THE BRAZILIAN LEGISLATIVE PROCESS, LEGISLATIVE "SMUGGING" IN PARLIAMENTARY AMENDMENTS AND THE CRISIS OF DEMOCRATIC INSTITUTIONS

O PROCESSO LEGISLATIVO BRASILEIRO, O "CONTRABANDO" LEGISLATIVO NAS EMENDAS PARLAMENTARES E A CRISE DAS INSTITUIÇÕES DEMOCRÁTICAS

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ABSTRACT

The rule of law and democracy presupposes respect for the legislative process; hence, it is necessary to observe procedural constitutional rules for the elaboration of normative acts and innovation of the legal system. The parliamentary prerogative to present amendments to a bill or to convert a provisional executive order into a law must observe the thematic pertinence, under penalty of violating the Federal Constitution, and ultimately cause the institutional crisis and tarnish the democratic regime itself.

Keywords: *constitutional law; legislative process; parliamentary amendments and "legislative contraband".*

RESUMO

O Estado de Direito e a democracia pressupõem respeito ao devido processo legislativo, e para tanto, é preciso observar as regras constitucionais procedimentais para a elaboração dos atos normativos e inovação do ordenamento jurídico. A prerrogativa parlamentar de apresentar emendas a um projeto de lei ou em uma conversão de medida provisória em lei deve observar a pertinência temática, sob pena de violar a Constituição Federal, e em última análise, fomentar a crise institucional e macular o próprio regime democrático.

Palavras-chave: *direito constitucional; processo legislativo; emendas parlamentares e "contrabando legislativo".*

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1. INTRODUCTION

The Legislative Process is guaranteed in our Constitution of the Republic since we live under the aegis of the Rule of Law, which is the subordination to the law, created in a procedure provided for a written and rigid constitution. Hence, the rule of law presumes the control of institutional powers by laws created according to pre-established constitutional procedures, which allow open and free popular participation, and with limits on fundamental rights.

Democracy arises from the Rule of Law, a regime designed so that government power is subject to constitutional rules, with provision for limiting its powers. It should be noted that the democratic regime can only function in a State of Law, which is nothing more than a society with formal institutionalization of power, having constitutional rules that determine the responsibilities of the people's representatives, and with limits to the exercise of power, and the fundamental rights of its nationals.

There is no democracy if the people do not govern themselves. The people are the source of power (*Principle of popular sovereignty*) implemented by free elections, (*Representative Principle*), with political opposition, and within the limits of checks and balances (*Principle of Power Limitation*).

The political system *representative* it must be examined from the perspective of the macro principle of legal certainty (Caggiano, 2011), whose central idea is prior knowledge of the law and the treatment that will be given in its application, and as a corollary: (a) legitimate expectations; (b) legality; and (c) the quality of the law.

However, for the proper application of the law, it is necessary to recognize the observance of the legislative process as a prerequisite for the legitimate creation of laws. The legislative process can be understood as "*The coordinated set of provisions that govern the procedure to be followed by the competent bodies in the production of laws and normative acts that derive directly from the Constitution*" (Moraes, 2018, p. 693).

Historically, the *lato sensu* law, became sovereign in the States, and compulsory even to the monarchs of the unitary States, with the Magna Carta of 1215. It is true that in all States, from the most primitive ones, there are exogenous powers, such as economic, religious, etc., which influence the conduct of man, but only the State is authorized to exercise coercion through physical force for the obedience of the rules it institutes.

But the holder of power, once despotic, now exercises his command by means of the law. According to Hobbes, in his masterpiece published in the seventeenth century (The Leviathan) the law is an order from the sovereign to his subjects. Sovereign power (implemented by a monarch or by several elected representatives) was not subject to civil laws, for it could revoke them at any time. Thus, "*Hobbes's legal voluntarism is based on a relativism of justice, at least in the face of the limitations of individual reason, and aims at peace*" (Ferreira Filho, 2007, p. 38).

In the same period of history, rooted in liberalism, Locke affirmed that man could live in the "*State of Nature*" because social relations would harmonize by themselves. However, developing his own ideas, he began to assert that man lacked: (i) laws to determine the property of each one; (ii) impartial judges to decide any disputes; and (iii) a public force to restore violated rights. And to define these basic rules, it is necessary to create laws, through the Legislative Branch. In the interpretation of Ferreira Filho (2007, p. 42):

> The Legislative Power is, it should be stressed, the main of the powers. It is the supreme power because it fulfills the supreme goal of social life, which is "to have one's property in peace and security," which can only be achieved through the laws.

Since the Proclamation of the Republic in 1889, Brazil has tried to establish a legitimate representative democracy, overcoming the monarchy, and reacting against a veiled aristocracy. In this context, for the legitimacy of the exercise of power through representatives, it was necessary to create a set of formal rules and procedures for decision-making.

So, democracy is closely related to the idea of representation, considering that the manifestation of the will of the representative is the expression of the will of the represented.

Elected representatives will use the power for which they were elected, since today's democracies make the separation of powers. In the eighteenth century, Motesquieu developed studies based on the premise that those who hold power have a natural tendency to abuse it, and thus created his classic work on the separation of powers, with the following thought: "*When in the same person or in the same body of magistracy the legislative power is united with the executive power, there is no liberty; for it is to be feared that the same monarch or the same senate will make tyrannical laws, to execute them tyrannically*" (Book XI, Chapter VI, p. 169). The creation of laws, and their subsequent obedience, is subject to this system. One branch is responsible, especially, for creating the norms of the legal system (Legislative Power), another branch administers the State, based on pre-existing laws (Executive Power), and a last one will decide the conflicts generated by the non-observance and/or interpretation of legal rules (Judiciary).

Hence it is said that the due legislative process for the elaboration of normative species is a corollary of the principle of legality, enshrined in the Federal Constitution, which adds: "No one is compelled to do or refrain from doing anything except by the law" (Article 5, item II, of the Federal Constitution).

Therefore, due to its relevance, only the Constitution of the Republic can establish the rite of the legislative process, including those who can start it, the debates on the relevance of the creation of the norm for the public interest, and the participation of the Executive and Judiciary Branches in the procedure.

2. DUE LEGISLATIVE PROCESS AS AN INSTRUMENT OF DEMOCRATIC EMANCIPATION

Assumption for the analysis of the theme of this article, that is, *parliamentary amendments*, is the understanding of the legislative process. The Federal Constitution, in its Article 59, provides 7 (seven) normative species, namely:

> Article 59. The legislative process shall comprise the drafting of:
>
> I - amendments to the Constitution;
>
> II – complementary laws (supplementary laws);
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> III - ordinary laws;

IV - delegated laws;

V – provisional measures (provisional executive order);

VI - legislative enactment;

VII - resolutions.

The *parliamentary amendments* only can be presented in the proceedings of ordinary or complementary bill, or in the case of conversion of provisional executive order into law.

It should be noted that a representative cannot amend Constitutional Amendment bills, due to the lack of legitimacy; nor delegated bills, by express constitutional prohibition (Article 68, § 3, *in fine*); and legislative enactment and resolutions have the procedure of the Legislative Houses for deliberation and approval.

The ordinary legislative process, for the approval and promulgation of ordinary or complementary laws, consists of three main stages: the initiative, the deliberation and the complementary phase. It is worth remembering that what distinguishes these two normative types is the subject to be deliberated and the voting quorum (relative majority for ordinary laws, provided that the absolute majority of its members is present in the House, and absolute majority for complementary laws, under the terms of article 69 of the Federal Constitution).

The first stage, doctrinally called the "initiative phase", does not require a procedure. According to Ferreira Filho (1997, p. 185) "*The initiative is not exactly a stage in the legislative process, but rather the act that triggers it*".

At this stage, it is necessary to identify the bodies or authorities with legitimacy to initiate the legislative process, which are: any member or Commission of the Chamber of Deputies (House of Representatives), the Federal Senate (Upper House) or the National Congress, the President of the Republic, the Federal Supreme Court, the Superior Courts, the Attorney General of the Republic and citizens (Article 61 of the Federal Constitution).

The initiative can be general or concurrent, i.e., attributed to more than one person entitled to present the bill; or, private or exclusive, for cases in which only a certain legitimized person can initiate the legislative process on the theme, such as, for example, the creation of positions at the federal level, which can only be done by bill initiated for the President of the Republic, or law on the organization of the members of the Judiciary, with exclusive initiative of the Federal Supreme Court.

About the *popular initiative*, the constitutional requirements are: initiative through 1% of the national electorate, distributed in at least five states of the federation, with no less than three-tenths per cent of the voters in each of them (Article 61, § 2, of the Federal Constitution). In the bills of popular initiative, it is *forbidden* to make parliamentary amendments, as expressly provided in article 252, item VIII of the Internal Regulations of the Chamber of Deputies[3]:

> Art. 252. The popular initiative may be exercised by presenting to the Chamber of Deputies a bill signed by at least one hundredth of the national electorate, distributed among at least five states, with not less than three thousandths of the voters of each of them, subject to the following conditions:
>
> (...)

3 Available at https://www2.camara.leg.br/atividade-legislativa/legislacao/regimento-interno-da-camara-dos-deputados, accessed May 16, 2022.

> VIII – each bill shall be limited to a single subject, and may otherwise be divided by the Constitution and Justice and Citizenship Commission into autonomous propositions, for separate processing;

The federal legislative branch is bicameral, so bills must pass through the two Houses that make up the National Congress: the initiating House and the revising House. The initiating House, par excellence, is the Chamber of Deputies, because it is the "House of the people", and the revising House will be the Federal Senate (Article 64 of the Federal Constitution). The Federal Senate may be the initiating House when the bill is authored by a senator or a committee of the Federal Senate.

Once the bill has been drafted, it will go to the initiating House, where it will go through a *Thematic Committee*, responsible for issuing an opinion on the merits of the proposal, and then, in the *Constitution and Justice Commission*, which carries out the preventive constitutional control, and if it considers the bill unconstitutional, prepares a final opinion, and forwards the bill to the archive.

As the bill is constitutional, it goes to a vote in the Plenary of the House, admitting the delegation *interna corporis*, that is, the possibility of deliberation and approval of the bill by one of the thematic committees of the Legislative Houses, when authorized by the Internal Rules of the respective House, and there is no contrary appeal by at least one tenth of its members.

At this point in the deliberative phase, before the vote, it is possible *Amendments* to the Bill. In the initiating House (usually, at the Chamber of Deputies) one of its members (federal deputy) or some committee may propose to include or exclude some part of the text. It must be with *connected subject* to the bill in progress and cannot cause an increase in expenditure on the bills initiated by the President of the Republic, or by the Chamber of Deputies, the Federal Senate, the Federal Courts and the Public Prosecutor's Office, under the terms of Article 63 of the Federal Constitution[4].

Disregard to these limits established in the Political Charter creates a cheat of the private initiative of the authentic person entitled to trigger the bill, being called in the doctrine of "*legislative smuggling*", which will be further explained in this essay.

After the deliberation of the bill in the Plenary of the initiating House – with or without parliamentary amendments – and its text approved, it will proceed to the reviewing House, where it will undergo the same deliberative procedure.

4 In this sense, Theme 68 judged in RE 745811-RG, Judging Body: Full Court, Rapporteur: Justice GILMAR MENDES, Judgment: 10/17/2013, Publication: 11/06/2013, Summary: Extraordinary Appeal. General repercussion of the recognized constitutional question. 2. Administrative Law. Public servant. 3. Extension, by means of a parliamentary amendment, of a bonus or advantage provided for by the bill of the Head of the Executive Branch. Unconstitutionality. Formal vice. Reservation of initiative of the Head of the Executive Branch to issue rules that change the remuneration pattern of public servants. Article 61, § 1, II, "a", of the Federal Constitution. 4. Single Legal Regime for Civil Servants of the Direct Administration, Autarchies and Public Foundations of the State of Pará (Law 5.810/1994). Articles 132, item XI, and 246. Provisions resulting from a parliamentary amendment that extended bonuses, initially provided only for teachers, to all employees who work in the area of special education. Formal unconstitutionality. Articles 2 and 63, I, of the Federal Constitution. 5. Extraordinary appeal granted to declare the unconstitutionality of articles 132, XI, and 246 of Law 5,810/1994, of the State of Pará. Reaffirmation of jurisprudence. *Topic 686 - Parliamentary amendment that implies an increase in expenditure on a project of private initiative of the head of the Executive Branch.* Thesis I - There is a reservation of initiative by the Head of the Executive Branch to issue rules that change the remuneration pattern of public servants (article 61, § 1, II, a, of the Federal Constitution); II – Parliamentary amendments that imply an increase in expenditure in a bill of private initiative of the Head of the Executive Branch are formally unconstitutional (article 63, I, of the Federal Constitution). Note: Writing of the thesis approved under the terms of item 2 of the Minutes of the 12th Administrative Session of the STF, held on 12/09/2015.

It is also possible that the bill initiated in the Chamber of Deputies will receive *amendment* in the reviewing House (of a senator or committee of the Federal Senate) and, in the same way, the bill initiated in the Federal Senate may be amended by a federal deputy or committee of the Chamber of Deputies. To respect the bicameral system of the Federal Legislature, when the amendment is presented by the revising House, the bill must return to the initiating House for deliberation and voting regarding the amended part (Article 65, sole paragraph, of the Federal Constitution). However, in this case, a second amendment cannot be presented, in other words, it is not admitted "*sub-amendments*".

Once the bill has been discussed and voted on in both Houses, the Executive Branch will deliberate through the sanction or veto of the President of the Republic. Remembering that the sanction may be express or tacit (after the silence of 15 working days), and the veto may be political, when considered contrary to the public interest; or legal, if unconstitutional (Article 66, § 1, of the Federal Constitution). The veto can be overturned in a joint session of the National Congress, with the vote of an absolute majority of federal deputies and senators (Article 66, § 4, of the Federal Constitution).

Once the deliberation of the bill is concluded, it proceeds to the third and final phase of the legislative process, the complementary one, for the promulgation and publication of the law, attributed by the President of the Republic. It should be noted that "*if the amendments are rejected, the bill goes to the President of the Republic for consideration, with the original text without the amendments. This means that, in the final analysis, the will of the initiating House prevails*" (Canotilho; Stretch; 2018, p. 1232).

Promulgation is the act by which the President of the Republic attests the existence of the law and confers on it enforceability. It occurs automatically when the law is enacted. If the veto is overturned, if the President of the Republic does not promulgate the law within 48 hours, the President of the Senate must promulgate it, or his deputy if he does not do so within the same period.

Publication is the act that makes the law obligatory, because from this moment on, there is a assumption of knowledge of its content by all individuals, who must comply with it, after the *vacatio legis,* when there is.

The procedure of provisional measure (provisional executive order) is peculiar, as it is a private normative type of the President of the Republic, with subsequent and immediate submission to the National Congress. The provisional measure must deal with a relevant and urgent issue (Article 62, *Caput*, of the FC), and must be approved by the Legislative Branch within the constitutional period (Article 62, § 3, of the FC). Therefore, "*It has a provisional and resolvable character*" (Mendes; Branco, 2011, p. 912).

In its procedure of conversion into law (or rejection), preliminarily, the assumptions of urgency and relevance in the National Congress are assessed. As with bills, they are submitted to the joint committee of deputies and senators, under the terms of article 62, paragraph 9, of the Federal Constitution, and after that, their voting procedure is initiated in the Chamber of Deputies (paragraph 8, of the same constitutional provision).

It is possible that before the vote, they also presented *parliamentary amendments* to the provisional measure issued by the President of the Republic, and in the same way, they will be submitted to the thematic committees. Amendments to a conversion bill must be restricted to the topic (urgent and relevant). That is, the amendments must observe the Resolution n.

1/2002 of the National Congress, especially regarding the *Thematic Pertinence*, according to Article 4, § 4: "*It is forbidden to present amendments that deal with matters other than those dealt with in the Provisional Measure, and the President of the Commission is responsible for their preliminary rejection*".

The purpose of the rule is to prevent topics separate from those contained in the provisional measure from being included, and not submitted to adequate parliamentary debate and subsequent deliberation in the Legislative Houses (the representatives of the people). Therefore, if the amendment contains a provision unrelated to the provisional measure, it must be rejected by the committee itself. On this subject, the lesson of Mendes and Branco (2011, p. 921):

> The provisional measure can be amended in Congress, and the prohibition in this sense that existed in the decree-law regime, in the previous constitutional order, will no longer last. The approved amendments must, however, hbe *thematically pertinent* to the object of the provisional measure, under penalty of rejection. If there is an amendment in the Senate, the bill must return to the House for confirmation or rejection of the changes made in the House of Review.

From what has been said so far about the legislative process, it can be concluded that in the procedure of ordinary or complementary laws, and in the procedure of conversion of provisional measures into law, it is possible to present *parliamentary amendments*, however, in both cases, it is essential that the amendments presented have *thematic pertinence*[5] with the bill or provisional measure pending in the National Congress, and do not bring an increase in expenses provided for in the original text.

3. PARLIAMENTARY AMENDMENTS AND "*LEGISLATIVE SMUGGLING*"

The Constitution brought general rules for the legislative process, which are specified by the rules of each of the houses of the National Congress. In fact, the beginning of the vote on the ordinary or complementary bill takes place, as a rule, in the Chamber of Deputies (initiating House), where parliamentarians can present amendments *suppressive*: which orders the eradication of any part of another proposition; *agglutinatives*: which results from the fusion of other amendments, or of these with the text, by a transaction tending to the approximation of the respective objects; *substitutes*: presented as a substitute for part of another proposition, being called "substitutive" when it alters it, substantially or formally, as a whole; an amendment aimed exclusively at improving the legislative technique is considered to be formal; *modifications*: which alters the proposition without substantially modifying it; or *additive*: which is added to another proposition. There are also the "sub-amendments", which are the amendments presented in the Committee to another amendment and which can be, in turn, suppressive, substitutive or additive, if it does not apply, the suppressive, on an amendment with the

5 Pursuant to the consolidated jurisprudence of the Federal Supreme Court: ADI 5442 MC, Judging Body: Full Court, Rapporteur: Justice MARCO AURÉLIO, Judgment: 03/17/2016, Publication: 04/04/2016, Summary: OBJECTIVE PROCESS – CONTROL OF CONSTITUTIONALITY – INJUNCTION – CONCESSION. If the relevance and risk of maintaining the precepts attacked with full effectiveness arises, it is necessary to grant the precautionary measure, suspending them. BILL – EXCLUSIVE INITIATIVE – PARLIAMENTARY AMENDMENT – DISTORTION. The lack of thematic relevance of the amendment of the legislative house to a bill of exclusive initiative leads to the conclusion that it is f*ormally unconstitutional.*

same purpose, and the drafting amendments, the modification that aims to remedy a defect in language, incorrect legislative technique or manifest lapse.

Thus, the legitimized party who took the initiative of the bill can only propose an additive amendment, since, after the bill begins its processing in the National Congress, he can no longer dispose of it. Strictly speaking, the legitimacy to present amendments belongs to parliamentarians, who are genuinely responsible for creating the laws. In this sense, the scholia of Ferreira Filho (1997, p. 188):

> First of all, it should be noted that not every initiative holder has the power to amend. With few exceptions, the power to amend is reserved to *parliamentarians*, while the initiative has been and is extended to the Executive or even to the courts. This reservation derives from the fact that parliamentarians are members of the power that, according to traditional doctrine, constitutes the new law, and the amendment is presented as a reflection of this power to establish new law.

It is possible, then, to make a *parliamentary amendment* in a bill initiated by the President of the Republic, provided that its content is related to the subject matter of the original bill, i.e., demonstrates the *thematic pertinence*.

It is not without reason that, for the creation of a new normative act, binding in the legal system and valid for all, the Constitution of the Republic provides a *procedure*, which seeks the genuine exercise of democracy, allowing all representatives of the people with seats in the National Congress to debate and vote on the proposed new law. In addition, the scope of the procedure is to bring pre-established basic rules, of mandatory observance, for any legitimate party to initiate the legislative process. Among them, also the content of the rule, the link with the subject to be regulated in that bill, present in all its provisions. That is why Article 59, sole paragraph, of the Federal Constitution provides: "*Complementary law shall provide for the drafting, drafting, amendment and consolidation of laws*", and then, Complementary Law n. 95 was drafted, which "*provides for the elaboration, drafting, amendment and consolidation of laws, as determined by the sole paragraph of article 59 of the Federal Constitution, and establishes norms for the consolidation of the normative acts mentioned*", with the provision in its article 7, item II, of the following:

> Article 7. The first article of the text shall indicate the object of the law and its scope of application, subject to the following principles:
>
> (...)
>
> II – the law shall not contain matter foreign to its object or not linked to it by affinity, pertinence or connection;

If a bill must follow a logical coherence, sticking to the object to be dealt with by the whole legal diploma, with much more reason the parliamentary amendment must be related to the theme, since it adheres to the initial project, modifying the already existing content.

Thus, if a parliamentary amendment is made in dissonance with the content of a bill initiated by the President of the Republic (as in the case, also, of the conversions of provisional measures), inserting a subject detached from its original text, the "*legislative smuggling*" will be present. This is a circumvention of the private (or exclusive) initiative of the President of the Republic or of the due legislative process.

Likewise, the Internal Regulations of the Chamber of Deputies provide in an identical manner on the subject[6]:

> Art. 124. Amendments that imply an increase in the planned expenditure will not be accepted:
>
> I - in projects of exclusive initiative of the President of the Republic, except for the provisions of article 166, §§ 3 and 4, of the Federal Constitution;
>
> II - in the projects on the organization of the administrative services of the Chamber of Deputies, the Federal Senate, the Federal Courts and the Public Prosecutor's Office.
>
> Art. 125. The President of the Chamber or of the Committee has the power to refuse an amendment formulated in an inconvenient manner, or that deals with a matter extraneous to the project under discussion or contrary to the regimental prescription. In the event of a complaint or appeal, it will be
>
> consulted the respective Plenary, without discussion or forwarding of a vote, which will be done by the symbolic process.

On the other hand, the Rules of Procedure of the Federal Senate, drafted under the Federal Constitution of 1967, partially regulates the matter, stating that there can be no amendment that contradicts the provisions of article 63[7] of the text, bringing a delimitation of a budgetary order.

In this case, the converse is not true, because if the extra-parliamentary body does not have the legitimacy to propose a bill, it could not amend it. However, it is usual for "*additive messages*" to be sent to the legislative houses, adding provisions (never to be deleted or amended), which also characterizes an anomaly in the legislative process. Equally, during the processing of a provisional measure in the National Congress, parliamentarians may present amendments, if the thematic pertinence of the original text is maintained.

Thus, the "*legislative smuggling*" occurs with the inclusion in the bill of norms foreign to the matter of the original text, being certain that in practice, the objective is not to draw the attention of the parliamentarians, or the population in general, of the norm that is intended to be approved surreptitiously. There is a clear manipulation of the legislative process, especially when a bill with popularity is combined, and an amendment with an unpopular theme.

It should be noted that the possibility of presenting a parliamentary amendment is legitimate and stems from the legislative function itself, as recognized by the Federal Supreme Court in the paradigm case on this matter, ADI 5127/DF, rapporteur by Minister Rosa Weber, and Writer of the judgment Minister Edson Fachin, Full Court, judgment on 10/15/2015, DJe 05/11/2016:

> The process by which the provisional measure is converted into law promotes the transformation of a legislative act of the Government into an act of Parliament, and the prerogative of presenting, in the course of the legislative process, amendments to the texts of the normative species in progress in the National Congress *is inherent to the exercise of parliamentary* activity. This is a necessary consequence of the effective participation of the members of the Legisla-

6 Available at https://www2.camara.leg.br/atividade-legislativa/legislacao/regimento-interno-da-camara-dos-deputados/arquivos-1/RICD%20atualizado%20ate%20RCD%2021-2021.pdf, accessed May 16, 2022.

7 Article 63. Public expenditure shall comply with the annual budget law, which shall not contain any provision extraneous to the fixing of expenditure and the forecasting of revenue. The prohibition does not include: I - the authorization to open supplementary credits and credit operations in anticipation of revenue; II - the application of the balance and the way to cover the deficit, if any. Sole Paragraph - Capital expenditures shall also be subject to multi-annual investment budgets, as provided for in the provisions set forth in. complementary law. Available at http://www.planalto.gov.br/ccivil_03/constituicao/constituicao67.htm, accessed May 16, 2022.

> tive Houses in the process of drafting, drafting, amending and consolidating laws, a corollary of the debate itself on the issues involved in the processing of matters.

The question raised, from the "*legislative smuggling*", occurs with the exercise of this parliamentary right in a distorted manner, with disingenuous or populist purposes, inserting completely unconnected themes. In the words of former Minister Celso de Mello of the Federal Supreme Court, without "*logical affinity*" with the bill or provisional measure submitted for conversion.

To corroborate, the vast jurisprudence of the Praetorium Court that supported the paradigm case: ADI 1333/RS, Rapporteur Minister Cármen Lúcia, Full Court, judgment on 10.29.2014, DJe 11.18.2014; ADI 2583/RS, Rapporteur Minister Cármen Lúcia, Full Court, judged on 01.8.2011, DJe 26.08.2011; ADI 2305/ES, Rapporteur Minister Cezar Peluso, Full Court, judged on 06.30.2011, DJe 08.05.2011; ADI 3288/MG, Rapporteur Justice Ayres Britto, Full Court, judgment on 10.03.2010, DJe 02.24.2011; RE 134278, Rapporteur Justice Sepúlveda Pertence, Full Court, judged on 27.05.2004, DJ 12.11.2004; ADI 2350/GO, Rapporteur Minister Maurício Corrêa, Full Court, judgment on 3.25.2004, DJ 04.30.2004, ADI 546/DF, Rapporteur Minister Moreira Alves, Full Court, judgment on 3.11.1999, DJ 04.14.2000; ADI 1050/SC, Rapporteur Minister Celso de Mello, Full Court, judgment on 9.21.1994, DJ 04.23.2004; ADI 2681/RJ, Rapporteur Minister Celso de Mello, judgment on 9.11.2002, DJe 10.24.2013.

A "*legislative tail*" (an expression also used to designate the *legislative smuggling*) destabilizes the Federal Constitution, violates the democratic principle and the due legislative process, creating tensions between the powers of the Republic.

In ADI 5127/DF referred to above, the reporting Minister Rosa Weber was emphatic in stating that the *legislative smuggling* It is not a formal error in the procedure for creating laws, in which the parliamentarian takes advantage of the short deadline for converting the provisional measure into law, justified by urgency and relevance. It's about practice *undemocratic*, to go beyond the thematic commissions and possible public hearings, tainting the entire mechanism for creating laws that must be based on the supremacy of the public interest and the adequate representation of the people. Here is the excerpt from the vote:

> What has been called legislative smuggling, characterized by the introduction of foreign matter to the provisional measure submitted to conversion, does not, in my opinion, denote a mere non-observance of formality, but a markedly *anti-democratic* procedure, insofar as, intentionally or not, it removes from the public debate and the deliberative environment proper to the ordinary rite of legislative work the discussion on the norms that will regulate life in society.

Consequently, the integrity of the legislative process derives from the participation of the people's representatives in its conversion into law, which, in a way, creates a gap in the legislative process in the procedures of the provisional measure.

As a note, the plenary decision of ADI 5127/DF suffered modulation of temporal effects, considering the common practice of parliamentary amendments in procedures for the conversion of a provisional measure into law, without due observance of thematic pertinence and the numerous laws in force with the stain of the *legislative smuggling*. Thus, based on legal certainty (article 27 of Law 9.868/99), the majority of the Supreme Court justices decided to apply *ex nunc* of the decision declaring this practice unconstitutional.

4. EFFECTS OF "*LEGISLATIVE SMUGGLING*" AND THREAT TO THE DEMOCRATIC RULE OF LAW

As explored elsewhere, due process of law is a guarantee of the rule of law and must be complied with in all its vicissitudes. Observing the infra-constitutional laws that regulate article 59 of the Federal Constitution is nothing more than respecting the constitutional text, since *"the principle of legality is also a basic principle of the Democratic Rule of Law"* (Silva, 2007).

The *legislative smuggling* is not new in our political-legal system. Since the National Constituent Assembly (1987-1988), numerous amendments have been made by the constituent parliamentarians and the population, and it is certain that the final text even contains articles that were not voted on, inserted in the Federal Constitution contrary to constitutional norms[8].

In fact, it is not a new practice, nor is it exceptional. Perform the *legislative smuggling* before the National Congress has become commonplace in our country, especially after Constitutional Amendment No. 32 of 2001, which changed the regime of provisional measures. To illustrate, in 2014 and 2015, 18 provisional measures were analyzed, in which 171 parliamentary amendments were presented, and 63 were not thematically relevant, that is, 48% of the total (Laan, 2018).

The analysis of provisional measures and the respective procedure has always been a thorny subject in Brazil, as it is a remnant of the dictatorship regime with authorization for the head of the Executive Branch to issue a normative species with the force of law, alone in his office. In the words of Clève (2021, p. 21):

> The subject holds, especially in the Brazilian case, some difficulties. The twenty years of the regime of exception, the abundant extraordinary legislation produced by that regime, the repeated issuance of decree-laws in the context of the validity of the last two Constitutions, and, even now, the excessive number of provisional measures already issued, all this, in a context in which, with immense difficulty, the National Congress only performs the function of control radically diminished during the authoritarian regime, it ends up justifying an understandable distrust on the part of jurists regarding the entrustment of the Executive's extraordinary function of legislating.

The discomfort in accepting provisional measures as a legitimate norm of the legal system is not only limited to the legitimacy of the President of the Republic, but also to its conversion procedure into law, which cannot give rise to parliamentary amendments unrelated to the proposed text.

8 It is worth checking out the article by Lilian Venturini, in the Nexo Newspaper, published on September 21, 2018 (updated 02/12/2020 at 17:35), highlighting the 20 months of discussion by 559 parliamentarians in the National Constituent Assembly, 122 popular amendments to the text, and the amendments inserted in the constitutional text without authorship or deliberation and voting. The following excerpt reads: "The long process of discussing and drafting the Constitution revealed its flaws years later. In 2003, the then Supreme Court Justice, Nelson Jobim, told the newspaper O Globo that two of the articles of the Charter were included without being voted on in plenary. Jobim was one of the constituent deputies of the PMDB. According to him, the inclusion of those excerpts occurred after a deliberation only among party leaders who were part of the Drafting Commission, responsible for the final adjustments of the text. One of the articles was essential, since it established the principle of independence between the Executive, Legislative and Judiciary. The other article remains under seal, part of the "pact of silence" that Jobim said he had made with Ulysses. The revelation provoked reactions among parliamentarians and representatives of the legal community, who called for Jobim's impeachment from the Supreme Court, which did not occur" – available at https://www.nexojornal.com.br/explicado/2018/09/21/Constitui%C3%A7%C3%A3o-cidad%C3%A3-30-anos-direitos-amarras-e-desafios, accessed May 17, 2022.

It should be noted that the *legislative smuggling* cause weakens to the rule of law, because it allows the creation of new laws in violation of legal certainty, the fundamental right of legality, and due legislative process for a given norm to enter the legal system.

Even today, it can be seen that there has been no cessation of the practice, both in the National Congress and in the Legislative Assemblies, even after the decision in ADI 5127/DF, a paradigm case with binding effects, as observed in other recent direct actions of unconstitutionality facing this same issue[9].

This practice stimulates the crisis between the powers, and ultimately, the weakening of democracy itself, because parliamentarians who seek anonymity regarding bills that are out of harmony with the thinking of their constituents, or anti-popular in general, take advantage of provisional measures to include a certain provision, usually unpopular, and impute authorship to the Presidency of the Republic. On the other hand, the Presidency of the Republic or the parliamentarians of opposition political parties began to judicialize before the Federal Supreme Court, forcing an activist stance, bringing the Supreme Court closer and closer to politics while distancing it from the legal aspect.

This scenario is not desirable, mainly due to the political crisis that the country has been dragging, and the solution is as simple as possible: strict observance of the due legislative process provided for in the Federal Constitution, and the respective procedures in infra-constitutional laws. That's because:

> In the case of the legislative process, however, the act of affirmation of power, the law, is the result of the indirect participation of citizens, through people elected for this specific purpose. Thus, the judge must be accountable to the litigants, while the legislature must be accountable to the citizens, in accordance with the mechanisms of participation established by the legal system, in order to ensure that the procedure takes place in a suitable environment, to express the rights in line with the values enshrined in the Constitution. It is understood, therefore, that the power to legislate, like the power to apply the law, whether through a judicial or administrative function, is not absolute, but must be guided by values established in the Constitution.
>
> (Coimbra, 2006, p. 135)The effects of *legislative smuggling* are dangerous for democracy, and respecting the Federal Constitution to overcome political-institutional conflicts becomes increasingly necessary.

9 By way of illustration, see ADI 6072, Judging Body: Full Court, Rapporteur: Justice ROBERTO BARROSO, Judgment: 08/30/2019, Publication: 09/16/2019, Summary: DIRECT ACTION OF UNCONSTITUTIONALITY. ARTS. 2ND, 3RD AND 4TH OF LAW NO. 15,188/2018 OF THE STATE OF RIO GRANDE DO SUL. AMENDMENT OF LAW NO. 13,930/2012 OF THE STATE OF RIO GRANDE DO SUL. STAFF OF THE RIO GRANDE DO ARROZ INSTITUTE. RULES ON PROMOTIONS AND BONUSES FOR PUBLIC SERVANTS OF THE EXECUTIVE INCREASED BY PARLIAMENTARY AMENDMENT. INITIATIVE RESERVED FOR THE HEAD OF THE LOCAL EXECUTIVE BRANCH. INCREASED SPENDING. CONSTITUTIONAL LIMITS TO PARLIAMENTARY AMENDMENTS TO RESERVED INITIATIVE BILLS. OFFENSE TO ARTICLE 63, I, OF THE FEDERAL CONSTITUTION AND TO THE PRINCIPLE OF SEPARATION OF POWERS (ARTICLE 2, CF). PEACEFUL AND DOMINANT JURISPRUDENCE. PREVIOUS. 1. The jurisprudence of the Federal Supreme Court is undisputed and dominant in the sense that the constitutional provision of reserved legislative initiative does not prevent the bill referred to the Legislative Branch from being subject to parliamentary amendments. In this sense: ADI 1.050-MC, Rel. Min. Celso de Mello; ADI 865-MC, Rel. Min. Celso de Mello. 2. However, this Federal Supreme Court has a peaceful and dominant jurisprudence in the sense that the possibility of parliamentary amendments to bills of initiative reserved to the Head of the Executive Branch, the Courts, the Public Prosecutor's Office, among others, encounters two constitutional limitations, namely: (i) they do not result in an increase in expenses and; (ii) maintain thematic relevance to the object of the bill. 3. The parliamentary amendment that is the object of the present action resulted in an undeniable increase in expenses provided for in the original bill submitted by the Governor of the State of Rio Grande do Sul, thus violating article 63, I, of the Federal Constitution, since it instituted and extended bonuses, as well as reduced the time originally provided for by law between promotions, making them more frequent. 4. Direct action of unconstitutionality, the request for which is upheld. Judgment(s) cited: (LAW INITIATIVE, PARLIAMENTARY AMENDMENT, BILL) ADI 1050 MC (TP), ADI 865 MC (TP). (PARLIAMENTARY AMENDMENT, CONSTITUTIONAL LIMIT, INCREASE IN EXPENDITURE, THEMATIC RELEVANCE) ADI 1333 (TP), ADI 2569 (TP), ADI 1050 MC (TP). (PARLIAMENTARY AMENDMENT, PRINCIPLE OF SEPARATION OF POWERS).

5. CONCLUSION

The purpose of this work is to demonstrate the distortion of the functions of the Powers of the Republic before the legislative process, since provisional measures issued by the President of the Republic reach the National Congress with articles containing matters foreign to the subject matter, congressmen present parliamentary amendments without thematic pertinence, and these issues, of an eminently political nature, are taken to the Judiciary that needs to interfere to safeguard the noblest rule of law.

The possibility of parliamentarians presenting amendments to bills (ordinary or complementary) or in the process of converting a provisional measure into law, as mentioned, is inherent to the very function they exercise in the Legislative House. However, it is well known that no right is absolute, and for the parliamentarian to exercise his constitutional prerogative to amend a bill or provisional measure, he must stick to what the legal system establishes. In this case, in particular, the thematic pertinence between the proposed amendment and the text to be amended.

Due legislative process is a constitutional rule and the subjective right of congressmen. The structure created to innovate the legal order must not be distorted by virtue of personal or political interests. The parliamentarians wait for the entry of a provisional measure in the National Congress for conversion into law, and present a parliamentary amendment to the text, whatever the theme, just to "hitchhike" on this legislative procedure, without concern for the theme to be regulated or observance of the debates before the legislative House.

These political postures, dissociated from the public interest, have brought excrescences to the legal system, causing the parliamentarians themselves (as a rule, through their political parties) to turn to the Supreme Court to guarantee the due legislative process. Until, in 2015, with the judgment of ADI 5127/DF which, in a separate summary, evaluated whether a tax law could regulate issues related to a profession (accountant), the decision of the Constitutional Court was stabilized, in the sense that parliamentary amendments would no longer be admitted without due *thematic relevance*.

The Supreme Court was right to declare the limits to the positions of parliamentarians, which went beyond the basic principles of legality and the legislative process, ignored proportionality and reasonableness in the inclusion of completely disparate amendments to bills, and consequently weakened democracy and the rule of law.

However, it cannot be ignored that many other problems related to the legislative process are still awaiting repairs from the Supreme Court. Parliamentary amendments have already been identified that did not even return to the initiating house for debate and voting, going "unnoticed" by the peers of the parliamentarian who presented it.

The solution is not to wait for the Supreme Court's pronouncement, but rather to remember that, if the rules pre-established by the Original Constituent Power for the due legislative process are complied with, as well as the infra-constitutional laws on the subject, legal certainty and the rule of law would be safeguarded.

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