion of powers helps in the implementation of public policies and the realization of social rights, for others this configuration points to a democratic bias.

The arguments presented so far have not considered the economic logic[13] and its impact on political power and, specifically, on the judiciary. Justice, democracy and neoliberalism are axes that complement each other in the search for answers to the perennial crisis. At the extreme, the

13 What is crystal clear is that the current economic model enables decisions to be made that are contrary to democratic desires. When dealing with the current economic model, whether it is here called neoliberal (related to authors such as Friedrich Hayek, Milton Friedman, F. Knight, Ludwig Von Mises, in short, those who were part of the Mont Pèlerin society), or even the model called post-neoliberal, known for its more "progressive", (this model related to the thought of authors such as Emir Sader, Atilio Borón, Carlos Fiqueroa Ibarra), what is clear is that the judicialization of politics and, consequently, judicial activism, are spectra of a political process that does not aim to build an equitable society (or a substantive equality, according to Istvàn Mészáros), but a merely "more equitable" society, which in practice means a non-equitable society (MÉSZÁROS, 2015). In the current neoliberal democracy, popular participation is limited to the choices between the nuances of neoliberalism, because it is a democracy whose aim is not the common good, but the market and its freedom of exploitation. However, the market does not aim at the symmetry of opportunities and the common good, but precisely at asymmetry, so that it can abuse more and more those excluded from this logic, the dispossessed. The judicialization of politics, which could be a shortcut for the

question hangs over whether the crisis of representation has led to an invasion of powers by the judiciary, or whether the invasion by the judiciary has led to a crisis of representation.

5. FINAL CONSIDERATIONS

The national institutional rearrangement can be read as a reorganization in function of international interests in the guarantee of contracts, the interests of the financialized economy, unlimited circulation and security, the limits of the State in guaranteeing fundamental rights, among others. However, what we can see is that the judicialization of social relations, through the innovations that have provided the Supreme Court with a new institutional role, has also implied the judicialization of politics. In other words, there was a transfer of power that belongs to the legislative branch, equipped with political representation, to a power with no representative covering, which is the judiciary.

If, on the one hand, urgent political questions are being answered more quickly by the Judiciary, on the other hand, it must be pointed out that these decisions have a democratic deficit. That is, if for some the expansion of powers helps in the implementation of public policies and the realization of social rights, for others this configuration points to a totalitarian bias, since there has been a transfer of power that belongs to the Legislative Branch, endowed with political representation, to a power with no representative covering, which is the Judiciary Branch.

In face of this conjuncture, the crisis of the democratic State and the Rule of Law was analyzed, since, in face of this structure, the intimate relation between democracy and totalitarianism in Giorgio Agamben's concept appears in the weakening of the democratic logic that, in this sense, will tend to totalitarianism.

To this end, the present article has pointed to decisionism, that is, the phenomenon of decisions contrary to the constitution materialized in activist decisions, as a private exercise of arbitrary power, because it removes from the public debate central issues related to the democratic political game. In the legal context, what was defined as neoconstitutionalism had as a characteristic the possibility of integrating elements endowed with subjectivity to the interpretation of constitutional letters, in order to enable the Supreme Court, the ultimate interpreter of the Constitution, greater autonomy of decision. This conjuncture, conceived from the possibility of enforcing rights and public policies not made possible by the other branches of government through judicial decisions, had as a secondary result the prominence of this branch of government in relation to the others.

As to the political aspect, the detachment of the legislative power from Brazilian society, its deficiency in relation to representativeness, and by extension its substantial lack of credibility on the part of citizens, as well as even the strategic dodging of the political game so as not to put issues considered controversial on the agenda, have contributed to the judiciary being called upon to make the rights set forth in the 1988 Federal Constitution viable. This transfer of political action to the judiciary distances the population from the democratic debate, so

realization of public policies aimed at the common good, becomes an increasingly central element in the dismissal of the norm in favor of the market.

that the laws, plural and applicable to all, are replaced by decisions that are valid for one or a few. Therefore, the social aspect of democracy loses space to a private, individualized and segmented space.

Furthermore, economic changes have led to legal changes. And within this logic, constitutionalism is seen as an obstacle to the dismantling of the welfare state. Therefore, the judicialization of politics comes to circumvent social rights to be in line with what is demanded by the international market. It happens that the market demands and the population's demands hardly coincide.

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